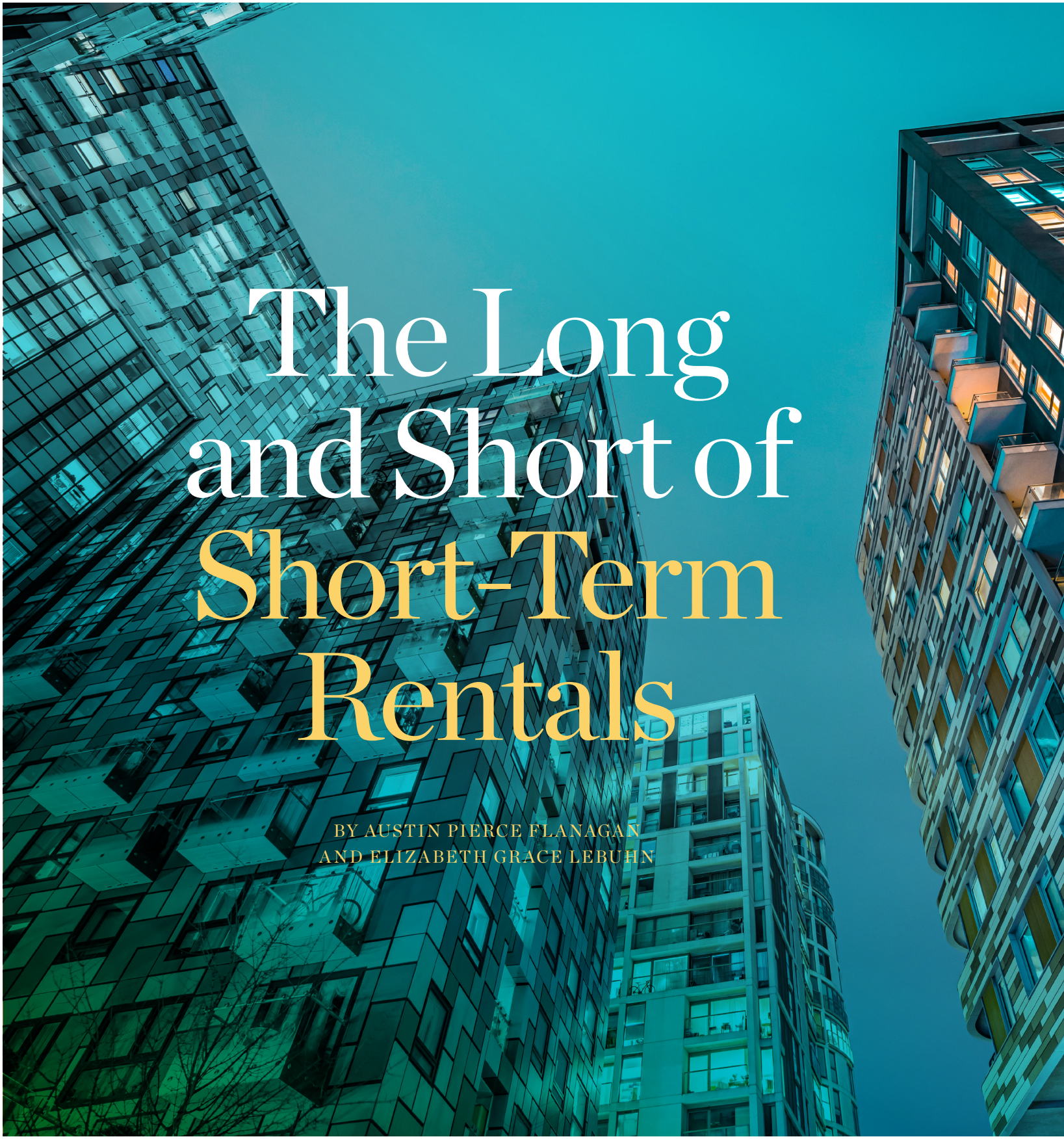

The Long and Short of Short-Term Rentals

BY AUSTIN PIERCE FLANAGAN
AND ELIZABETH GRACE LEBUHN

This article provides an overview of common legal challenges to short-term rental regulations across the country. With courts in other jurisdictions increasingly striking down restraints on short-term rentals, the risk associated with these regulations in Colorado is at a crossroads.

There are well over one million actively listed short-term rentals (STRs) in the United States, and that number is expected to grow.[1] The term STR generally refers to a residential property made available for occupancy for 30 days or less.[2] While online STR platforms have been around since the 1990s, the STR market exploded in 2008 with the emergence of home-sharing platforms like Airbnb. As property owners capitalized on the new economic opportunity, many communities and their local governments recoiled at an unwelcome change of character and scrambled to place parameters around STRs. Not long after these constraints emerged, challenges to invalidate them followed.

