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Re-zoning the Sharing Economy: Municipal Authority to Regulate Short-Term Rentals of Real Property

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RE-ZONING THE SHARING ECONOMY: MUNICIPAL AUTHORITY TO REGULATE SHORT-TERM RENTALS OF REAL PROPERTY

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INTRODUCTION

IMAGINE two scenarios. In the first, you live in a quiet residential community with easy access to your city's center. Your next-door neighbor, whom you have known for years, regularly rents out his home to one or two tourists who respect the peaceful character of the neighborhood. In the second scenario, you lease a unit in an urban apartment building, and the unit next to you, whose owner you have never met, always has strangers coming and going who leave trash in the common areas and throw all-night parties. Your friends experience the same kinds of problems in their buildings, and your rent has steadily been rising over the past few years. In either scenario, your neighbor's conduct might be considered illegal under the same short-term rental ordinance in your city simply because, in both scenarios, the property owner is conducting short-term rentals (STRs) for fewer than thirty days.

Cities throughout the country are battling the nuisances that sometimes accompany residential STRs in a number of ways. With the rise of internet-based home-sharing platforms, such as Airbnb.com, property owners of all shapes and sizes have taken to the web to rent out their spare rooms or their whole homes to vacationers visiting their communities in order to make a little cash on the side, to keep up with the cost of living

in some of the nation's most expensive cities, or as a primary means of deriving income.[1] The response of many cities, while attempting to address the valid concerns of their citizens, has challenged the limits of the Constitution. At what point must the state, through its municipal bodies, step in to regulate the transactions occurring between homeowners and short-term lodgers? At what point is the state's regulation an interference with the rights of property owners? This Comment will seek to answer these questions by looking at cases from throughout the country, with a focus on the current legal battle between the City of Austin and STR advocates there.

As this Comment will show, cities have extensive authority to regulate STRs under their traditional zoning powers with a view to effective city planning, but such ordinances must avoid rising to the level of a regulatory taking or asserting flawed policy justifications. Cities can avoid the regulatory taking issue by recognizing pre-existing property rights. But STR ordinances may also be attacked if they are guided by hollow or misleading policies that do not promote the general welfare and do not clearly address the kind of behavior they seek to curtail. Part I of this Comment proposes three categories of STR use and gives a summary of how various cities in the United States have attempted to regulate the current STR phenomenon. Part II establishes how modern STR regulations may rise to the level of a regulatory taking requiring just compensation under the Fifth and Fourteenth Amendments to the Constitution by assessing the impact of a leading Texas appellate case deciding an STR dispute.[2] In Part III, this Comment shows how STR laws describe the extent to which cities are allowed to define (1) the term "family," (2) occupancy caps, and (3) categories of use. Part IV analyzes the merits of various police power justifications cities have used to validate STR regulation.

I. SHORT-TERM RENTALS ON SHARING PLATFORMS PRESENT A NEW TYPE OF REGULATORY CHALLENGE

Americans have a long history of using their extra space for rental income. This Part will first offer some historical background on zoning regulation and then establish three models of behavior for better framing the future STR legal landscape. Finally, this Part will give a basic overview of zoning law, highlight some of the responses various cities across the nation have undertaken, and show a spectrum of regulation from the more hands-off to the very strict.

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1. *See* U.S. FED. TRADE COMM'N, THE "SHARING" ECONOMY ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS (2016), 2016 WL 6848922, at *15 [hereinafter FTC Report].

2. *See* Jamilla Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557 (2015).

A. History of the Regulation of Lodging and the Rise of the Sharing Economy

Widespread use of one's primary residence as a boarding house to supplement one's income may predate even our Republic.[3] Since the beginning of zoning ordinances near the turn of the twentieth century, however, cities have attempted to segregate areas of their territory by classifications of land use, whether residential, commercial, or industrial.[4] Regulation of short-term lodgings is certainly nothing new, as cities have long categorized such uses as boarding houses, lodging houses, bed and breakfasts, hotels, motels, and hostels.[5] While society generally respects the authority of cities to ensure that a large hotel with hundreds of rooms is not placed in the middle of a large, single-family residential area, a neighbor might simply not care that the house next door is rented out to a tourist for the weekend.

Never before have property owners been able to connect so easily with potential short-term lodgers through internet platforms scholars call the "sharing economy."[6] The sharing economy refers to the increasing number of peer-to-peer transactions being performed for services such as car transportation and, as pertinent here, home-sharing.[7] Cities face a new challenge in how they must meet the needs of their communities because not all property owners have welcomed the presence of short-term lodgers in their residential neighborhoods.[8]

At the center of the current debate is the popular internet-based home-sharing platform, Airbnb. The company sponsors a mobile phone application and website that allows anybody with a phone and a spare bedroom to post a listing to allow another user to reserve a night's stay or longer.[9] In less than a decade, CEO Brian Chesky and his co-founders took the tech company from a start-up to a global behemoth worth more than thirty billion dollars that serves over 150 million guests located in almost

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3. *Id.* at 562–63.

4. *See* William A. Fischel, An Economic History of Zoning and a Cure for Its Exclusionary Effects 3–4 (2001), https://www.dartmouth.edu/~wfischel/Papers/02-03.pdf [https://perma.cc/7GGY-SHQW].

5. *See, e.g.*, Austin, Tex., Code of Ordinances §§ 25-2-3 to -4 (2012), https://www.municode.com/library/tx/austin/codes/code_of_ordinances [https://perma.cc/JW8J-Y8EG] (Note that the city code in Austin classifies bed and breakfasts under residential use whereas hotel-motels are classified as commercial use.).

6. Jefferson-Jones, *supra* note 2, at 557.

7. *Id.* at 557–58.

8. *See* Roy Samaan, *Airbnb, Rising Rent, and The Housing Crisis in Los Angeles* 17, Los Angeles Alliance for a New Economy [LAANE] 2015 (Mar. 2015), http://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf [https://perma.cc/Z4VT-PM7X]. *But see* Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. Chi. L. Rev. Dialogue 103, 107 (2015) ("only" thirty-six percent of residents oppose Airbnb in New York City).

9. *About Us*, AIRBNB, https://www.airbnb.com/about/about-us [https://perma.cc/UWX4-95H5].

200 countries.[10] Airbnb is not alone in its business model, as other home sharing companies such as Homeaway.com, Vrbo.com, and Vacationhomerentals.com also allow property owners to easily connect with those seeking STRs through their databases of online listings.

B. Helpful Terminology and Three Basic Models of STR Use[11]

Generally speaking, there are three parties to internet STR transactions: the host, the guest, and the platform. "Host" means the party listing the property as an available STR. The host could be either the owner of the property or a leaseholder, although a lease between an owner and a tenant may restrict the ability of the lessee to use the property for STRs.[12] The "guest" is simply the person, whether a business traveler or tourist, who books the STR accommodation. The "platform" is the internet service that connects host with guest. Platforms, such as Airbnb, may receive a portion of the rental income from the host for the privilege of using their services.[13]

The way cities have responded to the regulatory challenges presented by this phenomenon is best understood by setting out three basic models of how homeowners (or long-term leaseholders) have generally used their property for STRs. While there are countless permutations of the models this Comment proposes, STRs can essentially be characterized by (1) home sharing, (2) home rental, or (3) transient rental.

In the "home sharing" model, the guest and the host are co-occupants of the premises during the guest's stay. Home sharing maximizes the accountability of the host because if the guest causes any nuisance to surrounding neighbors, the host is right there to deal with the problem. Austin refers to this type of arrangement as a Type I STR.[14]

The second model is "home rental" where the host uses her primary residence for the STR, but instead of restricting the guest to one room or STR unit, the guest has rented the entire dwelling, and the host does not

10. *Id.*; Matt Rosoff, *Airbnb Is Now Worth $30 Billion*, Business Insider (Aug. 6, 2016), http://www.businessinsider.com/airbnb-raises-850-million-at-30-billion-valuation-2016-8 [https://perma.cc/KWD5-8XKY].

11. The three models proposed *infra* are similar to those proposed by the City of Santa Monica in its 2015 report on STRs, with slight variations in that a new category is added and the name "vacation rental" is changed to "transient rental." *See* City of Santa Monica, City Council Report 9 (April 28, 2015), https://www.smgov.net/departments/council/agendas/2015/20150428/s2015042807-A.pdf [https://perma.cc/543X-36SR].

12. Maggie Kerkman & Deanna Dewberry, *Listing Apartment Gets Tenant in Trouble*, NBC DFW (Jan. 28, 2016) (citing Professor Mary Spector's assertion that landlords may evict tenants conducting STRs without landlord permission), http://www.nbcdfw.com/news/local/Apartment-Leasers-Beware-Listing-on-Airbnb-366819821.html [https://perma.cc/N749-APMG].

