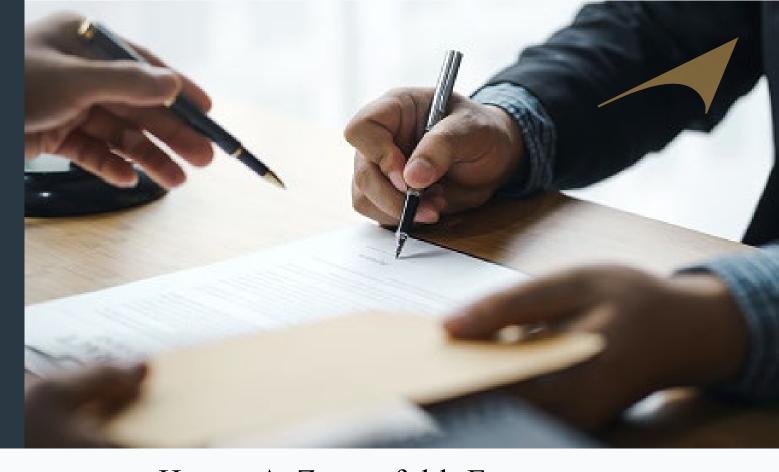
Regulating
Short-Term
Rentals





Henry A. Zomerfeld, Esq.

Michael N. Boncardo, Esq.

Tug Hill Commission Local Government Conference April 1, 2025

Overview

What are Short-Term Rentals ("STRs")?

STR Ordinances: What Works, What Doesn't, and What Leads to Lawsuits

Enforcing STR Laws and Violations: Top Issues and Challenges

Challenging Local STR Laws: Key Lessons from the Front Lines

Apartments and STRs: Critical Landlord & Tenant Concerns

The STR Industry: Current Issues and Legal Updates



What are Short-Term Rentals?

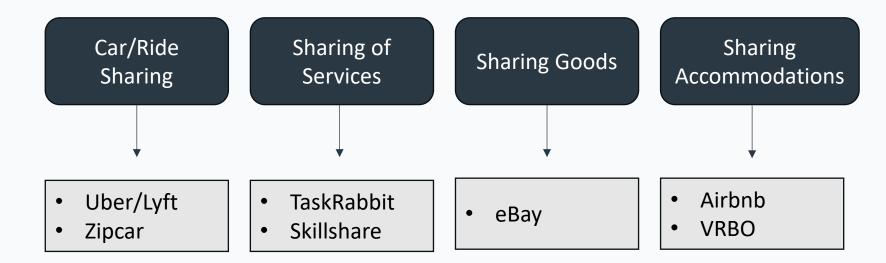
- Sometimes called vacation rentals.
- Tenancies for less than 30 days in traditionally residential dwelling units.
- Marketed on websites like Airbnb, VRBO, HomeAway.
 - Typically advertised by the owner or tenant of homes and apartments, customers, scan available properties for lodging
- Often cheaper than traditional hotels and may allow for the use of a larger home.



The Rise of Short-Term Rentals

"The Sharing Economy"

- Not unique to accommodations recent developments of online peer-to-peer exchange of goods and services
- Typically focuses on underused assets





Basic Information on 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.
- Company Launched in 2008 and is headquartered in San Francisco
- Over 8 million listings worldwide (~2.25 million in U.S.)
- 220+ Countries
- Over 2 billion guest arrivals
- Over 5 million hosts
- ~22 billion annual earnings for U.S. hosts
- Accommodations ranging from castles to small apartments, and more!



Increase in STRs following the COVID-19 Pandemic

- During COVID, marked increase in bookings in locations that provided outdoor space and social distancing with proximity to
 - Lakes;
 - Skiing;
 - Open Country;
 - Waterfront; and
 - Outdoor Activities.
- Post-COVID remote "work from anywhere" policies have also encouraged travel.



