

# **NEIGHBORS FIGHTING STRS: A PROPOSAL**

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## I.

### **Introduction**

Both the curse and beauty of practicing local government law in Texas is that local governments often find themselves on the cutting edge of innovation, whether for good or for bad. This is particularly true in addressing land use matters. Ten or fifteen years ago, most cities did not anticipate that single-family homeowners would offer for rent to strangers a room or a portion of their homes for weekends, or that those same homeowners would ever consider renting their backyard pools or their gourmet kitchens and dining rooms to strangers on an hourly basis.

The history of municipal regulation of short-term rentals is well known. The current case law and a brief review of recent proposed legislation is addressed in this paper; however, this review goes further. I assume, rightly or wrongly, that both the state courts and the Texas Legislature will not be sympathetic to a high degree of municipal regulation, and in fact may only leave municipalities the option of enforcing traditional nuisance ordinances (loud noise, trash on public property, public intoxication, etc.) when property is offered for short-term rental. With that premise, the purpose of this paper is to consider an alternative that may be available to private property owners to address STRs in the event municipalities are stripped of most of their regulatory authority. While this proposal is not ideal, in areas where STRs are not welcome, this may provide private property owners with some recourse—assuming their neighbors agree with them!

## II.

### **Short-Term Rentals in Texas and Evolving Municipal Regulations**

In late 2022 and early 2023 there was a flurry of activity in North Texas about municipal regulation of short-term rentals (“STRs”). STR regulation continues to be a hot topic in land use practice, and not just in North Texas. Even though there have been multiple Texas cases involving STRs, the court opinions generally do not comprehensively define the contours of municipal regulation. The result: cities in Texas are still struggling to determine the permissible extent of STR regulation. Dallas, Fort Worth and Plano are emblematic of this struggle.

#### **A. Texas Case Law on Municipal Regulation of STRs**

The Texas Supreme Court has not yet weighed in on the topic of municipal regulation of STRs,<sup>1</sup> and even though several STR cases have been considered by Texas

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<sup>1</sup> In *Tarr v. Timberwood Park Owners Association*, 556 S.W.3d 274 (Tex. 2018), the Texas Supreme Court did, however, address short term rentals in the context of restrictive covenants being enforced by a homeowners’ association against a resident who utilized his property in the subdivision as an STR. The Court, after a very detailed discussion on

appellate courts, they have provided little substantive direction for municipalities—but perhaps municipalities nevertheless can glean some guidance from the few appellate opinions addressing STRs.

The City of Austin has been at the forefront of STR regulations during the last decade. The February 2016 amendments to the Austin STR ordinance established three different categories of short-term rentals and corresponding licenses: Type 1 (owner-occupied residential rentals); Type 2 (residential rentals not part of a multifamily residential use, the unit is not owner-occupied and not associated with an owner-occupied principal residential use); and Type 3 (rentals that are part of a multifamily complex).<sup>2</sup> While the Austin ordinance provides for a fairly detailed licensing and regulatory scheme (required licenses, local contacts, occupancy limits, general limitations on uses and prohibited activities on short-term rental properties), the 2016 amendment was adopted in response to an outcry by neighbors living near short-term rental properties. Perhaps the most controversial provision of that ordinance amendment related to Type 2 rentals, phasing out all such rentals by April 1, 2022.<sup>3</sup> Not surprisingly, litigation ensued.

In *Zaatari v. City of Austin*,<sup>4</sup> the court of appeals addressed the April 1, 2022, termination date for all Type 2 rentals.<sup>5</sup> It should be noted, however, the Austin ordinance also imposed several conditions on properties operated as STRs: (1) banning all assemblies, including “a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping,” whether inside or outside, after 10:00 p.m. and before 7:00 a.m.; (2) banning outdoor assemblies of more than six adults at any time; (3) prohibiting more than six unrelated adults or ten related adults from using the property at any time; and (4) giving City officials authority to “enter, examine, and survey” the short-term rentals to ensure compliance with applicable provisions of the

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the law pertaining to restrictive covenants in Texas, held that the restrictive covenants in question did not prohibit the resident’s use of his home as a short-term rental. In a February 2022 opinion, the Texas Supreme Court wrote, however, that a homeowners’ association’s deed restrictions could be amended to prohibit short-term rentals of property. See *Jbrice Holdings v. Wilcrest Walk Townhomes Ass’n*, 644 S.W.3d 179, 188 (Tex. 2022). See also the Texas Supreme Court’s discussion of short-term rentals when it denied a petition for review in the *Muns* lawsuit, *infra*, n. 52.

<sup>2</sup> See Austin, Tex., Code of Ordinances §§ 25-2-788-790.

<sup>3</sup> See Austin, Tex., Code of Ordinances § 25-2-950.

<sup>4</sup> 615 S.W.3d 172 (Tex. App.—Austin 2019, pet. denied).

<sup>5</sup> *Zaatari*, 615 S.W.3d at 181.

City's code of ordinances.<sup>6</sup> Failure to comply with these provisions was punishable by a fine of up \$2,000 per day and possible revocation of the operating license.<sup>7</sup>

Although Austin was successful in the trial court, on appeal the appellate court (in a 2-1 opinion) struck the provisions related to Type 2 rentals of non-homestead properties, declaring them to be unconstitutional as a retroactive law<sup>8</sup> and an uncompensated taking of private property. The majority opinion concluded "that owners of type-2 rental properties have a settled interest in their right to lease their property short term," and Austin's ordinance provision eliminating "type-2 short-term rentals is unconstitutionally retroactive."<sup>9</sup>

The court of appeals also struck the "assembly" provisions contained in the Austin STR ordinance.<sup>10</sup> In doing so, it relied on both the federal and the state constitutional right of assembly:

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<sup>6</sup> *Id.* See also Austin, Tex., Code of Ordinances §§ 25-2-795(D)–(G), 25-12-213-1301.

