

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

PREPARED FOR

The National Association of Realtors®

OCTOBER 14, 2015

This paper has been prepared by Robinson & Cole LLP in its capacity as consultant to the National Association of Realtors® for informational purposes based on its general experience with land use planning, policies, and techniques, along with their implementing laws and regulations. The information contained in this document is not intended nor should be construed as a legal opinion. If NAR or any Realtor® Association requires legal advice on any issue addressed in this paper, it should consult with its counsel.

TABLE OF CONTENTS

	Page
PREFACE	i
SECTION 1. INTRODUCTION	1
1.1 Purpose of Paper	1
1.2 Scope of Paper	1
1.3 Special Features of Paper.....	2
SECTION 2. RENTALS AND THE HOUSING MARKET	3
2.1 Residential Real Estate and the Economy	3
2.2 Rental Housing Market.....	4
(a) Urban Rental Housing.....	5
(b) Suburban Rental Housing	5
(c) Tourist Communities – Short-Term Rental Housing.....	5
(d) College Community – Rental Housing Market	7
(e) Bed and Breakfast Inns	8
2.3 Rental Housing and Affordability.....	9
2.4 Short-Term Rentals and the Sharing Economy	11
(a) The Sharing Economy.....	11
(b) Airbnb	12
SECTION 3. LOCAL GOVERNMENT REGULATIONS	14
3.1 Regulatory Objectives.....	14
(a) Protection of Neighborhood Character	14
(b) Revenue.....	17
(c) Fairer Competition with Licensed Lodging.....	18
(d) Protection of Renter Safety	19
(e) Greater Compliance with Maintenance, Building and Nuisance Codes.....	20
(f) Increased Landlord Accountability	20
3.2 Moratoria.....	21
(a) Generally.....	21
(b) Application to Rental Housing Problems	22
3.3 Regulations Directed at Residential Rentals.....	23

TABLE OF CONTENTS

(continued)

	Page
(a) Prohibition.....	23
(b) Amortization	23
(c) Geographically-Based Regulations.....	25
(d) Quantitative Restrictions.....	26
(e) Proximity Restrictions	27
(f) Registration/Licensing Requirements	27
(g) Operational Restrictions.....	28
(h) Special Permit Requirement/Conditions of Approval	31
(i) Remedial Action Requirements	31
(j) Restriction on Number of Unrelated Individuals Residing in a Dwelling Unit.....	32
(k) Neighborhood Conservation Districts.....	33
(l) Business Licensing Requirement.....	33
(m) Taxation of Short-Term Rentals	34
(n) Crime Free Housing Program	34
(o) New Strategies to Address Airbnb and other Sharing Economy Models.....	36
3.4 Regulations that Indirectly Affect Residential Rentals.....	37
(a) Residential Zoning Districts that Prohibit Multifamily Development	38
(b) Minimum House Size Requirements	38
3.5 Regulation by Private Property Associations and Covenants.....	39
3.6 Enforcement and Penalties.....	39
(a) Abatement of Nuisances	40
(b) Enforcement of Building and Maintenance Codes	41
(c) Penalties	42
SECTION 4. IMPACTS OF RENTAL REGULATIONS ON RENTAL PROPERTY OWNERS.....	44
4.1 Rental Income	44
4.2 Property Values.....	45
(a) Value of Existing Rental Properties.....	45

TABLE OF CONTENTS

(continued)

	Page
(b) Value of Properties Not Previously Used as a Rental.....	45
(c) Resale Value	46
4.3 Operational Costs.....	46
4.4 Nonconforming Use Status	48
4.5 Owner Liability for Action of Tenant	48
SECTION 5. IMPACTS OF RENTAL REGULATIONS ON RENTERS	50
5.1 Rental Fees.....	50
5.2 Inventory of Rental Units.....	50
5.3 Intrusive Inspection Requirements	51
5.4 Mandatory Lease Provisions	52
SECTION 6. COMMUNITY IMPACTS OF RENTAL REGULATIONS	53
6.1 Local Real Estate Market.....	53
6.2 Property Values.....	55
6.3 Tourism	55
6.4 Local Economy	57
6.5 Source of Tax Revenue	58
6.6 Affordable Housing	60
(a) Impact of Short-Term Rentals	60
(b) Speculative Buying and Investment in Short-Term Rentals.....	61
6.7 Governmental Administrative Costs.....	62
SECTION 7. UNINTENDED CONSEQUENCES OF RENTAL REGULATIONS	64
7.1 “Underground Market” for Rental Units	64
7.2 Uncertainty in the Rental Housing Market	65
7.3 Potential Liability for Realtors®	65
7.4 Unnecessary Duplication of Existing Codes.....	66
7.5 Shifting Rentals to Areas Where They Currently Are Not a Problem.....	67
SECTION 8. RENTAL REGULATIONS AND PROPERTY RIGHTS	68
8.1 The Bundle of Property Rights	68
8.2 The Right to Rent Private Property.....	68
8.3 Local Government Authority to Regulate.....	69

TABLE OF CONTENTS

(continued)

	Page
(a) Police Power	69
(b) Zoning Power	70
8.4 Authority to Regulate Residential Rentals	71
(a) Regulation of Residential Rentals Under General Police Power Authority	71
(b) Regulation of Residential Rentals Under the Zoning Power	72
8.5 Limitations on Government Authority to Regulate Rental Housing	72
(a) General Principle	72
(b) Constitutional Limits on the Police Power	73
(c) Statutory Limitations	76
8.6 Regulation of Residential Rentals Under the General Police Power	81
(a) Findings from NAR Land Use Initiative Program	81
(b) Substantive Due Process Applied to Rental Regulations	81
(c) Equal Protection Applied to Rental Restrictions	82
(d) Takings Claims Asserted Against Rental Regulations	83
(e) Protection Against Unreasonable Search and Seizure in Mandatory Inspection Provisions	84
(f) Private Property Rights Protection Acts	85
8.7 Regulation of Residential Rentals Through Zoning	86
(a) Findings from NAR Land Use Initiative Program	86
(b) Regulation of the “Use” Not the “User”	87
8.8 Limits on Outright Ban or Amortization of Residential Rentals	89
SECTION 9. POTENTIAL POSITIVE EFFECTS OF RENTAL REGULATIONS	91
9.1 Greater Compliance with Maintenance, Building and Nuisance Codes	91
9.2 Stabilization of Neighborhoods	92
9.3 Increased Landlord Accountability	92
9.4 Increased Tax Revenue	93
9.5 Protection of Long-Term Rental Housing Inventory	95
SECTION 10. STRATEGIES FOR ADDRESSING PROPOSED RENTAL REGULATIONS	97
10.1 Question Local Authority to Adopt Rental Regulations	97

TABLE OF CONTENTS

(continued)

	Page
10.2 Consistency With Statutory Planning and Procedural Requirements.....	97
(a) General Plan Consistency Requirement.....	97
(b) Environmental Review Process	98
10.3 Question the Need for Residential Rental Regulations.....	99
10.4 Suggest Alternatives to Rental Regulations.....	100
(a) Enforcement of Existing Ordinances	100
(b) Adoption of Ordinances that Target Community-Wide Issues.....	103
10.5 Stakeholder Input and Collaborative Problem-Solving	103
(a) Input of Stakeholders	103
(b) Collaborative Problem Solving.....	103
10.6 Propose Best Practice Rental Regulations as Alternatives	106
(a) Adopt Narrowly-Tailored Regulations	106
(b) “Grandfathering” Provisions.....	107
(c) Quantitative Restrictions.....	108
(d) Operational Restrictions.....	110
(e) Licensing/Registration Requirements	110
(f) Inspection Requirements.....	111
(g) Enforcement Provisions	113
10.7 Pursue Proactive Strategy: State Legislation to Require More Uniform, Fairer, and Market-Sensitive Regulations.....	116
10.8 Bring Legal Challenges to Rental Regulations.....	116
Appendix A List of Jurisdictions Cited in White Paper	A-1
Appendix B Index of Key Terms	B-1

PREFACE

This paper has been prepared by Robinson & Cole LLP in its capacity as national consultant to NAR. The paper is one in a series of white papers that NAR requests be prepared from time to time in order to focus on a particular smart growth-related issue that has arisen with sufficient frequency in communities around the country to merit a more in-depth analysis.

In 2011, Robinson & Cole prepared a white paper entitled *Short-Term Rental Housing Restrictions*. During the four year period since NAR's publication of that paper, there has been a dramatic increase in local government initiatives around the country designed to regulate short term rentals. This new white paper, *Residential Rentals – The Housing Market, Regulations, and Property Rights*, contains both an update of the research in the prior white paper and an expanded scope of analysis of issues, including the critical issue of how these regulatory initiatives affect property rights.

The analysis in this paper is provided by NAR under its Smart Growth program to help REALTORS® at the state and local level better understand the issues involved in these types of residential restrictions, and to tailor strategies, as appropriate, to address short-term rental housing regulatory initiatives in their communities.

Brian W. Blaesser
Robinson & Cole LLP
October, 2015

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 1. INTRODUCTION

1.1 Purpose of Paper

This paper was prepared at the request of the National Association of REALTORS[®] (NAR). The purpose of this paper is to (1) provide an overview of the residential rental housing market; (2) explain the problem of rental housing restrictions; (3) categorize and describe the different approaches taken by local governments to regulate residential rental housing, including short-term rentals, in their communities; (4) analyze the issues raised by these different regulatory approaches; (5) provide Realtors[®] with strategies for addressing these issues; and (6) outline “best practices” approaches to rental housing regulations that Realtors[®] can use in discussing the issue with local government officials.

1.2 Scope of Paper

This paper addresses the regulation of both long-term and short-term rental housing. The term “**short-term rental housing**” typically means a **dwelling unit**¹ that is rented for a period of less than thirty (30) consecutive days. However, as discussed in Section 2.4, the term can also mean the short-term rental (generally for a period of less than 30 consecutive days) of less than an entire dwelling unit, such as a spare bedroom or other space within a home. In some communities, short-term rental housing may be referred to as vacation rentals,² transient rentals,³ or transient vacation rental units.⁴

In general, short-term rental housing differs from bed & breakfasts, hotels, motels, and other types of temporary “lodging” uses by providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. Although a bed & breakfast often is similar in appearance and location to many short-term rentals, it is distinguishable by the presence of the owner/operator on-site.⁵ A boarding house differs from a short-term rental by having multiple rooms or units for rent and common kitchen and dining facilities that are shared by the occupants.⁶ Boarding houses also tend to be less transient than short-term rentals.⁷ Similarly, hotels and motels are distinguishable from short-term rentals by having separate entrances and an on-site management office.⁸

¹ The International Building Code (“IBC”) defines “dwelling unit” to mean: “A single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.” IBC § 202 (2012).

