

# Regulating Short-Term Rentals



**Matthew B. Liponis, Esq.**  
**NYS Federation of Lake Associations**  
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# Overview

What are Short-Term Rentals (“STRs”)?

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

Enforcing STR Laws and Violations: Top Issues and Challenges

Challenging Local STR Laws: Key Lessons from the Front Lines

The STR Industry: Current Issues and Legal Updates




## What are Short-Term Rentals?

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



## Increase in STRs following the COVID-19 Pandemic

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



## Popular Listings Around New York State

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



## STRs: The Good

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



## STRs: The Bad

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



## STR Problems

- Hidden Cameras
  - “[Guest] noticed a tiny hole in the smoke detector of his Florida Airbnb. After taking it down to investigate, the Indiana couple found a hidden camera and microphone. The police arrested the homeowner and charged him with video voyeurism.”
- New Year’s Eve Party gets out of Hand
  - “Although his contract specifically stated no parties, a man threw a doozy in this Ohio Airbnb. In fact, he advertised his New Year’s Eve extravaganza on the internet and charged \$5 a person. This rockin’ eve turned into one of the largest Airbnb horror stories with over 250 guests.”
- House Sitter Lists Home on Airbnb
  - San Francisco couple only discovered this because the house sitter unknowingly rented the home to friends of theirs.
- Airbnb Guests Find Corpse in Garden
  - “A group of friends got together and rented a home in Palaiseau, France for the weekend. This excursion turned out to be the most grisly of Airbnb horror stories when one of the friends found a corpse in the garden [...]”

# REGULATING STRs





## Procedural Concerns

- State Environmental Quality Review Act (SEQRA) compliance.
  - Categorizing the Action (Type I, II, or Unlisted)
  - Declaring intent to act as Lead Agency
  - Coordination with other interested & involved agencies
  - Declaring Lead Agency status
  - Negative Declaration supported by reasoned elaboration
- Public Hearings – follow notice requirements in local laws
- General Municipal Law Section 239 compliance (full referral to County Planning Board, voting requirements, Report of Final Action)



# Zoning Concerns

## Is this a Residential or Commercial Use?

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



## Definitions are Key

- Is there an allowed use under the Town's current zoning that would permit a short term rental in the applicable zone?
- How has the Town interpreted that definition in the past (administrative precedent)?

## Definitions are Key (Cont.)



- “Although a reviewing court typically will grant great deference to the ZBA’s interpretation of a zoning ordinance — disturbing that interpretation “only if it is irrational or unreasonable — where, as here, the issue presented is one of **pure legal interpretation** of the underlying zoning law or ordinance, **deference is not required.**”
- “Further, zoning regulations, being in derogation of the common law, must be **strictly construed against the municipality** which has enacted and seeks to enforce them, and any ambiguity in the language used must be resolved in favor of the property owner.”

*See Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep’t 2012) (finding that definition of “tourist attraction” did not encompass a short-term rental property owned by Petitioner).



## Code Interpretation

- Who interprets the zoning code in the first instance?
  - Usually Code Enforcement Officer (“CEO”) or the Zoning Enforcement Officer (“ZEO”)
  - In New York City, the Department of Buildings

## Code Interpretation (Cont.)



- What is the remedy for an aggrieved party?
  - Seek review from the Zoning Board of Appeals with final determination on challenge to administrative official (usually CEO or ZEO), or variance application.
  - If unsuccessful - judicial intervention - Article 78 Proceeding and any potential appeals.
  
- Important to understand whether interpretation is strictly legal in nature or entails factual considerations.



## Code Interpretation (Cont.)

- ZBA is afforded great deference; decision disturbed only if unreasonable or irrational
- Pure interpretation vs. factual issue
- If no defined term, court will afford the term its plain or ordinary meaning
- Ambiguity resolved in favor of the property owner.

Body of caselaw attempts to strike a balance between property owner rights and ability of the public to regulate land use.



## **Municipal Legislative Authority**

- Pass Zoning Laws – Regulation of the use of land.
- Police Powers, regulate to protect the health, safety, and welfare of the community.