13. Airbnb, Inc. v. City of San Francisco, No. 3:16–cv–03615–JD, 2016 WL 6599821, at *1 (N.D. Cal. Nov. 8, 2016).

14. *See* Austin, Tex., Code of Ordinances § 25-2-788 (2015), https://www.municode.com/library/tx/austin/codes/code_of_ordinances [https://perma.cc/SQY3-7H3F].

occupy the home during the guest's stay.[15] A host under the home rental model is less accountable than under the home sharing model, but still more accountable than under the last model—"transient rental." Under the Austin ordinance, both the home rental and transient rental models would, in all fairness, fall under the Type II classification, with Type III being an STR of a multi-family dwelling such as a duplex or apartment.[16] Under a transient rental model, the host is essentially operating an income property that does not serve as the host's primary residence but is for the sole purpose of STRs. Hosts utilizing the transient rental model are the least accountable of the three models.

Conceptualizing the issue under these three general models is important because the behavior of STR hosts and guests can vary widely, from heavy interference with neighboring property owners to having absolutely no impact.[17] Consequently, some activity may warrant modest regulation, whereas in other cases, no regulation would be warranted at all. The thesis of this Comment states *supra* that STR ordinances can be attacked for not being rationally related to the general welfare. The more the ordinance takes into account these differences in use and the varying degree to which they affect neighboring property, the better the city's argument will be that it drafted the laws in consideration of the needs of the community rather than arbitrarily. The Type I-III categories used in the Austin ordinance are a good start, but the ordinance still does not consider the primary residence (home renting) versus separately owned income property (transient rental) distinction.[18]

C. Cities Have Responded to the Challenges of Internet-Based Home Sharing in Different Ways

Zoning power is a fundamental authority used by modern cities to structure their development and is considered a legitimate exercise of the state's police power unless the zoning ordinance is arbitrary or unreasonable and without a "substantial relation to the public health, safety, morals, or general welfare."[19] The power to zone is the power to divide up the locality's geographic area into different categories of land use that are inconsistent with each other.[20] Thus, the residential is separated from commercial and industrial areas, and ordinances generally provide for sub-categories and statutory definitions therein.[21] Residential districts are usually further separated into single-family and multi-family.[22] Scholars sometimes characterize the uses as the Euclidean zoning pyramid, with the most restrictive single-family residential category at the top and the

15. *See id.*; City Council Report, *supra* note 11.
16. *See* Austin, Tex., Code of Ordinances §§ 25-2-788 to -789.
17. *See* Kellen Zale, *Sharing Property*, 87 U. Colo. L. Rev. 501, 535 (2016).
18. *See* Austin, Tex., Code of Ordinances §§ 25-2-788 to -790.
19. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
20. 83 Am. Jur. 2d *Zoning and Planning* § 98 (2016).
21. *Id.*
22. *Id.*

least restrictive manufacturing and industrial uses at the bottom.[23]

The courts have long upheld the distinction between single-family residential and multi-family use because "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[24] Because STRs do not easily meet either a residential or commercial definition,[25] cities have taken a variety of approaches in recent years in attempting to curb their impact. The illustrations that follow are only a small sampling of cities that have begun to regulate STRs.[26]

1. New York City, New York

Perhaps the greatest challenge for city zoning officials is presented by the STR situation in New York City, where the city's 8,550,405 citizens live with a 27,000 per square mile population density.[27] The New York State Assembly amended its Multiple Dwelling Law (MDL—the statute that regulates building codes throughout the state and sets occupancy limits) in 2010 to define "permanent occupancy" as anything over thirty days, thus apartment buildings designated as "Class A" can only be rented out on a month or longer basis with anything less than that being a technically illegal rental.[28]

New York likely felt the Airbnb boom after 2008 the hardest, leading to the passage of its strict MDL amendment.[29] In its report on the Airbnb impact in New York City, the Attorney General's office cites mostly fire and safety concerns for apartment buildings that are different from hotels, and not required to meet the same code standards,[30] but the state was also motivated by a desire to preserve affordable housing.[31] After the amendment was passed, the Attorney General brought a subpoena against Airbnb to provide host information in anticipation of an enforcement action in 2014, but the New York Supreme Court in Albany

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23. *See, e.g.*, Laurie C. Malkin, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 U. PA. L. REV. 757, 802 (1995).

24. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

25. *See* Zale, *supra* note 17, at 523 ("while the commercial/noncommercial duality is recognized in a wide range of contexts, determining where to draw the line between the two is challenging").

26. *See generally* LAUREN HIRSHON ET AL., NAT'L LEAGUE OF CITIES, CITIES, THE SHARING ECONOMY AND WHAT'S NEXT (2015).

27. *New York City Population*, NYC PLANNING, https://www1.nyc.gov/site/planning/data-maps/nyc-population/population-facts.page [https://perma.cc/3TTH-GB67] (last visited Feb. 18, 2017).

28. N.Y. MULT. DWELL. LAW § 4(8) (West 2012).

29. *See* OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AIRBNB IN THE CITY 2 (2014), https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf [https://perma.cc/VDS4-CBX5].

30. *Id.* at 4.

31. *See* Katie Benner, *Airbnb Sues over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0 [https://perma.cc/BEZ8-YMEE].

quashed the subpoena as overbroad, in favor of Airbnb's motion.[32] Airbnb and New York officials will likely continue struggling to find common ground for the foreseeable future.

2. Santa Monica, California

The approach of officials in the Los Angeles area has generally been comparable to those in New York because in Santa Monica the city has decided to strictly prohibit whole-dwelling rentals in residential neighborhoods.[33] Santa Monica is a popular tourist destination for Los Angeles visitors with its world class surfing beaches and famous amusement park pier.[34] "Vacation rental," as Santa Monica defines the term, encompasses both the home rental and transient rental models, and both activities are equally prohibited by Chapter 6 of the Santa Monica Municipal Code.[35] Home sharing, as defined under this Comment's model and Santa Monica's definition, is, however, allowed with authorization from the city in the form of a permit.[36] Santa Monica states in its city council report on STRs that illegal STRs have "established a strong presence in the City and continue[ ] to flourish with little sign of abatement."[37] The city does not have the resources that would be required to bring effective enforcement actions against all 1,700 listings the city estimates are being illegally marketed.[38] Therefore, enforcement actions are brought on a complaint basis.[39]

A man named Scott Shatford, who rented various properties in violation of the ordinance, was recently convicted in a plea deal with the city, compelled to pay a $3,500 fine, and placed on two years' probation.[40] He also agreed not to further list properties in violation of the ordinance.[41] Shatford owned five properties that he listed in violation of the Santa Monica ordinance and openly "boasted" about how he thought Santa Monica would not be able to enforce its new law against him.[42] Even though Shatford knew the listings were illegal, he took the risk because, in his words, "the money's too good."[43] Mr. Shatford's experience should

32. Airbnb, Inc. v. Schneiderman, 989 N.Y.S.2d 786, 793 (N.Y. Sup. Ct. 2014).

33. *See* CITY OF SANTA MONICA, *Overview of the Home-Sharing Ordinance*, https://www.smgov.net/Departments/PCD/Permits/Short-Term-Rental-Home-Share-Ordinance [https://perma.cc/8APR-RP7R].

34. *See generally* CITY OF SANTA MONICA, https://www.smgov.net [https://perma.cc/LA63-Y46X].

35. SANTA MONICA, CAL., MUNICIPAL CODE ch. 6.20 (2015), http://www.qcode.us/codes/santamonica (Perma link unavailable).

36. *Id.* ch. 6.20.020.

37. CITY OF SANTA MONICA, CITY COUNCIL REPORT 17 (April 28, 2015).

38. *Id.* at 17–18.

39. *Id.* at 17.

40. Hailey Branson-Potts, *Santa Monica Convicts Its First Airbnb Host Under Tough Home-Sharing Laws*, L.A. TIMES (July 13, 2016), http://www.latimes.com/local/lanow/la-me-ln-santa-monica-airbnb-conviction-20160713-snap-story.html [https://perma.cc/8RVV-UXNE].

41. *Id.*

42. *Id.*

43. *Id.*

serve as a warning for hosts who want to publicly take on their home city's STR regulation efforts. This story also shows how seriously some cities are taking enforcement of their STR codes.

3. Denver, Colorado

Some cities have taken a more liberal approach in regulating STRs in order to encourage the tourism industry and gain valuable tax revenue.[44] Denver, while still requiring licenses at an annual rate of twenty-five dollars, does not bar the home renting model.[45] Denver's ordinance requires that transient occupancy taxes be paid and that proof of insurance be given.[46] The ordinance limits licensees to one primary residence and requires documentary proof to establish the address as the host's primary residence.[47] Denver recognizes the STR as an approved accessory use in any residential district, even where the host is not present for the stay.[48] Denver, along with some cities in other states,[49] generally takes a more favorable view of home sharing than the city has in New York or Santa Monica.[50]

D. The Austin Lawsuit—Maximizing Land Use Prerogatives and Testing Constitutional Limits

One of the more recent STR litigation battles working its way through the courts is the dispute between the City of Austin, Texas, and STR proponents there.[51] For the past few decades Austin has hosted a massive city-wide music, film, and technology festival in March called South By Southwest (SXSW).[52] Austin also plays host to the annual Austin City Limits Music Festival, and many other events that are a nationwide tour-

44. Brendaliss Gonzalez, *Short-Term Rentals One Step Closer to No Longer Being Illegal in Denver*, Denver 7 (Apr. 13, 2016), http://www.thedenverchannel.com/money/consumer/short-term-rentals-one-step-closer-to-no-longer-being-illegal-in-denver [https://perma.cc/PAM5-49WC].