² See, e.g., Sonoma County, CA Code of Ordinances § 02-140; Municipal Code of Chicago, Ch. 4-207; City of Islamorada, FL Code of Ordinances § 30-1292.

³ See, e.g., City of Coronado, CA Municipal Code § 86.78.030; City of Key West, FL Municipal Code § 122-1371.

⁴ See, e.g., Maui County, HI Code § 19.37; Kauai County, HI Code § 8.17.

⁵ See Nate Hutcheson, “Short-Term Vacation Rentals: Residential or Commercial Use?,” *Zoning News* (March 2002, American Planning Association) (hereinafter “APA Report”).

⁶ See APA Report at 5.

⁷ See APA Report at 5.

⁸ See APA Report at 5.

1.3 Special Features of Paper

Jurisdictions with residential rental restrictions that are cited in this paper are listed in *Appendix A, List of Jurisdictions Cited*. Key terms used in this paper are defined or explained in the context of the discussion. In order to assist the reader in locating and referencing these terms, they are **bolded** in the text and also listed in *Appendix B, Index of Key Terms*.

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 2. RENTALS AND THE HOUSING MARKET

2.1 Residential Real Estate and the Economy

The residential real estate industry historically has played a significant role in the United States economy. In a healthy market, residential real estate can account for approximately 20% of the nation's Gross Domestic Product (GDP).¹ Housing-related activities contribute to the GDP in two ways: (1) through residential fixed investment (RFI), which generally includes the construction of single-family and multifamily structures, residential remodeling, the production of manufactured homes, and brokers' fees; and (2) consumer spending on housing services, which includes gross rents (including utilities) paid by renters, as well as owners' imputed rent (i.e., an estimate of how much it would cost to rent owner-occupied units) and utility payments.² Historically, RFI has averaged approximately 5% of the GDP, while housing services have averaged between 12% and 13%, for a combined 17% to 18% of GDP.³

Analyses by the National Association of Home Builders (NAHB) indicate that the homebuilding and remodeling industry has a broad impact on the U.S. economy:

Probably the most obvious impacts of new construction are the jobs generated for construction workers. But, at the national level, the impact is broad-based, as jobs are generated in the industries that produce lumber, concrete, lighting fixtures, heating equipment, and other products that go into a home or remodeling project. Other jobs are generated in the process of transporting, storing and selling these projects. Still others are generated for professionals such as architects, engineers, real estate agents, lawyers, and accountants who provide services to home builders, home buyers, and remodelers.⁴

¹ See Mark Sprague, "Why housing is important to the economy," *Independence Title* (Aug. 1, 2014) (available online at <http://independencetitle.com/why-housing-is-important-to-the-economy/>) (last visited June 4, 2015).

² See Robert Dietz, "Housing's Share of GDP: 15.5% for the Second Quarter," *NAHB Eye on Housing* (Sept. 26, 2014) (available online at <http://eyeonhousing.org/2014/09/housings-share-of-gdp-15-5-for-the-second-quarter/>) (last visited June 4, 2015).

³ See *id.* See also *The State of the Nation's Housing 2014* at 8 (Joint Center for Housing Studies of Harvard University, 2014) (available online at http://www.jchs.harvard.edu/research/state_nations_housing) (stating that "RFI made up just 3.1 percent of GDP in 2013, well below its historical average share of 4.7 percent"); Ray Valadez, "The housing bubble and the GDP: a correlation perspective," *Journal of Case Research in Business and Economics* (June 2010) (available online at <http://www.aabri.com/manuscripts/10490.pdf>) (stating, in relevant part: "Traditionally, the line entry 'Residential Fixed Investment' in the [U.S. Department of Commerce, Bureau of Economic Analysis] tables has been used to measure the portion of the GDP dedicated to residential fixed investment. It normally runs approximately 5 percent of Real GDP in the U.S.... In combining the Residential Fixed Investment and Housing Services, they contribute to approximately 18 percent of the Real GDP in the U.S.).

⁴ Paul Emrath, "Impact of Home Building and Remodeling on the U.S. Economy," NAHB (Economics and Housing Policy Special Studies, May 1, 2014) (available online at <http://www.nahb.org/en/research/housing-economics/housings-economic-impact/impact-of-home-building-and-remodeling-on-the-u-s-economy.aspx>) (last visited June 4, 2015).

While all residential construction contributes to the economy, NAHB's analysis indicates that, on a per-unit basis, single-family construction has a significantly greater impact on the economy. For example, NAHB's national estimates for 2014 on the impact that residential construction had on the U.S. economy are as follows:

- Building an average single-family home: 2.97 jobs, \$110,957 in taxes
- Building an average rental apartment: 1.13 jobs, \$42,383 in taxes
- \$100,000 spent on remodeling: 0.89 jobs, \$29,779 in taxes⁵

Residential construction statistics reported by the U.S. Department of Housing and Urban Development (HUD) show that RFI made up approximately 3.1% of the GDP for the first quarter of 2015, well below the average of about five percent over the past fifty years.⁶

2.2 Rental Housing Market

According to U.S. Census Bureau estimates for the first quarter of 2015, the total housing inventory for the United States was approximately 133,575,000 housing units, with an overall occupancy rate of approximately 87 percent and an overall vacancy rate of approximately 13 percent.⁷ A breakdown of occupied housing units reveals that approximately 74,018,000 units (63.7%) were *owner-occupied*, while the remaining 42,222,000 units (36.3%) were *renter-occupied*. Between 2005 and 2015, the national trend in residential occupancies has shifted away from homeownership and toward rental occupancies. Nationwide, the homeownership rate peaked at 69.1 percent in 2005, but has steadily declined every year since then.⁸ The flip side to this decade-long decline in homeownership is the steady increase in the residential rental occupancy, which has risen from 30.9 percent of the total housing inventory in 2005 to 36.3 percent in 2015.⁹

A 2013 report on rental housing in the U.S. prepared by the Joint Center for Housing Studies of Harvard University (JCHS) described a confluence of factors that contributed to the recent upward trend in rental housing:

The enormous wave of foreclosures that swept the nation after 2008 certainly played a role, displacing millions of homeowners. The economic upheaval of the Great Recession also contributed, with high rates of sustained unemployment straining household budgets and preventing would-be buyers from purchasing homes. Meanwhile, the experience of the last few years highlighted the many risks of homeownership, including the potential loss of wealth from falling home values, the high costs of relocating, and the financial and personal havoc caused by foreclosure. All in all, recent conditions have brought

⁵ *Id.* at 1. For these estimates, the data on jobs created is shown in full-time jobs, while the term "taxes" represents all revenue paid to all levels of government (e.g., federal, state, local, and school district). The tax estimates also include various fees and charges, such as residential permit and impact fees. *See id.*

⁶ Ruth Mantell, "At last a tailwind for U.S. economy: housing," *Market Watch* (May 19, 2015) (citing New Residential Construction in April 2015, U.S. Census Bureau News - Joint Release - U.S. Department of Housing and Urban Development (May 19, 2015)).

⁷ "Residential Vacancies and Homeownership in the First Quarter 2015," U.S. Census Bureau News (April 28, 2015) (available online at <http://www.census.gov/housing/hvs/files/qtr115/currenthvspress.pdf>).

⁸ *See id.* at 5, Table 4, Homeownership Rates for the United States: 1995 to 2015.

⁹ *See id.*

renewed appreciation for the benefits of renting, including the greater ease of moving, the ability to choose housing that better fits the family budget, and the freedom from responsibility for home maintenance.¹⁰

Unlike owner-occupied housing, which is comprised predominantly of single-family homes, rental housing comes in a variety of configurations. Contrary to popular perceptions, most rental units are not located in large apartment buildings. Rather, according to the American Housing Survey, about 39 percent of rental properties are single-family homes and another 19 percent are located in small buildings with just two to four units.¹¹ Large apartment buildings (i.e., those containing ten or more units) account for approximately 29 percent of all rental housing units nationwide.¹²

(a) Urban Rental Housing

While rental housing is available in communities across the country, it is considerably more prevalent in central cities, where land prices tend to be high and low-income households generally are more concentrated.¹³ According to a JCHS tabulation of 2011 American Housing Survey data, approximately 43 percent of all occupied rental units are located in central cities, compared with 29 percent of all households.¹⁴ The concentration of rental housing rates in urban areas is highest in cities of the Northeast, where more than 60 percent of households rent compared with 45–50 percent in other regions.¹⁵

(b) Suburban Rental Housing

At approximately 40 percent, the share of rental housing units located in suburban areas is slightly lower than in urban areas of the country.¹⁶ The remaining 17 percent of rental homes are located in “non-metro” areas.¹⁷

(c) Tourist Communities – Short-Term Rental Housing

According to a market study of vacation rentals in the U.S., travelers spent \$23 billion on vacation rentals in 2012, nearly one-fifth of the total U.S. lodging market.¹⁸ Though the \$23 billion figure represents a decline in vacation rental revenue from pre-recession levels, the

¹⁰ *America's Rental Housing: Evolving Markets and Needs* at 1 (Joint Center for Housing Studies of Harvard University, 2013) (hereinafter “*America's Rental Housing*”) (available online at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_americas_rental_housing_2013_1_0.pdf).

¹¹ *America's Rental Housing* at 15.

¹² *America's Rental Housing* at 15.

¹³ *America's Rental Housing* at 11.

¹⁴ *America's Rental Housing* at 16.

¹⁵ *America's Rental Housing* at 16.

¹⁶ *America's Rental Housing* at 16.

¹⁷ *America's Rental Housing* at 16. In *America's Rental Housing*, the geographic areas are divided into three categories: central city, suburban, and non-metropolitan areas. Non-metropolitan appears to be a catch-all category of all areas other than central city and suburban.