<sup>7</sup> *Zaatari*, 615 S.W. 3d at 181, citing Austin, Tex., Code of Ordinances §§ 25-1-462.

<sup>8</sup> The Texas Constitution, in Article I, Section 16, provides, in part, that "[n]o . . . retroactive law . . . shall be made."

<sup>9</sup> *Zaatari*, 615 S.W.3d at 192.

<sup>10</sup> Section 25-2-795 of Austin's short-term rental regulations provides that:

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(B) Unless a stricter limit applies, not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.

(C) A short-term rental is presumed to have two bedrooms, except as otherwise determined through an inspection approved by the director.

(D) A licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.

(E) A licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m.

(F) For purposes of this section, an assembly includes a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping.

(G) A short-term rental use may not be used by more than:

[The Austin regulation] plainly restricts the right to assemble and does so without regard to the peaceableness or content of the assembly—as emphasized above, the word “assembly” is used to describe what is being banned or severely restricted temporally, quantitatively, and qualitatively. Even if it [sic] the ordinance did not expressly use the word “assembly,” section 25-2-795 represents a significant abridgment of the fundamental right to peaceably assemble—i.e., to get together or congregate peacefully. It forbids owners (i.e., “licensees” in the ordinance) and tenants from gathering outdoors with more than six persons, at any time of day, even if the property is licensed for occupancy of six or more. And it prohibits use by two or more persons for any activity “other than sleeping” after 10:00 p.m.

Moreover, in contrast to traditional cases that invoke the right to assemble on *public* property, here the right concerns the freedom to assemble with the permission of the owner on *private* property, implicating both property and privacy rights. . . . Surely the right to assemble is just as strong, if not stronger, when it is exercised on private property with the permission of the owner, thereby creating a nexus with property and privacy rights. . . .<sup>11</sup>

In sum, holding that the Austin ordinance’s Type-2 short-term rental provisions infringed on short-term rental owners’ and their tenants’ constitutional rights to assembly and did not serve a compelling government interest, the Texas Constitution’s guarantee to due course of law was violated.<sup>12</sup> Nonetheless, the court wrote that Austin is not powerless to regulate short-term rentals and negative side effects—the City’s various nuisance ordinances could be applied—noise ordinances, ordinance prohibiting public urination and defecation, littering ordinance, parking ordinance, disorderly conduct regulations and the public intoxication statute.<sup>13</sup>

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- (1) ten adults at one time, unless a stricter limit applies; or
  - (2) six unrelated adults.

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<sup>11</sup> *Zaatari*, 615 S.W.3d at 199-200 (emphasis in original) (citations omitted).

<sup>12</sup> *Id.* at 202.

<sup>13</sup> *Id.* at 201.

Next up on the appellate docket were two cases from the Texas Court of Appeals in Fort Worth in 2021: *Draper v. City of Arlington*<sup>14</sup> and *City of Grapevine v. Muns.*<sup>15</sup> The recitation of facts in *Draper* is similar to what many cities have experienced: an uptick in short term rentals of residential property in Arlington resulted in many unhappy neighbors, with complaints about fighting by STR tenants, wild parties, noise complaints, parking issues, public urination and a proliferation of trash, with one neighbor stating that STRs are a “nightmare for the neighbors.”<sup>16</sup> In response, Arlington retained consultants, held public meetings, conducted surveys and initiated an in-depth review of STR issues in the city.<sup>17</sup> After months of study and public comment, Arlington adopted two ordinances: one amending the City’s zoning ordinance by creating an STR Zone extending approximately one mile from Arlington’s entertainment hub (AT&T Stadium, home of the Dallas Cowboys, Globe Life Park, home of the Texas Rangers, Six Flags Over Texas and the University of Texas at Arlington); and one adopting an STR ordinance limiting short term rentals to the STR Zone and other specified higher-density residential zoning districts,<sup>18</sup> including a permitting process and regulations for STR owners and tenants.<sup>19</sup> Besides permitting, the STR ordinance required proof of insurance coverage of up to \$1 million per occurrence; safety and health inspections; prohibition of “the congregation of occupants outside at the premises between the hours of 10:00 p.m. and 9:00 a.m.”;

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<sup>14</sup> 629 S.W.3d 777 (Tex. App.—Fort Worth 2021, pet. denied).

<sup>15</sup> 651 S.W.3d 317 (Tex. App.—Fort Worth 2021, pet. denied).

<sup>16</sup> *Draper*, 629 S.W.3d at 782.

<sup>17</sup> As the appellate court opinion notes, “the City engaged in an ‘extensive period of public comment, public input, and work sessions with the legislative body and planning commission’ to strike a ‘reasonable balance’ between the interests of residents and of STR owners and operators. Among other things, the City hired consultants, mapped the distribution of STRs across the City according to census-tract data, and sought citizen input through a series of townhall meetings, surveys, an open house, and small group meetings with STR proponents and opponents. For over two years, the STR issue was discussed at almost 20 Arlington city council meetings at which citizens on both sides of the issue voiced their opinions. The city council tasked the City’s Department of Planning and Development Services with compiling public input, analyzing other cities’ approaches to STRs, developing regulatory options, and presenting its findings to the council.” *Id.*

<sup>18</sup> The City determined that STRs in higher-density residential zoning districts were more appropriate than in lower-density residential districts because the City’s zoning ordinance “was designed to advance the health, safety, and welfare of the City’s residents because it was designed to maintain the stability, quiet, and repose of lower-density residential districts, which were the environments that the City had determined that it wanted to protect and preserve for single-family homeowners.” *Id.* at 788.

