

Regulating Short-term Rentals

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The Sharing Economy

- Generally, online, peer-to-peer type exchange of goods and services.
 - Focus on underused assets
 - Provide a platform to connect users and service providers, use “big data” and apps, the company is just a facilitator
- Car/ride sharing
 - Uber, Lyft, Zipcar
- Sharing of services
 - Taskrabbit, Skillshare, Care.com
- Goods
 - Poshmark, ThreadUP
- Accommodations
 - Airbnb, VBRO, HomeAway
- Coworking
 - WeWork

What are short-term rentals?

- Sometimes called “vacation rentals.”
- Tenancies for less than 30 days in traditionally residential dwelling units.
- Marketed on websites or apps like Airbnb, VBRO, HomeAway.
 - Typically advertised by the owner or tenant of houses and apartments, customers scan available properties for lodging.
- In many cases cheaper than traditional hotels and may allow for the use of a larger home. Example:
 - One bed, one bath private tiny home in the suburbs of Portland, OR - \$84/night
 - A room at the Portland Marriott Downtown - \$195/night

Airbnb

- In 2007, two roommates could not afford their San Francisco Rent. They put air mattresses in their living room and turned their apartment into a bed and breakfast.
- Officially started the company in 2008, headquartered in San Francisco
- The company went public in 2020
- 5.6 million active listings in 100,000 cities and 220+ countries and regions
- 900 million+ guest arrivals
- 100 billion+ dollars earned by Airbnb hosts
- Accommodations ranging from private islands to apartments and more!

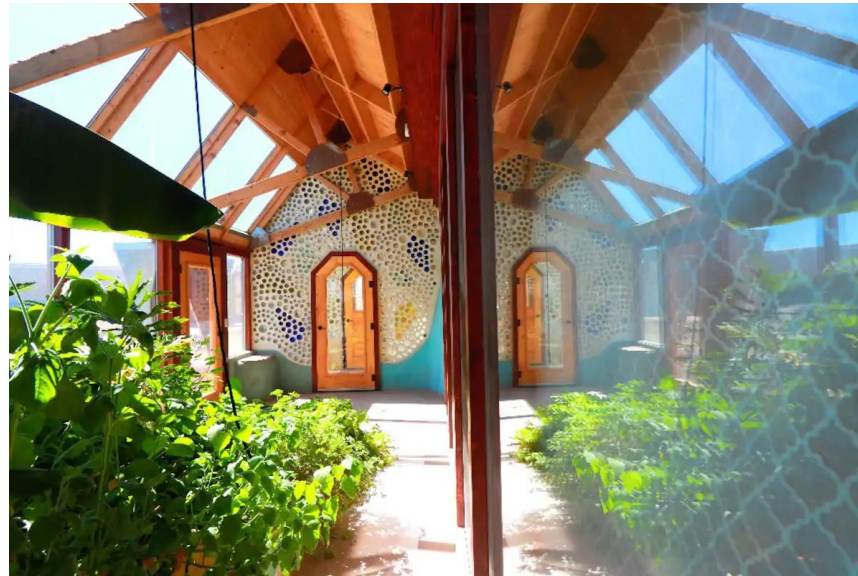
Official Global Model Earthship

Taos, NM - \$127/night

2 bed, 2 bath

“An Earthship is a state-of-the-art off-grid eco-friendly building with all the commodities of a conventional house and more. The Truchas Earthship is located in the Greater World, one of the world's only fully sustainable communities”

“The Earthship subdivision is the only official off-grid subdivision in the world and encompasses 630 acres of rolling sage-covered mesa with a deep gorge and beautiful views of the Sangre de Cristo Mountains.”



Delightful Dome in Crestone, CO

\$135/night – one bed, one bath

“The dome interior is soothing and nurturing, with natural plaster walls and adobe floor, and curved spaces that recirculate air and energy. Situated in open forests, transitional between alpine and high desert ecotones, the air can be absolutely still, the sky spacious, and at other times subject to sun and storm. Deer abound, coyotes howl. Winding paths lead through the open forest to Rangsal Yeshe stupa (15 minutes).”

“Visit nearby spiritual centers, organic foods market, art collective, brewery, hiking and biking, Sand Dunes National Monument, and (our favorite) soak in several nearby hot springs.”