45. *See* Denver, Colo., Code of Ordinances ch. 33, art III (2016), https://www.municode.com/library/co/denver/codes/code_of_ordinances [https://perma.cc/25HN-7KDC].

46. *Id.*

47. *Id.* §§ 33–46.

48. *See* Denver Short-Term Rentals FAQ, Denvergov.org, https://www.denvergov.org/content/dam/denvergov/Portals/723/documents/STR%20FAQ_2-29-16.pdf [https://perma.cc/S5L2-C52Q]. Accessory uses are generally those that may be considered "'incidental' and 'subordinate' to the principal use." Zale, *supra* note 17, at 550. Cities use the accessory use concept to regulate uses such as the home office. *Id.*

49. *See* Dana Palombo, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 Am. U. Bus. L. Rev. 287, 296–97 (2015) (describing Airbnb's "Shared City Initiative" and its partnership with Portland, Oregon).

50. *See* Denver Short-Term Rentals FAQ, *supra* note 48; *see also* FTC Report, *supra* note 1, at *63.

51. *AG Paxton Joins Lawsuit Against City over Short-Term Rentals*, KXAN (Oct. 5, 2016, 10:55 PM), http://kxan.com/2016/10/05/ag-paxton-joins-lawsuit-against-city-over-short-term-rentals [https://perma.cc/QK8B-P3WL].

52. *History*, South by Southwest, https://www.sxsw.com/about/history [https://perma.cc/M3PP-6YWJ].

ist draw throughout the year.[53] During these events, lodging in the city tends to reach maximum capacity, and many of the visitors turn to STR platforms to find places to stay.[54]

A group of hosts who profit from their STRs in Austin now seek to challenge the new ordinance in *Zaatari v. City of Austin*.[55] The Texas Public Policy Foundation (TPPF), a property rights and free-enterprise advocacy group, represents both hosts and guests in Austin in their suit against the city.[56] Plaintiffs claim that Austin's STR ordinance is an illegal interference with due process, assembly rights, freedom of movement, and privacy rights under the Texas Constitution.[57] Contrary to the approach authorities took in the New York battle, where the state and municipal interests were aligned, Texas Attorney General Ken Paxton entered the lawsuit by filing a plea in intervention *against* Austin, claiming that the regulations violate the constitutional rights of Texas citizens.[58] For its part, Austin entered a general denial to the claims of plaintiffs.[59]

Austin originally enacted its ordinance under a permitting scheme that gave different licenses for the different types of STRs that the host sought to conduct in exchange for a licensing fee.[60] The driving force behind enacting stricter regulations to Austin's STR market was a desire to counter the nuisances attendant to what residents called "commercial short-term rentals" operating right next to their single-family homes.[61] Testimony at the City Council hearings described many instances of late-night parties with throngs of people lasting through the night, along with the accompanying noise, trash, trespassing, and even public urination by STR guests.[62]

Because so many Austin residents were coming forward with these cases, which STR advocates characterized as merely "bad actors,"[63] the city was eventually compelled to act. It made extensive amendments to its

53. AUSTIN CITY LIMITS MUSIC FESTIVAL, https://www.aclfestival.com; *Arts and Leisure*, AUSTINTEXAS.GOV, http://austintexas.gov/resident/arts-and-leisure [https://perma.cc/WF6A-EA2J].

54. *See* Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, Abstract, Boston U. School of Management, Research Paper No. 2013-16 (2016), https://ssrn.com/abstract=2366898 [https://perma.cc/ZBY7-WPQT].

55. Original Petition, Application for Injunctive Relief, and Request for Disclosure at 2–8, Zaatari v. City of Austin, No. D-1-GN-16-002620 (53rd Dist. Ct., Travis County, Tex. 2016) [hereinafter Orig. Pet.].

56. *Id.*

57. *Id.* at 1.

58. Plea in Intervention of Texas at 1, Zaatari v. City of Austin, No. D-1-GN-16-002620 (53rd Dist. Ct., Travis County, Tex. Oct. 16, 2016).

59. Original Answer of Defendants at 1, Zaatari v. City of Austin, No. D-1-GN-16-002620 (53rd Dist. Ct., Travis County, Tex. July 20, 2016).

60. *See supra* Part I.B.

61. *See* City of Austin, September 15, 2015 City Council Meetings, http://austintx.swagit.com/play/09172015-549 [https://perma.cc/2ALW-EDCT] (click Item 78 (Part 1 of 4) – Approve a recommendation regarding short-term rentals; then navigate to 21:10).

62. *Id.*

63. *Id.* at 19:30.

STR ordinance in early 2016 to, among other things, place a six-unrelated-adult occupancy cap per dwelling and require a local point of contact for out of town owners.[64] But it also included many more invasive provisions, such as § 25-2-795(E), which reads: "A licensee or guest may not use or allow another to use a *short-term rental* for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m."[65] Furthermore, "assembly" was defined in the statute to basically encompass any activity "other than sleeping."[66] Hence, if an STR guest wanted to host a barbeque at his rental, he would be capped at five friends or family members, no matter the scale of the rental.[67] When read along with subsection (D) ("[a] . . . guest may not use or allow another to use a *short-term rental* for an assembly between 10:00 p.m. and 7:00 a.m."),[68] there is a strong case for what the TPPF has called, "a bedtime for tenants."[69] Thus, the Austin ordinance is unique in that none of the other ordinances from other cities discussed *supra* contain such extensive provisions seeking to regulate personal conduct within their respective STR regulatory frameworks.[70] Austin no longer issues Type II permits, which encompass both the home rental and transient rental models, and seeks to phase out Type II rentals by 2022.[71]

The result of the Austin litigation will likely set a trend for how many other cities will seek to regulate STRs going forward because it will show how far a city could be allowed to go concerning this evolving area of the law.[72] Essentially, the lawsuit can be boiled down to two issues. The first issue is whether the ordinance is an unconstitutional taking because it deprives certain homeowners of all beneficial use of their land.[73] This is the claim brought by the Texas Attorney General and has the most relation to the zoning powers discussed *infra*.[74] The second issue is whether the ordinance exceeds the limits of the Due Process Clause and goes beyond being a pure zoning regulation by attempting to closely circumscribe certain categories of personal conduct.[75] As to the first issue, this Comment will argue that the municipality can regulate STRs under its traditional zoning powers by setting occupancy caps and by preventing commercial activity in residential zones.

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64. AUSTIN, TEX., CODE OF ORDINANCES § 25-2-795(G), -796 (2015).
65. *Id.* § 25-2-795(E).
66. *Id.* § 25-2-795(F).
67. Orig. Pet., *supra* note 55, at 27.
68. AUSTIN, TEX., CODE OF ORDINANCES § 25-2-795(G).
69. Orig. Pet., *supra* note 55, at 2.
70. *See supra* Part I.C.
71. Mary Huber, *Austin City Council Votes to Phase Out Some Short-Term Rentals*, AUSTIN AMERICAN STATESMAN (Feb. 23, 2016), http://www.mystatesman.com/news/local/austin-city-council-votes-phase-out-some-short-term-rentals/quWXfecaaVxgkP59DUXP3O [https://perma.cc/7Q5L-TTRJ].
72. *See* E-mail from Chance Weldon, Attorney, Texas Public Policy Foundation, to author (Jan. 25, 2017, 10:55 CST) (on file with SMU Law Review Association).
73. *See* Plea in Intervention, *supra* note 58, at 4.
74. *See infra* Part II.
75. *See* AUSTIN, TEX., CODE OF ORDINANCES § 25-2-795(G), -796.

The plaintiffs in *Zaatari* raise important freedom of assembly and due process questions in their pleadings about the extent to which the city should be allowed to designate who and how many people a person has over to a residence.[76] The due process claim is partially addressed by Part II's discussion of the Supreme Court's decision in *Village of Belle Terre v. Boraas* in Part II.B., *infra*,[77] and by Part III's policy justification analysis. A more in-depth analysis of the plaintiff's freedom of assembly claim is warranted but is beyond the scope of this Comment.

II. STRIPPING STR RIGHTS COULD RISE TO THE LEVEL OF A REGULATORY TAKING

An STR host who seeks to resist the impact of a new regulation may do so by arguing that the state action is a type of interference with property rights that is called a regulatory taking. This Part sets out the applicable U.S. Supreme Court jurisprudence defining this legal principle, analyzes an important Texas case that applies this standard to STR prohibitions by the Village of Tiki Island, and assesses what the likely impact will be for litigants in the Austin case. Furthermore, this Part discusses STR use within the context of the legal doctrine of pre-existing use.