<sup>19</sup> *Id.*

prohibition of large numbers of attendees at events such as banquets, weddings, reunions, bachelor/bachelorette parties and similar activities; a limitation on the number of occupants; parking restrictions; amplified sound restrictions; and trash regulations, among others.<sup>20</sup>

The Fort Worth Court of Appeals held that the City's decision to allow STRs in the STR Zone and in high- and medium-density residential areas but not in low-density residential areas was rationally related to the City's police powers and not in violation of the plaintiffs' substantive "due course of law" rights under Article I, Section 19 of the Texas Constitution.<sup>21</sup> Additionally, the court rejected the plaintiffs' contention that the Arlington STR ordinance unconstitutionally restricted their tenants' freedoms of association and movement because the ordinance unilaterally prohibited assembly on private property at certain times, holding that the plaintiffs lacked standing because they were asserting the rights of others, not their own rights.<sup>22</sup> Moreover, the plaintiffs' assertion that the Arlington STR ordinance violated their equal protection rights under the Article I, Section 3 of the Texas Constitution did not long detain the Court of Appeals. The court wrote that a distinction between a rental of property for 30 days or less or the rental of property for more than 30 days is rationally related to legitimate governmental interests:

As noted, the City's stated legitimate governmental interests are (1) safeguarding the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public and (2) minimizing the adverse impacts resulting from the increase in transient rental uses in neighborhoods planned, approved, and constructed for single-family residences. . . . [The 30-day cutoff between STRs and long-term rentals is] based upon a common distinction made between transient occupancy versus longer-term occupancy. [Additionally,] a rental for fewer than 30 days triggers the imposition of hotel-occupancy taxes. Further, . . . the use of single-family residences as STRs can negatively affect the residential character of neighborhoods. We thus conclude that the 30-day distinction

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<sup>20</sup> *Id.* at 782-83.

<sup>21</sup> "Texas due course of law protections in Article I, § 19, for the most part, align with the protections found in the Fourteenth Amendment to the United States Constitution.' According to the Texas Supreme Court, an ordinance violates due process if it 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety[,] or the public welfare in its proper sense.'" *Id.* at 786 (citations omitted).

<sup>22</sup> *Id.* at 789-91.

between STRs and long-term rentals is rationally related to the City's legitimate governmental interests.<sup>23</sup>

The STR ordinance's other restrictions, as articulated by residents and City staff, indicated "that the City's decisions to restrict STRs to the STR Zone and certain zoning districts and to regulate the operation of STRs are rationally related to objectives within the City's police powers."<sup>24</sup>

The Fort Worth Court of Appeals several months later did not find any rational relationship supporting the City of Grapevine's STR regulations.<sup>25</sup> Although Grapevine had no STR regulations until September 2018, as described below, its zoning ordinance was amended in 2000 to allow bed and breakfasts in certain areas of the city. The 2000 "bed and breakfast" amendment excluded uses such as a "single-family dwelling transient rental"—without defining that term.<sup>26</sup> Prior to the 2018 STR ordinance's adoption, however, the plaintiffs

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<sup>23</sup> *Id.* at 792 (citations omitted) (internal punctuation omitted). Footnote 21 in the Court's opinion cites a California appellate case for the proposition that STR ordinances protect legitimate governmental interests:

It stands to reason that the "residential character" of a neighborhood is threatened when a significant number of homes . . . are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other "unmitigatable [sic], adverse impacts" cited by the Council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.

*Ewing v. City of Carmel-By-The-Sea*, 234 Cal.App.3d 1579, 286 Cal. Rptr. 382, 388 (1991).

<sup>24</sup> *Id.* at 794.

<sup>25</sup> The *Draper* opinion about Arlington's STR ordinances was delivered on July 15, 2021. The *Muns* opinion about Grapevine's STR ordinance was delivered on August 5, 2021; however, that opinion was withdrawn and another opinion in *Muns* was substituted on December 23, 2021.

<sup>26</sup> *Muns*, 651 S.W.3d at 326.



had rented out their Grapevine properties on a short-term basis without interference from the City. In fact, when some of the [plaintiffs] contacted the City's Planning and Zoning Department to ask about any restrictions on STRs, City employees told them that the City had no restrictions, regulations, or permit requirements for STRs. Based on these representations and the existing Zoning Ordinance, the [plaintiffs] invested money to purchase or to improve Grapevine homes for use as furnished STRs. Some of the [plaintiffs] paid short-term-occupancy taxes to the City, without incident and with the City apparently happy to accept them.<sup>27</sup>

Due to problems associated with the “usual” complaints about STRs—noise disturbances, parking problems, increased traffic, complaints from residents about STR guests' possible criminal activity—the Grapevine city council began a 10-month study and observation period in November 2017 concerning the effect of STRs on residential neighborhoods. At a public hearing in September 2018, it was “stated that—despite what the [plaintiffs] had been led to believe—the [Grapevine] Zoning Ordinance had always prohibited STRs.”<sup>28</sup> The city council then adopted the STR ordinance, expressly prohibiting such rentals in the City of Grapevine. “According to the City, the STR Ordinance did not really amend the Zoning Ordinance but simply clarified and affirmed that the Zoning Ordinance did not allow STRs.”<sup>29</sup> Thereafter, the City sent out notices to all of Grapevine's known STR owners and operators informing them that short term/transient rentals were prohibited in the City and they had a 45-day grace period before citations would be issued.<sup>30</sup> Not surprisingly, the City was sued.