Rustic Barn Stay in the Finger Lakes

\$161/night – sleeps four

“The 1810 Hay Barn was renovated and used as a Wellness studio before becoming a private overnight retreat spot. This unique stay provides a quiet and tranquil escape from the hustle and bustle of everyday life.”

Boasts opportunities for relaxation, nature views, meditation, yoga, reading, and close to hiking trails, local restaurants and craft breweries



Riverside Hideout Shipping Container

\$183/night – Dover, OH

Sleeps up to four

“A unique oasis tucked into the woods & hills along Tuscarawas River. Mini kitchen, bedroom, bath & living room. Sit on the patio & take in the views in the hot tub. Near Ohio/Erie Canal trail, ProFootball Hall of Fame, Amish Country Berlin & Walnut Creek, Atwood & Tappan Lake, Historic Zoar, Swiss Festival & Wineries.”



Continued Growth

- Airbnb has grown significantly in recent years and even rebounded well after 2020



The Good Parts

- Easy way to generate additional income from unused space
 - Property owners can make much more than with long-term rentals
 - The average Airbnb host earns \$9,600 per year
- Guests contribute to economies of municipalities where they are staying
- Tourists using Airbnb tend to stay longer and spend more money at local businesses (e.g. \$200 more per traveler in New York City)
- Guests report feeling much more “like a local” when they use Airbnb

The Bad Parts

- “In the history of the world, no one has ever washed a rented car.” - Lawrence Summers
 - Transforms a residential community into something else.
 - You don't rent an Airbnb NOT to party.
 - Impacts to neighboring residents.
 - Increase in rental costs for residents.
 - Noise, traffic, debris, litter, fire, trespassing, theft, crime, safety.

David, Host
Prospect Lefferts Gardens

Nail Host
East Greene

THE DUMBEST PERSON
IN THE BUILDING
IS PASSING OUT
KEYS

New Yorker
Airbnb is great for

Airbnb provides supplemental income for tens of thousands of local businesses in our neighborhoods and strengthens our

airbnb NYC

For more information, visit [AirbnbNYC](https://airbnb.com)

HALL WAY
RAPE
ANYONE?

166-043

More Short-term Rental Problems

- Guests discover hidden cameras in a smoke detector pointed at the bed while staying at an Airbnb in Florida.
- Host arrested for video voyeurism.
- Video and computer storage devices seized in a search of the host's property.
- “Experts recommend that people untrained in such matters look for hidden cameras by using the camera light on a smartphone to spot the reflection from a lens. There are also apps that claim they can detect hidden cameras. In addition, if you are extremely concerned about your privacy, you can also purchase an RF detector, which checks for wireless signals and may be able to detect hidden cameras.”

And more . . .

- A huge house party with at least 100 attendees was held in an Airbnb until 5 am with traffic blocking the road, loud music, and a brawl to end the night
- <https://metro.co.uk/2021/06/02/kent-at-least-100-people-party-at-luxury-airbnb-until-5am-14694148/>

And more . . .

- An Airbnb renter refuses to leave after the three-week stay
- <https://www.countryliving.com/life/travel/a39297/airbnb-horror-stories/>

Examples of Efforts to Regulate Airbnbs

- Internally

- “Responsible Hosting” efforts by Airbnb – policies created by Airbnb for Hosts to follow regarding:
 - Health and cleanliness (e.g. COVID – Airbnb’s 5 step enhanced cleaning process)
 - Safety (e.g. fire prevention, first aid kits)
 - Neighbors (e.g. being mindful of smoking rules, parking, noise)
 - Permissions (e.g. ensuring required notifications are provided to roommates, neighbors, HOA’s, etc.)
 - General regulations (e.g. tax implications, permits)
 - Insurance (e.g. suggesting Hosts review renter’s/homeowner’s policy)
 - Local regulations – Airbnb provides a resource to Hosts explaining the local regulation on short-term rentals in municipalities worldwide

Examples of Efforts to Regulate Airbnbs

■ New York City

- First major city to enter into a legal/political battle with Airbnb
- Since 2014, the city began its efforts to regulate Airbnb, finding it was providing people with a means to avoid the requirements of New York City regulations
- At that point, Hosts were seeing \$282 million in revenue (from 2010-2014) and commercial users (people who controlled 10 or more unique Airbnb units) were dominating the rental market
- Airbnb was having a significant effect on displacing long-term renters