This article examines common legal challenges to STR regulations, providing the framework of potential legal ramifications these regulations create.[3] Because Colorado has seen relatively few published court decisions on STRs, this article analyzes caselaw nationally and contemplates how those holdings could apply in Colorado.[4]

Challenges to STR Regulations

Local governments have the authority to impose reasonable restrictions on land uses, including STRs, by regulating the location, type, and manner of permitted uses through their police power.[5] However, the police power is not without limitation, and regulated landowners may raise a variety of challenges to invalidate such regulations. The following addresses common challenges to STR regulations and is organized by the likelihood of each challenge being successful, starting with the least successful and specifying when a case arises in a Colorado court.[6]

Regulatory Takings

Overreaching zoning regulations could be considered one of two types of regulatory takings. The first results when a landowner has a compensable property interest and the regulation deprives the landowner of 100% of the property's use (often called a per se taking).[7] The second results when the landowner has a compensable property interest and less than 100% of the value is diminished.[8] In that case, the court will weigh three factors to determine if the regulation amounts to a regulatory taking, including "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[9] Often the determinative factor, the regulation's economic effect must result in a severe decline in the property's value for the court to consider the regulation a taking.[10] Precedent disfavors a regulatory taking finding unless the diminution in value is greater than 93%.[11]

It is unlikely that a court would find a restriction on STRs, including a scheme to phase out STR licenses or even a total ban on STRs, a regulatory taking. For instance, the court in *Cope v. City of Cannon Beach* did not find a regulatory taking even with a total STR ban and phase-out of current STRs because the city's scheme did not amount to a severe decline in property value.[12]

Exaction Takings

If a local government imposes conditions on a land use approval for STRs, those conditions may be challenged as an exaction. In Colorado, through the land use approval process, local governments can require developers to pay for the costs of public improvements and facilities needed for new developments.[13] When a local government requires, as a condition of approval, the dedication of private property for public use or a fee-in-lieu thereof (an "exaction"), there

is a presumption that the condition effects a compensable taking.[14] This presumption can be overcome if the local government proves that (1) there is an "essential nexus" between the dedication or payment and a legitimate government interest, and (2) the dedication or payment is "roughly proportional" both in nature and extent of the impact to the proposed development or use of such property.[15]

In *Krupp v. Breckenridge Sanitation District*, one of the few Colorado cases involving STRs, the Breckenridge Sanitation District (the District) imposed a water plant investment fee on new developments as a condition of their land use approval. This was done so that the developers responsible for increased wastewater would pay for expanding the existing wastewater treatment facilities.[16] STRs were apportioned higher fees than long-term rentals because of their higher estimated wastewater usage.[17] STR developers challenged the higher fees as an impermissible exaction under the Takings Clause.[18]

The Colorado Supreme Court upheld the District's fee because it was legislatively established with evidence demonstrating higher wastewater impact from STRs than from long-term rentals.[19] Thus, the court found there was an essential nexus between the fees and the purpose of supplying wastewater facilities and that the higher fees for STRs were roughly proportional to the impact of STRs.[20]

Whether raised as an exaction or regulatory taking, challenges to invalidate STR regulations or conditions of approval are unlikely to be successful unless the local government imposes excessively burdensome and unsubstantiated requirements.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment ensures every person equal protection under the law, essentially requiring all similarly situated persons be treated similarly.[21] If a local law does not involve a suspect classification[22] or a fundamental right,[23] courts will apply the rational basis test to an equal protection challenge.[24] The rational basis test is deferential to local law, which is presumed valid and will be upheld if there is any "reasonably conceivable state of facts that could provide a rational basis for the classification."[25] The municipality need not articulate the reasoning behind the ordinance because "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[26]

In *Draper v. City of Arlington*, homeowners alleged an equal protection violation after the city amended its STR ordinance to limit STR locations and require operational standards but did not apply such restrictions to long-term rentals.[27] The court found no equal protection violation because homeowners who leased their properties on a short-term basis were not similarly situated to those who leased their properties long-term, largely because STRs had different impacts on the neighborhood than did long-term rentals, including nuisance violations and over-parking.[28] Even if similarly situated, the court found that protecting the historical character of low-density residential neighborhoods was a legitimate purpose of the STR ordinance.[29]

Similarly, in *Murphy v. Walworth County*, the court found that STR homeowners were not similarly situated based on differing usage of electricity, water, and gas; the number of automobiles in the driveway; amounts of trash generated; and the short-term renters' lower interests in preserving the quality of life in a neighborhood (because they would soon leave).[30]

Calvey v. Town Board of North Elba presented a slightly different analysis. Calvey alleged that other rental homes in the town, zoned for the same purpose and taxed at the same rate, were substantially similar to properties that did not have the same restrictions on use as under the STR ordinance.[31] The court determined that such distinctions, if found arbitrary, were sufficient to sustain an equal protection claim.[32] Though the court denied an initial motion to dismiss the equal protection claim, the case was dismissed before reaching the merits.[33]

These cases suggest that an equal protection challenge to an STR ordinance is unlikely to succeed. At the outset, courts seem skeptical that short-term and long-term renters are similarly situated. *Calvey* describes similarities between short-term and long-term renters (e.g., the same zoning district, use, and tax rate), which may make this showing more likely, while *Draper* and *Murphy* give examples of how the two types of renters are dissimilar (focusing on neighborhood impacts like parking, traffic, and nuisances).