The plaintiffs alleged that the STR ordinance was unconstitutional as a regulatory taking without compensation; it violated the plaintiffs' due-course-of-law rights under the Texas Constitution; the ordinance was impliedly preempted by Chapter 156 of the Texas Tax Code (relating to hotel occupancy taxes) alone or in conjunction with Chapter 92 of the Texas Property Code (relating to residential tenancies); and the ordinance violated the plaintiffs' vested property rights under Chapter 245 of the Texas Local Government Code. After the trial court granted a temporary injunction, Grapevine filed a plea to the jurisdiction, generally contending that the STR ordinance was not a “new ban” on STRs since the zoning ordinance previously prohibited STRs; the plaintiffs had failed to exhaust their administrative remedies under Chapter 211 of the Texas Local Government Code because they did not appeal to the Board of Adjustment; Grapevine had not waived its

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<sup>27</sup> *Id.* at 326-27. The opinion notes that one of the plaintiffs had paid approximately \$32,000 in such taxes to the City, “which the City has kept.” *Id.* at 327 n. 9.

<sup>28</sup> *Id.* at 327.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 327-28.

governmental immunity; and declaratory relief was invalid because it mirrored the plaintiffs' takings claim.<sup>31</sup>

In a lengthy opinion, the Fort Worth Court of Appeals ruled in favor of the plaintiffs on every claim they asserted other than the preemption claim.<sup>32</sup> The court held that exhaustion of administrative remedies was not required because the plaintiffs were "challenging the STR Ordinance's constitutionality and [that issue] would not have been mooted by an administrative decision,"<sup>33</sup> while noting that not every claim based on the Texas Constitution is "globally exempted" from "statutory exhaustion-of-remedies requirements."<sup>34</sup>

The court also held that the plaintiffs had sufficiently pleaded a regulatory takings claim under the Texas Constitution. "Although whether facts amount to a taking is ultimately a legal question, the trial court must resolve disputed fact issues about the extent of the governmental intrusion on the property. Here, fact issues exist regarding the STR Ordinance's economic impact on the [plaintiffs'] properties and the reasonableness of the [plaintiffs'] investment-backed expectations."<sup>35</sup> Moreover, the court ruled that no bright-line test exists for determining whether a law is unconstitutionally retroactive<sup>36</sup>; however, the correct analysis is not whether a property right was vested, as

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<sup>31</sup> *Id.* at 328-29.

<sup>32</sup> The Court held that the plaintiffs failed to plead a viable preemption claim under either the Tax Code or Property Code because they could not show with "unmistakable clarity" that the legislature intended to limit local regulation of STRs. *Id.* at 343.

<sup>33</sup> *Id.* at 333.

<sup>34</sup> *Id.* at 334. "[I]t is immaterial whether the administrative proceeding could have resolved the [plaintiffs'] claims, so long as the adjustment board could 'render relief that would have mooted those claims.' In other words, '[t]he question . . . is not whether an administrative hearing could have resolved *all* of [the plaintiff's] claims, constitutional or otherwise.' The proper inquiry is whether the administrative proceedings—here, appealing to the adjustment board—could have rendered the [plaintiffs'] claims moot." *Id.* (citations omitted) (emphasis in original). The Court noted that whether the board of adjustment had ruled in favor of the plaintiffs or against the plaintiffs, the ordinance prohibiting STRs would still be in place. *Id.* at 334-35.

<sup>35</sup> *Id.* at 341.

<sup>36</sup> See *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126 (Tex. 2010), for the proposition that not all retroactive laws are unconstitutional (*id.* at 139); however, a retroactive law is unconstitutionally retroactive only so long as 3 factors weigh against the challenged law: (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

claimed by the City, but the extent to which that right was settled. Here, the plaintiffs had pleaded that their property rights were settled and thus had pleaded a facially valid retroactivity claim.<sup>37</sup> The court also wrote that under Texas law property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made, but “we conclude that they have a fundamental leasing right arising from their property ownership. Private property ownership is a fundamental right. . . . Property ownership includes the right to lease to others,” thereby concluding that the plaintiffs “have a vested right to lease their properties and that this right is sufficient to support a viable due-course-of-law claim” under Article I, Section 19 of the Texas Constitution.<sup>38</sup>

## **B. Current Municipal STR Activity in North Texas**

At the present time three North Texas municipalities—Plano, Fort Worth and Dallas—are evaluating or have evaluated how they should address short-term rentals in their cities. It has not been easy and only Fort Worth has actually approved a new STR rental registration ordinance while Plano and Dallas are continuing to debate the scope of regulation. As expected, STRs have been the subject of strong debate in all three cities. As Fort Worth Mayor Mattie Parker stated at the February 14, 2023, city council meeting, “there is a lot of frustration and concern in the community” about STRs and this is “an evolving issue” about “what the future of STRs looks like,” not just in Fort Worth but around the country.

Short-term rentals are allowed in mixed-use and most form-based districts, commercial and industrial districts with a certificate of occupancy from the Fort Worth’s Development Services Department; however, STRs are not allowed in residential districts, such as those zoned single-family, two-family and multi-family areas, and a zoning change is required for an STR use.<sup>39</sup> While not addressing where STRs are (and

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impaired by the statute,” and (3) “the extent of the impairment.” *Id.* at 145, cited in *Zaatari*, 615 S.W.3d at 188.