Examples of Efforts to Regulate Airbnbs

■ New York City

- Airbnbs were violating the NY Multiple Dwelling Law, which governed “Class A” multiple dwellings
- Prior to 2010, a Class A multiple dwelling was defined as “a multiple dwelling which is occupied as a rule, for permanent residence purposes.”
- In 2010 following litigation, the MDL was amended to specify that permanent residency of a dwelling means at least 30 consecutive days’ occupancy by a “natural person or family” in a unit. Thus, an apartment in a Class A multiple dwelling cannot be rented for less than 30 days unless a permanent resident is present.
 - There are exceptions for “lawful boarders, roomers, or lodgers”
- At this time, many of the Airbnb rentals in New York City were for fewer than 30 days and were taking place at Class A multiple dwellings

Examples of Efforts to Regulate Airbnbs

- New York City

- New data-sharing requirements for Airbnb Hosts went into effect on January 3, 2021 as a result of Airbnb and the City settling litigation
- A City ordinance was amended to require information about Hosts/Co-Hosts and the rental listing be shared with the City
 - *E.g.* name, address, phone number, email address of the Host
 - *E.g.* physical address, listing name and ID number, URL of the listing

- Exemptions:

- Rentals for 30 nights or longer
- Class B listings (Class B multiple dwellings have transient occupation)
- Hosts who rent for 4 or less nights per quarter
- Private or shared rooms with capacity for 2 or fewer guests

Examples of Efforts to Regulate Airbnbs

- New York City
 - Additional regulations:
 - Advertisements for rentals in Class A dwellings that violate the MDL are banned
 - Business licensing may be required
 - There are certain rules and regulations governing rent stabilized or rent controlled properties under the New York Administrative Code
 - NYC or NY State taxes that may be applicable to Hosts:
 - State sales and use tax
 - NYC hotel room occupancy tax
 - State and NYC nightly room fees

Examples of Efforts to Regulate Airbnb

- New York City: Continuing Problems
 - New York also has an interest in supporting its local hotels
 - Airbnb represents a total departure from this traditional business model
 - City officials are thinking about potential regulations and taxes to help with this problem

Examples of Efforts to Regulate Airbnbs

- New York City – going forward
 - To understand the regulatory framework for short-term rentals, it will be important to monitor Airbnb in New York City going forward
 - Because this is the most populous city in the United States, it gets the most Airbnb traffic
 - Knowing the ways in which the City has tried to tax Airbnb's and the way it adjusts its housing laws will be at the forefront of Airbnb's regulatory challenges

Examples of Efforts to Regulate Airbnbs

- San Francisco
 - Initially, Airbnb had mixed reactions from residents of San Francisco
 - Some residents valued the opportunity for additional income that Airbnb provided
 - Other residents were worried landlords would evict them to rent rooms full time on Airbnb
 - San Francisco came up with a plan to balance these competing concerns

Examples of Efforts to Regulate Airbnbs

- San Francisco
 - Short-term rental operators must have a Business Registration Certificate and a Short-term Residential Rental Certificate
 - Hosts must be the primary resident – meaning, a Host must live in the unit/on the property for at least 275 days per year
 - Hosts must have at least \$500,000 of liability insurance
 - The Administrative Code places additional requirements on rent-controlled property
 - The Building Department enforces certain rules and regulations on construction and maintenance of buildings to ensure habitability, health and safety, etc.

Examples of Efforts to Regulate Airbnbs

- San Francisco

- The City also passed additional regulations on reporting, recordkeeping and safety for short term rentals.
- The City collects a 14% Transient Occupancy Tax (TOT) on short-term rental reservations – however, Airbnb takes care of this requirement for Hosts (*i.e.* Airbnb collects the TOT from Hosts and remits it to the City)
- The City also passed a Rent Ordinance prohibiting landlords from evicting tenants without “just cause”

Examples of Efforts to Regulate Airbnbs

- San Francisco
 - San Francisco was able to accomplish its regulatory goals by amending outdated laws, enacting a series of new requirements, and developing a special regulatory board
 - Many think San Francisco should serve as a model for how municipalities should deal with Airbnb and other short-term rentals

Examples of Efforts to Regulate Airbnbs

- Los Angeles

- L.A. is experiencing unique issues with Airbnb because of the severity of its housing crisis
- Local lawmakers first proposed regulating short-term rentals nearly three years ago, seeking to regulate a practice that has boomed in the area
- Many owners of large residential properties jacked rent prices up leading to the eviction of permanent tenants in order to receive higher rent payments from Airbnb users