Popular Listings Around New York State

- Lake George
- Saratoga Springs
- Skaneateles
- Finger Lakes
- Lake Placid
- "Short-term rental platform Airbnb found a 40% rise in user searches for rentals in the Catskills, Adirondacks and Hudson Valley as part of a broader national trend of people seeking to socially distance in the rural parts of the country for Fourth of July weekend." https://www.uticaod.com/story/special/2020/07/01/amid-covid-19-pandemic-renters-and-buyers-flock-to-adirondacks-finger-lakes-catskills-real-estate/113425024/



STRs: The Good

- Easy way to generate additional income from otherwise unused room, house, or property.
- Guests contribute to economies of municipalities where they are staying.
- Tourists using Airbnb tend to stay longer and spend more money at local businesses (ex. \$200 more per traveler in NYC).
- Guests report feeling much more "like a local" when they use Airbnb



STRs: The Bad

- "In the history of the world, no one has ever washed a rented car" – Lawrence Summers
- Transforms a residential community into something else.
- Airbnb's often rented for parties.
- Impacts to neighboring residents (noise, traffic, debris, litter, fire, trespassing, theft, crime, safety).
- Increase in rental costs for residents.
- Limits housing availability for long-term renters.





STR Problems

Hidden Cameras

"[Guest] noticed a tiny hole in the smoke detector of his Florida Airbnb. After taking it down to investigate, the Indiana couple found a hidden camera and microphone The police arrested the homeowner and charged him with video voyeurism.

New Year's Eve Party gets out of Hand

"Although his contract specifically stated no parties, a man threw a doozy in this Ohio Airbnb. In fact, he advertised his New Year's Eve extravaganza on the internet and charged \$5 a person. This rockin' eve turned into one of the largest Airbnb horror stories with over 250 guests."

House Sitter Lists Home on Airbnb

 San Francisco couple only discovered this because the house sitter unknowingly rented the home to friends of theirs.

Airbnb Guests Find Corpse in Garden

• "A group of friends got together and rented a home in Palaiseau, France for the weekend. This excursion turned out to be the most grisly of Airbnb horror stories when one of the friends found a corpse in the garden [...]"



Zoning Concerns

Is this a Residential or Commercial Use?

- Are STRs commercial uses? Or residential uses?
 - There is a "business" aspect, as the property owner is renting a room like a hotel.
 - But guests may be using the property in a similar manner as any long-term resident would.
- Some municipalities caught off-guard. Many do not routinely update their zoning codes.
 - To resolve this, courts will look at plain language of the code.



Definitions are Key

Atkinson v. Wilt, 94 A.D.3d 1218 (3d Dep't 2012).

- Petitioners own 6-bedroom lakeshore property in the Town of Arietta located in a single/multi-family residential zoning district.
- 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 about short-term rentals.
- ZEO determined Petitioners were operating a tourist accommodation in violation of the zoning code, ZBA affirms. Petitioners then commenced an Article 78 proceeding.
- Supreme Court granted petition and annulled the ZBA's determination. Town appealed.



Definitions are Key (Cont.)

- "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."
- Petitioners contend that Town's definition of "tourist attraction" does not encompass their property.
- Town definitions held to govern: "Applying these definitions to the record before us, we agree with Supreme Court that the ZBA's characterization of petitioners' property as a tourist accommodation is irrational."



Examples of Efforts to Regulate Airbnb's

- NYC (Local Law 18)
 - Hosts must register their property with the Mayor's Office of Special Enforcement (OSE) if they want to rent it for less than 30 days.
 - Host must be physically present in the unit during the guest's stay.
 - No more than two guests are allowed to stay in a rental at a time, regardless of the home's size.
 - And many other requirements.
 - Hosts who violate the rules could face fines of up to \$5,000.

San Francisco

- Short-term rental operators must have a Business Registration Certificate and a short-term residential rental certificate
- Host must be the primary resident of the property
- Host must provide at least \$500,000 of liability insurance



Examples of Efforts to Regulate Airbnb's

Cont.

- Los Angeles
 - "Home-Sharing Ordinance" went into effect on November 1, 2019 to manage short-term rentals throughout the city.
 - Hosts can only list their primary residence as a short-term rental.
 - A mandatory registration process with the city includes obtaining a home-sharing permit and paying an annual fee.
 - Short-term rentals are subject to a 120-day annual cap. Hosts seeking to exceed this limit may apply for an extended homesharing permit subject to additional requirements and fees.
 - Hosts and platforms are required to maintain logs of rental activity, which must be furnished upon the city's request.



Regulating Short-Term Rentals

A 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."



Code Interpretation

- Who interprets the zoning code in the first instance?
 - Quentin Rd. Developments, LLC v. Collins, 150
 A.D.3d 859 (2d Dep't 2017)
 - NY Department of Buildings ("DOB")
 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 ("BOS") 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 (Cont.)

- What is the remedy for an aggrieved party?
 - 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 whether this use was permitted.
 - ZBA found that the proposed use was 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.
 - Supreme Court annulled the ZBA's determination.