¹⁸ See Dennis Schaal, “Vacation Rentals in the U.S. Are Now a \$23 Billion Industry,” *Skift* (Oct. 23, 2013) (available online at <http://skift.com/2013/10/25/vacation-rentals-in-the-u-s-are-now-a-23-billion-industry/>) (citing the PhoCusWright study “U.S. Vacation Rentals 2009-2014: A Market Reinvented”).

percentage of vacation rentals that were booked online reportedly doubled from 12% in 2007 to 24% in 2012.¹⁹

The short-term rental market can have a significant economic impact on the economy of a state or a local community. The 2014 study “Economic Impact: Florida’s Vacation Rental Industry”²⁰ of the economic impact of approximately 11,000 vacation rental units²¹ in Florida provides an illustration of the state-wide impact. The study estimated that in 2013 the state had a total of 17,017,768 vacation rental visitors. Using survey data and visitor spending estimates provided by Florida’s official tourism marketing corporation, the study calculated the economic impact of vacation rentals in terms of employment, visitor spending, and the overall state economy. It concluded:

- Florida’s vacation rental market has a total impact on economic output of \$31.1 billion.
- Florida’s vacation rental industry directly or indirectly supports a total of 322,032 jobs in Florida annually.
- The total labor income generated by those 322,032 jobs is approximately \$12.64 billion per year.
- The total estimated spending by visitors staying in vacation rental units is \$13.43 billion.
- Total owner-management spending across all licensed rental units in Florida is \$3.3 billion.²²

Studies also show that the vacation rental industry can have a significant impact on a local economy. A 2013 study of private home rentals by the University of New Orleans Hospitality Research Center described the economic impact of private home vacation rentals on the New Orleans metro area economy as follows:

In 2013, approximately 100,000 visitors to the New Orleans area stayed in private home rentals. These visitors made a substantial contribution to the New Orleans metro area economy. They generated a total economic impact of \$174.8 million, comprised of \$99.8 million in direct spending and \$74.9 million in secondary spending. Visitor spending also resulted in the creation or support of nearly 2,200 full-and part-time jobs. These jobs

¹⁹ See *id.*

²⁰ *Economic Impact: Florida’s Vacation Rental Industry* (2014, prepared by Thinkspot for the Florida Vacation Rental Managers Association) (hereinafter “*Florida Vacation Rental Study*”) (available online at http://gometeoric.com/wp-content/uploads/2014/03/FVRMAEconImpactReport_FINAL.pdf).

²¹ Consistent with Florida’s statutory definition, the *Florida Vacation Rental Study* defined “vacation rental” to mean “any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, three-family or four-family house or dwelling that is also a transient public lodging establishment. *Florida Vacation Rental Study* at 3 (citing Florida Stat. § 509.242(1)(c)). Florida statute defines “transient public lodging establishment” to mean:

any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

Florida Stat. § 509.013(4)(a)(1).

²² *Florida Vacation Rental Study* at 1.

are expected to create a total of \$56.1 million in additional earnings for residents of the New Orleans area.

Visitor spending is also estimated to generate a total of \$10.8 million in tax revenue for state and local governments. Of that total, roughly \$6.1 million will go to the State of Louisiana, and \$4.7 million will be claimed by local governments in the New Orleans area.²³

Studies of the local impact of short-term rentals in the Myrtle Beach Area of South Carolina²⁴ and Coachella Valley, California²⁵ reached similar conclusions. The Coachella Valley study, for example, concluded that short-term rentals spending was an important part of the tourism industry, “ultimately creating thousands of jobs and millions of dollars of earnings and tax revenue for the community each year.”²⁶

(d) College Community – Rental Housing Market

Communities that are home to a college or university also face a unique challenge in rental housing, namely the conversion of single-family homes to student rentals. The City of Saint Paul, Minnesota, for example, is home to nine colleges and universities.²⁷ Though each institution provides some degree of housing on campus, the limited supply of on-campus housing—and the preference of some students to reside off-campus—results in strong demand for housing in the surrounding neighborhoods.²⁸ According to a 2012 study of student housing under Saint Paul zoning regulations, more than half (3,002 of 5,715) of full-time undergraduate students at the University of Saint Thomas’s lived off-campus.²⁹ The study found that about two-thirds of the students who live off-campus reside in residential neighborhoods located within a mile of the UST campus, including 426 single- and two-family homes that were identified in UST records as student houses.³⁰

The popularity of off-campus housing in college towns has created a market for investors to buy single-family homes to hold as a long-term investment or to “fix and flip” for short-term profit. The website *Investopedia* describes the appeal of college-town housing as a possible investment opportunity:

Every year, millions of college students flood into college cities and towns. Those students, along with the faculty and staff at their schools, have one common need:

²³ Private Home Rentals: Visitor Survey Results and Economic Impact Analysis 2013 (July 2014, prepared by The University of New Orleans Hospitality Research Center for the Alliance for Neighborhood Prosperity) (available online at <http://neworleanscitybusiness.com/files/2014/09/Private-Home-Rentals-2013.pdf>).

²⁴ See *The Local Impact of Participating Short Term Rentals in the Myrtle Beach Area* (Spring 2014, TXP Inc.) (available online at <http://www.stradvocacy.org/media/TXP-STRAC-Impact-Report-Myrtle-Beach.pdf>).

²⁵ See *The Local Impact of Participating Coachella Valley Short Term Rentals* (Spring 2014, TXP Inc.) (available online at <http://www.stradvocacy.org/media/TXP-STRAC-Impact-Report-Coachella-0312141.pdf>).

²⁶ *Id.* at 7.

²⁷ *Student Housing Zoning Study: Report and Recommendations* (Saint Paul Planning Commission, May 2012) (available online at <http://www.stpaul.gov/documentcenter/home/view/20436>) (hereinafter the “*Saint Paul Student Housing Report*”).

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

housing. Consistent demand for housing makes college and university communities attractive to people interested in real estate investing....

Whereas housing demand may fluctuate in other areas, college towns boast a steady flow of students, professors and staff, and a percentage of those will always require off-campus housing. Most colleges and universities do not have enough on-campus housing to satisfy demand, and when school budgets are tight, maintaining and upgrading housing can take a back seat to other financial priorities. Properties that are well-maintained, well-marketed, competitively priced and close to amenities can attract buyers and renters alike.

Baby boomers are beginning to realize the multiple benefits of investing in real estate in these communities. Many parents are viewing off-campus housing options as something that could not only provide a home for their child, but also be an investment that could appreciate in value for resale after graduation or provide a place for their own future retirement.³¹

The investment potential of college town rental housing has led to the publication of “Top Ten” lists that annually rank the best college towns for investing in residential properties for rental or flipping purposes. *RealtyTrac*, for example, “ranked the top 10 college towns for buying rental properties, and the top 10 college towns for flipping in 2014,” noting that:

College towns are often insulated from the real estate and economic storms that buffet other local housing markets, providing real estate investors a somewhat protected environment in which to either buy and hold rental properties for long-term cash flow or fix and flip homes for a short-term profit.³²

For the parents of college-aged children, college-town real estate can provide multiple benefits. Buying a house in their child’s college town can be a safe and more cost-effective alternative to spending money on rent or dorm fees.³³ In addition, off-campus housing is also an investment that could appreciate in value for resale after graduation or provide a place for their own future retirement.³⁴

(e) **Bed and Breakfast Inns**

A **bed and breakfast inn** (i.e., “B&B”) is similar to a short-term rental in that it provides temporary sleeping accommodations for guests and is often located in a single-family dwelling in a residential neighborhood. Although B&Bs often are similar in appearance and location to many short-term rentals, they are distinguishable by the presence of the owner/operator on-site

³¹ Katie Adams, “Real Estate Speculation in College Towns,” *Investopedia* (available online at <http://www.investopedia.com/articles/mortgages-real-estate/08/real-estate-speculation.asp>).

³² *College Towns: The Best for Real Estate Profiting* (RealtyTrac LLC, 2014) (available online at <http://www.realtytrac.com/content/news-and-opinion/best-college-towns-for-buying-rentals-flipping-in-2014-8156>).

³³ Lara Hertel, “Parents Head to College Towns to Buy Real Estate,” *Resort Life Blog* (available online at <http://resortlife.blogs.realtor.org/2010/11/18/parents-head-to-college-towns-to-buy-real-estate/>).

³⁴ Katie Adams, “Real Estate Speculation in College Towns,” *Investopedia* (available online at <http://www.investopedia.com/articles/mortgages-real-estate/08/real-estate-speculation.asp>).

and the breakfast service that that they provide to guests.³⁵ For example, the Town of Jamestown, North Carolina, defines “bed and breakfast (B&B) inn” to mean “a private residence that offers sleeping accommodations to lodgers in 14 or fewer rooms for rent, is the innkeepers principal residence while renting rooms, and serves breakfast at no extra cost.” Communities typically regulate B&Bs through their zoning regulations. Maui County, Hawaii, for example, allows B&Bs by right in certain residential zoning districts, subject to certain licensing requirements and operational standards.³⁶ For example, Maui County requires that the owner/proprietor reside on the same lot as the B&B, limits B&Bs to a maximum of six bedrooms, and requires that breakfast be made available to onsite guests but prohibits the operation of a B&B as a restaurant.³⁷

The Professional Association of Innkeepers International (PAII) estimates that there are 17,000 B&Bs in the United States.³⁸ The number of bed and breakfast inns in the U.S. peaked at about 20,000 between 200 and 2005, but has since declined as a generation of innkeepers retired and the economic downturn made it more difficult for aspiring new owners to secure financing.³⁹ According to PAII estimates, the B&B industry is worth approximately \$3.4 billion, including the value of the inns themselves and the products and services needed to run a B&B, real estate, finance, insurance, food and beverage, cleaning, and more.⁴⁰

2.3 Rental Housing and Affordability

There is no universally accepted definition of “**affordable housing**.” U.S. Department of Housing and Urban Development (HUD) defines “affordable housing” to mean “housing for which the occupant(s) is/are paying no more than 30 percent of his or her income for gross housing costs, including utilities.”⁴¹

Local governments, on the other hand, tend to define “affordable housing” by applying the HUD “30 percent rule” to specific income groups. Portland, Oregon, for example, uses the following definition of “affordable housing”:

The term “affordable housing,” “affordable rental housing” or “housing affordable to rental households” means that the rent is structured so that the targeted tenant population pays no more than 30 percent of their gross household income for rent and utilities. The targeted tenant populations referred to in this section include households up to 80 percent of area median family income.⁴²

³⁵ See Nate Hutcheson, “Short-Term Vacation Rentals: Residential or Commercial Use?,” *Zoning News* (March 2002, American Planning Association).