Examples of Efforts to Regulate Airbnbs

- Los Angeles

- The Home-Sharing Ordinance went into effect on July 1, 2019 which requires Hosts to register with the City and post their registration number on listings in order to rent their *primary residence* for less than 30 days
 - Primary residence is defined as the Host's residence for more than six months
 - This registration lasts one year
 - The residence cannot be subject to the City's Rent Stabilization Ordinance
 - Written approval from the owner is required, if the Host is a renter
 - The Host must obtain a Transient Occupancy Tax Registration Certificate or list exclusively with a hosting platform which collects and remits this tax to the City
 - There is also a Los Angeles County tax that Airbnb *does not* collect
- To rent secondary or vacation homes, listings must be 30 or more nights, as they are not a Host's primary residence

Examples of Efforts to Regulate Airbnbs

- Los Angeles

- Regulated “home-sharing” is limited to 120 days per year – to extend that time, a Host can apply for “extended home-sharing”
- The Host must meet the following additional requirements:
 - The Host has maintained a valid registration for at least 6 months or has hosted for at least 60 days
 - Such registration was not suspended or revoked within the past 2 years
 - The application for “extended home-sharing” must be mailed to neighboring owners and occupants
 - The Host was not issued more than one citation within the past 3 years

Examples of Efforts to Regulate Airbnbs

- Los Angeles

- Similarly to NYC, Airbnb must comply with certain data-sharing requirements with the City
- Airbnb is required to share certain short-term rental listing information with the City
 - The information is only used to ensure compliance with the Home-Sharing Ordinance
 - It only applies to listings that register or claim an exemption under the ordinance
 - *E.g.* listing ID, registration number, address, exemption code (if applicable)

Examples of Efforts to Regulate Airbnb

- Examples from Washington State
 - Clyde Hill addressed short-term rentals in its municipal code.
 - Defines short-term rental as rental of a dwelling or portion of a dwelling for less than 30 days
 - Property owners are required to obtain a permit, the owner must have a business license, and properties must meet minimum safety standards
 - Spokane makes a distinction between two kinds of short-term rentals:
 - Type A, which requires an administrative permit, where bedrooms or an entire dwelling unit can be rented for fewer than 30 days, but commercial meetings are prohibited
 - Type B, which requires a type III conditional use permit, where bedrooms or an entire dwelling unit can be rented and commercial meetings are allowed

Examples of Efforts to Regulate Airbnb

- Utilizing a website can make regulation of Airbnb simpler for municipalities
- Examples from Colorado
 - Boulder has a short-term rental webpage which includes a short term rental license application packet that must be filled out and submitted in order to obtain a license.
 - Durango maintains a Vacation Rental Information webpage that details a relatively strict rental code, including a maximum number per block/intersection for designated residential areas.

Examples of Efforts to Regulate Airbnb

- Foreign Cities...
 - Barcelona
 - Short-term rentals are considered “tourist households,” which must be registered and advertisements must include this registration number
 - Reykjavik
 - People can rent out their apartments for up to 90 days per year, in periods of no more than 30 days, before needing a hospitality license. They can also earn a maximum of \$2M ISK (\$8,785 USD) per year.
 - However, prospective Airbnb hosts will still need to get their property registered, which requires meeting health and safety regulations.
 - Rentals that exceed these time/income limits are “general accommodation services” that require an operating permit
- Amsterdam
 - Short-term rentals are either private vacation rentals, bed & breakfasts, or professional operators – all need to be registered and, as of 2021, all need permits

Zoning Concerns

- Are short-term rentals commercial uses? Or residential uses?
 - There is a “business” aspect, as the property owner is renting a room similar to a hotel.
 - But, guests may be using the property in a similar manner as any long-term resident would.
- Some municipalities have been caught off guard by this question and many do not routinely update their zoning codes in order to address these kinds of situations that arise.

Municipal Authority

- Zoning – Regulation of the use of land
- Police Powers allow a municipality to regulate to protect the health, safety, and welfare of the community.
- Town Law § 130(20) – “Hotels, inns, boarding houses, etc. Regulating hotels, inns, boarding houses, rooming houses, lodging houses, associations, clubs or any building or part of a building used in the business of renting rooms, individual or several, and also private sanatoriums, convalescent homes, homes for aged or indigent persons, day nurseries, hospitals, rest homes or any building or part of a building used for similar purposes, containing a total number of beds, cots or similar equipment providing sleeping accommodations for more than five persons; specifying the type of construction, the manner of their running and operation and prescribing regulations assuring proper sanitation, cleanliness and fire protection.”

