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SHARING ECOMONY: SHORT TERM RENTALS

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I. INTRODUCTION

How real property may be used can be regulated by cities in a variety of ways. The most typical regulation is through a city's zoning powers found in chapter 211 of the Texas Local Government Code. In Houston there is no zoning, but regulation of uses by restrictive covenants. Nuisance laws and licensing also can play a critical role in the regulation of uses, even though those rules may not designate the type of use permitted on the property.

Unless using a form based code, the typical Euclidian zoning classifications will divide the uses and a city into residential, commercial and industrial/manufacturing districts. When those uses in the same district blur, the distinctions can be increasingly difficult to determine what is commercial and what is residential. Some of the typical cross-overs include running a hair salon in your home, conducting your law practice in your living room, and renting out your house for just the night. This last scenario is the case of short-term rentals.

II. CONFLICTS

Depending on whom you ask the residential/commercial separation is destroyed by renting out your house or room for short periods of time. Neighbors that do not typically rent their homes or rooms for the night or the week will argue the short-term landlord is operating a commercial hotel in their residential district. The neighbor is upset by the strangers cycling in and out next door. The owner that rents out their property will argue it is within their bundle of sticks as a property owner to rent their property for whatever period of time, short or long term.

Those of us dealing with land use matters are used to the balancing act of neighbors, uses and nuisances. In the past the issue was bed and breakfasts. Owner occupied residences renting out rooms to maybe supplement their retirement income or in resort areas of the state. With technology and the connection of people with a mobile app, it is easier than ever to rent out just about anything. Welcome to the sharing economy. The sharing economy allows for a lower overhead cost (i.e. advertising or management company costs), and instant connection of people, places and things without the need for the owner to remain on the premises.

Bringing people together brings conflicts. These annoyances have not changed since the B&B days of old but are usually the same complaints – noise, trash, traffic, parking and over-occupancy. Generally short-term rentals are defined as rental of part or all of a residential structure for periods less than thirty days. Short-term rentals are subject to chapters 351 (municipal) and 352 (county) of the Texas Tax Code imposing hotel occupancy taxes.

Cities have the option to: (1) not regulate short-term rentals and allow their unregulated use, (2) prohibit the use altogether, (3) adopt zoning regulations, (4) adopt licensing regulations, or (5) a combination of zoning and licensing. Ancillary to the short-term rental discussion is whether the city will want to regulate

long-term renters. The issues may not be as frequent, but can often be the same.

III. CASELAW

There are two fairly recent appellate court decisions involving restrictive covenants and short-term rentals. The Texas Supreme Court has denied the petitions for review in both cases. In the first case *Friedman v. Rozzlle,*[1] Rozelle had rented her cottage in Rockport for short terms as well as was a rental agent for short-term rentals of properties in the subdivision, in violation of the property's restrictive covenants. The language in the restrictive covenants reads, "The term of any lease of a single family dwelling may not be for a period of less than thirty (30) days, with no transient tenancy or occupancy and no hotel purposes allowed."

Rozzlle filed a declaratory judgment action against some of the homeowners and the homeowners' association, requesting the court declare this provision unenforceable, void and waived by the homeowners. Friedman filed a counter-claim against Rozzlle and a cross-claim against the homeowners association because they had taken no action to stop the ongoing violations.

Evidence was presented that almost every homeowner in the subdivision had at one time or other rented their property for time periods in violation of the covenant. Further Rozzlle, as a rental operator, had rented homes in the subdivision for short terms for the past nineteen years. Based on the finding that the violations of the short-term rental provision were "extensive and material," the court found the actions of the homeowners amounted to an abandonment of the provision and waiver of the right to enforce the covenant. Therefore the trial court ruled and the appellate court affirmed that the short-term rental restriction was void and awarded attorney's fees to Rozzlle and the association.

The second appellate case involves property owners in Austin.[2] Here the restrictive covenant reflects the majority of restrictive covenants out there and provided that the properties in the subdivision could only be used for "single family residential purposes." There was no distinction or limitation on rentals or time.

The HOA objected and demanded that the Zgabays cease use of their property for short-term rentals, vacation rentals and online advertising based on the single family provision in the restrictive covenants. While the HOA prevailed at the trial court level, the appellate court reversed.

When interpreting restrictive covenants, the 3rd Court of Appeals in Austin held that a court would apply the general rules of contract construction, and if unambiguous they should be construed liberally to

[1] *Friedman v. Rozzelle*, No. 13-12-00779-CV, 2013 WL 6175318 (Tex. App.--Corpus Christi November 21, 2013, pet. denied).

[2] *Zgabay v. NBRC Property Owners Association*, No. 03-14-00660-CV, 2015 WL 5097116 (Tex. App.--Austin August 28, 2015, pet. denied) (mem. op.).

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