³⁶ See Maui County (HI) Code § 19.64.020 (available online at <http://www.co.maui.hi.us/DocumentCenter/Home/View/8581>).

³⁷ See *id.* § 19.64.030.

³⁸ See “The B&B Industry,” *Professional Association of Innkeepers International* (available online at https://innkeeping.site-ym.com/?The_Industry) (last visited June 10, 2015).

³⁹ See Alyssa Abkowitz, “A New Crop of Bed and Breakfasts,” *The Wall Street Journal* (Nov. 27, 2013).

⁴⁰ See The B&B Industry.

⁴¹ HUD User Glossary (available online at http://www.huduser.org/portal/glossary/glossary_a.html).

⁴² Portland, OR City Code § 30.01.030.A.

While affordable housing includes both owner-occupied homes and rental housing, quality affordable rental housing is the best option for serving the needs of lower-income families.⁴³ Realistically, rental housing is the only option for a significant majority of low- and very low-income families nationwide.⁴⁴ Housing Virginia observes that, in addition to being the most financially realistic option for low- and moderate- income families and families who have recently lost a home to foreclosure, rental housing fulfills the needs of other individuals and families:

Other people rent because they prefer the lifestyle of renting and may still be as socially invested in their community as homeowners typically are. Among their ranks are both former homeowners who are empty- nesters and lifelong renters who don't want to worry about lawns, gutters, and home repairs. Still others rent because they expect to move frequently. Finally, for some families, affordable rental housing is an important stepping stone that allows them to accumulate savings and prepare for homeownership.⁴⁵

In the post-Recession years, the growing demand for rental housing has resulted in a shortage of affordable housing nationwide. According to initial estimates from the American Community Survey, the number of cost-burdened renters (i.e., those paying more than 30 percent of household income for housing) reached approximately 21.1 million in 2012, more than half of all rental households.⁴⁶ The report *America's Rental Housing—Evolving Markets and Needs* explains that the widespread incidence of cost-burdened rental housing “reflects the gap between what lower-income households can afford to pay in rent and what housing costs to build and operate across the nation.”⁴⁷ The report states:

An analysis by the National Low Income Housing Coalition (NLIHC) compares the rent for a modest two-bedroom home in each state in 2013 to the average hourly wage that full-time workers would have to earn to afford that housing. In the highest-cost states, the estimated wage is more than \$20 an hour—well above the earnings of a typical renter. But even in the lowest-cost states, the wage needed to rent a modest home is at least \$12 an hour, considerably more than the federal minimum wage of \$7.25. In no state did the mean hourly wage of renters exceed what was needed to afford a modest home.

While growth in the number of low-income renters is an important factor driving the spread of cost burdens, the difficulty of supplying housing at rents these households can afford is also a problem. As a result, the gap between the demand for and supply of affordable rentals continues to widen.⁴⁸

As discussed in Section 6 of this paper, there is a growing sentiment among local governments that short-term and vacation rentals also contribute to the shortage of rental housing, as more rental units that could be rented out as long-term housing are set aside for use as short-term.

⁴³ TIM IGLESIAS & ROCHELLE E. LENTO, THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT at 489 (2nd ed., 2011 American Bar Association).

⁴⁴ *See id.*

⁴⁵ *Why is affordable housing important? Is rental housing or homeownership more important?*, Housing Virginia (available online at <http://www.housingvirginia.org/Why-is-affordable-housing-important.aspx>).

⁴⁶ *America's Rental Housing* at 28.

⁴⁷ *America's Rental Housing* at 30.

⁴⁸ *America's Rental Housing* at 32.

2.4 Short-Term Rentals and the Sharing Economy

(a) The Sharing Economy

Like “affordable housing,” the term “**sharing economy**” has many definitions. *Investopedia* defines it as an “economic model in which individuals are able to borrow or rent assets owned by someone else. The sharing economy model is most likely to be used when the price of a particular asset is high and the asset is not fully utilized all the time.”⁴⁹ The blog *PeopleWhoShare* states that the sharing economy “is a socio-economic ecosystem built around the sharing of human and physical resources. It includes the shared creation, production, distribution, trade and consumption of goods and services by different people and organizations.”⁵⁰

However the term is defined, the sharing economy is growing at a rate that has outpaced governmental regulation and arguably has affected human behavior. The tech magazine *Wired* described this phenomenon in the 2014 article *How Airbnb and Lyft Finally Got Americans to Trust Each Other*:

The sharing economy has come on so quickly and powerfully that regulators and economists are still grappling to understand its impact. But one consequence is already clear: Many of these companies have us engaging in behaviors that would have seemed unthinkable as recently as five years ago. We are hopping into strangers’ cars (Lyft, Sidecar, Uber), welcoming them into our spare rooms (Airbnb), dropping our dogs off at their houses (DogVacay, Rover), and eating food in their dining rooms (Feastly). We are letting them rent our cars (RelayRides, Getaround), our boats (Boatbound), our houses (HomeAway), and our power tools (Zilok). We are entrusting complete strangers with our most valuable possessions, our personal experiences—and our very lives. In the process, we are entering a new era of Internet-enabled intimacy.

This is not just an economic breakthrough. It is a cultural one, enabled by a sophisticated series of mechanisms, algorithms, and finely calibrated systems of rewards and punishments. It’s a radical next step for the person-to-person marketplace pioneered by eBay: a set of digital tools that enable and encourage us to trust our fellow human beings.⁵¹

The idea of homeowners renting out their property to short-term renters is not a new one. The company VRBO—short for Vacation Rental By Owner—was established in 1995 for the purpose of facilitating short-term rentals of properties by their owners over the internet. However, a more recent entrant into the sharing economy—Airbnb—has revolutionized how the short-term rental market operates.

⁴⁹ See <http://www.investopedia.com/terms/s/sharing-economy.asp>.

⁵⁰ See <http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/>.

⁵¹ Jason Tanz, “How Airbnb and Lyft Finally Got Americans to Trust Each Other,” *Wired* (April 23, 2014) (available online at <http://www.wired.com/2014/04/trust-in-the-share-economy/>).

(b) Airbnb

Airbnb was founded in 2007 by a pair of San Francisco roommates who rented three air mattresses on their living room floor and cooked breakfast for their guests. From those humble beginnings Airbnb has grown into a company that in October 2014 was valued at \$13 billion, more than the Wyndham Worldwide or Hyatt hotel chains.⁵² As of September 2015, Airbnb's website touts more than 1,500,000 listings in more than 34,000 cities and 190 countries worldwide.⁵³ Since its inception, Airbnb reportedly has booked accommodations for more than 40,000,000 guests worldwide.⁵⁴

Airbnb works by providing an online marketplace for "hosts" to rent out spare rooms or properties, and guests to book them. Hosts can specify the type of accommodation (shared or private) and booking periods being offered, set "house rules," and upload photos.⁵⁵ The Airbnb website is fairly easy to use and intuitive for both hosts and guests, with multiple search criteria and results that are displayed with an adjacent map view and picture-based listings.⁵⁶ Hosts can either allow instant booking or require that a request be submitted first.⁵⁷ Airbnb makes money by charging a 6-12% "guest service fee" and a 3% host service fee every time a reservation is booked on its online platform.⁵⁸

Studies commissioned by Airbnb suggest that the company's contribution to the local economy can be significant. A *Los Angeles Times* article summarized the findings of Airbnb's Los Angeles study as follows:

The tech firm—which typically keeps its data close to its vest—says that it has just under 4,500 "hosts" in the city of Los Angeles and that they earned a combined \$43.1 million through the service from May 2013 through April 2014.

After tracking spending by guests and hosts and projecting the effect that money has filtering through the region's economy, Airbnb estimates a total economic impact of \$312 million, enough to support about 2,600 local jobs.⁵⁹

A similar study commissioned by Airbnb for the New York City market concluded that Airbnb "generated \$632 million in economic activity in New York in one year and supported 4,580 jobs throughout all five boroughs."⁶⁰ The New York City study also asserted that Airbnb guests spend more time and money in the city than typical tourists:

⁵² See "Airbnb's valuation could soar with new funding raise," *San Francisco Business Times* (Mar. 2, 2015) (available online at <http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/03/airbnb-seeks-20-billion-valuation-in-new-funding.html>).

⁵³ See <https://www.airbnb.com/about/about-us>.

⁵⁴ See *id.*

⁵⁵ Lizzie Porter, "Airbnb: do the bargains come at a price?," *The Telegraph* (Aug. 8, 2014) (available online at <http://www.telegraph.co.uk/travel/travelnews/11020812/Airbnb-do-the-bargains-come-at-a-price.html>).

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See <https://www.airbnb.com/support/article/63>.

⁵⁹ Tim Logan, "As L.A. weighs regulation, Airbnb touts its economic impact in city," *Los Angeles Times* (December 4, 2014) (available online at <http://touch.latimes.com/#section/-1/article/p2p-82176472/>).