Zoning Requirements

- “Because Zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt. [] In claims such as this, the analysis follows traditional due process rules: if the zoning ordinance is adopted for a legitimate governmental purpose and there is a ‘reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end,’ it will be upheld. [] An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement. [] The court will not pass on its wisdom.”
- *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131-32 (1988).

Real Life Zoning Saga



The Zoning Complaint

- Neighbor filed a complaint
 - Noise
 - Parked Cars
 - Trespassing
 - Debris thrown around property
- Is the use allowed under the zoning code?
 - Residential Zoning District allowed “single family dwelling”
 - Code defined dwelling as: “Any building or portion thereof designed or used exclusively as the residence or sleeping place of one or more persons, erected on a permanent foundation.”
 - A “Dwelling Unit” is similarly defined as: “A residential unit other than a mobile home, with one or more rooms, including cooking facilities and sanitary facilities in a dwelling structure, designed as a unit for occupancy by not more than one family for living and sleeping purposes.”

Code Compliance

- “Prohibited uses: any use not specifically listed as an approved as-of right or specifically permitted use is not allowed in the Town.”
- Tourist Homes – Require a License. Tourist Home definition: “any private dwelling or dwellings customarily used as a residence which regularly or seasonably offer overnight accommodations to tourists or transients.”
- Uniform Code Compliance – “No change shall be made in the nature of the occupancy of an existing building unless a certificate of occupancy authorizing the change has been issued.”

Back to our Zoning Saga

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Code Interpretation

- Who interprets the zoning code in the first instance?
- *Quentin Rd. Development, LLC v. Collins*, 150 A.D.3d 859 (2d Dep't 2017).
 - NYDOB determined that a provision of the zoning ordinance setting forth a maximum permitted floor-to-area ratio for a portion of a building applied.
 - Following the DOB determination, the NYC Board of Standards and Appeals (BSA) upheld the DOB determination.
 - The Court held that a determination of the BSA may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion.

Code Interpretation

- What is the remedy for an aggrieved party?
 - Article 78 Proceedings
 - Area and use variances

Case Law

- *Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep't 2012).
 - Petitioners own lakeshore property in the Town of Arietta
 - Property located in a single- or multi-family residential zoning district.
 - The structure is a 6-bedroom residence.
 - Petitioners bought the property in 2009, joined the Chamber of Commerce, and began marketing their property for short-term rentals on the internet.
 - Neighbors complained. The ZEO determined Petitioners were operating a tourist accommodation in violation of the zoning code.
 - The ZBA affirmed, Petitioners commenced an Article 78 proceeding.

Case Law

- *Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep't 2012).
 - “Although a reviewing court typically will grant great deference to the ZBA's interpretation of a zoning ordinance — disturbing that interpretation “only if it is irrational or unreasonable — where, as here, the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required.”
 - “Further, zoning regulations, being in derogation of the common law, must be strictly construed against the municipality which has enacted and seeks to enforce them, and any ambiguity in the language used must be resolved in favor of the property owner.”

Case Law

- *Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep't 2012).
 - The Town defines single family residence as a “detached building, not including a mobile home, used as the living quarters for one family” and also includes “seasonal cottage.”
 - The Town defines tourist accommodation as “any hotel, motel, resort, tourist cabin or similar transient facility used to house the general public, including an accessory restaurant.”
 - Third Department found the ZBA’s interpretation of the Petitioners’ property as a “tourist accommodation” irrational.
 - They carefully screened potential renters, so the property was not “open to the general public.”
 - Their use falls within the definition of single family residence and nothing in the law prevents them from renting their residence to vacationers, particularly since this use expressly includes seasonal cottages

Case Law

- *Soule v. Scalci*, 288 A.D.2d 585 (3d Dep't 2001)
 - Petitioner commenced an Article 78 proceeding against the ZBA which interpreted the definition of "tourist accommodation" as including petitioner's 5-unit apartment house.
 - "A building intended, designed, and used as a private residence within which [rooms] are rented from time to time for the overnight accommodation of guests. Includes Tourist Homes and Bed and Breakfast Establishments."
 - ZEO issued a notice of violation once units were rented out on a short-term basis. ZBA affirmed the ZEO's interpretation.
 - ZBA reversed: The building meets the definition of multiple-family dwelling as "[a] residence designed for or occupied by three or more families, living independently of one another, with separate housekeeping and cooking facilities for each." There was no evidence Petitioner was renting space within his private dwelling.
 - **Town could have easily included a limitation on duration of rentals of multiple-family dwellings, but it didn't.**