<sup>37</sup> *Muns*, 651 S.W.3d at 344-45, citing *Zaatari*, 615 S.W.3d at 191.

<sup>38</sup> *Muns* at 346-47. Similarly, the Fifth Circuit has held that a municipal requirement that no person could obtain an STR license unless the property was the owner’s primary residence was unconstitutional under the dormant Commerce Clause to the United States Constitution. See *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 325-26 (5th Cir. 2022).

<sup>39</sup> See [Short-Term Rentals \(STR\) – Welcome to the City of Fort Worth \(fortworthtexas.gov\)](https://www.fortworthtexas.gov). As noted on the Fort Worth website, during a December 6, 2022, city council work session, the city council “directed staff to keep the current Zoning Ordinance regulation which does not allow Short Term Rentals, or STRs, in residential zoning districts and requires a zoning change for STR use.”

are not) authorized, Fort Worth approved an STR registration ordinance on February 14, 2023. The registration ordinance, to be codified in Article XIII of Chapter 7, “Buildings,” of the Fort Worth Code of Ordinances, generally provides that short-term rentals,<sup>40</sup> where currently allowed by existing zoning, must register annually; hotel occupancy taxes must be paid; a local party must be available 24/7 to respond to concerns at the property; rentals are limited to two persons per bedroom with no more than twelve people staying in the property at one time; only on-premise parking would be allowed; no events or parties would be allowed; and registration could be revoked based on any violations of any of provisions of the STR registration ordinance. The registration deadline is June 1, 2023. It should be noted that Fort Worth was sued in June this year by over 100 STR and property owners.

The City of Plano has been studying the STR issue for months, and not without significant controversy. A planning and zoning commission staff report dated November 21, 2022, provided background about the steps that Plano had taken as of that date: the city council had referred the topic of STRs to the planning and zoning commission in October 2022, after the city council had received an attorney briefing about the legal issues associated with STRs and heard public comments; the city council indicated that the planning and zoning commission “should consider using zoning to designate where short-term rentals may be appropriate in the city”; an STR registration program was tabled at the November 14, 2022, city council meeting until after zoning amendments are adopted; and it was noted that city officials were meeting with Arlington officials on the STR regulatory process utilized by Arlington.<sup>41</sup>

A January 17, 2023, memorandum to the city council from the director of planning outlined the actions that had been taken by city staff since the November 21 staff report:

- Met with Arlington staff to understand their process and solution, as well as key differences between the two cities.
- Met with interested citizens to discuss their concerns regarding short-term rentals.
- Held internal committee meetings to ensure staff is working in unison, due to the number of departments involved with the issue.
- Provided an update to the Planning and Zoning Commission meeting on November 21, 2022.

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<sup>40</sup> Section 7-453 defines a short-term rental as “the rental for compensation of dwellings or accessory dwelling units or portions thereof for the purpose of overnight lodging for a period of not less than one night and not more than 29 consecutive days other than ongoing month-to-month tenancy granted to the same renter for the same unit as their primary residence. This is not applicable to hotels, motels, bed and breakfasts homes, bed and breakfast inns, or rentals made for less than thirty days upon the sale of a dwelling when the tenancy is by the former owner.”

<sup>41</sup> See [11-21-2022 Planning & Zoning Commission Packet \(PDF\) \(civicplus.com\)](#).

- Substantially completed research on other cities' zoning ordinances, in preparation for a discussion on zoning amendments.
- Pursued procurement of third-party STR data through efforts from Technology Solutions, Neighborhood Services, and Purchasing departments. Because specific locations of short-term rentals are not readily available, a third-party data consultant is being selected. These consultants monitor STR platforms and cross-reference them with publicly-available data to identify STRs in the city. A recommendation is being finalized at this time for the selected vendor.
- Held interviews with four potential facilitators to assist with public outreach.
- Continued to track STR data through the Police Department. For the year 2022, there were 141 calls for service at known STR locations (57 properties). 41% of calls (58 calls) were from 11% of the properties (six properties).<sup>42</sup>

The City of Plano entered into a third party contract to hire both a consultant to assist with STR data analysis and a public outreach facilitator, and afterwards begin a discussion before the planning and zoning commission based on the data and research.<sup>43</sup> As of the date of preparation of this presentation, the Plano city council recently appointed a task force to address the topic, and the task force's meetings are ongoing.

The City of Dallas has had a long history of studying, but not yet addressing, short-term rentals in the city. Dallas has been reviewing the STR issue for more than three years (which included three separate task forces), and while the Dallas Plan Commission recently approved amendments to the city's zoning regulations defining "short-term rental lodging," there has been no action yet by the city council.<sup>44</sup> The Plan Commission adopted what some call the "keep it simple solution"—prohibiting STRs from residential areas. The STR amendment is indeed short and to the point:

#### SEC. 51A-4.205. LODGING USES

- (3) Short-term rental lodging.

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<sup>42</sup> See City of Plano Website for January 23, 2023, Agenda Packet.

<sup>43</sup> *Id.*

<sup>44</sup> See [Planning & Urban Design Short Term Rentals \(dallascityhall.com\)](https://www.dallascityhall.com/planning-urban-design/short-term-rentals). The *Dallas Morning News* reported on February 22, 2023, in an article entitled "Dallas says decision on short-term rentals not coming before spring," that the Dallas City Council is tentatively scheduled to be briefed on April 4, 2023.

(A) Definition: A full or partial unit containing one or more kitchens, one or more bathrooms, and one or more bedrooms that is rented to occupants for fewer than 30 consecutive days per rental period.