If a challenger demonstrates similarly situated short-term and long-term renters, they must then show no "reasonably conceivable state of facts that could provide a rational basis" for the distinction between the two renters.[34] There is no guidance in relevant caselaw indicating how a challenger could make such a showing.

Substantive Due Process

Substantive due process requires that a government not arbitrarily or capriciously deprive a person of the legitimate use of their property.[35] In *Ewing v. City of Carmel-by-the-Sea*, decided over 30 years ago, homeowners alleged that a zoning ordinance prohibiting rentals for fewer than 30 days was an unconstitutional substantive due process violation.[36]

The homeowners argued that the city's prohibition of STRs arbitrarily restricted STRs while allowing other types of longer-term rentals and transient commercial uses in the same zoning district.[37] The homeowners also complained that the city drew an arbitrary line by permitting rentals of 30 consecutive days, but not 29 or less.[38]

The court found that prohibiting STRs in part of a low-density residential district was reasonable because it furthered the city's purpose of preserving the area's residential character.[39] In upholding the ban, the court emphasized the threats STRs pose:

> Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.[40]

Thus, a substantive due process challenge is likely to fail so long as a municipality cites a purpose for the STR regulation reasonably related to promoting the public health, safety, and welfare of the community.[41] Still, it is imag-

> Courts have split on whether STRs are rightly classified as commercial or residential, and their rulings differ depending on whether the STR regulation is promulgated by a local government versus an HOA.

inable that aspects of an STR regulation, like the duration of occupancy, could be difficult for a municipality to reasonably relate to the purpose for the regulation.

Dormant Commerce Clause

Under the Dormant Commerce Clause, state and local governments may not discriminate against or impose undue burdens on interstate commerce.[42] A state or local law that does so is presumed invalid and will be upheld only if it advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives.[43]

In *Rosenblatt v. City of Santa Monica*, an STR owner challenged the city's STR ban, which exempted "home sharing," where a primary resident must reside in the dwelling.[44] The court found that although STRs implicate interstate commerce in a number of ways, the ordinance did not violate the Dormant Commerce Clause because out-of-staters were not prohibited from home sharing in their out-of-state homes and they could arrange for another person, other than the owner, to serve as the primary resident.[45]

In contrast, in *Hignell-Stark v. City of New Orleans*, a Dormant Commerce Clause challenge succeeded where the city amended its STR regulations to permit STRs in residential zoning districts only when the owner occupied the STR as their primary residence.[46] The court found the owner-occupancy requirement was facially discriminatory against out-of-state property owners by forbidding them to compete in the city's STR market.[47] Though the court concluded that the city's purposes—preventing nuisances, promoting affordable housing, and protecting neighborhoods' residential character—were legitimate, it held that such purposes could be adequately served by nondiscriminatory alternatives.[48]

The Fifth Circuit's denunciation of owner-occupancy requirements in *Hignell-Stark* casts doubt on this common STR requirement, and the full effects of the decision are not yet realized.[49] Yet, in *Rosenblatt* the Ninth Circuit did not find a Dormant Commerce Clause violation where the city required that a full-time resident, not necessarily the owner, reside at the STR. Thus, while owner-occupancy requirements are likely on shaky legal ground, a very similar permanent resident requirement is likely to be legally permissible.

Prohibition of STRs as "Commercial" Use

Municipalities often differentiate between commercial and residential uses in their land use codes to designate respective areas for these intended uses. Like local government regulations, homeowners associations (HOAs) often prohibit or limit commercial uses through private covenants.

Depending on the jurisdiction, STRs have been defined as commercial or residential uses, but sometimes they are not defined at all. Various challenges and legal standards have been applied to determine whether STRs should rightly be considered commercial or residential. For simplicity, this article analyzes all types of challenges based on the property's land use classification.

Courts have split on whether STRs are rightly classified as commercial or residential, and their rulings differ depending on whether the STR regulation is promulgated by a local government versus an HOA.