- Airbnb visitors stay on average 6.4 nights (compared to 3.9 for hotel guests) and spend \$880 at NYC businesses (compared to \$690 for average New York visitors).
- Airbnb brings visitors to neighborhoods that traditionally have not benefited from tourism. 82% of Airbnb listings in New York are outside of the main tourist hotel area of midtown Manhattan and the average Airbnb guest spends \$740 in the neighborhood where that guest stays.⁶¹

Airbnb also asserts that nearly 75% of its hosts use the money they earn to stay in their homes and about 30% of all hosts say hosting helped them to start a new business.⁶²

The rapid growth of Airbnb has led to concerns that the conversion of long-term rental properties into short-term rentals is having a negative impact on the available supply of long-term rental housing in some markets. An October 2014 report by the New York State Attorney General found that in 2013, more than 4,600 residential units in New York City were dedicated primarily or exclusively to short-term rentals.⁶³ The report, entitled “Airbnb in the City,” noted that most of the buildings converted to short-term rentals were located in popular neighborhoods in Brooklyn and Manhattan, and observed that:

A dozen buildings in those same neighborhoods had 60 percent or more of their units used at least half the year as private short-term rentals, suggesting that the buildings were operating as de facto hotels.⁶⁴

Similar concerns have been raised in other communities where Airbnb has grown in popularity. In the City of Boulder, Colorado, for example, the City Council directed staff to draft a short-term rental ordinance out of concern that investors were buying property for use as short-term rentals, thereby reducing the supply of long-term and affordable housing for residents.⁶⁵

⁶⁰ Caroline Moss, “Airbnb Says It Generated \$632 Million in Economic Activity in New York,” *Business Insider* (Oct. 23, 2014) (available online at <http://www.businessinsider.com/airbnb-632-million-economic-activity-new-york-2013-10>).

⁶¹ *Id.*

⁶² Tim Logan, “As L.A. weighs regulation, Airbnb touts its economic impact in city,” *Los Angeles Times* (December 4, 2014) (available online at <http://touch.latimes.com/#section/-1/article/p2p-82176472/>).

⁶³ *Airbnb in the City* (Oct. 2014, New York State office of the Attorney General) (available online at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>).

⁶⁴ *Id.* at 12.

⁶⁵ See Erica Meltzer, “Boulder council: Preserving housing for residents will guide short-term rental regulations,” *Daily Camera* (June 2, 2015) (available online at http://www.dailycamera.com/news/boulder/ci_28240692/boulder-short-term-rental-owners-plea-flexibility).

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 3. LOCAL GOVERNMENT REGULATIONS

3.1 Regulatory Objectives

Many communities around the country, from major cities to rural towns and tourist destination communities, have adopted some form of rental housing regulation. The growing trend toward local regulation of residential rentals is evidenced by the rising number of requests that NAR has received for review of proposed rental regulations under the Land Use Initiative program. From 2003 to 2008, NAR received a total of eight such requests, for an average of 1.5 requests per year. By contrast, from 2009 to 2014, NAR received 26 requests for review of rental regulations, for an average of 4.3 per year. In 2015, the trend grew more sharply, with twelve requests received by NAR by the end of September.

Below is an overview of the most common reasons cited by communities for regulating rental housing.

(a) Protection of Neighborhood Character

New York City's City Environmental Quality Review (CEQR) Technical Manual describes the concept of "**neighborhood character**" as follows:

Neighborhood character is an amalgam of various elements that give neighborhoods their distinct "personality." These elements may include a neighborhood's land use, socioeconomic conditions, open space, historic and cultural resources, urban design, visual resources, shadows, transportation, and/or noise.¹

Generally speaking, neighborhoods tend to have at least two defining characteristics: (1) the physical character, such as the architecture of buildings and the layout of streets and open spaces; and (2) the non-physical character, such as the combination of land uses and density that affect the "quality of life" or "livability" of a neighborhood.

The protection of the character of existing *residential* neighborhoods is the most commonly cited municipal purpose for regulating rental housing. The need to protect the residential character is frequently cited by communities in support of a proposed vacation rental ordinance or a restriction on single-family home rentals. Often these communities are responding to complaints from permanent residents about the disturbances that may be caused by short-term tenants, including excessive noise, late night parties, trespassing, increased traffic, and other activities that disrupt the residential character.

¹ *CEQR Technical Manual* at 21-1 (2014 ed., NYC Mayor's Office of Environmental Coordination) (available online at http://www.nyc.gov/html/oec/html/ceqr/technical_manual_2014.shtml).

(i) Neighborhood Character: Protection of Neighborhood Livability

For tourist communities, the rationale is that vacationers and guests who do not have ties to the local community are more concerned with maximizing their fun than they are with being good neighbors. This rationale is evident in the City of Venice, Florida's "resort dwellings" ordinance, which prohibits new resort dwellings from being established in certain single-family zoning districts:

[The] City council finds that resort dwelling rental activities in single-family neighborhoods affects the character and stability of a residential neighborhood. The home and its intrinsic influences are the foundation of good citizenship. The intent of these regulations is to prevent the use of single-family residences for transient purposes in order to preserve the residential character of single-family neighborhoods.²

In college communities, the rationale is largely the same. In 2011 the City of Saint Paul, Minnesota adopted a one-year moratorium on the conversion of owner-occupied homes to rentals in order to temporarily halt the proliferation of new college/university student rental housing in neighborhoods of predominantly single-family and duplex housing. While college students might consider single-family home rentals a better option than dormitory housing, and investors view them as an investment opportunity, permanent residents of college towns tend to see them in a much different light. A study of student housing and zoning in Saint Paul prepared by the Saint Paul Planning Commission (the "Saint Paul Student Housing Study") summarized the impacts that rental housing were believed to have on residential neighborhoods as follows:

The conversion of housing to student occupancy, particularly the conversion of previously owner-occupied single-family and duplex housing, has substantially affected the character of the neighborhoods in and around the moratorium area and has had a negative impact on quality of life for many residents. Students tend to live at higher concentrations of adult residents as compared to rental housing as a whole. As a result, traffic and parking impacts tend to be greater than for rental housing in general. In addition, students as a population have a different lifestyle than the population as a whole, and in particular in comparison to families with young children. Students also are a transient population with respect to the neighborhoods they inhabit, and so have less connection to the long-term well-being of that neighborhood than more permanent residents may. As a result, noise can be an issue, and inattention to things like litter or property appearance can lead to negative associations with students and student housing for other residents. Finally, poor student behavior, exacerbated by alcohol use and abuse, can have a dramatic, negative impact on neighborhood livability. In general, these negative impacts associated with student housing are felt more acutely in lower density neighborhoods, as the conversion of even a single unit measurably changes the make-up of the neighborhood.³

Concerns about the protection of neighborhood character are not limited to tourist communities and college towns. Major cities including Los Angeles and San Francisco have adopted measures for the purpose of protecting neighborhood character. In June 2015, two members of

² City of Venice, FL Land Development Code § 86-151.

³ *Student Housing Zoning Study: Report and Recommendations* at 2 (Saint Paul Planning Commission, May 2012) (available online at <http://www.stpaul.gov/documentcenter/home/view/20436>).

the Los Angeles City Council proposed an ordinance that would ban people from renting out their home or apartment for short-term stays unless the property being rented out is their primary residence. After the measure was introduced, one of the sponsors was quoted as saying: “We cannot tolerate how a growing number of speculators are eliminating rental housing and threatening the character of our neighborhoods.”⁴ When in July 2015, the City of San Francisco announced the formation of a new agency—the Office of Short-Term Rental Administration and Enforcement—to oversee short-term rentals in the city, the mayor cited the need “to protect our housing supply and neighborhood character.”⁵

(ii) Neighborhood Character: Protection of Physical Characteristics

Some communities also cite the need to protect the physical characteristics of their residential neighborhoods. The underlying rationale is that rental properties generally are not owner-occupied and therefore are less likely to be cared for to the same degree as permanent residences. In theory, absentee property owners are presumed to be less diligent about the types of regular and routine maintenance tasks typically associated with home ownership, such as lawn maintenance, tree and shrub pruning, and exterior painting. This perspective is evident in the Saint Paul Student Housing Study, which asserted that some of the negative impacts of student housing can be attributed to the fact that student housing “tends to be almost exclusively rental with absentee ownership” and that the owners of student housing “may not observe the same standards of property maintenance as residents of owner-occupied properties expect.”⁶

In 2009, the City of Frisco, Texas cited inadequate property maintenance by absentee owners as justification for requiring the owners of single-family rental properties to register with the city. In particular, the “whereas” clauses of Frisco’s single-family rental ordinance stated that the city council “had investigated and determined that some absentee owners of single-family residential properties do not have firsthand knowledge of the condition of their properties” and that the registration requirement would “prevent the growth of unmaintained properties and ... preserve and enhance residential neighborhoods and property values.”⁷

The City of Clinton, Mississippi’s “Rental Housing Ordinance” webpage states that the city “adopted a Rental Property Ordinance in order to insure the health, safety and welfare of the community.”⁸ In response to the question “Why Does The City Have A Rental Inspection Program?,” the Rental Housing Ordinance webpage explains:

For years the City responded to complaints from tenants, other nearby rental property owners, and residents about the lack of property maintenance on many rental properties.

⁴ “L.A. proposal would block Airbnb hosts from creating ‘rogue hotels,’” *Los Angeles Times* (June 2, 2015) (available online at <http://touch.latimes.com/#section/-1/article/p2p-83685019/>).

⁵ See “San Francisco creates short-term rental agency,” *Business Insider* (July 2, 2015) (available online at <http://www.businessinsider.com/r-san-francisco-creates-short-term-rental-agency-2015-7>).

⁶ *Saint Paul Student Housing Study* at 9.

⁷ City of Frisco, Texas, Rental Ordinance – Single-Family Dwelling at 1 (available online at <http://www.ci.frisco.tx.us/departments/planningDevelopment/codeEnforcement/Documents/Rental%20Ordinance.pdf>). The Frisco Rental Ordinance is codified as Article VIII (Reporting Requirements) of the City of Frisco Code of Ordinances). See <http://z2.franklinlegal.net/franklin/Z2Browser2.html?showset=friscoset>.

⁸ City of Clinton, MS – Rental Housing Ordinance (available online at <https://www.clintonms.org/departments/community-development/rental/>).