Code Interpretation (Cont.)

- Holding: Reversed. Zoning Board's decision was reinstated.
 - ZBA is afforded great deference; decision disturbed only if unreasonable or irrational
 - Pure interpretation vs. factual issue
 - If no defined term, court will afford the term its plain or ordinary meaning
 - Ambiguity resolved in favor of the property owner.
 - What is the meaning of "worship"? Black's Law Dictionary "any act of religious devotion"



Municipal Authority

- Zoning Regulation of the use of land.
- Police Powers, regulate to protect the health, safety, and welfare of the community.
- Town Law § 130(20)
 - "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, 131-132 (1988).



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 and 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 (Cont.)

- "[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)



Takeaways for Municipalities

- When regulating short-term rentals, look to what other communities are doing.
- Work with Town Attorney or special counsel as there is higher potential for litigation.
- Make a good record during the public hearing and in legislative findings.
- Consider amortization period to allow for nonconforming uses to terminate. Offer possible extension of period if certain criteria are satisfied.



Takeaways for Municipalities (Cont.)

- Look to existing zoning code and comprehensive plan. But don't rely on old zoning codes to regulate short-term rentals.
 - Even where you have a solid basis, courts are siding with property owners.
 - Can't rely on traditional deference to municipalities.
- You can prohibit them by specifically defining them.
- In many cases, there will be a need to develop a comprehensive ordinance.



Nonconforming Use Problems

- What are they?
- "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?



Nonconforming Use Problems (Cont.)

- 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 Problems (Cont.)

- Amortization
 - One year for asphalt plant upheld
 - "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).
- Administrative remedies
 - Provisions for extensions



Initial Questions

- Do you want short-term rentals?
- Are they important for your community?
- Would they be consistent with the Comprehensive Plan?
- What kinds do you want?
- Where do you want them?
- If you allow them, how should they be regulated? How should the regulations be enforced?
- What do you want to do with the existing operations?



Tips on Fashioning Regulations

- Develop legislative findings.
- Must be specific as to the treatment of "short-term rentals." Have a good 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.
 - Site plan?



Tips on Fashioning Regulations (Cont.)

- Application requirements
 - Minimum requirements
- Consider a residency requirement for owner.
- Otherwise consider limiting number of permits to same owner if not owner-occupied.
- Guest registry.
- Cap on the number of days the property may be rented as a short-term rental.
- Parking requirements.
- Allow in higher-density neighborhoods, but limit for single-family neighborhoods.



Tips on Fashioning Regulations (Cont.)

- Designation of <u>local</u> contact person who will be responsible for handling any problems that arise with the property.
- Noise and nuisance provisions, or reference to other ordinances addressing such situations.
- Garbage collection issues.
- Minimal required spacing between short term rentals, to ensure the entire area does not get inundated with short-term rentals.
- Requirements for notifying neighbors.
 - Caution
- Limitations on the number of guests.
- Limitations on turnover (ex. Minimum stay of a week.)



Enforcement Challenges

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



Steps to Regulation

- Adopt a new law zoning out "short-term rentals."
- How do you deal with non-conforming uses?
 - Provide for termination
 - Administrative remedies to exhaust
- Article 78 proceedings
- Be prepared for use variance applications.



Variance Applications

- Area Variance vs. Use Variance
- Use Variance: seeks to allow an otherwise nonpermissible use of a property.
 - <u>Example:</u> Owner wants to operate an industrial operation on a parcel zoned residential.
- Area Variance: pertains to the land itself and relates to the expansion of a permitted use.
 - <u>Example:</u> Owner of single-family residential wishes to build an extra room on his house, but it would violate a side yard restriction.



Use Variance Test

- "No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located
 - (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."

Town Law 267-b(2)(b).





Area Variance Test

- "The zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider:
 - (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
 - (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
 - (3) whether the requested area variance is substantial;
 - (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
 - (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

Town Law 267-b(3)(b).



Case Studies





Case Study

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- Local Law No. 9 of 2015 amending the Town Code by prohibiting short-term rentals of less than thirty days, except in homes occupied by the homeowner (bed-and-breakfast facilities).
- One-year amortization period to allow pre-existing short-term rentals to terminate. It also permitted affected individuals to apply for an extension of the amortization period to allow additional time (up to three years), provided the applicant met certain criteria. Those criteria track the requirements for the granting of a use variance under N.Y. Town Law § 267-b.



Case Study (Cont.)

