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

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SHORT-TERM RENTALS

Short-term rentals ("STR's") present an increasingly complicated regulatory challenge for municipalities. That challenge is exacerbated by the increasing popularity of STR's from both an owner/operator and consumer perspective. STR's constitute an increasingly popular trend in today's "sharing economy". The sharing economy is an economic model often defined as a peer-to-peer based activity of acquiring, providing, or sharing access to goods and services that are facilitated by a community based on-line platform. Sharing economies allow individuals and groups to make money from underused assets. For owners and operators, STR's provide a lucrative money-making alternative to traditional long-term residential rentals. For consumers, STR's can offer a more economical, flexible, and comfortable option to hotels. As these economic forces have caused the number of STR's nationwide to proliferate, cities have struggled to keep up with the trend from a regulatory and enforcement standpoint. Those cities face the competing interests of STR's owners and operators who seek to protect their revenue stream and the desire of owner-occupied residences to enjoy the peace and tranquility of a traditional residential neighborhood. A significant part of the regulatory struggle is based on the similarities between traditional residential uses and STR's. Additionally, the litigious nature of STR advocates has created confusing precedent that has been misused and misrepresented by STR advocates. At the end of the day, when STR's are examined more closely, STR's clearly represent a unique and distinct land use that can and should be treated differently from more traditional residential uses.

I.
What are STR's and How Do They Threaten Neighborhoods?

In order to fully understand the regulatory options to address STR's, the threshold issue is to fully grasp and comprehend what an STR is. The most commonly utilized definition of an STR is a type of lodging where a home, or part of a home, is rented for a fee for fewer than thirty (30) consecutive nights. From a regulatory standpoint, the question arises as to how to classify STR's under the Zoning Ordinance. To properly assess that classification, the above-referenced definition is not sufficient. STR advocates urge the proposition that STR's are no different from other residential uses, and as such, STR's should be allowed by right in any residentially zoned neighborhood. However, that proposition and the above definition do not take into account the detrimental and harmful impacts of STR's on traditional residential neighborhoods that will be addressed below. STR's are commercial, money-making ventures. From a land use and regulatory perspective, the starting place is a review of the existing Zoning Ordinance.

A. STR's Continue to be Prevalent

Over the past several years, the number of STR's nation and world-wide has grown exponentially. During one two-year period STR rentals on Airbnb in Nashville increased 365 percent, Airbnb rentals in New Orleans went up 340 percent, and Airbnb stays in Portland Maine shot up 328%. A Los Angeles study revealed that 90 percent of Airbnb revenues are generated by hosts who rent out their entire unit and by leasing companies

which rent out two or more entire rental units. Similar studies for the cities of San Francisco, New Orleans, Nashville, and New York have yielded similar results. In 2016, there were more than 2,700 U.S. cities and counties with more than 50 STR's. A man in London owns 881 short term rental properties throughout London and made 15.6 million dollars in 2017. In 2021 the average number of monthly available units (short term rental properties) in the U.S. was 1.067 million units.

B. STR's Are Harmful to Neighborhoods

STR's represent a fundamentally different character of use when compared to traditional residential occupancies by owners or long-term renters. STR's typically turn over the entire occupancy of the residence multiple times per month and sometimes during the same week. With each such turnover, the new guests move in their luggage, groceries, ancillary items, and vehicles while the outgoing guests remove same. All responsible operators provide a cleaning service between each occupancy. STR's regularly attempt to utilize the residence for a much greater density of use than traditional residential. Some examples of this "super-density" are as follows: a 2,100 square foot house advertised to sleep 14 adults, ($375 avg. night); a 2,500 square foot home that can host up to 18 adults ($425 avg. night); 1,800 square foot home for up to 16 guests ($275 night average); and a 1,500 square foot home with ten beds which is listed for up to 12 adult guests. STR's like these infringe on neighborhoods in multiple ways: (1) Noise: higher in volume due to the number of guests, more robust than traditional houses due to the hospitality nature of STR's, and longer hours for the noise; (2) 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; and (3) 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. STR occupants are less cognizant of neighbor concerns because they are not neighbors. Instead, STR guests are paying to utilize a residence as a commercial occupancy which tends to result in an overall increased level of intensity in use. This adversely affects neighborhood cohesion thanks to the revolving door of guests who have no connection with or investment in the community in which they only temporarily reside.