HOA classifications. In *Houston v. Wilson Mesa Ranch HOA*, the Colorado Court of Appeals addressed whether STRs could be prohibited under HOA covenants that defined the community as a residential area and prohibited commercial use.[50] Property owners sought a declaration that the HOA could not bar STRs based on a commercial use prohibition because the covenants did not expressly prohibit STRs and they were rightly classified as residential.[51] The court found that although the HOA was to "be developed and maintained as a residential area," this did not preclude STRs, and nothing suggested STR renters used the property for anything besides ordinary residential purposes.[52] Thus, an HOA prohibiting commercial uses does not in itself bar STRs.[53]

Local government classifications. Courts have reached different conclusions when plaintiffs raise similar challenges under local government regulations.[54] In *Slice of Life v. Hamilton Township Zoning Hearing Board*, the court examined whether an STR was permitted within a residential zoning district that permitted unrelated persons to live together as a "single housekeeping unit."[55] The court held that a single housekeeping unit is limited to a group of individuals functioning as a single household and "sufficiently stable and permanent so as not to be fairly characterized as purely transient."[56] Based on their transient nature, STRs were more properly classified as commercial rather than a single housekeeping unit.[57]

Similarly, in *Working Stiff Partners, LLC v. City of Portsmouth*, the city issued a cease and desist to an STR zoned as "general residential," alleging that STRs are not residential.[58] Ultimately, the court classified STRs as commercial, finding

them analogous to accommodation-type uses that contemplated daily lodging guests.[59]

There are no published decisions in Colorado regarding whether STRs are residential or commercial in the context of land use regulations. However, the Colorado Court of Appeals has held that an STR used predominantly as a second home is properly classified as residential for property tax purposes.[60] The court reasoned that a property is not transformed from residential to commercial because of financial benefit, the advertisement of the property, or the remittance of a lodging tax.[61] Although not dispositive in the land use context, this holding suggests that Colorado courts may be likely to consider STRs residential uses.

Though a fact-intensive inquiry, in Colorado it is likely that STRs will be classified as residential when such a distinction is not made clear in the regulatory language, especially in the context of HOA covenants.

Retrospective Application of STR Regulations

Statutes or ordinances create vested rights when they explicitly provide for such a right.[62] Implicit vested rights are created through the common law vested rights doctrine, requiring a more complicated analysis.

There is no bright-line test for determining whether a common law right is vested.[63] Instead, courts look for the existence of three elements: (1) that the government authorized, through zoning or issuance of a building permit, a particular use of the owner's property; (2) that the property owner's reliance on the government's authorization was reasonable and in good faith; and (3) that the property owner's reliance on the government's authorization was to the property owner's substantial detriment.[64]

No matter how they are created, vested rights protect a property owner from regulatory changes that interfere with or restrict prior-approved plans.[65] A vested right exists independently of the law under which it was acquired.[66] Thus, even a change in the underlying law will not affect a previously vested right.[67]

The Colorado Constitution prohibits state and local governments from enacting any law that is "retrospective in its operation."[68] Retrospective legislation impairs vested rights or associates a new duty or burden with a past transaction.[69]

While municipalities have broad authority through their police power to amend local land use regulations, such regulations may be struck down as impermissibly retrospective.[70] Colorado courts use "retrospective" to describe unconstitutional retroactive legislation, distinguishing it from properly applied retroactive legislation.[71] A retroactive application of a law that implicates (but does not "impair") a vested right is permissible only if the law bears a rational relationship to a legitimate government interest.[72] The court applies "a balancing test that weighs public interest and statutory objectives against reasonable expectations and substantial reliance."[73]

Where is the line for STRs? Several recent Texas cases help answer this question.[74] In *Village of Tiki Island v. Ronquille*, the appeals court affirmed an injunction enjoining enforcement of the village's STR ordinance, which prohibited STRs but exempted 15 identified properties.[75] The court found all preexisting STRs, regardless of if they were exempt in the ordinance, had a vested right to continue.[76] The court relied on property owners' substantial investments into STRs, potential loss of income from the ban, and reliance on STRs being allowed historically.[77]

In *Zaatari v. City of Austin*, the city amended its STR ordinance to create three classes of STRs.[78] At issue was the type 2 class, which applied to STRs in principal residential units that were not owner-occupied.[79] The ordinance suspended future licensing of new type 2 STRs and established a termination date for all existing type 2 STRs.[80] Property owners, joined by the state, argued, in part, that the eventual termination of all type 2 STRs was unconstitutional based on a clause in the Texas Constitution—similar to Colorado's—prohibiting retrospective laws.[81]

The court found that the type 2 STR restrictions were unconstitutionally retroactive because they undermined settled property rights without furthering a government interest.[82] The city failed to justify its claim that the type 2 rentals created adverse neighborhood impacts.[83] And the court found the city was already addressing such impacts through other ordinances—like generally applicable parking, noise, and littering ordinances—and the city failed to show how the type 2 rental restrictions would further address such issues.[84]