Nearby property owners complained that as a result of poor property maintenance on rental properties, their property values were being adversely affected. This same complaint was echoed by other rental property owners who believed that their ability to rent, and even their ability to increase rents, was being adversely affected by other errant rental property owners in their neighborhoods.⁹

The City of Waconia, Minnesota’s “Housing Ordinance for Rental Property” is another example of an ordinance targeting the physical characteristics of rental property—the stated purpose of the ordinance is to “provide minimum standards to safeguard life or limb, health and public welfare by regulating and controlling the use and occupancy, maintenance and repair of all buildings and structures within the City used as rental housing.”¹⁰

(b) Revenue

For many communities, particularly those with a robust tourist industry, short-term rentals represent a potentially significant source of tax revenue. In Texas, for example, the state’s Hotel Occupancy Tax statute defines the term “hotel” to include any building that offers sleeping accommodations for consideration, including a “tourist home” or “tourist house,” and imposes a six percent tax on the price paid for such accommodations.¹¹ In addition, the Municipal Hotel Occupancy Tax statute authorizes Texas cities, towns and villages to impose and collect an additional nine percent tax on hotels, including short-term rental properties.¹² The potential revenue available to municipalities with authority to tax short-term rentals is evidenced by a 2011 study prepared by the city auditor for Austin, Texas, which estimated that the city could gain \$100,000 to \$300,000 annually by collecting taxes on short-term rental properties.¹³ Communities that desire to collect such taxes often impose registration or licensing requirements as a means of identifying properties that are being used for short-term rentals and are therefore subject to taxation.

At least one local jurisdiction—Pima County, Arizona—has begun reclassifying properties that are used for short-term rental purposes from residential use to commercial use. These reclassifications are done unilaterally by the Office of the County Assessor, resulting in a substantial increases in property taxes for affected property owners.¹⁴ According to the Pima County Assessor, the reclassification is justified because “state law defines transient lodging establishments as those that rent for less than 30 days at a time” and short-term rentals meet this

⁹ *Id.*

¹⁰ City of Waconia, MN – Housing Ordinance for Rental Property § 541.01, Subd. 1 (available online at <http://www.waconia.org/DocumentCenter/Home/View/158>).

¹¹ See Texas Code §§ 156.001, 156.052. Accommodations of “at least 30 consecutive days, so long as there is no interruption of payment for the period,” are exempt from the tax. *Id.* § 156.101.

¹² See Texas Code § 351.003.

¹³ See “City of Austin begins work on short-term rental regulations; Planning Commission to address safety, tax revenue concerns,” (Source: impactnews.com: Central Austin, April 22, 2011). Austin’s short-term rental regulations were adopted in September 2013 as Ordinance No. 20130926-144 (available online at <http://www.austintexas.gov/edims/document.cfm?id=199458>).

¹⁴ See “Pima County Airbnb owners surprised by new taxes,” *Arizona Daily Star*, August 22, 2015 (available online at http://tucson.com/news/local/govt-and-politics/changes-put-bite-on-short-term-landlords/article_b3efb530-237f-5533-8cce-03a7dec4eb63.html).

criteria.¹⁵ In 2015, Pima County reportedly reclassified 235 residential properties to commercial, thereby causing the property tax rate on these properties to rise from the residential rate of 10 percent to the commercial rate of 18 percent.¹⁶

In June 2015 the State of Rhode Island adopted a budget bill that extended the state's 7 percent sales tax and 1 percent local hotel tax to house and room rentals of 30 days or less.¹⁷ It also imposed a total of 13 percent in taxes on "room resellers" such as Airbnb and Expedia, including the 7 percent sales tax, a 5 percent statewide hotel tax, and a 1 percent local hotel tax.¹⁸

A bill introduced in the Massachusetts General Assembly in January 2015 likewise proposes to tax short-term rentals at both the state and local levels. Bill H.2618 would require that all short-term rental properties be registered with the state and would impose a 5 percent state excise tax on all short-term residential rentals.¹⁹ Bill H.2618 would also authorize Massachusetts cities and towns to impose a local excise tax of up to 6 percent on short-term residential rentals.²⁰

In a 2014 report, the Attorney General of the State of New York estimated that, based on the city's hotel room occupancy tax rate of 5.875 percent, private short-term rentals in New York City would have incurred more than \$33 million in hotel tax liability from 2010 through June 2014.²¹

(c) Fairer Competition with Licensed Lodging

Short-term rental restrictions may also be viewed as a means of leveling the playing field between short-term rentals and more traditional types of overnight lodging that may be specifically regulated under state or local law, such as hotels and bed and breakfasts. In 2015, the American Hotel & Lodging Association (AH&LA) reportedly increased its lobbying efforts in a push for stronger regulation of short-term rentals listed on websites such as Airbnb.²² In an effort to "ensure that short-term rental hosts are held to the same standards as hoteliers," the AH&LA reportedly began working with governments and local hotel associations to address subjects such as occupancy tax payment and American with Disabilities Act (ADA) compliance.²³

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See "New taxes take effect in R.I.," Providence Journal (July 2, 2015); see Article 11 of the Rhode Island Fiscal Year 2016 Budget (H 5900 Sub A) (available online at <http://www.budget.ri.gov/Documents/CurrentFY/FY%202016%20Appropriations%20Act%20Final.pdf>).

¹⁸ See *id.*

¹⁹ See Massachusetts Bill H.2618, § 2 (2015) (available online at <https://malegislature.gov/Bills/189/House/H2618>). H.2618 was referred to the Joint Committee on Revenue in January 2015. As of October 14, 2015, H.2618 has not been reported out of committee.

²⁰ See *id.* § 3.

²¹ *Airbnb in the City* at 9 (Oct. 2014, New York State office of the Attorney General) (available online at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>).

²² See Danny King, "Hotels group seeks more regulation of short-term rentals," *Travel Weekly* (May 5, 2015) (available online at <http://www.travelweekly.com/Travel-News/Hotel-News/Hotels-group-seeks-more-regulation-of-short-term-rentals/>).

²³ See *id.* (quoting Vanessa Sindors, AH&LA's senior vice president of governmental affairs).

In 2015 the California Hotel & Lodging Association (CH&LA) came out in support of Senate Bill 593, which proposed to assist cities and counties in collecting Transient Occupancy Taxes by requiring online services that facilitate short-term residential rentals (e.g., Airbnb, VHBO, and FlipKey) to report the location of the units, the number of days rented, and the amounts paid.²⁴ CH&LA explained that it supports the bill because its “members simply want a level playing field” and that many short-term rental hosts “simply don’t pay the required taxes.”²⁵

In some cases, the hotel industry has lobbied for the adoption of short-term rental regulations on the grounds that short-term rentals are functionally the same as hotel units and therefore should either be taxed and regulated like hotels, or prohibited. For example, at a June 2011 meeting of the Planning Board of Buncombe County, North Carolina, several hoteliers cited unfair competition in arguing against the potential repeal of a ban on vacation rentals in the county’s more restrictive residential zoning districts. One industry representative testified that hotels “spend many, many hours and many, many dollars abiding by all the regulations that [hotels] are require to abide by and that many do not apply to short-term rentals.”²⁶

(d) Protection of Renter Safety

Protecting the health, safety, and welfare of residential renters is often cited as justification for the adoption of an ordinance requiring the registration and inspection of residential rental properties. For example, the City of Gary, Indiana has a rental registration and inspection program that requires all rental properties in the city to be registered annually and allows anyone who resides within 300 feet of a rental unit to file a complaint and cause the unit to be inspected.²⁷ The protection of renter safety is among the stated purposes of the Gary’s rental registration and inspection program, which states that the intent of the program is to “prevent unsafe living conditions, overcrowding and violations of laws and ordinance in residential housing units; [and] to correct and prevent housing conditions that adversely affect the safety, welfare and health of the persons occupying residential rental housing units.”²⁸

The protection of renter safety is also sometimes cited as the reason for the adoption of short-term rental restrictions. The rationale is that operational restrictions (e.g., occupancy limits based on septic system capacity) and inspection requirements are necessary to ensure the safety of occupants of short-term rental units. For example, the City of Big Bear Lake, California has a “transient private home rentals” ordinance that is intended, in part, “to ensure . . . that minimum health and safety standards are maintained in such units to protect the visitor from unsafe or unsanitary conditions.”²⁹

²⁴ CH&LA Legislative Action Summit Issues Summary (March 18, 2015) (available online at http://www.calodging.com/images/uploads/general/2015_Leg%20Issue_brief.pdf).

²⁵ *Id.*

²⁶ “Buncombe planners wade into Asheville-area vacation rental issue again; County debates relaxing the rules,” *The Asheville Citizen-Times*, June 6, 2011.

²⁷ See City of Gary, IN Rental Registration/Inspection Program Fact Sheet (available online at http://www.gary.in.us/gary-building-department/pdf/Rental_Registration_Fact_Sheet.pdf).

²⁸ *Id.*

²⁹ City of Bear Lake, CA Municipal Code § 17.03.310(A).

(e) Greater Compliance with Maintenance, Building and Nuisance Codes

Achieving greater compliance with property maintenance, building, and public nuisance codes is also cited as a reason for the adoption of an ordinance requiring the registration and inspection of residential rental properties. For example, the City of Gary, Indiana’s rental registration and inspection ordinance states that one of its purposes is to “facilitate enforcement of minimum standards for the maintenance of existing residential buildings and thereby prevent slums and blight.”³⁰

Some communities have also sought to improve the level of code compliance in rental properties by requiring that all residential rental agreements contain provisions that expressly require tenants to comply with all applicable laws. In 2015 the Town of Kure Beach, North Carolina, for example, considered an ordinance that would have required all vacation rental permit holders to include in their rental agreements a statement that:

tenants shall not violate federal, state, or local laws, ordinances, rules, or regulations; engage in disorderly or illegal conduct; engage in activities or conduct creating or resulting in unreasonable noise, disturbances, and public nuisances; allow an unreasonable amount of garbage, refuse, and rubbish to accumulate on the property; illegally park vehicles in conjunction with their use of the vacation home; and overcrowd the vacation home premises.³¹

The proposed ordinance, which was tabled by the Kure Beach Planning and Zoning Commission,³² also would have required all rental agreements to contain a statement that a “material breach” of above-quoted provision would result in a termination of the rental agreement.³³ The rationale is that, if the law itself is not sufficient to deter renters from engaging in unlawful conduct, the knowledge that the rental agreement could be terminated—for example, for having a party that results in a call to the police—might make renters think twice about their behavior.

As discussed in the subsection (f) below, rental regulations may also seek to achieve greater code compliance by holding landlords accountable for violations, regardless of whether they are directly responsible.

