

## Sharing Economy 600:200

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### Legal Overview: Short-Term Rentals

#### I. Introduction

The “sharing economy”, led by companies such as Uber and Airbnb, continues to grow and gain popularity. Of particular interest in real property law is short-term residential rentals. Companies such as Airbnb and VRBO offer an online marketplace for individuals to lease or rent short-term lodging in houses, apartments, vacation homes and the like. Short-term rentals offer travelers an alternative to traditional sources of lodging while offering property owners a way to generate extra income from their property.

Short-term rentals are not a new concept in real property law. With the expansion of the sharing economy, however, cities, courts and neighborhoods increasingly have to address short-term rentals. This article provides an overview on how cities, courts and neighborhoods are adapting to the rise in popularity of short-term rentals on sharing economy platforms.

#### II. Zoning Ordinances

Zoning is a powerful tool for cities to regulate short-term rentals. Zoning is a function of cities' “police power” to regulate in the public interest. As such, cities have wide latitude to regulate land use within their municipal boundaries (so long as the regulation advances the public health, safety or welfare). The main constitutional restraint on zoning is that it cannot be unreasonable, arbitrary, or capricious. Courts tend to defer to the judgment of cities when evaluating such broad discretion.

A survey of different zoning ordinances shows a myriad of approaches in regulating short-term rentals. The following is a list of examples from various zoning ordinances. This is not a complete list of the different regulations that cities impose. Instead, it provides a flavor on how different cities approach short-term rentals.

- Austin, Texas: Provides three classifications of short-term rentals: (1) owner occupied; (2) non-owner occupied; and (3) multi-family. Many cities follow a similar structure. The regulations that apply to each category differ. For instance, the regulations for multi-family units are much more strenuous than for owner occupied units.
- Portland, Oregon: Operators of a short-term rental must provide notice to adjacent property owners that their residence is leased on a short-term basis.
- Nashville, Tennessee: Short-term rentals are permitted as an accessory use in all zoning districts that allow residential use provided that the owner receives applicable permits issued for operation of the property as a short-term rental.
- Charleston, South Carolina: Short-term rentals are permitted in certain single family, multifamily and commercial zones as a conditional use, subject to satisfactions of applicable requirements for each zone.
- Denver, Colorado: Short term-rentals must be operated by the person maintaining such dwelling as their primary residence and cannot be located in mobile homes, recreational vehicles or travel trailers.

The following regulations are found in many zoning codes: permit requirements, decibel level thresholds, insurance requirements, parking and signage requirements, restrictions on ancillary commercial uses, and durational and occupancy limits. The main takeaway is that a city has broad discretion to regulate short-term rentals as desirable.

It is prudent for cities desiring to regulate short-term rentals to expressly do so in their code of ordinances. Two cases illustrate the importance of express regulations. The following two cases involved cities with zoning codes that did not directly regulate short-term rentals. The relevant language in each code was similar, but the results of the case were the opposite.

In [Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825 \(Ind. 2011\)](#), the Indiana Supreme Court found that two homeowners, who listed their property on VRBO for short-term rental, violated the city's zoning ordinance which zoned the applicable district to “single-family dwelling” use. Ogden Dunes' code defined “single-family dwelling” as “[a] separate detached building designed for and occupied exclusively as a residence by one family.” The court found the ordinance unambiguous in that a single family must occupy the dwelling as their residence. Further, the court stated that there are commercial districts within the city and that commercial use is defined as “any activity conducted for profit or gain.” The court reasoned that leasing the residence on a short-term rental was a commercial activity (i.e., for profit or gain), which was not permissible in a residential district.

In [Heef Realty and Investments, LLP v. City of Cedarburg Bd. of Appeals, 2015 WI App 23, 361 Wis. 2d 185, 861 N.W.2d 797 \(Ct. App. 2015\)](#), a Wisconsin appellate court found that a permitted use of “single family dwellings” did not prohibit short-term rentals. The court found short-term rentals permissible because “only one family will use each home at a time.” It did not matter to the court that the family might be different every other day (as is often the case with short-term rentals). The court stated that the ordinance “does not require occupancy over a period of time.” The court elaborated that there is “nothing inherent in the concept of residence or dwelling that includes time.” The court finished by stating that if the city wanted to require a certain period of time for occupancy that it should do so with clear and unambiguous language.