C. How Are STR's treated under Zoning and Chapter 211?

1. Traditional Zoning Applies to STR's

Chapter 211 of the Texas Local Government Code is the State's zoning enabling law. The division of a city or area into districts and the prescription and application of different regulations in each district generally is referred to as zoning. A comprehensive zoning ordinance necessarily divides a city into certain districts and prescribes regulations for each one having to do with the architectural design of structures, the area to be occupied by them, and the use to which the property may be devoted. The use of a building may be restricted to that of trade, industry or residence. 10 Tex. Jur. 3d, Building Regulations § 6.

Zoning laws are enacted in the exercise of the police power, and are distinguishable from the law of nuisance because comprehensive zoning ordinances have a much wider scope than the mere suppression of the offensive use of property. They act, not only negatively, but constructively and affirmatively, for the promotion of the public welfare. The existence of a nuisance is not a necessary prerequisite to the enactment of zoning regulations. *Id.* So once a city has exercised its authority to zone properties within the city, the question comes down to whether or not STR's fit within an existing permitted use.

2. *Tarr v. Timberwood Park Homeowners' Ass'n* Does Not Restrict Zoning Options

STR advocates have erroneously claimed that a Texas Supreme Court decision regarding STR's and deed restrictions supersedes the ability to utilize zoning to address STR's. The Texas Supreme Court issued its decision in the case of *Tarr v. Timberwood Park Homeowners' Ass'n*, 556 S.W.3d. 274 (Tex. 2018). Therein the Court held that the particular restrictive provisions found 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. However, *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. The HOA had two restrictive provisions on which it based its enforcement efforts. One required the use for "residential purposes," but the restrictive covenants did not define what "residential" meant. The Court decided that in the absence of a more restrictive definition of "residential" the STR use fell within "living" quarters and a "residential" use as opposed to a prohibited commercial use. The other provision of the restrictive covenants on which the HOA relied stated that "[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. Based on those definitions, the Court found that these provision did not ban STR's. In doing so, 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." In short, the Texas Supreme Court held that the HOA had the power to ban rentals of less than a specified period but found that the specific restrictive provisions of the HOA's covenants were not sufficient. Accordingly, the Court left the door wide open to restrictions on STR's.

3. Defined Terms Are Crucial to Reaching the Correct Zoning Determination

Once *Tarr* is properly understood, the question comes down to how STR's fit under the applicable zoning ordinance. Most zoning ordinances, but certainly not all, are prescriptive in establishing allowed uses meaning that only specifically listed and defined uses are permitted. An example clause provides that, "[n]o building or structure; no use of any building, structure or land; and no lot of record or zoning lot, now or hereafter existing, shall hereafter be established". Under that provision, all other unlisted uses would thereby be prohibited as a new and unlisted use. While some zoning ordinances define residential uses broadly, others are more specific. One example of a broad and open-ended definition for "residential use" is as follows: a structure or use designed or used for occupancy as a

human dwelling or lodging place, such as single family dwelling. That definition is more in line with the HOA's open-ended covenant definition in *Tarr*. Other cities are more specific in their definition such as: "single-family residence shall mean an enclosed building designed for use and occupied by only one family and specifically excluding bed and breakfasts and short-term rentals". It must be noted that the zoning predicament that preceded STR's was bed and breakfasts. When bed and breakfasts began to permeate more traditional suburban communities similar questions were raised about what they were and whether or not bed and breakfasts fit within allowed residential categories. A few crucial terms which are important to properly and thoroughly define are: bed and breakfast, hosted primary residence, primary residence, short-term rental, and vacation rental. So to properly assess the status of STR's in your city, the starting place is a thorough review of the city's zoning ordinance and the definitions contained therein.

II. What Options Are Available to Regulate STR's

For cities who find their zoning ordinances are not sufficiently clear to address, prohibit, or regulate STR's, there are a myriad of options that can be utilized in attempt to find a sensible regulatory solution to the issues caused by STR's. Many cities have struggled to govern the trend of increasing STR numbers nation-wide, resulting contentious debates about how much to regulate STR's, or whether even to allow certain kinds of them. STR advocates urge that STR's are beneficial to the community. Those proponents urge 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. However, a recent poll by WFAA TV in Dallas revealed than 84 percent of residents oppose STR's in their neighborhood. That opposition is tied to the negative impacts from STR's on the quality of residential life and the negative impacts on traditional neighborhoods. Balancing these interests presents both legal and policy challenges.