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- Petitioner initially sought the one-year extension under the amortization period, which the Town denied. Petitioner did not challenge this denial.
- Then Petitioner sought a use variance. Again, because he failed to meet his burden, the Town denied this application.
- Petitioner commenced an Article 78 challenge seeking to overturn the denial of the use variance and the constitutionality of Local Law, which he alleged constituted a taking.
- Supreme Court dismissed the Petition, and an appeal ensued.
- On appeal the Petitioner limited his brief to the constitutionality and takings issues, thereby abandoning the challenge to the use variance denial.



Case Study (Cont.)

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- The Fourth Department affirmed, holding that Petitioner did not meet his burden to invalidate the Local Law or prove that the law effectuated a taking.
- Key to the Court's rationale was Petitioner's own evidence, which showed that he could use the property for other lawful purposes: as a residence or as a rental with a long-term tenant. He could also sell the property. The use as a short-term rental, which was prohibited, was not the only option.
- "Indeed, plaintiff's submissions demonstrated that he had some economically viable uses for the subject premises, i.e., selling it at a profit or renting it on a long-term basis. It is immaterial that plaintiff cannot use the property for the *precise* manner in which he intended because a property owner 'is not constitutionally entitled to the most beneficial use of his [or her] property." *Wallace*, 184 A.D.3d at 1091 (emphasis and brackets in original).



Takings Claims Challenging Short-Term Rental Regulation

- "The Takings Clause provides that no 'private property [shall] be taken for public use, without just compensation." 1256 Hertel Ave. Associates, LLC v. Calloway, 761 F.3d 252, 261 (2d Cir. 2014) (citing U.S. Const. amend. V). "The clause applies to the states through the Fourteenth Amendment. Id. (citing Kelo v. City of New London, Conn., 545 U.S. 469, 472, n.1 (2005)).
- "The property owner must show more than that the current zoning classification has caused a significant diminution in value, or that a substantially higher value could be obtained if an alternative use is permitted. Rather, the proper test is whether the owner can presently receive a reasonable return on his property. To succeed with a constitutional challenge, the owner must 'establish that no reasonable return may be had from any permitted use." McGowan v. Cohalan, 41 N.Y.2d 434, 436 (1977) (quoting Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 82 (1973) (emphasis added)).



Takings Claims Challenging Short-Term Rental Regulation (Cont.)

- A law that prohibits an existing property use "does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 592 (1962).
- To ascertain whether a regulatory taking occurred, several factors are often considered: the economic impact of the regulation, interference with investment-backed expectations, and character of government action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (ultimately holding that the application of New York's Landmarks Law did not effect a taking on the appellants' property).



Economic Impact of the Regulation

- The "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 618 (1997) (citing *Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993); *Penn Cent.*, 438 U.S. at 131 (cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'").
- Along with diminution of value, the argument that lost profit and loss of a reasonable rate of return has been expressly rejected as bases for takings claims. Park Ave. Tower Assoc. v. City of New York has been expressly rejected as bases for takings claims., 746 F.2d 135, 139 (2d Cir 1984). "'[I]it is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred." Id. (quoting Sadowsky v. New York, 732 F.2d 312 (2d Cir. 1984)).



Economic Impact of the Regulation (Cont.)

- The key question is "whether others 'might be interested in purchasing all or part of the land' for permitted uses." Id.
- Inability to use property as a short-term rental does not preclude use as a residence or often as a long-term rental to a tenant.



Interference with Investment-Backed Expectations

- For one to possess a reasonable investment-backed expectation, such an expectation must be more than a "unilateral expectation or an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006 (1984) (internal citation and quotations omitted).
- To make out a claim for a regulatory taking, a petitioner must show "dollars and cents" proof that the property would not be capable of producing a reasonable rate of return under the law at issue. *Lubelle v. Rochester Pres. Bd.*, 158 A.D.2d 975, 976 (4th Dep't 1990).
- To succeed with a constitutional challenge, the owner must establish that no reasonable return may be had from any permitted use." *McGowan v. Chalan*, 41 N.Y.2d 434 436 (1977).



Character of Government Action

• Where the regulation completely extinguished the rights of the property owner, the character of the government regulation was "extraordinary." Hodel v. Irving, 481 U.S. 704, 716 (1987).