## Zoning Requirements

- Strong presumption of constitutional validity for zoning ordinances.
- “if the zoning ordinance is adopted for a legitimate governmental purpose and there is a ‘reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end,’ it will be upheld. [ ]”

*Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131-132 (1988).

\*CREATE A RECORD SUPPORTING FINDINGS!\*



## Regulating Land Use/Operational Details (Cont.)

- “[Z]oning boards may not impose conditions which **are unrelated to the purposes of zoning**. Thus, a zoning board may not condition a variance upon a property owner's agreement to dedicate land that is not the subject of the variance application. Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located.”
  - *St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988).
- “We find the imposition of this condition was no more than an impermissible attempt to regulate the details of the operation of the petitioner's enterprise”
  - *Old Country Burgers Co. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805, 806 (2d Dep't 1990)



## Takeaways for Municipalities

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



## Takeaways for Municipalities (Cont.)

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



## Initial Questions

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



## Tips on Fashioning Regulations

- Develop legislative findings.
- Must be specific as to the treatment of “short-term rentals.” Have a good definition.
- Develop a fee structure to administer/enforce the program.
  - *Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 40 N.Y.2d 158 (1976).
- Determine what zoning/police power mechanisms to use in regulating short-term rentals.
  - Consider requiring a special use permit and/or license to operate, which will require an application process and review of the proposal.
  - Site plan?



## **Tips on Fashioning Regulations (Cont.)**

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



## Tips on Fashioning Regulations (Cont.)

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



## Enforcement Challenges

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



## Steps to Regulation

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



# Variance Applications

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

## Use Variance Test



- (1) Reasonable Return
- (2) Alleged hardship is unique to the property in question
- (3) Relief will not alter essential character of the neighborhood; **and**
- (4) Alleged hardship was not self-created.

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



## Area Variance Test

- Balancing Test
  - (1) Undesirable change or detriment to nearby properties
  - (2) Can benefit requested be achieved via some other feasible method
  - (3) Substantial area variance sought?
  - (4) Whether the requested area variance is substantial;
  - (5) Self-creation.

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

# Case Studies





## Case Study

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

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

## Case Study (Cont.)

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

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

## Case Study (Cont.)

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

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

## Takings Claims Challenging Short-Term Rental Regulation



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

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



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



## ***Penn Central* Factors**

### **Economic Impact of the Regulation**

- The “mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Gazza v. New York State Dep’t of Env’tl. Conservation*, 89 N.Y.2d 603, 618 (1997) (citing *Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993); *Penn Cent.*, 438 U.S. at 131 (cases “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking.’”).
- *Accord, Sadowsky v. New York*, 732 F.2d 312 (2d Cir. 1984) (“[I]t is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred.”)



## ***Penn Central Factors***

### **Economic Impact of the Regulation (Cont.)**

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

# *Penn Central* Factors



## Interference with Investment-Backed Expectations

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



## ***Penn Central Factors***

### **Character of Government Action**

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



# Challenges to Local Laws

## Legal Standard of Review

- Courts will strike down local legislative enactments only "***as a last resort.***" *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 218 (1958).
- A reviewing court may not substitute its decision for that of the legislative body. *See McDonough v. Apton*, 48 A.D.2d 195, 199 (4th Dep't 1975) (if the validity of a local legislative act is "***fairly debatable,***" the judgment of the legislature which enacted it must stand).



## Takeaways for Municipalities

- When regulating short-term rentals, look to what other communities are doing.
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- Make a good record during the public hearing and in legislative findings.
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  - Even where you have a solid basis, courts are siding with property owners.
  - Can't rely on traditional deference to municipalities.
- You can prohibit them by specifically defining them.
- In many cases, there will be a need to develop a comprehensive ordinance.



## Takeaways for Owners

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



## Current Issues and Legal Updates

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

# Questions?



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Matthew B. Liponis, Esq.

[mliponis@hodgsonruss.com](mailto:mliponis@hodgsonruss.com)

518.433.2417