(f) Increased Landlord Accountability

Increased landlord accountability is also cited as a reason for the adoption of rental regulations. The City of Minneapolis, Minnesota makes no attempt to hide its intent to hold landlords responsible for the condition of their properties and to hold them accountable for compliance

³⁰ See City of Gary, IN Rental Registration/Inspection Program Fact Sheet.

³¹ Town of Kure Beach, NC: Proposed Vacation Rental Ordinance § 9(c) (available online at <http://townofkurebeach.org/Data/Sites/1/media/government/planning-zoning/proposed-vacation-rental-ordinance-version-four-final-2-5-15.pdf>).

³² See <http://www.wect.com/story/28694632/kure-beach-officials-decide-against-using-proposed-rental-property-ordinance>.

³³ Town of Kure Beach, NC: Proposed Vacation Rental Ordinance § 9(d).

with applicable laws. The Department of Housing Inspections Services maintains a webpage entitled “Holding Property Owners Accountable,” which states, in relevant part:

The City of Minneapolis does not tolerate landlords who violate rental licensing standards. We hold property owners responsible for the condition of their properties and hold owners responsible to proactively plan for, address and respond to issues of tenant behavior. Landlords are required by law to comply with the conditions of their rental license and must be responsive to problems on their properties. Maintaining a rental license in the City of Minneapolis is a privilege.

Unfortunately, the City of Minneapolis has not been able to convince all property owners to comply with our laws. As a result, properties have been condemned for maintenance, licenses have been revoked and in some instances, properties have been demolished.³⁴

The City of New Braunfels, Texas is another community in which rental property owners are held accountable for violations of the short-term rental regulations, even if the violation is committed by a tenant. Section 144-5.17-7(b) (Enforcement/Penalty) of New Braunfels’s short-term rental ordinance states: “Violations of any subsection of this [ordinance] may revoke the short term rental permit in accordance with subsection 144-5.17-8, Revocation.”³⁵ Notably, this provision does not distinguish between violations that are committed by a tenant (e.g., excessive noise or a parking violation) rather than by the owner.

3.2 Moratoria

(a) Generally

A governmental **moratorium** is a suspension by government of a particular activity within its jurisdiction. In the land use regulatory context, it is a type of interim zoning control that either prohibits all development or certain types of development for a defined period of time.³⁶

Moratoria are used by local governments to preserve the status quo or to limit the amount of change that can occur during a planning process or while new regulations are being drafted. A leading zoning and land use law treatise explains the rationale for development moratoria as follows:

A moratorium on development activity protects the planning process by preventing the establishment of uses that, though legal when established, would or might be inconsistent with needs ultimately identified by planning studies; uses, structures or lots established while new plans or regulations are being drafted may turn out to be “nonconforming” with the new regulations, a status that creates legal and practical problems for both the public and private sector. Public knowledge that the government has made, or is about to make, studies to alter existing land use controls frequently triggers development activity that may frustrate planning efforts. Developers race to beat the imposition of new controls which, they fear, will be more restrictive.... Successful [moratoria] should

³⁴ City of Minneapolis, MN: Housing Inspections Services – Holding Property Owners Accountable (available online at http://www.ci.minneapolis.mn.us/inspections/inspections_accountable).

³⁵ New Braunfels, TX Code § 144-5.17-7(b) (available online at https://www.municode.com/library/#!/tx/new_braunfels/codes/code_of_ordinances).

³⁶ See NAR GROWTH MANAGEMENT FACT BOOK § 3.01 (4th ed., 2015).

preclude the establishment of vested rights in new uses that are likely to become nonconforming under new regulations.³⁷

(b) Application to Rental Housing Problems

As applied to long- or short-term rental issues, moratoria have been adopted by communities in order to preserve the status quo while perceived problems are studied and/or new rental regulations are prepared. In 2013, the City of La Crosse, Wisconsin adopted a six-month moratorium on the “conversion, change, transfer, establishment or registration of any one family dwelling into a rental dwelling” in certain residential zoning districts.³⁸ The city reportedly adopted the moratorium in response to concerns that the conversion of single-family homes from owner-occupied dwellings to rental dwellings was having a negative impact on neighboring properties, such as a decrease in property values and a decline in the quality of life.³⁹ La Crosse reportedly used the six-month moratorium period to “study the impact of the conversion of [owner-occupied] dwellings to rental dwellings” and to determine whether it was necessary to amend the city’s Code of Ordinances in order to properly address those impacts.⁴⁰

Another example is the City of Cedar Falls, Iowa, which in 2014 adopted a six-month moratorium on the issuance of “minimum rental housing occupancy permits” in certain single-family zoning districts in order to “protect the status quo, ... to study and review the existing Cedar Falls Code of Ordinances, and to consider a revised ordinance or ordinances to deal with the competing interests involved.”⁴¹ The Cedar Falls moratorium directed staff “to make recommendations to the City Council that will resolve the legitimate concerns related to [the conversion of single-family owner-occupied or non-rented residential dwellings into rental dwellings], and that City staff develop a recommendation for one or more proposed ordinances to address such matters.”⁴²

In September 2015, the City of Anaheim, California adopted a 45-day moratorium on new short-term rental applications “to give staff time to consider long-term fixes.”⁴³

³⁷ ZONING AND LAND USE CONTROLS, Ch. 22, Moratoria and Interim Development Controls § 22.01 (LexisNexis Matthew Bender 2015).

³⁸ La Crosse, WI Municipal Code, § 8.07(I); *see also* Betsy Bloom, “City Oks 6-month ban on rental conversions,” *La Crosse Tribune* (July 12, 2013) (available online at http://lacrossetribune.com/news/local/city-oks--month-ban-on-rental-conversions/article_face5252-ea9f-11e2-8792-0019bb2963f4.html).

³⁹ Lewis Kuhlman, *Moratorium on Granting New Rental Registration for Single-Family Homes in the R-1 District, Issue brief explaining the need for a moratorium to study rental conversion’s effect on single-family homes and their neighborhoods* (hereinafter, “*Moratorium on Granting New Rental Registration*”), City of La Crosse, Planning & Development, at 1 (June 7, 2013).

⁴⁰ *Id.*

⁴¹ *See* Cedar Falls, IA, Resolution No. 19,183 at 2, ¶ 1.

⁴² *Id.* at 2, ¶¶ 5, 6.

⁴³ *See* “Anaheim imposes moratorium on new short-term rentals,” *Los Angeles Times*, September 16, 2015 (available online at <http://www.latimes.com/business/la-fi-anaheim-airbnb-20150916-story.html>).

3.3 Regulations Directed at Residential Rentals

(a) Prohibition

From the perspective of a short-term rental property owner, the most severe form of restriction is an outright ban on short-term rentals. A short-term rental prohibition may be limited to specific neighborhoods or zoning districts, or may be community-wide. In June 2015, the City of Manhattan Beach, California adopted a citywide ban on residential rentals of less than thirty days.⁴⁴ Also in 2015, the City of Santa Monica, California adopted a citywide ban on “vacation rentals” in which a guest has “exclusive private use of the unit” for less than thirty days.⁴⁵ Santa Monica’s ordinance does, however, permit “home-sharing,”⁴⁶ in which the primary resident of the property lives “on-site during the visitor’s stay,” provided that the owner obtains a business license and pays a 14% hotel tax on all home sharing stays.⁴⁷ As discussed in Section 6.1, the concern that rental property owners are converting long-term rentals to short-term rentals, thereby causing a decline in the inventory of available rental housing units, has led some communities—e.g., Santa Monica—to prohibit short-term rentals unless the unit is occupied by a long-term tenant for a minimum number of days annually and during the short-term rental period.

In Miami Beach, Florida, short-term rentals are subject to two types of bans: a district-specific ban and a citywide ban. First, Miami Beach’s short-term rental regulation prohibits the rental of any apartment unit or townhome for a period of six months or less in certain residential districts.⁴⁸ Miami Beach is also an example of a citywide ban, as its land development regulations prohibit the rental of any single-family dwelling anywhere in the city (i.e., citywide) for a period of six months or less.⁴⁹

(b) Amortization

Amortization is a type of regulation that enables a community to gradually eliminate nonconforming uses by giving the user of the nonconforming use a “designated grace period to continue and amortize an investment, after which the nonconforming use must be

⁴⁴ See “Manhattan Beach bans short-term rentals,” *The Beach Reporter*, June 23, 2015 (available online at http://tbrnews.com/news/manhattan_beach/manhattan-beach-bans-short-term-rentals/article_d88ef560-19dd-11e5-a467-53ec06713eb7.html).

⁴⁵ See generally Santa Monica, CA Ordinance No. CSS (available online at <http://www.smgov.net/departments/council/agendas/2015/20150512/s2015051207-A-1.htm>); see also Sam Sanders, “Santa Monica Cracks Down on Airbnb, Bans ‘Vacation Rentals’ Under a Month,” NPR (May 13, 2015) (available online at <http://www.npr.org/sections/thetwo-way/2015/05/13/406587575/santa-monica-cracks-down-on-airbnb-bans-vacation-rentals-under-a-month>).

⁴⁶ The Santa Monica ordinance defines “home-sharing” to mean: “An activity whereby the residents host visitors in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit’s primary residents lives on-site, in the dwelling unit, throughout the visitors’ stay.” *Id.* § 6.20.010(a).

⁴⁷ *Id.*

⁴⁸ See Miami Beach, FL Code of Ordinances § 142-1111(a) (Short-term rental of apartment units or townhomes) (available online at https://www.municode.com/library/#!/fl/miami_beach/codes/code_of_ordinances?nodeId=13097).