Challenges to Local Laws

Legal Standard of Review

- Legislative enactments carry a strong presumption of validity. "[T]he burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt." Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 131-132 (1988).
- Courts will strike down local legislative enactments only "as a last resort." Wiggins v. Town of Somers, 4 N.Y.2d 215, 218 (1958).
- A reviewing court may not substitute its decision for that of the legislative body. See McDonough v. Apton, 48 A.D.2d 195, 199 (4th Dep't 1975) (if the validity of a local legislative act is "fairly debatable," the judgment of the legislature which enacted it must stand).





Challenges to Local Laws

Legal Standard of Review (Cont.)

- In evaluating the constitutionality of a local law, a reviewing court will apply the rational basis test since there is no protected liberty interest at stake. See Pecoraro v. Bd. of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004) (a determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by the record).
- Under the rational basis test, the government need only show that the law advances a legitimate government interest. If it does, the statute will be upheld "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).
- So long as there is a rational relationship between the end and the means, the law must be upheld. See e.g., New Orleans v. Dukes, 427 U.S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity).



Challenges to Local Laws

Legal Standard of Review (Cont.)

A municipality has "a legitimate governmental purpose in maintaining the integrity of its zoning scheme and [its] residential character . . . [and] may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features." Roman Catholic Diocese of Rockville Centre, N.Y. v. Incorporated Village of Old Westbury, 128 F. Supp. 3d 566 at 584 (E.D.N.Y. 2015) (ellipsis and brackets added).



Case Law

Spilka v. Town of Inlet, 8 A.D.3d 812 (3d Dep't 2004)

- Plaintiff owns a single-family Dwelling and rents it out. Property is located in an R-1 zoning district
- 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 shortterm 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



Case Law (Cont.)

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: Multi-family dwelling allowed. The building meets the definition. Multiple-family dwelling is defined therein 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."
- Town could have easily included a limitation on duration of rental, but it didn't.



Case Law (Cont.)

In re 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.
- Property owner's activity did not "fit neatly into the definitions in the Town Code."



Case Law (Cont.)

DeVogelaere v. Webster ZBA, 87 A.D.3d 1407 (4th Dep't 2011)

- In 2010 the Town amended its zoning ordinance to prohibit transient rental, i.e., "[r]ental of a dwelling unit for a period of less than 28 continuous days."
- Petitioner owned a SFR 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."



Other Cases of Interest

- Jane Eiseman, et al. v. Village of Bellport, et al., 2020 N.Y. SLIP OP. 31941(U)(Sup. Ct., Suffolk Cnty. 2020) (Index No. 003374/2018).
 - Village law held arbitrary, capricious, and unconstitutional due to failure to substantiate any reasons set forth in legislative intent. The mayor failed to answer questions about how the law would help "prevent neighborhood blight," "protect residential property values," or "manage the effects of village amenities."
- Calvey, et al. v. Town Board of North Elba, et al., Case 8:20-cv-00711-TJM-CFH (N.D.N.Y. 2021)
 - Court dismissed a number of claims (but not all) related to short-term rentals regulations.
- Cradit v. Southold Town Zoning Board Of Appeals, 179 A.D.3d 1058 (2d Dep't. 2020).
 - "The Board correctly determined that Cradit's use of the residence for short-term rentals was 'similar to a hotel/motel use,' which had never been a permissible use in her zoning district." *Cradit*, 179 A.D.3d at 1060.



Landlord-Tenant Issues

- If both long-term tenants and short-term renters allowed, this can create additional issues.
- Long-term tenants may be concerned about qualityof-life issues with the influx of new individuals on a rotating basis who may stay only for a few nights.
 - These include safety, noise, cleanliness, and parking.
 - Breach of quiet enjoyment.
- Will tenant sue landlord or will tenant just move out at the end of the lease term?
 - Landlords take note: if you are operating unlawfully, tenant can involve municipal code enforcement officer, which unlike filing a lawsuit is a free process.



Landlord Tenant Issues (Cont.)

- What about tenant who uses rental as an Airbnb or other shortterm rental?
 - Look to lease language. Does your lease prohibit illegal uses?
 - Tenant would have to apply to get a permit from municipality in most cases if permissible, which would require owner's permission. Without this, any short-term rental by a tenant is likely to run contrary to the local law.
- Does your lease preclude running a business at the property?
- Does your lease expressly prohibit short-term rentals or sublets?
 - Typical provision requires owner's permission. Denial of tenant's request must be reasonable. If consent is unreasonably withheld, the law deems the owner to have granted consent. Lexann Realty Co. v. Deitchman, 83 A.D.2d 540, 540 (1st Dep't 1981) (citing Real Property Law § 226-b).
- Short-term rental guests were not tenant's "roommates" so to avoid eviction. *Goldstein v. Lipetz*, 150 A.D.3d 562, 566 (1st Dep't 2017).