Case-Law involving Airbnb

- *Fruchter v. Zoning Bd. of Hurley*, 133 A.D.3d 1174 (3d Dep't 2015).
 - Property owner brought Article 78 proceeding and action for a declaratory judgment to review determination of town's zoning board of appeals (ZBA) requiring owner to obtain special use permit for renting out residence on Airbnb.
 - The Court held that owner's use of property did not require special use permit (not clearly a "hotel," "bed and breakfast," or "transient use.")
 - Because the property owner's activity did not "fit neatly into the definitions in the Town Code," his use did not place the residence outside the definition of a residential one-family dwelling.

Case Law

- *DeVogelaere v. Webster ZBA*, 87 A.D.3d 1407 (4th Dep't 2011)
 - In 2010 the Town amended its zoning ordinance to prohibit transient rentals, *i.e.*, rentals of dwelling units for less than 28 consecutive days.
 - Petitioner owned a single family residence in a residential district and conducted short-term rentals.
 - ZEO issued a determination that Petitioner was violating the ordinance.
 - Petitioner appealed to the ZBA, which affirmed the ZEO's interpretation.
 - "Here, respondent reasonably determined that petitioner's serial rental of the subject property was prohibited under the zoning ordinance and that it did not constitute a legal nonconforming preexisting use, and thus petitioner had no right to continue such use."

Takeaways

- Municipalities cannot rely on old zoning codes to regulate short-term rentals.
 - Courts tend to side with property owners.
 - Municipalities also cannot rely on traditional deference given the frequent need of courts to interpret the law
- Short-term rentals can be prohibited if they are specifically defined.
- In many cases, a municipality will need to develop a comprehensive ordinance.

Regulating Land Use/Operational Details

- *Bonefish Grill, LLC v. Zoning Bd. of Rockville Centre*, 153 A.D.3d 1394 (2d Dep't 2017)
- ZBA conditioned the variance from parking requirements on limiting hours of operation to those where use of the adjacent parking lot were allowed upon use of valet parking.
- Request to annul conditions put in place by Zoning Board was denied.
- “Here, the ZBA's conditions requiring valet parking and limiting the petitioner's hours of operation to coincide with the hours of access to the 40 off-street parking spaces granted in the license agreement were proper because the conditions related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of the petitioner's operation, such as the anticipated increase in traffic congestion and parking problems”

Regulating Land Use/Operational Details

- “[Z]oning boards may not impose conditions which are unrelated to the purposes of zoning. Thus, a zoning board may not condition a variance upon a property owner's agreement to dedicate land that is not the subject of the variance application. Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located.” *St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988).
- “We find the imposition of this condition was no more than an impermissible attempt to regulate the details of the operation of the petitioner's enterprise” - *Old Country Burgers Co. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805, 806 (2d Dep't 1990)

Nonconforming Use Problem

- What are nonconforming uses?
- “Nonconforming uses, though lawful, are disfavored.”
 - *Gernatt Asphalt Prods, v. Town of Sardinia*, 87 N.Y.2d 668, 676, n.1 (1996).
- The Court of Appeals has reaffirmed that the “overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination.”
 - *Toys “R” Us v. Silva*, 89 N.Y.2d 411, 417 (1996).
- Is there a vested right?
- How do you get rid of them lawfully?
 - *Wallace v. Town of Grand Island*, 184 A.D.3d 1088 (4th Dep’t 2020)

Nonconforming Use Problem

- *Spilka v. Town of Inlet*, 8 A.D.3d 812 (3d Dep't 2004)
 - Plaintiff owns a single family dwelling in an R-1 zoning district and rents it out.
 - The 1966 Zoning Ordinance was amended to restrict short-term rentals (less than four months).
 - Is there a non-conforming use?
 - Did the 1966 zoning ordinance permit short-term rental of a single-family dwelling?
 - Strict construction against municipality. Ambiguity resolved in favor of property owner.
 - “One-family dwelling or camp” allowed in R-1 district in 1966.
 - Short-term rental was restricted by later amendment.