The court reasoned that even if the type 2 restrictions furthered a legitimate government interest, the ordinance significantly disrupted long-settled property rights—namely, a property owner's right to rent their property on a short-term basis.[85] Thus, even if the type 2 rental prohibition was shown to further a legitimate government interest, the harm created (e.g., disrupting the long-settled right to rent non-owner-occupied STRs) would be greater than that alleviated (e.g., reducing neighborhood impacts like noise, parking, and littering).[86]

In *City of Grapevine v. Muns*, a city zoning ordinance stated that all unlisted uses were prohibited.[87] Historically, the city did not explicitly regulate STRs, was aware of several residences used as STRs, and informed residents multiple times that it did not regulate STRs.[88] After a surge of STRs, the city amended its zoning ordinance to "clarify" that STRs were not and had never been permitted in the city, ordering all STRs to cease operations.[89] Property owners sued, alleging the city's ban was unconstitutionally retroactive.[90]

The court of appeals reasoned in favor of the property owners, stating that even though they did not have vested rights to operate STRs under the zoning ordinance, they had a fundamental leasing right arising from their property ownership that amounted to a vested right, similar to a Colorado common law vested right.[91] Such right confers to the property owners a "well-settled right to lease their property" and an ordinance impairing such right after it is established could be found to be unconstitutionally retroactive. The court did not further evaluate the merits of the argument at this stage.[92]

Worthy of note, the court in *Hignell-Stark* found that there was no property right in the renewal of an STR license because the municipality made clear that the license granted a revocable "privilege, not a right" and the property owners' interests in the licenses were "not so longstanding that they can plausibly claim custom had elevated them to property interests."[93] Still, the court made clear that its analysis was limited to whether a property right

was established for the purpose of a takings claim and not impairment of a vested right.[94] Notably, the legal standards for the two are distinguishable and the *Hignell-Stark* holding is unlikely to apply in a vested rights analysis.

In Colorado, like Texas, courts will invalidate a retroactive regulation that impairs a vested right unless such regulation bears a rational relationship to a legitimate government interest that outweighs a property owner's reasonable and substantial reliance on expectations.[95] Caselaw indicates that STRs established prior to the enactment of a restriction impairing their operation are permitted to continue if their operation is based on reasonable expectations and reliance that the use is at least not explicitly prohibited.

In *Tiki Island* and *Grapevine*, the municipality never expressly permitted STRs, yet the court found that a right existed, using factors similar to those that create a common law vested right in Colorado. Further, total bans or restrictions designed to phase out STRs were found to unconstitutionally impair that right retroactively. *Zaatari* demonstrated that courts may be reluctant to take a municipality's public purpose for limiting a vested right at face value (as opposed to an equal protection analysis, for instance). Importantly, the *Zaatari* court found holes in the city's stated purpose by comparing generally applicable ordinances that served the same or similar purpose and would not have impaired a vested right.

Recap of Challenges Analyzed

The requirements placed on STRs, and the legal standards in the challenges to invalidate them, are outcome determinative. At one end, regulations that are retroactive in nature and apply to STRs that historically operated legally are susceptible to being invalidated as unconstitutionally retrospective. Similarly, regulations that attempt to include STRs as a part of a general ban on commercial uses are unlikely to withstand a challenge. Likewise, *Hignell-Stark* indicates that owner-occupancy requirements are prone to be struck down under the Dormant Commerce Clause, although *Rosenblatt* suggests that primary resident requirements would not have the same result. Somewhere in the middle are substantive due process challenges, whose outcomes depend heavily on the reasonableness of the regulation in furthering the public purpose. At the other end, takings, whether regulatory or exactions, and equal protection challenges are unlikely to be successful.

Where Does This Leave Colorado?

A storm sufficient to upheave many Colorado municipalities' STR regulations may be on the horizon.[96] With a robust tourism economy, ample STRs, and successful STR challenges popping up across the nation, it seems that such a storm could reach Colorado sooner than later. Yet, a lack of challenges to STRs in Colorado leaves municipalities with little guidance on how to regulate them (and perhaps gives municipalities carte blanche over such regulations in the meantime).

STR regulations, both public and private, have changed dramatically since the *Carmel-by-the-Sea* decision over 30 years ago.[97] Increasingly, courts have seemingly shifted the narrative from one of protecting neighborhood character to protecting a long-held property right to rent out your home.[98]

Both municipalities and property owners may benefit from understanding other jurisdictions' STR challenges and decisions. Risk-averse municipalities should carefully consider to what extent their current regulations are subject to legal risk, while potential challengers have the opportunity to assess which claims are more viable than others. Whether a local government, property owner, community member, or Airbnb aficionado, all interested parties should take note of the national STR legal landscape and consider how that landscape is quickly evolving.


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NOTES

1. Zarcynski, "U.S. Short-Term Rental Market Poised for Further Growth: Pricing, Location Might Dictate Demand Patterns Instead of Pandemic Considerations," CoStar (Oct. 12, 2022), https://www.costar.com/article/1874040746/us-short-term-rental-market-poised-for-further-growth.