STR's have become extremely popular among high school students as party houses. It is easy for students to rent an STR without the property owner figuring out that they are renting the property to a minor. In fact, sometimes the parents will rent the property for their children to throw parties at because they believe it is safer and it keeps their own home and property safe from damage. Unfortunately, these parties can create extremely unsafe environments. In 2019, a group of high school students threw a party at an Airbnb in Plano. A fight broke out and eighteen bullets were fired and a young 16 year old boy. While these unfortunate incidents are not exclusively the result of STR's, there accessibility creates dangerous situations which makes City regulations imperative.

A. There Is a Full Range of Regulatory Options for Addressing STR's

Cities across the globe have attempted to utilize a wide range of regulatory options for STR's. On the more aggressive end, instituting a total ban or prohibition on STR's is possible. Bans provide the most effective level of protection for residential neighborhoods and is the least taxing on enforcement staff. Several Texas cities have adopted full bans on STR's, including but not limited to Hurst, Southlake, Sugar Land, and Westlake. The most effective ban should be adopted via an amendment to the zoning ordinance in full

compliance with Chapter 211 of the Local Government Code. In the zoning realm, consideration can be given to adopting a locational restriction that limits STR's to only certain areas of the city. Given the commercial nature of and negative impacts related to STR's, perhaps it makes the most sense to preclude them altogether from the least dense residential districts in the city. Beyond that, the city could look at applying a conditional or special use requirement for STR's. Conditional/special use permits allow for case by case analysis and consideration for each STR. Licensing or registration provisions require self-disclosure of STR operators thereby improving both regulation and enforcement prerogatives. Hotel occupancy tax requirements apply to all STR's in Texas under State law and under local ordinance in most cases. Additional fees or taxes must generally be connected to the costs associated with the regulation of STR's, a calculation that can prove difficult to substantiate. Capping the number of nights for STR's in each year can be used to decrease the overall intensity of the impact of STR's on neighborhoods. 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-	Principal Residency Requt.-
Hotel Occupancy Tax-	Night Cap-
Location/zone restrictions-	Safety Provisions (smoke/fire)
Conditional or special use permits-	Nuisance Provisions-
Operator License or Registration-	Density
Operator/License Fees-	ADA

B. Austin's Phase Out Plan Not Successful- Zaatari

The City of Austin's experience illustrates the tensions and conflicts behind the debate over STR's. The Austin City Council first regulated short-term rentals in 2012 and 2013. Then in February 2016, the City significantly tightened its regulations. The latest 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). Further, the ordinance bans "an outside assembly" with more than six adults. The ordinance prohibits outdoor activity at STR's located in residential neighborhoods be between 10 p.m. and 7 a.m. Austin's rules classify STR levels and include a gradual phase out of Type 2 STR's in residential neighborhoods by April 2022. Type 2 rentals are properties with no live-in owners that are available for rent year-round. In an effort to meet the City's goal of slowly eliminating non-owner-occupied vacation rentals in residential neighborhoods, the City stopped accepting license applications for them. As such, 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, a conservative think tank in Austin,

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. In that case, 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. 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 successfully eliminated or regulated short term rentals successfully.

C. 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. Lastly, STR owners have sought to continue their operations in an effort to amortize out their investment. A brief review of these claims and the applicable responses is as follows.

1. Declaratory Judgment

As noted above, there are a number of questions of interpretation and application regarding zoning and code enforcement ordinances. This is especially so when a plaintiff is dissatisfied with a classification determination by city staff which is inconsistent with the plaintiff's operational goals. While the Declaratory Judgment Act (Chapter 37 Civil Practice and Remedies Code ("DJA")) generally provides a mechanism to seek judicial interpretation of documents, that mechanism is quite limited when it concerns a municipality. That limitation is based on the fact that the only waiver against municipalities under the DJA is to determine the validity of an ordinance or franchise. Tex. Civ. Prac. & Rem. Code § 37.007(b)(emphasis added); *City of Dallas v. Turley*, 316 S.W.3d 762, 771 (Tex. App.—Dallas 2010, pet. denied). In order to establish the trial court's jurisdiction over this type of claim, the plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *See Texas Ass'n. of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 446 (Tex. 1993). For the waiver to be effective, a plaintiff must plead a constitutional or legislative waiver with facts that make the waiver applicable. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001) (the pleader must allege facts to demonstrate a valid constitutional claim); *Tex. Ass'n of Bus*, 852 S.W.2d at 446 (the pleader must allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause). Plaintiffs cannot meet that burden unless they are challenging the validity of an ordinance. No waiver of immunity exists for a party that seeks only to challenge the interpretation of an ordinance. Additionally, as a general rule,