These two cases drive the point home that a city desiring to regulate short-term rentals should do so with clear and unambiguous language. Cities could turn to the codes in Austin, Texas or Portland, Oregon for comprehensive short-term rental zoning language.

### **III. Proposed Legislation**

As more cities regulate short-term rentals through zoning ordinances, some state legislatures have attempted to enter into the fray. For instance, the Texas legislature attempted to preempt zoning ordinances that regulate short-term rentals. Senate Bill 451 would have prevented Texas cities from banning or regulating short-term rentals. The language was broad and limited the ability of cities to regulate only in limited situations (such as building codes or housing of sex offenders). The bill, however, expressly permitted neighborhoods to govern short-term rentals through their deed restrictions. The bill passed in the Senate but failed to make it out of the House. Similar bills have been proposed in the Michigan legislature. It is likely that as more cities regulate short-term rentals through their zoning ordinances, state legislatures may attempt to preempt such regulations.

### **IV. Deed Restrictions**

Deed restricted neighborhoods can address short-term rentals in a number of ways that best suit their distinct neighborhood. Deed restrictions are different than zoning because deed restrictions are private, contractual covenants, placed on the land by property owners (as compared to government regulations). Such restrictions are often placed in a deed for a specific property. Alternatively, a developer of a subdivision may place deed restrictions on all the property

within the subdivision before the first lot is sold to a third party. Like zoning, the contents of deed restrictions can be broad. Neighborhoods, therefore, have wide latitude to address short-term rentals.

An important step to regulate short-term rentals would be to define “short-term rentals” within the deed restrictions. The most common approach is defining short-term rentals as a rental of less than thirty days or one month. For instance, the following is from a neighborhood in Houston, Texas that is in the process of amending their deed restrictions to prohibit short-term rentals: “single family residential use ... prohibits ... renting any part of the Residential Dwelling (including any accessory and outbuildings) on a Lot to others for less than one (1) month.”

### **A. Prohibition of Short-Term Rentals**

A simple approach to short-term rentals would be a complete prohibition of short-term rentals. Although this may seem like an overreach on the part of a neighborhood, such prohibition would likely be permissible. The prohibition would typically be placed in the “prohibited use” section of the deed restrictions.

A complete prohibition approach may be attractive to neighborhoods that already have deed restrictions in place that limit use to single family only and otherwise prohibit multi-family use. An express prohibition of short-term rentals is a logical extension for such neighborhoods to maintain a close-knit single-family environment. As addressed below, neighborhoods should not rely on “single family home”, “residential use only”, or other similar phrases to prohibit short-term rentals.

### **B. Short-Term Rentals Permitted**

Neighborhoods may choose to permit short-term rentals. Neighborhoods wanting to allow short-term rentals have two primary avenues for achieving such results. First would be expressly stating that short-term rentals are permitted. Deed restrictions generally have a “permitted use” section, which lists the permitted uses within the neighborhood. This section can be amended to include short-term rentals.

A neighborhood, however, need not necessarily amend their deed restrictions to expressly permit short-term rentals. In many deed restrictions, short-term rentals are likely permitted through silence. Deed restrictions which neither expressly prohibit nor expressly permit short-term rentals likely permit short-term rentals by default. Simply put, courts will not enforce restrictions that do not exist. It is prudent, however, for neighborhoods desiring to allow short-term rentals to expressly state as such in their deed restrictions. As the two Texas cases show below, it is best to be unambiguous with deed restriction language.

### **C. Regulating Short-Term Rentals**

Neighborhoods can take a third approach and allow short-term rentals subject to various restrictions (similar to how cities handle short-term rentals through zoning). This approach would provide neighborhoods the opportunity to allow short-term rentals but subject to specific restrictions that best suit that particular neighborhood's needs.

There are numerous ways a neighborhood could regulate short-term rentals. As a starting point, neighborhoods may apply different rules to owner-occupied short-term rentals and non-owner-occupied short-term rentals. Many cities have taken such approach in their zoning ordinances.