2. "Short-term rental" is a bit of a misnomer in that the property is ordinarily not rented via lease agreement; instead, the "rental" is most often a license to occupy the premises for a short period.

3. Rental platforms themselves are far from complacent on STR regulations, but VRBO, Airbnb, and HomeAway policies are not this article's focus (though the influence of such platforms on the outcome of legal challenges is certainly relevant to the overall discourse). Likewise, this article does not examine challenges brought under the Colorado Common Interest Ownership Act, such as *Town of Vail v. Vill. Inn Plaza-Phase V Condo. Ass'n*, 498 P.3d 1123 (Colo.App. 2021).

4. For a broad overview of current local regulations on STRs in Colorado, see Larkin and Brimah, "The State of Short-Term Rentals in Colorado," 51 *Colo. Law.* 34 (Apr. 2022), https://cl.cobar.org/features/the-state-of-short-term-rentals-in-colorado.

5. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See also Nopro Co. v. Town of Cherry Hills Vill.*, 504 P.2d 344 (Colo. 1972).

6. This article highlights certain claims within each case to help create a framework for discussion of STR regulations, but it does not provide an exhaustive analysis of every claim that the plaintiffs brought in their respective suits.

7. U.S. Const. amend. V; *Vane Min. (US), LLC v. United States*, 116 Fed. Cl. 48 (2014); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992).

8. *State Dep't of Health v. The Mill*, 887 P.2d 993, 999 (Colo. 1994). *See also McCarthy v. City of Cleveland*, 626 F.3d 280 (6th Cir. 2010).

9. These are known as the three *Penn Central* factors. *See Penn Cent. Trans. Co. v. N.Y.C.*, 483 U.S 104,

137–38 (1978).

10. *Id.* at 138.

11. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 66 (Colo. 2001). The US Supreme Court has not found a regulatory taking where the diminution in value is between 75% and 92.5%.

12. *Cope v. City of Cannon Beach*, 855 P.2d 1083 (Or. 1993). The Court held that even with a prohibition on STRs, the property retained significant economic value, including long-term rental potential.

13. *Bd. of Cnty. Comm'rs v. Bainbridge, Inc.*, 929 P.2d 691, 698 (Colo. 1996); *Bennett Bear Creek Farm Water and Sanitation Dist. v. City and Cnty. of Denver*, 928 P.2d 1254, 1268 (Colo. 1996).

14. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Wolf Ranch, LLC v. City of Colo. Springs*, 220 P.3d 559, 562 (Colo. 2009). *See* CRS §§ 29-20-201 et seq. (commonly referred to as RIPRA), which has a specific statutory claims procedure.

15. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374; *Wolf Ranch, LLC*, 220 P.3d at 562.

16. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 690–91 (Colo. 2001).

17. *Id.* at 691.

18. *Id.*

19. *Id.* at 694.

20. *Id.* at 697.

21. US Const. amend. XIV. *See also Plyler v. Doe*, 457 U.S. 202, 216 (1982).

22. E.g., disparate treatment based on race, alienage, or national origin.

23. E.g., the right to vote, interstate travel, or marriage.

24. *Plyler*, 457 U.S. at 216; *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). *See also* Robinson & Cole LLP, National Association of Realtors, "Short-Term Rental Housing Restrictions" (white paper) (Sept. 2011), bit.ly/3Kgwja2.

25. *Id.*

26. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993).

27. *Draper v. City of Arlington*, 629 S.W.3d 777, 782 (Tex.App. 2021), review denied (Jan. 28, 2022).

28. *Id.* at 792. The court did not rely on the city's evidence, which showed such impacts existed and were created by STRs, but instead largely relied on neighbors' testimony explaining the differing impacts.

29. *Id.* at 793.

30. *Murphy v. Walworth Cnty.*, 383 F. Supp. 843, 851 (E.D.Wis. 2019).

31. *Calvey v. Town Bd. of N. Elba,* No. 8:20-CV-711, 2021 WL 1146283, at *7 (N.D.N.Y. Mar. 25, 2021).

32. *Id.*

33. *Id.*

34. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

35. U.S. Const. amends. V, XIV. *See also Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) (a governmental action that does not substantially advance a legitimate government interest is a substantive due process claim, not a takings claim).

36. *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App.3d 1579, 1584 (Cal.App. 1991). The authors did not find any STR cases prior to *Ewing*.

37. *Id.* at 1592–93.

38. *Id.* at 1593.

39. *Id.* at 1589–90.

40. *Id.*

41. *Id.* at 1593.

42. *Id.* (citing *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2019)).

43. *Id.* (citing *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008)).

44. *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 442–43 (9th Cir. 2019). The court noted that the primary resident could be a long-term renter or any individual who permanently used the home as their primary residence.