the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction." *State of Texas v. Morales,* 869 S.W.2d 941, 945 (Tex.1994); See also, *State v. Logue,* 376 S.W.2d 567 569 (Tex. 1964). For these reasons, declaratory judgment actions against a city are only viable when the plaintiff is challenging the validity of the ordinance.

2. Vested Rights

Chapter 245 of the Local Government Code generally allows property owners to rely upon land use regulations that applied at the time they commenced that land use. *Village of Tiki Island v. Ronquille,* 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The enforcement mechanism is a request for declaratory relief, and sovereign immunity is waived. *See Tex.* Local Gov't Code § 245.006(a), (b). Section 245.002 "establishes a general rule that municipal regulatory agencies must consider a permit application under the terms of the ordinances, rules, and other applicable regulations that are in effect at the time a permit, development plan, or plat application is filed." *Vill. of Tiki Island,* 464 S.W.3d at 440. Such statutory rights apply to a "project" and are "vested." *Id.* "Project" is broadly defined to include the Homeowners' investments in their real property. Local Gov't Code § 245.001(3). "Permit" includes mere "consent" by a municipality, *Id.* § 245.001(1), (4). However, "all property is held subject to the valid exercise of police power." *Sheffield Dev. Co., Inc. v. City of Glenn Heights,* 140 S.W.3d 660, 670 (Tex. 2004) (quoting *City of College Station v. Turtle Rock Corp.* 680 S.W.2d 802, 804 (Tex. 1984)). Additionally, "[n]o property owner has a vested interest in particular zoning classifications and a city may rezone as public necessity demands." *City of San Antonio v. Arden Encino Partners, Ltd.,* 103 S.W.3d 627, 630 (Tex. App.—San Antonio 2003) (citing *City of University Park v. Benners,* 485 S.W.2d 773, 778 (Tex. 1972)). Zoning changes are to be expected in growing communities. *See Sheffield,* 140 S.W.3d at 678. When vested rights conflict with a city's exercise of its police power, a takings claim may be the appropriate cause of action (see subsection 4 below).

3. Due Process

For a due process claim, 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 <u>if</u> 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 actual, 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.

Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 87 (Tex. 2015); *see also Barshop v. Medina Cnty. Underground Water Conservation District*, 925 S.W.2d 618, 626-27 (Tex. 1996) (same, as applied to zoning in a substantive due process and equal protection case). While cities have a legitimate interest in regulating noise, traffic, trash, and the like, STR owners have challenged that those interests cannot be addressed with the

regulation of STR's. In short, the claimants 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.

4. Unconstitutional Regulatory Taking

The U.S. and Texas Constitutions both bar the government from taking private property without adequate compensation. See U.S. Const. amend. V; Tex. Const. art. 1, § 17; *see generally Mayhew v. Town of Sunnyvale,* 946 S.W.2d 922, 939 (Tex. 1998). Three varieties of physical regulatory taking occur where: (1) regulation compels "the property owner to suffer a physical "invasion' of his property," (2) regulation "denies all economically beneficial or productive use of land," or (3) regulation "does not substantially advance legitimate state interests." *Sheffield Dev. Co., Inc. v. City of Glenn Heights,* 140 S.W.3d 660, 671 (Tex. 2004). Separate from such physical takings are situations "where regulation has gone too far and become *too much like a physical taking.*" *Vill. of Tiki Island v. Ronquille,* 463 S.W.3d. 562, 575 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (emphasis added). Such cases require "a careful analysis of how the regulation affects the balance between the public's interest and that of private landowners." *Sheffield,* 140 S.W.3d at 671 (citing *Penn Central* factors") are as follows:

(1) the economic impact of the regulation on the claimant;
(2) the extent to which the regulation has interfered with distinct investment-backed expectations; and
(3) the character of the governmental action.