One common restriction is occupancy limits. The maximum number of allowable guests is usually tied to the square footage or number of bedrooms of the residency. Another common restriction is use restrictions. For instance, a neighborhood may prohibit certain types of assemblies (e.g., bachelor or bachelorette parties, weddings, family reunions,

concerts, or the like) allowed to take place in the rental. A neighborhood may also place time restrictions on certain types of uses. For instance, the neighborhood may permit weddings at a residency, but only within a certain time window. Neighborhoods may also restrict where in the neighborhood short-term rentals are permitted. A neighborhood, for example, may permit short-term rentals only on streets that abut commercial areas or larger roads while prohibiting short-term rentals in the interior parts of the neighborhood.

#### **D. Case Law Split**

The early results of cases addressing short-term rentals are split. Texas cases from the Austin and San Antonio Court of Appeals have come to opposite conclusions with similar fact patterns. The issue is whether the restrictive language is ambiguous (common law interpretation applies) or unambiguous (statutory interpretation applies). This split is similar to the zoning cases discussed above.

##### **1. *Zgabay v. NBRC Prop. Owners Association***

In [Zgabay v. NBRC Property Owners Association, 2015 WL 5097116 \(Tex. App. Austin 2015\)](#), review denied, (Apr. 1, 2016), the Austin Court of Appeals found that a “for single family residential purposes” restriction did not prohibit short-term rentals. The Zgabays purchased a home in a deed restricted subdivision and began leasing the home on a short-term rental basis. The property owner's association demanded that the Zgabays cease renting the home on a short-term basis; asserting that such use was in violation of the deed restrictions.

The court found that the term “single family residential purpose” was ambiguous and held that short-term leasing did not violate such covenant. The deed restrictions did not define the term “single family residential purpose.” The deed restrictions, however, permitted signs advertising a property for sale or rent. Therefore, the court concluded, leasing was contemplated and thus permissible under the terms of the deed restrictions. The court also noted that there were no time limitations placed on such rentals.

Given that the deed restrictions were ambiguous, the court applied the common law doctrine that favors the least restrictive use of the land and allowed the Zgabays to rent their house on a short-term basis.

##### **2. *Tarr v. Timberwood Park Owners Association, Inc.***

Faced with a similar fact pattern as *Zgabay*, the San Antonio Court of Appeals, in [Tarr v. Timberwood Park Owners Association Inc., 510 S.W.3d 725 \(Tex. App. San Antonio 2016\)](#), review granted, (Sept. 22, 2017), came to the opposite conclusion. The issue in *Tarr* was whether a deed restriction, which stated that homes may be “used solely for residential purposes,” prevented Tarr from leasing his home on a short-term basis.

The property owner's association notified Tarr that he was using the home as a commercial rental property rather than for residential purposes as required by the deed restrictions. The court found that the term “used solely for residential purposes” has a definite legal meaning and is unambiguous. Given that the term was unambiguous, the court applied the standards from [Section 202.003 of the Texas Property Code](#) which liberally construes the phrase to provide for the drafters' intent and ensures that every provision is given effect.

The court found the term “residence” requires both a physical presence and intention to remain. The short-term leasing was found to be inconsistent with a renter who does not have the intent to remain at the home; instead, the leasing shows that the home is being used for transient purposes rather than residential purposes.

These cases showcase the importance of neighborhoods wanting to regulate short-term rentals to carefully draft their language so that there is no doubt on the neighborhoods intent.

## V. Lease Agreements

Even if a neighborhood or zoning district permits short-term rentals, renters face an additional hurdle when attempting to lease out their rental unit on a short-term basis. Unless the lease agreement provides otherwise, a tenant may not assign or sublet their premises without the consent of the landlord. A tenant renting out their apartment on Airbnb would constitute a sublease, thus requiring landlord consent. Therefore, even if a neighborhood or zoning district permits short-term rentals, a tenant may need to seek the additional consent of their landlord (which would likely result in an emphatic “no” from the landlord).

## VII. Conclusion

As short-term rentals continue to grow in popularity, cities and neighborhoods have the broad ability to govern to what extent short-term rentals are permissible. However, as recent case law shows, it is best to do so with clear and express language.

## About the Author



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