(B) Districts permitted: By right in MO(A) [mid-range office], GO(A) [general office], central area, mixed use, multiple commercial, and urban corridor districts.

(C) Required off-street parking: One space per full or partial unit rented to occupants.

(D) Required off-street loading: none

(E) Additional provisions:

(i) This use must comply with Chapter ##, "Short-Term Rentals" of the Dallas City Code.

(ii) The number of short-term rentals in a single unit may not exceed one.

(iii) A short-term rental must not be used as a commercial amusement (inside), commercial amusement (outside), restaurant with drive-in or drive-through service, restaurant without drive-in or drive-through service, or any other use unless located in a zoning district in which the use is permitted and a Certificate of Occupancy is issued for the use.

(iv) Short-term rental lodging is prohibited in a multifamily structure or development that has received and utilized a development bonus under Division 51A-4.1100 "Mixed Income Housing."<sup>45</sup>

This proposed amendment to the Dallas Development Code is similar to Fort Worth's STR regulations which prohibit short-term rentals in both single-family and multi-family zoning districts, and a motion at the December 8, 2022, Dallas Plan Commission to include STRs in certain multi-family districts failed. Not unlike what Arlington and Plano have done, Dallas presented statistical evidence about calls to 311 and 911 related to short-term rentals, generally concluding that (1) STRs annually generated 2.07 311 calls per property, compared to 1.52 311 calls per non-STR property annually, and (2) STRs annually generated 3.12 911 calls per property, compared to 1.89 911 calls per non-STR property annually. Approximately 88% of STRs generated no 311 or 911 calls. Moreover, even though 2,628 STRs were registered or identified as of December 2022, it was estimated that there were at least 6,000 STRs in Dallas.<sup>46</sup> Not unlike in many cities in

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Texas, the STR debate will continue and it is clear that significant public involvement in the discussion of municipal regulation is both divided and emotionally charged. Notwithstanding the varied municipal responses to STR ordinances, I believe municipal approaches to the topic can be briefly summarized in the following chart<sup>47</sup>:

### MUNICIPAL APPROACHES TO STR REGULATION

<b>None</b>	<b>Registration and Traditional Enforcement</b>	<b>Evidence-Based Local Restrictions</b>	<b>Total Ban</b>
No regulation of STRs	Register STRs, collect hotel occupancy taxes, and use code enforcement and police response to address problem STR properties	Develop evidence-based ordinance to restrict STRs to certain residential zoning districts or other described areas of the city	Completely ban STR uses or in all single-family residential districts
May not address community concerns regarding STR problems	Low comparative cost, can be quickly implemented using existing resources	High comparative costs, may require external consultants, extensive data collection and a lengthy implementation period ( <i>Draper</i> )	May infringe on STR owner property rights; unlikely to result in total compliance and fairly high risk of litigation ( <i>Zaatari; Muns</i> )

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<sup>47</sup> The author thanks his law partner, David Ritter, for his kind assistance with the chart.

### III.

#### **Recent Activity by the Texas Legislature and Texas Supreme Court**

Even though the Texas Legislature did not pass any bills related to short-term rentals, hourly amenity rentals or accessory dwelling units, it certainly appeared that several bills might emerge from the 88th Session of the Legislature. In late February 2023, Representative Gary Gates of Richmond filed House Bill No. 2665. That bill would have added a new Chapter 247 to the Texas Local Government Code, generally prohibiting a city from banning STRs or limiting occupancy or durations of stay for residential properties, which includes single-family dwellings, condominium units, cooperatives, mixed-use developments or time-shares, while allowing for municipal enforcement of nuisance-related regulations (parking, noise, solid waste handling and containment). Similarly, House Bill No. 2789, filed by Representative Justin Holland of Rockwall, also would have added another new Chapter 247 to the Texas Local Government Code, which would allow the rental of accessory dwelling units.<sup>48</sup>

House Bill No. 2367, filed by Representative J. M. Lozano of Kingsville, addressed short-term “residential amenity rentals.”<sup>49</sup> By its terms, a “residential amenity rental” or “rental” meant “a feature or facility: (A) that is part of a property used or designed to be used as the home of a person, family, or household, including a single-family dwelling; and (B) that is rented for a period of less than 15 hours and not for the purpose of providing sleeping accommodations to a tenant.” While several commentators have suggested the legislation was drafted to address swimming pool rentals, the scope of a “residential amenity” clearly could also encompass tennis and sports courts, gourmet kitchens, front yards and backyards, stables, and any other residential amenity. House Bill No. 2367 further provided that prior to renting, a “political subdivision” could require the provider to pay a “nominal” registration fee, designate an emergency contact and, somewhat oddly, “provide proof that written notice was given to each owner of property that shares a common boundary with the property where the rental is located of the provider’s intent to use the property as a residential amenity rental.” The governmental entity would be allowed to maintain an Internet website or telephone number where complaints may be lodged and a civil penalty eventually could be assessed,<sup>50</sup> but to

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<sup>48</sup> The Senate companion bill to House Bill No. 2665 is Senate Bill No. 1412, introduced by Senator Bryan Hughes of Mineola. Presumably specifically authorizing the rental of ADUs would include the short-term rental of ADUs.

<sup>49</sup> The Senate companion bill to House Bill No. 2367 is Senate Bill No. 1466, introduced by Senator Kelly Hancock of North Richland Hills.