Vill. Of Tiki Island, 463 S.W.3d at 575 (internal citations omitted) (quoting *Sheffield* and federal precedent). While ordinances generally are presumed constitutional, zoning ordinances are construed more strictly. *See City of Kermit v. Spruill,* 328 S.W.2d 219, 223 (Tex. Civ. App. 1959, writ refused n.r.e.). "Any regulation of land use is in derogation of the common law." *Town of Annetta S. v. Seadrift Dev., L.P.,* 446 S.W.3d 823, 830 (Tex. App.—Fort Worth 2014) (citing *Thomas v. Zoning Bd. Of Adjustment,* 241 S.W.2d 955, 957 (Tex. Civ. App.—Eastland 1951, no writ) and *Bryan v. Darlington,* 207 S.W.2d 681, 683 (Tex.Civ.App.—San Antonio 1947, writ ref'd n.r.e.) "All restrictions of the free use of land are in derogation of the common law right to use land for all lawful purposes that go with the title and possession, and are to be construed strictly against the person creating or attempting to enforce such restrictions.")).

The foregoing factors are not formulaic. *Sheffield,* 140 S.W.3d at 672. For example, "the economic impact of a regulation may indicate a taking even if the landowner has not been deprived of all economically beneficial use of his property." *Id.* The court must consider all of the surrounding circumstances, *Mayhew,* 964 S.W.2d at 933, and apply "a fact-sensitive test of reasonableness," *City of College Station v. Turtle Rock Corp.* 680 S.W.2d 802, 804 (Tex. 1984). In situations where an existing money-making use of property is suddenly barred, one form of relief to the property owner is allowing the owner to continue the "nonconforming use" for a period of years in order to recoup her investment and avoid losses or damages. *See, e.g., See City of University Park v. Benners,* 485 S.W.2d

773, 777-779 (Tex. 1972) (25-year recoupment period); *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL3198398, at *7 (Tex. App.—Dallas June 29, 2018, pet. filed) (mem. op.) (14-year grace period was sufficient). Another solution is to simply grandfather an affected owner's use. *See Village of Tiki Island*, 463 S.W.3d at 586.

5. Preemption

STR advocates have asserted that STR bans are preempted by Chapter 156 of the Texas Tax Code and/or Chapter 92 of the Property Code. The concept of preemption is grounded in constitutional law. Article XI, Section 5(a) of the Texas Constitution provides that home-rule city ordinances shall not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." *See generally City of Laredo v. Laredo Merchants Ass'n,* 550 S.W.3d 586, 592 (Tex. 2018) (in express preemption case, city could not ban plastic trash bags); *City of Fort Worth v. Rylie,* No. 02-17-00185-CV, 2018 WL 4782291, at *8 (Tex. App.—Fort Worth Oct. 4, 2018, no pet. H.) (similar). The applicable standard is as follows:

> 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 with be invalid only to the extent of any inconsistency.

City of Laredo, 550 S.W.3d at 593 (cleaned up). Further, as quoted approvingly in *City of Laredo:*

> a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction, just as one general statute will not be held repugnant to another unless that is the only reasonable construction.

City of Beaumont v. Fall, 116 Tex. 314, 291 S.W. 202, 205-206 (1927).

The Legislature expressly began taxing STR's in 2015 as part of the state hotel occupancy tax. The intent to raise revenue from that source is plain. At the same time, the Legislature declined to change the existing regime of residential leasing at Chapter 92 of the Property Code, which given express references to "transient"- type stays in that statute, the Legislature plainly would have done had the Legislature intended to restrict such rentals. STR advocates claim that allowing cities to ban STR's would undermine the Legislature's intent to generate revenue and subject STR's to a ban inconsistent with the Legislature's desire to allow such rentals without restriction. However, the fact that the State taxes STR's and defines certain residential uses does not constitute a clear and unambiguous preemption of local regulation of STR's, including but not limited to prohibition.