Nonconforming Use Problem

- Termination:

- The Court of Appeals has stated that if the “zoning ordinance provides a sufficient period of permitted nonconformity, it may further provide that at the end of such period the use must cease”
 - *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 561 (1958).
- “When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid.”

Nonconforming Use Problem

- Amortization

- “The validity of an amortization period depends on its reasonableness. We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that **an amortization period is presumed valid**, and the owner must carry the heavy burden of overcoming that presumption by **demonstrating that the loss suffered is so substantial that it outweighs the public benefit** to be gained by the exercise of the police power.”

- *Suffolk Supply, Inc. v. Board of Trustees of Village of Westhampton Beach*, 59 A.D.3d 429 (2d Dep’t 2009).
- One year for asphalt plant upheld

- Administrative remedies

- Provisions for extensions

Developing Regulations on Short-Term Rentals: Initial Questions

- Do you want short-term rentals? Is it important for your community?
- What types of short-term rentals do you want?
- Where do you want them?
- If you allow them, how should they be regulated? How should the regulations be enforced?
- What does the Comprehensive Plan say?
- What do you want to do with the existing operations?

Tips on Fashioning Regulations

- Develop legislative findings and then adopt a new regulation on short-term rentals.
- Must be specific as to the treatment of “short-term rentals.” Have a clear definition.
- Develop a fee structure to administer/enforce the program.
 - *Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 40 N.Y.2d 158 (1976).
- Determine what zoning/police power mechanisms to use in regulating short-term rentals.
 - Consider requiring a special use permit and/or license to operate, which will require an application process and review of the proposal.

Tips on Fashioning Regulations

- Application requirements
 - Develop minimum requirements
- Consider a residency requirement and guest registry
- Cap the number of days the property may be rented as a short-term rental.
- Include parking requirements.
- Allow in higher-density neighborhoods, but limit for single-family neighborhoods.

Tips on Fashioning Regulations

- Designate a **local** contact person who will be responsible for handling any problems that arise with the property.
- Include noise and nuisance provisions, or refer to other ordinances addressing such situations.
- Address garbage collection issues.
- Require minimum spacing between short-term rentals, to ensure the entire area does not get inundated.
- Requirements for notifying neighbors.
- Limit the number of guests.
- Limit turnover – e.g. minimum stay of one week.

Enforcement Challenges

- Late night issues
 - Personnel limitations
- Administrative enforcement, revocation of license/permit
 - Due process required
- Noise/nuisance laws
 - Vague
 - Court challenges

Variance Applications

- Be prepared for variance applications following the regulations!
- Area variance vs. Use Variance
- Use variance test:
 - (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence (dollars and cents proof);
 - (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
 - (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; **and**
 - (4) that the alleged hardship has not been self-created.

Variance Applications

- Area variance test:
 - Whether the variance would produce an undesirable change to the neighborhood or a detriment to neighboring uses
 - Whether the outcome sought by the applicant can be achieved in another way
 - Whether the variance requested is substantial
 - Whether the alleged difficulty in meeting the zoning requirements was self-created
 - Whether the variance would have an adverse impact on physical or environmental conditions in the neighborhood or zoning district

Article 78 Proceedings

- Also be prepared for Article 78 Proceedings challenging enforcement of the new regulation against residents
- An Article 78 Proceeding is the vehicle residents use to challenge a land use/zoning ruling of a municipal board

Article 78 Proceedings

- *Sullivan v. Albany Bd. of Zoning*, 144 A.D.3d 1480 (3d Dep't 2016).
 - Church notified City of its intention to establish a “home base” for up to 14 homeless individuals in its parsonage. Church asked the City whether it needed a use variance.
 - City ZEO responded that the proposed use was not for a “house of worship” and stated that a use variance was required. The church sought an interpretation from the ZBA.
 - ZBA found that the proposed use is consistent with the mission and actions of a house of worship and that no additional zoning exemptions or permissions are necessary.
 - Neighbor commenced an Article 78 proceeding, and the Supreme Court annulled the ZBA's determination.
- Holding: Reversed. Zoning Board's decision was reinstated.
 - ZBA's interpretation is afforded great deference, only disturbed if unreasonable or irrational
 - Pure interpretation vs. factual issue
 - If no defined term, court will afford the term its plain or ordinary meaning and ambiguity is resolved in favor of the property owner.

Thank you!

Any questions?