<sup>50</sup> For the first violation, a civil penalty not to exceed \$200 may assessed; for a second violation, the civil penalty cannot exceed \$400; and after a third violation, the governmental entity may suspend the registration of a provider for a period not to exceed one year or prohibit the continued use of the property as a residential amenity rental by the same provider.



assess a civil penalty, suspend a registration or prohibit the continued use of the property as a residential amenity rental, the governmental entity would have had “the burden of proof of demonstrating that the violation was a direct result of the residential amenity rental’s operation” and no action can be taken by the governmental entity until “the provider has exhausted all appeal rights for the underlying violation.”

Although none of the foregoing legislation survived the session, there is no reason to believe that future sessions of the Texas Legislature will not see similar legislation being introduced. I believe that if the Legislature has its way with STRs and hourly residential amenity rentals, it seems that virtually any residential property in the State of Texas (not subject to applicable restrictive covenants) can be monetized as a result—and neighbors and local governments will have little control over what events happen next door.

The Texas Supreme Court denied the City of Grapevine’s petition for review in *Muns*<sup>51</sup> on June 16, 2023; however, Justice Evan A. Young authored a short opinion in support of the denial of the petition for review. He phrased the question of “increasing and demonstrable importance” is “the extent to which municipal bans on short-term rentals pass constitutional muster.”<sup>52</sup> Justice Evans wrote that Grapevine, like many other municipalities, sought to outlaw the STR market entirely, and due to the “explosion” of the short-term rental market, he “tended to agree” that there are constitutional questions which should be addressed by the Court.<sup>53</sup> Notwithstanding those constitutional questions, he wrote that the *Muns* case “starts out as a less-than-ideal vehicle for resolving the constitutional issues” associated with short-term rental bans due to complex administrative exhaustion and enforcement issues unique to *Muns*:

Given the seeming prevalence of short-term rental bans, and of the opposition against them, I am confident that other cases—unburdened by potentially dispositive collateral questions—will lead to a better vehicle for this Court to address the bans’ constitutionality.<sup>54</sup>

What does this mean? Coupled with recent legislative activity, albeit unfruitful last session, should a municipal attorney feel confident that one day soon both the Legislature and the Texas Supreme Court will uphold municipal bans on short-term rentals?

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<sup>51</sup> *Supra*, note 15.

<sup>52</sup> Opinion on Petition for Review in *Muns*, Case No. 22-0044, Texas Supreme Court (June 16, 2023) at 1.

<sup>53</sup> *Id.* at 2-3.

<sup>54</sup> *Id.* at 4.

## IV.

### **A Proposal: Deed Restrictions Among Neighbors**

Call me a skeptic, but I do not have faith that either the Texas Legislature or the Texas Supreme Court will uphold municipal bans of short-term rentals. The Attorney General's Office sided with landowners in *Zaatar* and contended that private property rights were paramount, thus limiting—if not eliminating—most municipal regulatory authority.

So, what about this? A property owner in a neighborhood, for example, is opposed to STRs and certainly does not want one next door. His/her neighbors agree—they are similarly opposed to STRs and do not wish to see them either take root or proliferate in the neighborhood. They feel similarly about hourly rentals of amenities and accessory dwelling units for rent popping in their neighbors' backyards and they have legitimate concerns about parking, noise, illegal activities, trash and a host of other concerns.

1. Property owner (PO) and Neighbor 1 (N1) agree, for good and valuable consideration (which they mutually confess), in a Real Property Covenant Running with the Land (Covenant) that PO will not use, allow to be used or be made available or offer for use PO's property for an STR, hourly rental of an amenity on the property or allow an ADU to be constructed, used, allowed to be used or made available on the property.

2. PO enters into this Covenant with other Neighbors (N2 and N3, for example) and the Covenant is now between PO and N1, N2 and N3. They mutually agree that if PO one day wishes to engage in an STR, hourly rental amenity or the rental/construction of an ADU on PO's property, N1, N2 and N3 must agree in writing and they must file such authorization in the county's real property records.

3. If N1, N2 and N3 agree, then the original Covenant is of no further force and effect. But, if PO engages in a STR of the property, an hourly amenity rental or an ADU on the property without the consent of N1, N2 and N3, then either N1, N2 or N3 can take action to enforce the Covenant.

4. N1, N2 and N3 are specifically designated in the Covenant as beneficiaries of the Covenant and retain the right to prevent or enforce the terms of the Covenant.

5. If a disagreement arises, the Covenant specifically provides for nonbinding mediation prior to the institution of litigation.

6. The Covenant runs with the lands and provides definitions of "short-term rental," "hourly rental of residential property amenities," and "accessory dwelling units," with terms utilized by the legislation introduced in the last session of the Legislature.

A sample Covenant is attached to this paper as Exhibit A.

There are several caveats and issues with this proposal. First, a mortgage company may require review of any covenant a property owner enters into. Second, if the property is located in a subdivision with a homeowners' association, the subdivision's HOA documents may address these issues and/or prohibit individual property owners from entering into such an agreement. Third, property owners may be reluctant to enter into such agreements with their neighbors since the obligation is perpetual and will run with the land. Fourth, these covenants may provide piecemeal protection, with groups of neighbors being supportive and other neighbors not supportive, with hopscotch restrictions in a neighborhood.

## V.

### **Conclusion**

While it would be understandable if property owners were hesitant to deed restrict their property prohibiting STRs, hourly amenity rentals and the rental/construction of ADUs, some would not be and I believe that if the courts or the Legislature limit the ability of municipalities to regulate STRs, hourly amenity rentals and ADUs in any significant manner, an anti-STR covenant may be a feasible alternative.