6. Amortization

As a corollary to vested rights claims, for legal nonconforming uses, plaintiffs have the ability to seek the right to amortize out their investment in their STR. Cities have the general right to establish zoning districts under their general police power to protect public health, safety, and general welfare. TEX. LOC. GOV'T CODE § 211.003; *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953). These zoning restrictions, however, may not be made retroactive. *Id*. Any ordinance enacted must relate to the future rather than to existing buildings and uses of land. *Id*. An ordinance may not operate to remove existing buildings and uses that are nonconforming. *Id*. A "nonconforming use" is a use of land that existed legally when a zoning restriction became effective and has continued to exist. *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972), *app. dism'd*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1973). One way cities have attempted to remove nonconforming uses is through the process of amortization. Amortization allows a nonconforming use to continue for a reasonable period of time to permit the owner to recoup his investment in the property. Amortization serves as adequate compensation in these instances, satisfying state constitutional provisions prohibiting the unconstitutional taking of property without adequate compensation. *See* Tex. Const. art. I, §17. Texas courts have approved the termination of nonconforming uses, provided that adequate time is allowed to recover an owner's investment in the property. *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 735 (Tex. Civ. App.-Dallas 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 277, *reh'g denied*, 397 U.S. 977 (1970). Another way a nonconforming use can be terminated is through abandonment. Abandonment requires: (1) intent to abandon; and (2) an overt act or failure to act, which carries the implication of abandonment. *See Turcuit v. City of Galveston*, 658 S.W.2d 832, 834 (Tex. App.—Houston [1st Dist.] 1983, no writ). A municipal ordinance can dictate the required period of nonuse required to be considered abandoned, and many cities already have ordinances containing this language. Amortization is a complex legal process that should not be undertaken without the guidance of an experienced land use attorney.

7. Due Course of Law

A due-course of law claim is facially invalid unless it is based on "a liberty or a property interest that is entitled to constitutional protection." *Klumb v, Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015). "Property 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). Until recently, no court had found that a property owner had a vested right to use their property as a short term rental. In the *City of Grapevine v. Muns* case, the court determined that the property owners have a valid vested right to use their property as a short term rental. This opinion could have extremely negative repercussions on a city's ability to enforce zoning regulations and thus its ability to protect citizens through that enforcement. This opinion is currently being appealed to the Texas Supreme Court and so it is unknown if this opinion will remain.

III. Grapevine V. Muns

The City of Grapevine is currently in litigation over short term rental regulations. Grapevine's position is that short term rentals were never authorized under the city ordinances and so it was not a retroactive act to ban them. The court held that the property owners had sufficient property rights to allege a regulatory takings claim and that the city ordinance was the cause in fact of the taking. It is the city's position that the court has made a grave error with this holding and hopes the Supreme Court will correct it. The opinion seems at many points contradictory and inconsistent.

To be more specific, the court held that "homeowners were not required to exhaust all administrative remedies before they brought action; homeowners had vested property right sufficient to allege regulatory-takings claim; passage of ordinance was cause in fact of alleged taking; homeowners presented sufficient evidence that ordinance had economic impact on value of their property; homeowners presented sufficient evidence that ordinance interfered with their distinct investment-backed expectations; homeowners had vested right to lease their properties; and city did not have immunity from request for injunctive relief."

Grapevine takes the position that the court misconstrued Chapter 211 of the Local Government Code when they determined that the trial court had jurisdiction over this case. Chapter 211 requires that any person aggrieved by a city official's decision made "in the enforcement of" a local zoning ordinance to appeal that decision to the city's local board of adjustment before filing a lawsuit. A person's failure to do so deprives the trial court of jurisdiction over the lawsuit. According to the court, the property owners were able to bypass the required administrative process under Chapter 211 because they were not given proper notice. The City Building Official's letter to the property owners telling them that the Zoning Ordinance prohibits STRs warning them that the continued use of their properties as STRs would result in "citation," "conviction," and "fine," and thanking the property owners for their "compliance." The court stated that this notice was not sufficient because it was "not made in the act or process of compelling compliance with the Zoning Ordinance." *Muns*, 2021 WL 6068952, at *7. This holding is incorrect and undermines the purpose of Chapter 211.

In addition to the jurisdiction determination, the court made a grave error holding that a property owner has a constitutionally protected right to use their houses as STRs. This determination has no legal precedent whatsoever. As stated above, "property 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). Historically, this has not allowed a property owner to use their property anyway they wish. However, the court of appeals claimed that property owners "have a vested right to lease their properties and that this right is sufficient to support a viable due-course of law claim." *Muns*, 2021 WL 6068952, at *19. It appears that the court tried to soften this holding by stating that a property owner has a vested right to lease a property but not to use it as an STR. Unfortunately, this distinction makes no material difference. *See City of Beaumont v. Starvin Marvin's Bar & Grill, L.L.C.*, No. 09-11-00229-CV, 2011

WL 6748506, at *4 (Tex. App.—Beaumont Dec. 22, 2011, pet. denied) (mem. Op.) (holding that the "use of the leased property as a restaurant with live outdoor music is not a constitutionally protected vested property right"); *City of Houston v. Guthrie,* 332 S.W.3d 578, 597 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (plaintiffs' "right to lease" is not an absolute right and does not "establish [] a vested property interest.").

