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First Principles for Regulating Short Term Rentals in Texas

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INTRODUCTION

Over the better part of the last decade, courts have seen a flurry of litigation regarding so-called short-term rentals (STRs)—a term generally applied to homes rented for less than thirty days. Despite the recent buzz, STRs are nothing new. Individuals have been renting out homes on short-term leases for generations. Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-HomeSharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395, 396 (2017). In places like Austin, STRs have been common since at least the 1940s, perhaps earlier.¹

Nor is the urge to regulate STRs novel. Vacation hotspots in the northeast unsuccessfully attempted to limit STRs in the 1980s and 90s, only to have their ordinances struck down. *Ocean Cty. Bd. of Realtors v. Twp. of Long Beach*, 599 A.2d 1309, 1311–12 (1991); *Owners Ass'n of Belmar v. Borough of Belmar*, 447 A.2d 933, 936 (App. Div. 1982).

In recent years, however, online platforms like AirBnB and HomeAway have made it easier than ever before for individuals rent their homes to potential short-term guests. As a result, STRs have become more prevalent, triggering a response from city governments. Courts attempting to respond to these new regulations have come to mixed results.

Bans on STRs have been found by some Texas courts to give rise to claims under the anti-retroactivity, takings, and Due Course of Law provisions of the Texas Constitution. *Zaatari v. City of Austin*, 615 S.W.3d 172, 180 (Tex. App.—Austin, 2019) (retroactivity); *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 582 (Tex. App.—Houston, 2015) (takings); *City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 Tex. App. LEXIS 10133, at *48 (Tex. App. Dec. 23, 2021) (Due Course of Law). Curfews and regulations on assemblies at STRs have been held to violate the Texas's Constitution's protections for the freedom of assembly. *Zaatari*, 615 S.W.3d at 202. Other Courts have upheld STR restrictions. See *Draper v. City of Arlington*, 629 S.W.3d 777, 789 (Tex. App.—Fort Worth, 2021) (rejecting Due Course of Law

¹ See P. 20, brief of the State of Texas (cataloging history of STRs in Texas). Available at: <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=3e86dc6e-0633-43be-a409-a90073a29e1c&coa=coa03&DT=Brief&MediaID=56a138dd-6783-4b30-86cf-576f98cc29d0>

and Equal Protection challenge); *Hignell v. City of New Orleans*, 476 F. Supp. 3d 369, 377 (E.D. La. 2020) (rejecting federal challenge).

In light of this confusion, this paper argues that the best approach to reviewing STR regulations is a return to first principles. Rather than examine the various cases and theories challenging STR regulations as if STRs were a purely 21st Century phenomenon, this paper looks to broad principles of Texas property law to set a minimum baseline for any regulation of STRs.

Once this is established, the framework for regulating STRs becomes clear. If a city's ordinances are silent on the issue of STRs, then the common law presumption is that STR use in residential areas is permissible. If a city chooses to regulate STRs in ways that differ from long-term rentals, those regulations must, at a minimum, be based on evidence that STRs are creating nuisances and must be targeted to address those nuisances. Like any other common law use of property, mere antipathy towards STRs in a community is not sufficient to justify prohibition of the practice.

I. STR regulations are restrictions on property rights

In Texas, the right to own property includes the right to use it. *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921). As the Texas Supreme Court has explained: Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.” *Id.* This view of property predates Texas to the time of William Blackstone. As Blackstone explained, “[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions.” William Blackstone, *Commentaries on the Laws of England*, 1:134 (1765).

Included in this broad right of use is the “right to lease,” which is not limited by duration. *Zaatari v. City of Austin*, 615 S.W.3d 172, 190-91 (Tex. App. 2019) (quoting *Terrace v. Thompson*, 263 U.S. 197, 215 (1923); *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (Tex. 1890)). The right to use one's home as an STR is therefore a basic property right protected by the Constitution. As discussed below, this right is not absolute. But as will become clear, the fact that we are dealing with a property right matters.

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