A. Supreme Court Precedent Defining Regulatory Taking

"Regulatory taking" is a term of art that should be distinguished from a normal taking. The Fifth Amendment's Takings Clause, and similar state constitutional provisions, usually involve applying eminent domain, which is the legal principle allowing a public entity to seize private lands for a public purpose if it pays the private owner "just compensation."[78] This form of taking involves government physically entering, occupying, reforming, or destroying property.[79] When a physical taking happens, making a determination that government has taken the land and calculating its value is relatively straightforward.[80] However, the government may also impose restrictions that, while not a "physical invasion" for public use, interfere with the property owner's rights in the land to such an extent that a regulatory taking occurs and justice demands that the property owner be compensated.[81]

The Supreme Court further clarified that there are two distinct categories where there may be an instance of regulatory taking in *Lucas v. S.C. Coastal Council*.[82] The first is where government regulation causes the property owner to suffer a physical incursion into the property, "no matter how minute," and the second is where the property owner is denied

76. *See* Orig. Pet., *supra* note 55, at 1.
77. 416 U.S. 1, 9 (1974).
78. *See* U.S. Const. amend V; *see also* Tex. Const. art. I, § 17(a).
79. Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) [hereinafter *Penn Central*].
80. *See id.*
81. *Id.* at 127–28.
82. 505 U.S. 1003, 1015 (1992).

"all economically beneficial or productive use of land."[83] This second category has been interpreted to mean that the owner suffers a total loss in using the land, akin to a complete public seizure, and not a minor loss in value.[84] Finally, the Court reiterated the principle that if a regulation does not have a substantial relation to a legitimate state interest, then the regulation is a taking.[85]

But since *Lucas*, overturning a regulation of private property under the rational relation test has been more appropriately cast as a Due Process question rather than a Takings question by the Supreme Court in *Lingle v. Chevron U.S.A., Inc.*[86] In her majority opinion, Justice O'Connor explained that:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.[87]

However, using the "substantially advances" test in establishing a taking remains viable under Texas law because the Supreme Court of Texas has not yet abrogated that standard in the wake of *Lingle*.[88]

Any municipal regulations seeking to curtail STR use in residential zones do not involve a taking in the traditional sense because they do not involve the government physically seizing a homeowner's property for a public purpose; thus, takings claims against STR ordinances will necessarily be of the regulatory variety.[89] Practically speaking, if a court deems an STR ordinance to be a taking, the ordinance will probably be amended and STR hosts will be allowed to continue with their activities because the city could not realistically compensate them all adequately given the proliferation of STR use.[90]

Pennsylvania Central Transportation Company v. City of New York is a leading case helping to explain regulatory takings by acknowledging that while there is no "set formula" to defining when government must com-

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83. *Id.*

84. *Id.* at 1017; *see also* Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 671 (Tex. 2004).

85. *Lucas*, 505 U.S. at 1016; *see also Sheffield*, 140 S.W.3d at 671.

86. 544 U.S. 528, 543 (2005).

87. *Id.*

88. *See* Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 849 (5th Cir. 2016) (applying Texas law).

89. *See* Penn Central, 438 U.S. 104, 124 (1978).

90. For instance, the court in *Airbnb, Inc. v. City of San Francisco* observed that more than 4,000 rentals were listed on Airbnb and operating illegally (not to mention other home listing services). No. 3:16–cv–03615–JD, 2016 WL 6599821, at *2 (N.D. Cal. Nov. 18, 2016). Assuming a court finds all those instances to be takings, and that the court must compensate the owners at a rate of $25,000 a year (what claimants asserted in the case analyzed in Part II.B., *infra*—a San Francisco landlord could probably make much more), the city would end up paying $100,000,000 in compensation claims alone. Note that this figure is also on the low end.

pensate, there are still relevant factors to consider.[91] These factors include: (1) the general economic impact upon the property owner, (2) the extent to which a "distinct investment backed expectation" is frustrated, and (3) the nature of the government interference.[92] Not every slight interference or economic impact upon a property owner by some action of government will result in compensation because under such a regime "[g]overnment could hardly go on."[93]

In *Penn Central*, New York City passed a landmark preservation law giving the Board of Estimate authority to designate historical landmarks and impose building restrictions on those property owners.[94] The Pennsylvania Central Transportation Company (Penn Central), as owner of the Grand Central Station, sought to establish a regulatory takings claim because its partner, UGP, a real estate company, was restricted from building a multi-story office building on top of the terminal.[95] Justice Brennan, writing for the majority, held that there could be no cognizable claim for just compensation against the city.[96] The Court reasoned that the landmark law did not impact Penn Central's ability to continue its transportation operations as it had prior to the law's passage and that Penn Central and its partners conceded that a decrease in property value alone cannot establish a taking.[97]

B. For Existing STR License Holders in Texas, Banning STR Use Has an Economic Impact on the Property Owner and Interferes with Investment-Backed Expectations

In one of the few Texas cases to address the issue, the Texas Court of Appeals, in *Village of Tiki Island v. Ronquille*, decided an STR dispute in favor of the property owner, instead of the city as in *Penn Central*.[98] The court applied the *Penn Central* framework and decided that an STR prohibition could plausibly constitute a regulatory taking under the Texas Constitution.[99] Plaintiffs in *Tiki Island* were condominium owners in a resort community outside of Galveston on the Gulf Coast seeking injunctive relief after the village passed an ordinance prohibiting their STR activities.[100] As many plaintiffs in STR cases have tended to do,[101] the host-property owners in *Tiki Island* brought a temporary injunction seeking to

91. *Penn Central*, 438 U.S. at 124.
92. *Id.*
93. *See id.* (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
94. *Id.* at 107–08.
95. *Id.* at 115–16.
96. *Id.* at 138.
97. *Id.* at 131, 136 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
98. *See* 463 S.W.3d 562, 587–88 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
99. *Id.* at 585.
100. *Id.* at 564–65.
101. *See* Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 61 (2d Cir. 2011); City of New York v. 330 Continental LLC, 60 A.D.3d 226, 227 (N.Y. App. Div. 2009); Ewing v. City of Carmel-By-The-Sea, 286 Cal. Rptr. 382, 383–84 (Cal. Ct. App. 1991).

preclude the city from enforcing the new ordinance on them in anticipation of a trial and final judgment on the merits.[102]

Under the Texas standard for injunctive relief, the elements of a temporary injunction are (1) a valid suit against the defendant, (2) a likelihood of success on the merits, and (3) "a probable, imminent, and irreparable injury" if equitable relief is denied.[103] Preliminary injunctions are crucial for STR hosts who depend on their rentals for income because the injunctions help to "preserve the status quo of the litigation's subject matter" leading up to a trial on the merits as well as keep the STR host from having to suspend operations during the possible years of litigation the case might endure.[104] Equitable relief is also highly discretionary for judges; therefore, advocates on both sides of the aisle should use policy arguments bearing on these controversial STR zoning issues.[105]

With this procedural backdrop, the court examined the takings claim under the familiar factors from *Penn Central* of what the economic impact was upon the property owners, whether there was an interference with "distinct investment-backed expectations," and what the "character of the government action" was.[106] The factors are considered non-exhaustive, and a totality of the circumstances analysis is required to determine the appropriate balance of interests.[107] Since this case arose on an interlocutory appeal, the issue was whether the evidence based on the pleadings could satisfy the standards for the trial court's grant of the injunction under abuse of discretion deference.[108] Because the court found that the trial court could issue the injunction within its discretion, the court upheld the decision that plaintiffs adequately plead economic impact and interference with investment-backed expectation so as to meet the requirements of irreparable harm and probable success on the merits.[109]

The court determined that the plaintiffs had shown that there would be a significant economic impact on their property values if unable to continue their STR use.[110] The court based the finding on evidence of one plaintiff's stated income of $25,000 in 2014 and the live testimony of the homeowners that they would be unable to generate such profits in the future.[111] These circumstances were distinguishable from a blocked real-estate project for which the law does not necessarily recognize a right to lost profits if government regulation frustrates such efforts because the

102. *Tiki Island*, 463 S.W.3d at 583–84.
103. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); *see also* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (including the Texas elements but adding as elements (4) the balance of equities tips in plaintiff's favor, and (5) issuance of equitable relief is in the public's interest).
104. *See Tiki Island*, 463 S.W.3d at 584.
105. *See id.*
106. *Id.* at 575 (quoting Sheffield Dev. Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660, 672 (Tex. 2004)).
107. *Id.*
108. *Id.* at 584.
109. *See id.* at 584, 587.
110. *Id.* at 579.
111. *Id.*

government need not guarantee profitability for property owners subject to its control.[112]

The *Tiki Island* court's approach to factoring in the economic impact to an STR host is not unique to Texas law, or even state law for that matter.[113] A Second Circuit case, *Dexter 345 Inc. v. Cuomo*, provides a useful comparison to *Tiki Island* because the claims of property owners were nearly identical, and both courts addressed the economic impact of barring STRs under the takings framework.[114] Plaintiff building owners in New York City sought injunctive relief from enforcement of the state's new MDL provisions.[115] The hosts owned "class A" dwellings under the New York MDL,[116] and were thus prohibited from STR activity but could rent on a more long-term basis.[117] Prior to the MDL's amendment, the property owners had a regular practice of renting some of the rooms on a long-term basis and some as STRs.[118] The Second Circuit reached the opposite result from *Tiki Island* in finding that the plaintiffs did not sufficiently plead an irreparable harm because they did not assert easily calculable figures for lost profits from STR income.[119]

The investment backed-expectation factor for the *Tiki Island* plaintiffs was manifest to the court because of representations made by the village and due to the surrounding circumstances.[120] In other words, the court found that because the village wrote its ordinance specifically to grandfather in certain pre-existing condos that were lawfully being used for STRs before the ordinance made STRs unlawful, plaintiffs had an investment-backed expectation that they could continue STR activities in reliance on the village's ordinance.[121] Furthermore, the ordinance permitted the continued use of the homes "for the purpose for which [they were] constructed and used prior to their acquisition, i.e., a single family residence," and because the village failed to show that this use was inconsistent with STR use, a valid investment backed expectation was present.[122] Also, that many residents had used their properties for STRs in the preceding twenty years was relevant and indicative of investment-backed expectation.[123]

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112. *See* Taub v. City of Deer Park, 882 S.W.2d 824, 826 (Tex. 1994); *Tiki Island*, 463 S.W.3d at 579.