IV. 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 regulation of STR's. In 2014 the Village passed an ordinance barring STR's outright and included a grandfathering for existing STR's. Plaintiff Angelia Hill invested in a house in 2007 to utilize as an STR, and she had contracts extending out into the future. Ms. Hill's STR was in operation prior to the ban and should have been included among those grandfathered under the new ordinance. For some inexplicable reason the city did not allow Ms. Hill either recoupment of her investment in her STR or grandfathering. Ms. Hill sued for a regulatory taking and won. In issuing its ruling, the Houston Court of Appeals held as follows:

> Hill has been renting her Tiki Island home short-term since 2007. She bought it as an investment for the purpose of rentals, and made substantial improvements to the property. Tiki Island's 2014 ordinance banning short-term rentals grandfathered certain identified properties that were already engaged in short-term rentals as of 2011. It is not evident from the record why Hill's use of her home for short-term rentals was not grandfathered , as she was engaged in short-term rentals before the 2011 grandfathering cut-off. The Village's excluding Hill from this grandfathered status, however, foreclosed Hill's existing investment use of her property without an avenue for recoupment. We thus hold that she has identified a vested right for purposes of conferring the trial court with jurisdiction to enter a temporary injunction in her favor.

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.

The *Tiki Island* Court failed to apply the correct standard when examining the economic impact of Ordinance 05-14-02. In *Mayhew,* the Court explained that a taking occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is to leave his property economically idle." *Mayhew,* 964 S.W.2d at 937 (quoting *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 (1992) (emphasis in original). A reduction in value is not enough. *See Mayhew,* 964 S.W.2d at 937-938 (substantial reduction leaving property still worth more than what owner paid does not destroy all economically beneficial uses); *Sheffield* 140 S.W.3d at 677 (fifty percent reduction in value not enough to destroy all economically beneficial uses). In *Tiki Island,* the Court found that the fact that a property is worth more

if allowed to provide STRs, and that the property may "lose value greatly" and would cost the property owner "quite a bit" if no longer able to provide STRs was sufficient to show that the regulation "had an economic impact on the value of [the] property." *See Tiki Island*, 463 S.W.3d at 577, 582. This finding not only applies the wrong standard, it contradicts established precedent.

The *Tiki Island* Court also mistakenly cited *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972) to support its position that while property owners generally do not have a vested right in a particular use of their property, they likely do have a "narrow vested . . . right when a new law restricts an existing commercial use of a property." *Tiki Island*, 463 S.W.3d at 587 (citing *City of University Park*, 485 S.W.2d at 778). Because of this, the Court found that the Village should have provided Plaintiff Hill with a sufficient period of time to recoup her investment. *Tiki Island*, 463 S.W.3d at 587. *City of University Park* involved a city termination of two nonconforming commercial uses in a residentially-zoned district. *City of University Park*, 485 S.W.2d at 775. "A nonconforming use . . . is a use that existed legally when the zoning restriction became effective and has continued to exist." *City of University Park*, 485 S.W.2d 777 (citing *Swain v. Bd. of Adjustment of the City of University Park*, 433 S.W.2d 727 (Tex. Civ. App.—Dallas 1968). Commercial uses are not permitted in residentially-zoned districts. Additionally, even if STRs may have been permitted at the time of Plaintiff Hill's purchase of the property, using it for a commercial purpose likely violated the zoning ordinance, meaning Plaintiff's Hill's property use was not legally existing when the zoning restriction became effective. A property owner cannot have a reasonable expectation to be able to engage in illegal activity. For all these reasons, it appears that *Tiki Village* may not be the panacea claimed by STR's.

V.
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 a 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 are permitted. Regardless, the definitions of the most relevant terms is crucial. If there is need to amend the ordinance(s), care should be taken that the legal pitfalls identified above are either avoided or at least minimized. 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 the Chapter 211 zoning take advantage of the available tools to address these issues.