# **EXHIBIT A**

**REAL PROPERTY COVENANT RUNNING WITH THE LAND**

Name of Owner(s): \_\_\_\_\_

Property Address: \_\_\_\_\_

\_\_\_\_\_

**WHEREAS**, the proliferation of short-term rentals of property, the hourly rentals of residential property amenities (including but not limited to swimming pools, pool decks and patios) and/or the construction of accessory dwelling units on residential properties may both adversely affect and impact property values in residential areas of a city and it is the purpose of this Real Property Covenant to preserve and protect residential property values; and

**WHEREAS**, the Owner or Owners (hereinafter referred to as “Owner,” whether singularly and/or collectively) agree and acknowledge that it is Owner’s intent to prohibit short-term rentals, hourly rentals of residential property amenities and/or the construction of accessory dwelling units on the Property (“Property”), whose address is listed above and for which a legal description of said Property is attached hereto as Exhibit 1 and incorporated by reference; and

**WHEREAS**, for good and valuable consideration, the sufficiency of which is hereby mutually confessed, agreed to and acknowledged by Owner and any Adjoining Property Owner hereinafter listed in Exhibit 2, attached hereto and incorporated by reference, said Owner and any Adjoining Property Owner agree and acknowledge that Owner shall not construct, allow, permit, authorize or suffer the use of the Property for a short-term rental, an hourly rental of residential property amenities and/or an accessory dwelling unit; and

**WHEREAS**, Owner hereby grants, for the foregoing good and valuable consideration, to any Adjoining Property Owner the rights, duties and obligations hereinafter stated.

**NOW, THEREFORE**, Owner of the Property, for the aforementioned consideration, hereby voluntarily establishes this Real Property Covenant over the Property on the terms and conditions, including definitions, contained herein, as follows:

1. At no time shall the Property be used, allowed to be used, or made available or offered for use as a short-term rental or an hourly rental of residential property amenities, nor shall an accessory dwelling unit be constructed, used or made available or offered for use on the Property. The foregoing uses of and activities on the Property are expressly prohibited.

2. Owner and any Adjoining Property Owner hereinafter listed agree and acknowledge that Owner may (1) use, allow to be used, or make available or offer for use the Property as a short-term rental or hourly rental of residential property amenities, or (2) allow the construction of an accessory dwelling unit on the Property, only with the express written and notarized Authorization of all Adjoining Property Owners, and said

Authorization shall be filed in the real property records of \_\_\_\_\_ County. In the event said Authorization is so filed in the real property records of \_\_\_\_\_ County, then this Real Property Covenant shall expire and be of no further force or effect.

3. In the event Owner uses, allows to be used, or makes available or offers for use the Property in violation of Paragraph 1, above, without having obtained and filed an Authorization referenced in Paragraph 2, above, then any Adjoining Property Owner is hereby authorized to take action to enforce the terms of this Real Property Covenant.

4. Any Adjoining Property Owner hereinafter listed is a beneficiary of this Real Property Covenant and retains the right to prevent and enforce the terms of this Real Property Covenant.

5. If any dispute arises between Owner and any Adjoining Property Owner concerning the interpretation of this Real Property Covenant, before instituting litigation, such dispute shall be submitted to nonbinding mediation where each party bears its own costs and attorney's fees, and any mediation costs shall be borne equally by the parties.

6. This Real Property Covenant shall run with the land in perpetuity and shall be binding on Owner and any of Owner's heirs, successors and assigns, unless otherwise terminated pursuant to Paragraph 2, above.

7. For purposes of this Real Property Covenant, the following definitions shall apply:

A. "Short-term rental" shall mean a residential property, including a single-family dwelling or a unit in a condominium, cooperative, mixed use development, or timeshare, that is rented wholly or partly for a fee for a period not longer than thirty (30) consecutive days. A short-term rental shall not include a hotel, motel, bed and breakfast homes, bed and breakfast inns, or rentals made for less than thirty (30) days upon the sale of a residential dwelling when the tenancy is by the former owner.

B. "Hourly rental of residential property amenities" shall mean a feature or facility that is part of a residential property, including a single-family dwelling or a unit in a condominium, cooperative, mixed-use development or timeshare, and is rented for a period of less than fifteen (15) hours and for a purpose other than providing sleeping accommodations to the lessee.

C. "Accessory dwelling unit" shall mean a residential housing unit that is located on any lot that is not zoned or is zoned for a single-family home or duplex, is independent of the attached or detached primary dwelling unit and is a complete and independent living facility for at least one individual.

**OWNER(S):**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_

**THE STATE OF TEXAS**

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§  
§

**COUNTY OF \_\_\_\_\_**

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_, in his/her capacity as Owner of the Property.

\_\_\_\_\_  
Notary Public – State of Texas

My commission expires: \_\_\_\_\_

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_

**THE STATE OF TEXAS**

§  
§  
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**COUNTY OF \_\_\_\_\_**

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_, in his/her capacity as Owner of the Property.

\_\_\_\_\_  
Notary Public – State of Texas

My commission expires: \_\_\_\_\_

**EXHIBIT 1**  
**(Legal Description of Owner Property)**



**EXHIBIT 2**

**ADJOINING PROPERTY OWNER(S):**

Name of Owner(s): \_\_\_\_\_

Property Address: \_\_\_\_\_

Signature: \_\_\_\_\_

Name of Owner(s): \_\_\_\_\_

Property Address: \_\_\_\_\_

Signature: \_\_\_\_\_

Name of Owner(s): \_\_\_\_\_

Property Address: \_\_\_\_\_

Signature: \_\_\_\_\_

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Property Address: \_\_\_\_\_

Signature: \_\_\_\_\_