113. *See, e.g.*, Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011).

114. *See id.*

115. *Id.*

116. *See supra* Part I.C.1.

117. *Dexter*, 663 F.3d at 62.

118. *Id.*

119. *Compare id.* at 63 (finding plaintiffs did not plead sufficient irreparable harm because they did not assert specific figures), *with* Vill. of Tiki Island v. Ronquille, 463 S.W.3d 562, 579 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (finding injunction well plead because host asserted, inter alia, $25,000 of STR income in the prior year).

120. *See Tiki Island*, 463 S.W.3d at 579.

121. *Id.*

122. *Id.* at 579–81.

123. *Id.* at 580–81.

C. The Investment-Backed Expectation Factor Raises the Question of Applying Pre-Existing Use Doctrine

Whether there is an investment-backed expectation is perhaps the most important issue to consider for the purposes of predicting the result of the Austin dispute and, therefore, STR disputes elsewhere, because it invokes the question of pre-existing land use.[124] Under the law in most United States jurisdictions, when a new zoning ordinance changes the allowable land uses in a certain zone, those in possession of land in said zone will be allowed to continue their operations, which were lawful prior to the ordinance, as a nonconforming use and are exempt from the new ordinance.[125] Otherwise, if the city wants to terminate a valid nonconforming use, it is subject to paying just compensation under the Takings Clause.[126] At least one state court has explicitly found that STR use can be construed as a valid nonconforming use when the owner's use predates the new ordinance.[127] Therefore, as we see in *Tiki Island*, the municipality cannot necessarily ban STRs, if they can be said to be a nonconforming use, without being subject to the Takings Clause.[128] Of course, as it was in *Tiki Island*, most cities will write grandfathering provisions into their ordinances recognizing such nonconforming use as valid.[129]

The most important takeaway from *Tiki Island*, at least for Texas litigants, is that the court established that STR use is not necessarily inconsistent with single-family residential use, the most restrictive category on the Euclidean zoning pyramid.[130] While this analysis may be legally flawed for reasons that will be further established in this Comment, it is not a completely unreasonable proposition considering the circumstances for the particular community at issue in *Tiki Island*. As even the village's government website admits, Tiki Island is a beach community with "resort-type living" and a prime spot for fishing.[131] So for the village to suddenly ban a large group of owners, who never lived in these condos full-time, from using them for what the owners were fully justified in believ-

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124. *See id.*

125. 2 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 72:1 (4th ed. 2016).

126. *See id.*

127. Rollison v. City of Key West, 875 So. 2d 659, 662 (Fla. Dist. Ct. App. 2004).

128. *Cf. Tiki Island*, 463 S.W.3d at 584. The issue of cities recognizing nonconforming use also raises the question of whether the city must permit such use in contravention of the zoning ordinance in perpetuity. The simple answer is that where the law recognizes a valid nonconforming use it limits the property owner from expanding the use and terminates the right to nonconforming use if the property owner abandons the use. Ziegler, *supra* note 125, § 74:2. The city may also terminate nonconforming use through a process called amortization, which sets an extended deadline to allow nonconforming landowners to recoup investments and come into conformity with the ordinance. Ziegler, *supra* note 125, § 74:18.

129. *See Tiki Island*, 463 S.W.3d at 579 (the court in *Tiki Island* recognized the village's efforts to grandfather in certain properties but the plaintiffs did not have their pre-existing use considered by the village); *see also* Ziegler, *supra* note 125, § 72:1.

130. *See Tiki Island*, 463 S.W.3d at 580–81.

131. Village of Tiki-Island, Tex., http://www.villageoftikiisland.org/goverment.htm [https://perma.cc/7Q26-N4BY] (last visited Jan. 27, 2017).

ing was what they were meant for, our sense of justice would rightly be offended.[132]

Interested parties from both sides in these disputes will likely use *Tiki Island* as a guide for both writing and fighting STR ordinances. Because the presumption of validity for zoning laws under the police power is so strong,[133] STR advocates will certainly face an uphill battle to prove a regulatory taking. But establishing a claim is now a legal possibility in the wake of *Tiki Island*'s holding.[134] Where a prospective plaintiff can show that the STR use of the property predates the passage of restrictive ordinances, the property generated a specific amount of income, and the city at least passively allowed it, the plaintiff will have an easier course under the *Penn Central* standard in establishing that a "distinct investment-backed expectation" will be frustrated and that a heavy economic impact will result if an STR permit is denied or rolled back.[135] For some of the plaintiffs in *Zaatari*, including Mr. Zaatari himself, the takings claim is probably unripe because Austin continues to recognize these parties' STR permits.[136]

City officials writing ordinances, issuing permits, and dealing with STR hosts informally do have the power to shape their communities through prospective zoning laws that regulate STR activity, especially in single-family residential zones.[137] But such power must be exercised within the limits of the Constitution and existing case law interpreting the scope of zoning authority.[138] Cities must recognize that many property owners may have rights under a nonconforming use theory or a regulatory taking theory, especially if the city grants hosts STR licenses and later seeks to further restrict those hosts' activities.[139] But the ability of STR hosts to assert such a claim depends in large part on how to characterize the activity, whether accessory versus principal or residential versus commercial.[140] The following Part will discuss these legal fault lines in more detail.

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132. *See Tiki Island*, 463 S.W.3d at 579–80.

133. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

134. *See Tiki Island*, 463 S.W.3d at 585.

135. *See* Penn Central, 438 U.S. 104, 124 (1978); *Tiki Island*, 463 S.W.3d at 585.

136. *See* Orig. Pet., *supra* note 55, at 3.

137. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

138. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998).

139. *See* Rollison v. City of Key West, 875 So. 2d 659, 662 (Fla. App. 2004) (property owner's STR use of condo was a lawful nonconforming use predating city's passage of more restrictive ordinance); *cf.* Mo. Rock, Inc. v. Winholtz, 614 S.W.2d 734, 739 (Mo. Ct. App. 1981) (ruling that city could not infringe on strip mining activity that was a valid nonconforming use before enactment of a zoning ordinance by requiring property owner to seek a permit).

140. *See* Zale, *supra* note 17, at 523, 550.

III. STATUTORY INTERPRETATIONS OF ZONING ORDINANCES MAY PRESENT A CHINK IN THE ARMOR OF THE POLICE POWER PRESUMPTION

Municipalities writing zoning ordinances enjoy a rather strong presumption of validity under the police power.[141] However, as this Part will show, courts may find ordinances too restrictive or too vague.[142] A court might find that a city is not interpreting its own ordinance correctly as written,[143] and thus the uses a city seeks to prohibit are construed as perfectly legal under the applicable ordinance. This Part first explains the special protection the Supreme Court has recognized for single-family residential districts and then turns to how poorly drafted ordinances can provide an opening for STR plaintiffs to protect their property interests. Lastly, this Part will analyze the commercial/residential use distinction in zoning laws and how it has been applied to regulation of STRs by suggesting how these approaches can be improved. This Part argues that the municipal practice of simply casting STRs as commercial, and then banning their use, fails to recognize that much of the host activity has little impact on neighboring property, and ordinances should be more carefully drafted to account for the vast differences in STR host behavior.