Takeaways for Municipalities

- When regulating short-term rentals, look to what other communities are doing.
- Work with Town Attorney or special counsel as there is higher potential for litigation.
- Make a good record during the public hearing and in legislative findings.
- Consider amortization period to allow for nonconforming uses to terminate. Offer possible extension of period if certain criteria are satisfied.
- Look to existing zoning code and comprehensive plan. But don't rely on old zoning codes to regulate short-term rentals.
 - Even where you have a solid basis, courts are siding with property owners.
 - Can't rely on traditional deference to municipalities.
- You can prohibit them by specifically defining them.
- In many cases, there will be a need to develop a comprehensive ordinance.



Takeaways for Owners

- Contact code enforcement officer/building inspector for requirements.
- Once permitted and in compliance, have protections:
 - Adequate insurance
 - Legally-reviewed rental agreement
 - Sufficient security deposit
 - If not on premises, have 24/7 contact to property manager or you
 - Inform neighbors (shows you are considerate, and may open dialogue in lieu of complaints)



Current Issues and Legal Updates

- <u>S.885C/A.4130C</u>: New York's Short-Term Rental Registry Law (Effective April 2025)
 - Initially called for a statewide STR registry maintained by the Department of State (DOS).
 - Governor Hochul modified the bill, which now encourages counties to establish their own registries, with DOS receiving only quarterly reports from booking platforms on the number of STR bookings in each county.
 - Mandates that STR operators or booking platforms collect and remit sales and occupancy taxes, matching their tax obligations with those of hotels.



Current Issues and Legal Updates

- City of New York v. Corphousing Group, Inc.
 - In March 2024, the Mayor's Office of Special Enforcement (OSE) announced a new <u>lawsuit</u> and prenegotiated <u>settlement</u> against a former illegal shortterm rental operation.
 - Suit alleges that defendants operated illegal short-term rentals in 67 permanent residential dwelling units across 29 buildings in Manhattan and Brooklyn, generating more than \$3.9 million in payouts for more than 4,300 illegal short-term rentals between March of 2019 and March of 2022.
 - New York City's short-term rental registration law requires short-term rental hosts in New York City to register with the city and prevents platforms like Airbnb from processing transactions for unregistered hosts.



Current Issues and Legal Updates

- MBSC Property South, LLC v. The City of Myrtle Beach, South Carolina (filed Feb. 2025)
 - City banned converting short-term rentals to long-term use with a new zoning overlay. The overlay banned these conversions for properties larger than a singlefamily home or duplex/oceanfront properties.
 - Defendant claims that the city's moratorium on conversion prevented it from obtaining a long-term rental business license, project-based housing choice vouchers, and lost profits.
 - "MBSC's inability to engage in long-term rentals at the Properties has caused significant damages and devalued the Properties [...] MBSC acquired the Properties with the specific investment-backed expectation of long-term renting the Properties and selling them as a stabilized, income-producing asset."



Questions?



HODGSON RUSS

Disclaimer

This presentation is intended for general informational purposes only and does not constitute legal advice or legal opinion on any specific facts or circumstances. Information contained in this presentation may not be appropriate to your particular facts or situation. You should not act upon the information in this presentation without consulting Hodgson Russ LLP or other professional advisors about your particular situation. No attorney-client relationship with Hodgson Russ LLP is established by viewing this presentation. Hodgson Russ LLP makes no representations as to the accuracy or completeness of any information in this presentation, and the opinions expressed in this presentation are the opinions of the individual authors and may not reflect the opinions of the firm or any individual attorney.

All copyrightable text and graphics, the selection, arrangement, and presentation of these materials (including information in the public domain), are ©2025 Hodgson Russ LLP. All rights reserved. Permission is granted to download and print these materials for the purpose of viewing, reading, and retaining for reference. Any other copying, distribution, retransmission, or modification of these materials, whether in electronic or hard copy form, without the express prior written permission of Hodgson Russ LLP, is strictly prohibited.



Thank You!

Henry A. Zomerfeld, Esq. hzomerfe@hodgsonruss.com (716) 848-1370

Michael N. Boncardo, Esq. mboncardo@hodgsonruss.com (518) 433-2410