45. *Id.* at 445, 448 ("The ordinance penalizes only conduct in Santa Monica, regardless of whether the visitors are in-state or out-of-state.").

46. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 321, 324 (5th Cir. 2022).

47. *Id.* at 328.

48. *Id.*

49. Diedrich and King, Husch Blackwell, "Fifth Circuit Strikes Down New Orleans Ordinance Aimed at Short-Term Rental Properties" (Aug. 30, 2022), https://www.huschblackwell.com/newsandinsights/fifth-circuit-strikes-down-new-orleans-ordinance-aimed-at-short-term-rental-properties ("We expect to see in the Fifth Circuit and elsewhere a new wave of STR lobbying efforts in other cities, efforts by owners in residential subdivisions to impose new deed restrictions, and efforts by HOAs to impose new rules–along with the litigation that will inevitably follow."). The authors found no additional cases in the Fifth Circuit after *Hignell-Stark* nor any relevant caselaw from the Tenth Circuit.

50. *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 360 P.3d 255, 256 (Colo.App. 2015).

51. *Id.* The HOA fined the plaintiff for each additional STR reservation booked through VRBO after it amended its covenants to include the STR ban.

52. *Id.* at 258–59 (distinguishing *Jackson & Co. (USA) v. Town of Avon*, 166 P.3d 297, 298–300 (Colo.App. 2007) and *E.R. Southtech, Ltd. v.*

Arapahoe Cnty. Bd. Of Equalization, 972 P.2d 1057, 1059–60 (Colo.App. 1998), upon which the HOA relied, based on the lack of an explicit prohibition in the HOA covenants).

53. *Id.* The court defined "residential" as "used, serving, or designed as a residence or for occupation by residents" and "residential use" as "meaning that the use of the property is for living purposes, or a dwelling, or a place of abode." *Id.* As with the requirement of "residential use," the court declared that the dictionary definitions of "commercial" and "commercial use" do not resolve whether STRs are permitted under the covenants. *Id.* (citing *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997) ("The ordinary meaning of 'residential' does not resolve the issue between the parties. That is so because a 'residence' can refer simply to a building used as a dwelling place, or it can refer to a place where one intends to live for a long time."); *Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007) (a restrictive covenant's requirement that lots be used for "residential purposes" was "ambiguous both as to whether a residential purpose requires an intention to be physically present in a home for more than a transient stay and as to whether the focus of the inquiry in on the owner's use of the property of the renter's use. . . . Moreover, if the phrase 'residential purposes' carries with it a 'duration of use' component, it is ambiguous as to when a rental of the property moves from short-term to long-term."); *Dunn v. Aamodt*, 694 F.3d 797, 800 (8th Cir. 2012) (the phrase "residential purposes" in a restrictive covenant was ambiguous as to short-term rental of property)).

54. *See, e.g.*, *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886, 888–90 (Pa. 2019) (finding that a zoning ordinance that defines "family" as requiring "a single housekeeping unit" and limits residences to single-family homes containing "a single housekeeping unit" prohibits the purely transient use of residences for STRs and other impermanent or unstable purposes).

55. *Slice of Life, LLC*, 207 A.3d at 890–91 (citing Young, 2 *Anderson's American Law of Zoning* § 9 at 30 (4th ed. Clark Boardman Callaghan 1996) ("The prevalence of this construction, in combination with the principle that zoning ordinances should be liberally construed to permit the broadest possible use of land, makes it apparent that a 'single housekeeping unit' must be considered the plain and ordinary meaning of family in the zoning context.")). A "single housekeeping unit" is more commonly referred to as a single-family dwelling. *Id.*

56. *Id.* at 232. *See Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 515–19 (1977) (Stevens, J. concurring) (recognizing that state decisions regarding residential zoning ordinances generally require, *inter alia*, "that a single-family home be occupied only by a 'single housekeeping unit' and for 'such households to remain nontransient'"); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (non-family uses, including fraternity houses and boarding houses, have been found to be antithetical to the "residential character," because "[m]ore people occupy a given space; more cars rather continuously pass by; more cars are parked; and noise travels with crowds. . . . A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."); *Berman v. Parker*, 348 U.S. 26 (1954) (discussing the broad concept of public welfare).

57. *Slice of Life, LLC*, 207 A.3d at 903.

58. *Working Stiff Partners, LLC v. City of Portsmouth*, 232 A.3d 379, 381–83 (N.H. 2019) (The ordinance stated that "[n]o building, structure, or land shall be used for any purpose or in any manner other than that which is permitted in the district in which it is located.").

59. *Id.* at 385–86. Likewise, the Colorado Court of Appeals held that a duplex rented out as an STR was prohibited as a "lodge" based on the subdivision plat prohibiting lodging uses. *Jackson & Co. (USA) v. Town of Avon*, 166 P.3d 297, 298 (Colo.App. 2007).