A. Occupancy Caps Within STR Ordinances Are Substantially Related to the General Health, Safety, and Welfare as a Matter of Police Power Validity

Any discussion of STR freedoms must consider the special power the Supreme Court has recognized of cities to protect residents in single-family districts from the impacts of incompatible use under the police power.[144] *Village of Belle Terre v. Boraas* addressed whether the city's definition of a single family as no more than two people "[un]related by blood, adoption, or marriage" living together under the same roof could be sustained in the face of several constitutional arguments, including a violation of the freedom to associate.[145] The Court found that in enacting the ordinance, the village sought to address the growing problems of urbanization and boarding houses creeping into quiet residential neighbor-

141. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
142. Viviano v. Sandusky, 991 N.E.2d 1263, 1267–68 (Ohio Ct. App. 2013).
143. City of New York v. 330 Continental LLC, 60 A.D.3d 226, 227 (N.Y. App. Div. 2009).
144. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). Whether the substantial relation test is more appropriately plead under the Due Process Clause or the Takings Clause is not necessarily an issue in Texas courts, but a charge that an ordinance is not substantially related to the general welfare, etc., should be brought as a Due Process claim in federal courts for the reasons stated by Justice O'Connor in *Lingle*, and a similar pleading strategy would perhaps be wise in Texas courts as well. *See* Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 849 (5th Cir. 2016).
145. 416 U.S. at 2–3, 7.

hoods.[146] It reasoned that legislative bodies should be given broad powers to improve the public welfare, which encompasses such ideals as aesthetics, spaciousness, and cleanliness; and prevents scourges such as disease, overcrowding, and "misery."[147]

The Supreme Court, however, also placed limits on the city's power to define the occupant's characteristics for single-family dwellings in *Moore v. City of East Cleveland*.[148] Under East Cleveland's zoning ordinance, single-family use was restricted to only certain categories within a nuclear family, thus criminal sanctions were brought for a grandmother and grandson living under the same roof.[149] For the Court, such an intrusion into private and family life could hardly be sustained as a rational exercise of the police power, and the ordinance was struck.[150]

Many jurisdictions set a limit on how many unrelated people may occupy a single-family residence at one time through their zoning ordinances.[151] Courts are often faced with the task of interpreting zoning statutes that define allowable uses, and the language contained in these ordinances can range in clarity from unconstitutionally vague to highly technical.[152] One case of the technical variety, *Hall v. Zoning Board of Appeals*, interpreted Edgartown, Massachusetts's zoning by-laws.[153] The court found that if the number of occupants exceeded the allowable number for a residential dwelling, and the ordinance defined "transient residential facilit[ies]" as "lodging houses with a capacity of more than four guest beds," then the residential use was transformed into an impermissible "transient residential facility."[154] Under Edgartown's zoning by-laws, people in residential districts could have up to four boarders, but plaintiffs in *Hall* were found to have exceeded these allowable limits when the evidence showed that the subject dwellings housed between seven to ten occupants, although only four names appeared on the lease.[155] The court found that exceeding the occupancy limits set out by the zoning by-law was a use that would ordinarily be inconsistent with single-family residential use.[156]

But where a zoning statute fails to define its terms in seeking to limit STR activity with clear language, the city can be frustrated in its planning efforts by conscientious litigants intent on profiting from their property.[157] Whatever Sandusky, Ohio was attempting to proscribe, the ap-

146. *Id.* at 9.
147. *Id.* at 5–6 (citing Berman v. Parker, 348 U.S. 26, 31, 32–33 (1954)).
148. 431 U.S. 494 (1977).
149. *Id.* at 498–99.
150. *Id.* at 499.
151. 83 AM. JUR. 2D *Zoning and Planning* § 149.
152. *See* Viviano v. Sandusky, 991 N.E.2d 1263, 1268 (Ohio Ct. App. 2013); Hall v. Zoning Bd. of Appeals, 549 N.E.2d 433, 435 (Mass. App. Ct. 1990).
153. 549 N.E.2d at 435.
154. *Id.* at 435–37.
155. *Id.*
156. *Id.* at 437.
157. *See Viviano*, 991 N.E.2d at 1268.

peals court found that it did not use clear enough language when it wrote its transient rental ordinance.[158] The ordinance defined a "Dwelling" to be a "building designed or occupied exclusively for non-transient residential use (including one-family, two-family, or multifamily buildings)."[159] Because the statute failed to define "non-transient residential use" by using a certain time frame, whether days or weeks, the court found the ordinance void for vagueness under Ohio state standards.[160]

Drafting errors, or having a court construe statutory language in a manner that the legislative body did not necessarily intend, are not confined to local ordinances, as one case in New York shows.[161] Prior to New York amending its MDL to more strictly proscribe STRs in Class A dwellings, the MDL defined the Class A multiple dwelling as "a multiple dwelling which is occupied, *as a rule*, for permanent residence purposes."[162] Furthermore, under the city's Zoning Regulation (ZR), the owners' buildings were designated as "apartment hotels" in which the *primary* use of the building was to be for permanent residency.[163] Local hotel businesses that had occupied certain apartment buildings since the 1940s, and carried on vacation rentals alongside their long-term leases, prevailed against an injunction brought by the city because of this statutory ambiguity.[164] The court found that use of the language "as a rule" and "primary purpose" meant that a minority of the building's units could be used as STRs under these statutes and that the city failed to show that a majority of the units were being used for transient purposes in violation of a clear statutory rule.[165] New York would of course amend its MDL in 2010 to more clearly state that no STRs in Class A dwellings would be permitted.[166]

As the cases in this Subsection illustrate, local governments have broad ranging powers to regulate the activity of property within single-family residential districts. But as the cases from Parts II.B. and C have also shown, cities might bind themselves to observing pre-existing property rights that frustrate planning because of the representations they make to the public, the permits they issue, and the uses they allow.[167] Thus, key aspects to effective planning include clear drafting of ordinances, observation of vested property rights by the use of grandfathering provisions, constitutionally permissible definitions of "family," and the use of specific occupancy caps when cities want to expand residential uses. As we saw in

158. *See id.*
159. *Id.* at 1265.
160. *Id.* at 1268.
161. City of New York v. 330 Continental LLC, 60 A.D.3d 226, 227 (N.Y. App. Div. 2009).
162. *Id.* at 228 (quoting N.Y. Mult. Dwell. Law § 4 (McKinney) (amended 2011) (emphasis added).
163. *Id.* at 229 (emphasis added).
164. *Id.* at 228, 230.
165. *Id.* at 230 ("There is no requirement under either the ZR or the certificates of occupancy that the subject buildings be used exclusively for permanent occupancy.").
166. *See supra* Part I.C.1.
167. *See supra* Part II.B–C.

Belle Terre, the city may go so far as to restrict a single-family dwelling use to only members of the same family unit with no more than two unrelated persons.[168] Given this permissible restriction, the six-unrelated-person rule set out by the Austin ordinance is generous by comparison.[169] Thus, the right to conduct STRs within those districts will be valid under either a nonconforming use theory (the city's scheme permitted commercial use, or did not regulate use, before passing an ordinance permitting only residential use) or because the city issued the property owner a permit to conduct STRs, which cannot be subsequently withdrawn arbitrarily.[170]

B. STRs Can Be Considered Accessory, Residential, or Commercial Use and Ambiguities Are Resolved on Inconsistent Bases

No unifying legal theory on how to classify STR use has emerged in the wake of the sharing economy revolution.[171] Some courts have maintained outright bans on rentals,[172] whereas other courts have held, or at least suggested in dicta, that there is nothing inconsistent about STRs and single-family residential use.[173] Courts and cities alike have asserted a range of legal interpretations that include accessory, residential, and commercial use.[174]

In other words, STR use is whatever the city says it is. Even when a court has found that STR use could be construed as consistent with single-family use, this was only because the city failed to clearly specify otherwise in its zoning ordinance.[175] For example, in *Marchenko v. Zoning Hearing Board*, a host in Monroe County, Pennsylvania utilized her personal residence under a home-sharing model and was present or easily reachable for the duration of the guest's stay.[176] The ordinance at issue defined a "single-family dwelling" as one "occupied exclusively by one family," and Pennsylvania had case law stating that as long as any use for

168. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

169. *See id.*; *cf.* Austin, Tex., Code of Ordinances § 25-2-795(G) (2016).

170. *See* Vill. of Tiki Island v. Ronquille, 463 S.W.3d 562, 579 (Tex. App.—Houston [1st Dist.] 2015, no pet.); Ziegler, *supra* note 125, § 72:1; *cf.* Mo. Rock, Inc. v. Winholtz, 614 S.W.2d 734, 739 (Mo. Ct. App. 1981).

171. *See* Zale, *supra* note 17, at 523.

172. *See, e.g.*, Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825, 830 (Ind. 2011).

173. *See* Marchenko v. Zoning Hearing Bd., 147 A.3d 947, 950–51 (Pa. Commw. Ct. 2016); *Tiki Island*, 463 S.W.3d at 580–81.

174. *See* Austin, Tex., Code of Ordinances § 25-2-3(B)(10) (2016) (STR use is a residential classification); Santa Monica, Cal., Municipal Code ch. 9.51.030 (2015) (vacation rentals classified under lodging, a commercial use); *Siwinski*, 949 N.E.2d at 830 (renting home in designated district for profit was a commercial use); *Marchenko*, 147 A.3d at 950–51 (STRs are a permitted residential use); *Denver Short-Term Rentals FAQ*, Denvergov.org, https://www.denvergov.org/content/dam/denvergov/Portals/723/documents/STR%20FAQ_2-29-16.pdf [https://perma.cc/78BH-HQ64] (Denver considers STRs as an accessory use permissible in any residential district, although this language does not appear in the city's ordinances.).

175. *See Marchenko*, 147 A.3d at 950–51.

176. *Id.* at 950.

transient purposes was not "purely transient," STR use could be permitted under the meaning of single-family use.[177] Hence, Marchenko's use of her home under the home-sharing model did not exceed the scope of how Pennsylvania would construe the meaning of single-family use unless the city set out additional qualification of the use in the ordinance.[178]

The Pennsylvania approach is similar to how a court will normally view STR activity as an accessory use—one incidental and secondary to the principal use[179]—or more traditionally, "boarding."[180] The general rule for boarding as an accessory use is that the use must be proportional to that exercised by the principal resident—when the boarding use exceeds that limit, the use becomes commercial.[181]

On the contrary, the Indiana Supreme Court found language similar to that at issue in *Marchenko* enough to construe a host's rental activity as commercial and not consistent with single-family residential use.[182] The ordinance at issue in *Siwinksi v. Town of Ogden Dunes* defined commercial use as "any activity conducted for profit or gain" and single-family dwellings as "occupied exclusively as a residence by one family."[183] Defendant homeowner argued that because at any given time only one family occupied the residence, the defendant did not violate the ordinance.[184] The court rejected this argument because it found the hosts were engaged in a commercial use since the residence was not occupied "exclusively" by a single family, but instead occupied sometimes by the owners and at other times by the renters.[185] Furthermore, the owners conceded that they derived a profit from this use, and it was therefore commercial for that reason as well.[186] How can almost identical language result in such drastically different results?

The differences between *Marchenko* and *Siwinski* can be explained by the different canons of construction used by the Pennsylvania and Indiana Supreme Courts.[187] Whereas the Indiana Supreme Court was guided

177. *Id.* at 950–51 (quoting Albert v. Zoning Hearing Bd., 854 A.2d 401, 410 (Pa. 2004)).

178. *Id.* at 951; *see Albert*, 854 A.2d at 409–10.

179. Zale, *supra* note 17, at 550.

180. ZIEGLER, *supra* note 125, § 33:35.

181. *Id.*

182. Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825, 830 (Ind. 2011).

183. OGDEN DUNES, IND., TOWN CODE § 152.002 (2011).

184. *Siwinski*, 949 N.E.2d at 829.

185. *Id.* at 830

186. *Id.*; *cf.* Brookford, LLC v. Penraat, 8 N.Y.S.3d 859, 863 (N.Y. Sup. Ct. 2014) (referring to a tenant's STR activity in violation of the MDL as commercial activity and an "illegal hotel," a common rallying cry for those taking a hard stance against STR use in their communities).

187. *Compare Siwinksi*, 949 N.E.2d at 829 (quoting State v. Carmel Healthcare Mgmt., Inc., 660 N.E.2d 1379, 1386 (Ind. Ct. App. 1996)) ("We should also remember a cardinal rule of statutory construction, which is to 'ascertain the intent of the drafter.'"), *with* Albert v. Zoning Hearing Bd., 854 A.2d 401, 405 (Pa. 2004) ("zoning ordinances are to be liberally construed and interpreted broadly to permit a landowner the broadest possible use of her land").

by legislative intent in deciding how to read the zoning ordinance,[188] the Pennsylvania courts broadly construe zoning terms to maximize property owners' freedom within the meaning of the ordinance.[189] Thus, whether STRs will be permissible within a residential district comes down to not only the language the city writes into the ordinance, but also which canon of construction the court will apply to the language. Will the court consider the intent of the drafter or give the ordinance a broad construction?[190]

In Texas, courts will be more likely to take an approach like that in Pennsylvania and construe restrictions on property owners narrowly while construing permissive language broadly because zoning regulations "are in derogation of common-law rights to use property."[191] In deciding how to litigate STR claims against a city, it is imperative for advocates to understand their state's approach to statutory construction of zoning ordinances. Because Texas's strict construction of zoning laws tends to maximize the freedom of property owners, STR advocates in Austin have one more legal arrow they can place in their quiver.[192] However, because Austin has drafted a more precise set of requirements to regulate its STR permit holders,[193] only those with valid nonconforming uses or who were previously issued permits are likely to have viable claims against the city.[194]

The residential versus commercial distinction, while providing courts with an easy mechanism for declaring STR use to be lawful or illegal, does not adequately balance the prerogatives of the city with the recognition of individual property rights. As this Comment asserts in Part I, *supra*, the way forward is for cities to take a more functional approach in drafting ordinances to account for the variable impact that different kinds of STR use have on a neighborhood. This can be done by allowing for free use of home sharing while restricting the number of transient renters, who are generally unaccountable for their guests.[195] Curbing transient rentals will remain a due process issue because property owners will still seek to challenge such restrictions. In the next Part, this Comment will address many of the policy arguments that have been asserted as justification for regulating STRs and analyzes their merits against the backdrop

188. *See Siwinksi*, 949 N.E.2d at 829.

189. *See Albert*, 854 A.2d at 405.

190. Another distinction between the Indiana and Pennsylvania cases is that in *Marchenko* the host was home sharing whereas the hosts in *Siwinski* were using the home as a transient rental—or were, at a minimum, home renting. *See Siwinski*, 949 N.E.2d at 829; Marchenko v. Zoning Hearing Board, 147 A.3d 947, 950–51 (Pa. Commw. Ct. 2016). Austin has recognized these distinctions by providing different levels of permits depending on the level of STR activity. *See* AUSTIN, TEX., CODE OF ORDINANCES § 25-2-788 et. seq. (2015).

191. *See, e.g.*, City of Kermit v. Spruill, 328 S.W.2d 219, 223 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

192. *See id.*

193. *See* AUSTIN, TEX., CODE OF ORDINANCES § 25-2-788 to -799 (2015).

194. *See supra* Part II.B.

195. *See* AUSTIN, TEX., CODE OF ORDINANCES § 25-2-788 to -799.

of the enforcement challenges nearly all cities have faced with the emergence of the sharing economy.

IV. CITIES HAVE ASSERTED A RANGE OF POLICY JUSTIFICATIONS FOR BRINGING STRs INTO THE REGULATORY FOLD

Zoning ordinances are presumed valid as long as they are substantially related to the "public health, safety, morals, or general welfare" of the communities they regulate.[196] In the context of STR regulations, cities have asserted several justifications in either prohibiting STR use or implementing a permitting scheme.[197] Cities claim that tougher regulations are necessary to deal with nuisances, such as loud parties, associated with some STR guests[198]—this has also been referred to as the nebulous "neighborhood character" justification.[199] Other policy arguments include the preservation of affordable housing,[200] safety of residences and guests alike,[201] and the generation of transient occupancy tax revenue.[202] The policy arguments with the strongest legal force, interestingly, appear to be preservation of neighborhood character and tax generation whereas the other policy arguments have had less legal or empirical force.

A. Preservation of Neighborhood Character Has Been Found to Be a Valid Exercise of the Police Power

As *Ewing v. City of Carmel-By-The-Sea* correctly observed, there is strong Supreme Court precedent favoring the municipality's capacity to preserve neighborhood character.[203] This ideal encompasses things such as aesthetics and prevention of nuisances so that "family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[204] The *Ewing* court found that the city could validly restrict the occupation of homes in a residential area to those staying longer than thirty days, even if such people were not causing nuisances, because only permanent residents have a stake in the community and stick around long enough to get involved in things like "volunteer[ing] at the library" or "lead[ing] a Scout troop."[205] The court also recognized that the city was not trying to simply ban outsiders or visitors from com-

196. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
197. *See* FTC Report, *supra* note 1, at *63–64.
198. *See id.* at 63.
199. Ewing v. City of Carmel-By-The-Sea, 286 Cal. Rptr. 382, 386 (Cal. Ct. App. 1991) ("non-residential uses may have an increasingly deleterious impact on a residential district 'until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed' ") (quoting *Euclid*, 272 U.S. at 394).
200. Samaan, *supra* note 8, at 16–19.
201. Brookford, LLC v. Penraat, 8 N.Y.S.3d 859, 862–63 (N.Y. Sup. Ct. 2014).
202. Office of the Attorney General of the State of New York, *supra* note 29, at 9.
203. *See Ewing*, 286 Cal. Rptr. at 386 (citing *Euclid*, 272 U.S. at 394).
204. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).
205. *Ewing*, 286 Cal. Rptr. at 388.

ing to their city, it was only seeking to confine such activity to commercial areas.[206] Although such standards as "neighborhood character" can often be hard to define—and should therefore present concerns for any legal scholar—judges (even Supreme Court Justices) and city officials often find these appeals persuasive.

The Austin City Council was probably influenced most by a desire to preserve neighborhood character in passing its STR ordinance when it listened to its citizens at the public hearings.[207] Even still, under Texas law, "[t]he existence of a nuisance is not a necessary prerequisite to the enactment of zoning regulations."[208] Therefore, cities need not wait for the nuisance to present itself before enacting zoning ordinances to place reasonable limits on transient renting.