60. *O'Neil v. Conejos Cnty. Bd. of Comm'rs*, 395 P.3d 1185 (Colo.App. 2017).

61. *Id.* at 1192 (relying on *Slaby v. Mountain River Ests. Residential Ass'n*, 100 So.3d 569, 579–80 (Ala.Civ.App. 2012)).

62. Colorado law requires local governments to specifically identify the types of land use approvals that will cause property rights to vest. *See* CRS § 24-68-103(1)(a).

63. *Ficarra v. Dep't of Regul. Agencies*, 849 P.2d 6, 17 (Colo. 1993).

64. Siemon et al., *Vested Rights: Balancing Public and Private Development Expectations* (Urb. Land Inst. 1982) (providing a thorough, if not exhaustive, review of caselaw). *See also Pratt v. City and Cnty. of Denver*, 209 P. 508 (Colo. 1922) (applying equitable estoppel principles to determine if a vested right exists, becoming the underlying rationale of common law vested rights). Colorado's common law vested rights doctrine is similar to what other jurisdictions, like Texas, consider a "settled property right."

65. Shultz, "Vested Property Rights in Colorado: The Legislature Rushes in Where . . ." 66 *Denv. U.L.* Rev. 31 (Jan. 1988).

66. *Specialty Rests. Corp. v. Nelson,* 231 P.3d 393, 399 (Colo. 2010).

67. *DC Auto., Inc. v. Kia Motors Am., Inc.*, 411 F.Supp. 3d 1137 (D.Colo. 2019).

68. Colo. Const. art. II, § 11. *See also City and Cnty. of Denver v. Denver Buick, Inc.*, 347 P.2d 919, 930 (Colo. 1959), *overruled on other grounds by Stroud v. City of Aspen*, 532 P.2d 720 (Colo. 1975); *In re Est. of DeWitt*, 54 P.3d 849, 854 (Colo. 2002).

69. *Ficarra*, 849 P.2d at 16.

70. *Id.*

71. *DeWitt*, 54 P.3d at 854. The terms "retrospective" and "unconstitutionally retroactive" are used interchangeably.

72. *Id.*

73. *Kuhn v. State*, 924 P.2d 1053, 1059 (Colo. 1996) (quoting *Ficarra*, 849 P.2d at 17).

74. Texas and Colorado have different legal regimes concerning retroactivity and vested rights. In analyzing whether a retroactive law is permissible, Texas courts consider whether the prior right was either vested or settled. Notably, the bar for a settled right is lower, asking whether the plaintiff had a settled expectation that the legislature would not extinguish a right previously relied on (this appears to be very similar to a Colorado common law vested right). As a spoiler of the cases analyzed, *Village of Tiki Island v. Ronquille* found there was a vested right to operate an STR despite a ban, while *Zaatari v. City of Austin* and *City of Grapevine v. Muns* found that there was a settled right to continue to rent on a short-term basis.

75. *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 575 (Tex.App. 2015).

76. *Id.* at 587.

77. *Id.*

78. *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. 2019).

79. *Id.* at 181.

80. *Id.*

81. *Id.* at 188.

82. *Id.* at 189.

83. *Id.* at 189–92.

84. *Id.*

85. *Id.*

86. *Id.* The dissent argued that the law was not retroactive and even if it was, the right being impaired is narrow and the need for long-term rentals is great enough to overcome any impairment. Thus, there was no constitutional violation. "Just because the property owners are not making as much profit as they could with unfettered rights to short-term rentals does not mean their property right has been unconstitutionally impaired."

87. *City of Grapevine v. Muns*, 651 S.W.3d 317, 327 (Tex.App. 2021).

88. *Id.* Property owners operated STRs throughout the city for at least two decades.

89. *Id.*

90. *Id.*

91. *Id.* at 343–45.

92. *Id.*

93. *Hignell-Stark*, 46 F.4th 317 at 324 ("The plaintiffs didn't have property interests in the renewal of their [STR] licenses.").

94. *Id.* at 323 ("Because property interests under the Due Process Clause and the Takings Clause are not the same, that test is not the same as the one for determining whether an interest qualifies as property for procedural due process. Instead, a property interest must be so deeply rooted in custom that 'just compensation' for appropriating necessarily includes money damages.").

95. *DeWitt*, 54 P.3d at 854.

96. *See Powell*, "Hearing for Lawsuit about Short-Term Rental Tax Reveals a Case with Little Precedent," *Steamboat Pilot & Today* (Aug. 17, 2022), https://www.steamboatpilot.com/news/hearing-for-lawsuit-about-short-term-rental-tax-reveals-a-case-with-little-precedent.

97. *Ewing*, 234 Cal.App.3d at 1584.

98. *Id. See also Vill. of Tiki Island*, 463 S.W.3d at 575; *Zaatari*, 615 S.W.3d at 172.