B. Disruption of Traditional Industries Will Spawn New Forms of Taxation

STR activity, especially with the ease of transaction brought about by Airbnb and other platforms, has made a tremendous impact on our economy.[209] The platforms have clearly benefited the everyday consumer, who may now be able to afford lodging in an expensive city where before a hotel room was prohibitively expensive.[210] But platforms have also disrupted the traditional hotel industry.[211] Cities notice this effect most in the accompanying loss of tax revenue,[212] and traditional hotels often complain of the unfair effect of having to compete with an industry peer that is not subject to regulation such as the transient occupancy tax.[213]

The ability of the city to collect this missing tax revenue, however, depends on the ability to enforce permitting schemes by locating and investigating defiant (or ignorant) hosts. Airbnb claims to be supportive of requiring its hosts to pay their fair share of taxes and asserts its amenability to working with cities in this endeavor,[214] but this may only be true to a certain degree.[215] Airbnb was embroiled in a high-profile dispute with New York's Attorney General over a subpoena requesting host information so that authorities could enforce the ban on STRs in class A dwellings.[216] But Airbnb prevailed in the trial court below and was not required to disclose host information that authorities were unable to glean from the bare online listings.[217] Although the city could not sub-

206. *Id.* at 388–89.
207. *See* City of Austin, September 15, 2015 City Council Meetings, *supra* note 61.
208. 77 Tex. Jur. 3d Zoning §2 (citing Lombardo v. City of Dallas, 73 S.W.2d 475 (1934)).
209. FTC Report, *supra* note 1, at *2.
210. *See* FTC Report, *supra* note 1, at *1.
211. FTC Report, *supra* note 1, at *53; *see also* Zervas et al., *supra* note 54.
212. Hirshon et al, *supra* note 26, at 11–12.
213. FTC Report, *supra* note 1, at *10.
214. Palombo, *supra* note 49, at 297.
215. *See* Airbnb, Inc. v. Schneiderman, 989 N.Y.S.2d 786, 788–89 (N.Y. Sup. Ct. 2014).
216. *Id.* at 793.
217. *Id.*

poena Airbnb for host information in New York City, the federal court in the Northern District of California held that San Francisco could fine Airbnb for collecting a fee from hosts who were found to be in violation of the city's permitting requirement.[218]

Despite the success in the San Francisco case, the practical reality is that cities attempting to enforce permitting schemes, host presence requirements, or general prohibitions face an impossible task in eradicating all illegal forms of STR use.[219] Even if the city wanted to ban STRs altogether, the use would probably continue in large numbers despite enforcement efforts. The city therefore has a much stronger incentive to utilize a permit scheme to (a) control the prevalence of STR use in particular zones, and (b) collect tax revenue it would otherwise lose if there were an outright prohibition.

C. Guest Safety Is a Tenuous Policy Justification

As this Comment explained in Part I, New York City authorities face unique challenges in seeking to create the safest and healthiest environment in a city of millions of people living literally on top of each other. In *Brookford, LLC v. Penraat*, the court explained as much and elaborated that, unlike as required in the city's hotels and other regulated lodging facilities, Class A dwellings used for STRs do not meet the same high level of code specifications for ensuring fire safety.[220] Unlike all of the other cases discussed in this Comment, *Penraat* concerned a landlord-tenant dispute where the landlord sought to enjoin his tenant from engaging in STRs in violation of the MDL.[221] The court found that the defendant's activities were a threat to the safety of not only the guests but also the permanent residents of the building who "must endure the inconvenience of hotel occupancy in their buildings."[222]

The concern of fire code safety was also integral to the New York Attorney General's report, which included an affidavit and statistics of fire department and code officials in support of the findings.[223] While these findings showed that fire safety code requirements were a necessary response to deadly incidents in New York's past, and likely saved hundreds

218. Airbnb, Inc. v. City of San Francisco, No. 3:16–cv–03615–JD, 2016 WL 6599821, at *7–8 (N.D. Cal. Nov. 18, 2016).

219. *See id.* at *2 (San Francisco estimates only 20% of Airbnb rentals are validly registered); Hirshon et al., *supra* note 26, at 22.

220. 8 N.Y.S.3d 859, 862–63 (N.Y. Sup. Ct. 2014).

221. *Id.* at 859. It should be noted that some cities, to include Indianapolis and Washington, D.C., have taken the position that STR issues do not necessarily need to be resolved by city regulation and that "issues may get solved by private interactions between renters and their landlords." Hirshon et al., *supra* note 26, at 22–23. Other legal doctrines that could provide a solution outside of municipal intervention are the laws governing common-interest communities and common-law nuisance. *See* Restatement (Third) of Property (Servitudes) § 6 (Am. Law Inst. 2000); Restatement (Second) of Torts § 821D (Am. Law Inst. 1979).

222. *Penraat*, 8 N.Y.S.3d at 863.

223. Office of the Attorney General of the State of New York, *supra* note 29, at 21–30.

of lives over the past decades, the report did not include any incidents of STR guests being harmed as a result of their presence in a Class A dwelling.[224] The safety justification is not as persuasive as other reasons asserted in favor of STR intervention. It seems unlikely that an STR guest, using an apartment in nearly the same manner as the permanent occupant would, is at any greater risk of dying in a fire than any of the other residents or children living in the building. This is not to say, however, that if an owner deliberately modifies the dwelling so as to violate existing codes and to maximize the usable space for STRs, a significant fire risk would not be created.

D. Little Conclusive Evidence That Rise of STRs Has Impacted the Supply of Affordable Housing

Proponents of stricter regulations for STR activity have asserted the affordable housing argument in Austin,[225] New York,[226] and the Los Angeles area.[227] The argument goes like this: if people owning several pieces of valuable real-estate are allowed to use those properties for the more profitable enterprise of transient renting, then the long-term residents of the city are harmed because there are then fewer units available and the corresponding effect is a rise in the price of rent.[228] Another possible effect is that people living in the more upscale residential neighborhoods see a drop in their property values because a neighbor uses the property for STRs, resulting in a higher transient presence in the neighborhood.

On the other hand, STR advocates such as Airbnb and others deny that STR use has any effect on affordable housing, and they assert that the real effect is actually to the contrary—under a home-sharing model, a person could earn extra income to enable the person to meet increasing costs of living.[229] But the consensus appears to be that any number of factors might affect the availability of affordable housing in a city, as even the National League of Cities conceded, and, therefore, more research is needed to determine what, if any, impact there is.[230]

CONCLUSION

Internet-based short-term rentals have changed many lives for the better: certainly the platforms themselves have been enriched, hosts can now derive income where before they may not have been able to, and guests

224. Office of the Attorney General of the State of New York, *supra* note 29, at 21–30.

225. Claire Ricke, *Lawsuit: Austin's Short Term Rental Ordinance Is 'Illegal'* (June 20, 2016), http://kxan.com/2016/06/20/lawsuit-trying-to-block-austins-short-term-rentals [https://perma.cc/U9L5-4VDN].

226. Benner, *supra* note 31.

227. Samaan, *supra* note 8, at 16–19.

228. *See* FTC Report, *supra* note 1, at *64; *see also* Zale, *supra* note 17, at 532–33 (the sharing economy benefits those with the most desirable assets more than the "regular folk").

229. *See* FTC Report, *supra* note 1, at 64.

230. Hirshon et al., *supra* note 26, at 18–19.

as consumers now have alternatives for accommodation when they travel at lower price points. But the new economic order did not emerge without resistance from those who may have been affected negatively. The person whose next-door neighbor abuses his STR permit by renting to thirty guests in a single-family home, the budget motel owner who saw his market share challenged, or the landlord whose tenant violates the lease are each potential victims.

Professor Zale tells us that the commercial/noncommercial distinction applies in a wide array of legal contexts concerning the sharing economy but that a clear point at which to draw the line has eluded us.[231] As we saw with the case studies in Part I, cities will continue to struggle to find the sweet spot of protecting the property rights of citizens while protecting the quality of life of their neighbors, with some jurisdictions skewing more to one side than the other.[232] Cities attempting to take bold stances against STR use may get themselves into trouble with regulatory taking claims and, therefore, they should be mindful of pre-existing property rights.[233] Although municipalities have a high level of deference in zoning decisions, a litigator might prevail over new STR regulations by attacking their drafting errors.[234]

This Comment has argued that while the authority to enact zoning laws to restrict STRs is extensive, it should be exercised in a way that addresses the complexity of the phenomenon. As shown, a failure to do so results in either constitutional challenges or void ordinances, which send underpaid and overworked city attorneys back to the drawing board. The City of Austin has taken some of the right steps even if, in other regards, the ordinance may be unconstitutional. Austin's STR ordinance is useful in that it recognizes the gradients of use that are comparable to the three models this Comment proposes: it more heavily restricts Type II uses—transient rentals—than Type I home-sharing rentals.[235] This is the best way to ensure that those with the most accountability are given the most leeway in conducting STRs with minimal impact, whereas those who are largely detached from the community can only profit by renting an income property to a long-term resident. Only by more thoroughly accounting for the new ways in which property owners are using their homes will cities be able to find their way forward in solving the STR controversy.

231. Zale, *supra* note 17, at 523.
232. *Supra* Part I.
233. *Supra* Part II.
234. *Supra* Part III.
235. *See* AUSTIN, TEX., CODE OF ORDINANCES § 25-2-788 to -799.