⁴⁹ See *id.* § 142-1111(a)(1); see also the City of Miami Beach’s “Vacation/Short-Term Rentals” webpage at <http://www.miamibeachfl.gov/planning/scroll.aspx?id=69472>.

discontinued.”⁵⁰ Amortization laws are based on the principle that “the property owner should be given time to recoup his investment in land before being forced to discontinue the use without compensation.”⁵¹

The City of Cannon Beach, Oregon provides a good example of an amortization provision in a rental ordinance. In 1992 the Cannon Beach City Council adopted a transient rental ordinance that included a provision requiring that “short-term rentals” (defined as a rental period of less than two weeks) be discontinued by February 1995, effectively creating a five-year amortization period for short-term rentals.⁵² The Cannon Beach City Council extended the amortization period to January 2005.⁵³

Calaveras County, California’s short-term rental regulations for the Lake Tulloch area provide another example. In general, the Lake Tulloch Short-Term Vacation Rental Regulations allow short-term vacation rentals, provided that the an administrative use permit (“AUP”) is obtained and certain “conditions of operation” are met.⁵⁴ The conditions of operation include restrictions on the number of occupants allowed to stay overnight, compliance with off-street parking requirements, and noise control standards.⁵⁵ In order to eliminate nonconforming short-term vacation rentals in the Lake Tulloch area, the Lake Tulloch Short-Term Vacation Rental Regulations contain the following amortization provision:

Section 20.20.102 - Amortization.

There is established a phased amortization period following the effective date of the adoption of this chapter, for any property rendered nonconforming by its provisions, wherein to attain full compliance with the provisions of this article according to the following schedule:

- A. Within three months of the effective date, all property owners of nonconforming short term vacation rentals shall submit an application for an initial AUP to the planning department for processing. Section 20.20.040 Development Standards, Subsection B (maximum occupancy) and Subsection E (off-street parking) shall not be limited as part of the first year (twelve months from county approval of the initial AUP) for any nonconforming use. Upon renewal of the initial AUP, Subsection B

⁵⁰ ZONING AND LAND USE CONTROLS § 41.04[1].

⁵¹ *Id.* As discussed in 8.2(c)(iii), an amortization law can constitute a taking under the Fifth Amendment to the U.S. Constitution if the amortization period is insufficient to allow affected property owners to recoup their investment.

⁵² See City of Cannon Beach, CA – Short Term Rental of Dwelling Units Proposed Ordinance (stating, in relevant part):

In January of 1992, the City Council adopted Ordinance 92-01. This ordinance established regulations for the transient rental of dwelling units, including a provision that the short-term rental of dwelling units would be discontinued on February 6, 1997 (this was referred to as the amortization period.) The ordinance defined the transient rental of a dwelling as a rental period of less than two weeks. Since 1992, the City Council has extended the amortization period twice, most recently to January 1, 2005.

⁵³ See *id.*

⁵⁴ See Calaveras County, CA Code of Ordinances, Ch. 20.20, Lake Tulloch Short Term Vacation Rentals at § 20.20.30.A (available online at https://www.municode.com/library/#!/ca/calaveras_county/codes/code_of_ordinances?searchRequest=%7B%22searchText%22:%22tot%22,%22pageNum%22:1,%22resultsPerPage%22:25,%22booleanSearch%22:false,%22stemming%22:true,%22fuzzy%22:false,%22synonym%22:false,%22contentTypes%22:%5B%22CODES%22%5D,%22productIds%22:%5B%5D%7D&nodeId=16236).

⁵⁵ *Id.* § 20.20.050.

- (maximum occupancy) and Subsection E (off-street parking) shall be in full compliance with the provisions of this chapter.
- B. Any application filed after three months of the effective date shall be in compliance with the provisions of this chapter.
 - C. A property owner may demonstrate a short term vacation rental qualifies for nonconforming status by providing evidence of legal contracts executed prior to the effective date of the ordinance that provide for short term rental of the property for dates that are after the ordinance comes into effect; or provide evidence that the property owner has paid TOT tax within one year of the date prior to the ordinance coming into effect.⁵⁶

In effect, Section 20.20.102 creates a “phased” amortization schedule for existing short-term vacation rental properties. In the first phase, short-term vacation rental property owners are allowed to continue without filing an accessory use permit application for a period of three months. In the second phase, short-term rental vacation properties are not required to comply with the maximum occupancy and off-street parking requirements for a period of one year. After the one-year amortization period, all short-term vacation rental properties are required to be “in full compliance” with Lake Tulloch’s Short-Term Vacation Rental Regulations.

The City of Newport Beach, California has an “amortization and amnesty period” provision in its Short Term Lodging Permit ordinance that allows the owners of short term lodgings who did not obtain a transient occupancy registration certificate prior to the effective date of the ordinance to do so without penalty, provided that an application for the certificate is filed not less than sixty days after the effective date of the ordinance.⁵⁷

(c) Geographically-Based Regulations

Communities that choose to allow short-term rentals often use their zoning authority to regulate the use on a geographic basis. For example, Venice, Florida regulates short-term rental properties (referred to locally as “resort dwellings”) only in the city’s Residential Estate (RE) and Residential Single Family (RSF) zoning districts.⁵⁸ In June 2015, the City of South Lake Tahoe, California considered amending its Vacation Home Rental Code in order to create a two-tiered districting scheme in which vacation home rentals would be permitted by-right in areas where “Tourist Accommodation Uses” were allowed by-right or with a special use permit, but would require a special use permit in areas of the city where Tourist Accommodation Uses were not authorized.⁵⁹

⁵⁶ *Id.* § 20.20.102.

⁵⁷ See Newport Beach, CA Municipal Code § 5.95.090 (available online at <http://www.codepublishing.com/ca/newportbeach/html/NewportBeach05/NewportBeach0595.html>).

⁵⁸ See generally Venice, FL Land Development Code § 86-151 (available online at https://www.municode.com/library/#!/fl/venice/codes/code_of_ordinances?nodeId=SPBLADERE_CH86LADECO_ARTVUSRE_DIV9SPUSRE_S86-151REDW).

⁵⁹ See http://slt.granicus.com/GeneratedAgendaViewer.php?view_id=6&event_id=218. The proposed vacation home rental ordinances appear on the “New Business” portion of the South Lake Tahoe City Council agenda as items (a) and (b) respectively. “Tourist Accommodation Uses” include bed and breakfasts, commercial transient lodging establishment (e.g., hotels, motels, and tourist cabins), and timeshares. See “Tourist Accommodation Project Information Packet and Checklist,” Tahoe Regional Planning Agency (available online at http://www.trpa.org/wp-content/uploads/Tourist_Accommodation_Project_Application.pdf).

(d) Quantitative Restrictions

Rather than regulating *where* short-term rentals may be located, some communities have chosen to regulate *how many* short-term rentals are allowed to exist at any given time. This quantitative approach represents a compromise between short-term rental owners who argue that they have the right to rent their properties on a short-term basis, and opponents who argue that short-term rentals should be prohibited as an unlawful commercial use in a residential neighborhood.⁶⁰

(i) **Numerical Cap.** Quantitative restrictions may take the form of a fixed limit on the total *number* of short-term rental permits that may be issued at any given time. For example, the City of Santa Fe, New Mexico authorizes the issuance of “up to 350 short term rental permits” for residential properties that do not otherwise qualify for permits as an accessory dwelling unit, owner-occupied unit, or unit located within a “development containing resort facilities.”⁶¹ Similarly, Maui County, Hawaii limits the number of short-term rental permits that may be issued by imposing the following restriction through its Short-Term Rental Homes code:

The County shall be restricted in approving the number of permits for short-term rental homes as distributed per the following community plan areas and as further restricted by the applicable community plan:

1. Hana: 48.
2. Kihei-Makena: 100; provided that, there are no more than five permitted short-term rental homes in the subdivision commonly known as Maui Meadows.
3. Makawao-Pukalani-Kula: 40.
4. Paia-Haiku: 88.
5. Wailuku-Kahului: 36.
6. West Maui: 88.⁶²

⁶⁰ The question whether governments have the authority to prohibit property owners from renting out their property is addressed in Section 8.2.

⁶¹ See Santa Fe, NM City Code § 14-6.2(A)(5)(b)(v) (available online at <http://clerkshq.com/default.ashx?clientsite=Santafe-nm>).

⁶² See Maui County, HA County Code § 19.65.030.R (available online at https://www.municode.com/library/#!/hi/maui_county/codes/code_of_ordinances?nodeId=TIT19ZO_ARTIVREMI_AR_CH19.65SHRMREHO).

(ii) Numerical Ratio. Another type of quantitative restriction that can be used to limit the number of short-term rentals within a community is a ratio. Specifically, a community may establish a maximum *ratio* of short-term rentals to residential dwelling units that cannot be exceeded. A good example of this approach is the Mendocino County, California zoning ordinance, which requires that the county maintain a ratio of “thirteen (13) long-term residential dwelling units to one (1) single unit rental or vacation home rental.”⁶³ An advantage to this approach is that, unlike a hard cap, the maximum number of short-term rentals permitted in Mendocino County will increase as the number of long-term residential dwelling units in the county increases—specifically, for every thirteen long-term residential dwelling units created, the county will allow one additional short-term rental permit to be issued.

(e) Proximity Restrictions

An alternative to restricting the quantity of short-term rental permits that can be issued by a numerical cap or ratio is a proximity restriction, which prohibits a short-term rental property from being located within a certain distance of another short-term rental property. For example, although it has since been revised to eliminate the proximity restriction, the “Residential Vacation Rentals” ordinance of San Luis Obispo County, California, previously contained the following provision:

[N]o residential vacation rental shall be located within 200 linear feet of a parcel on the same block on which is located any residential vacation rental or other type of visitor-servicing accommodation that is outside of the Commercial land use category.⁶⁴

(f) Registration/Licensing Requirements

Owners who intend to offer their property for rent may be required to register their property with the local government. For example, Garrett County, Maryland requires owners to register their property with the Office of Licensing and Enforcement Management and to pay a one-time fee as condition precedent to receiving a “transient vacation rental unit license.”⁶⁵ Short-term rental licenses often are valid only for a one- or two-year period, requiring property owners to renew the licenses—and to pay associated fees—on a regular basis. In the City of Marco Island, Florida, for example, a short-term rental registration must be renewed every year.⁶⁶

Many communities require short-term rental properties to pass certain inspections prior to the issuance of a permit, license, or renewal. For example, as a condition to the issuance of a short-term rental permit, Tillamook County, Oregon requires property owners to obtain a certification

⁶³ Mendocino County, CA Code § 20.748.020(A) (available online at https://www.municode.com/library/#/ca/mendocino_county/codes/code_of_ordinances?nodeId=MECOCO_TIT20_ZOOR_DIVIIIMETOZOCO_CH20.748SIUNREVAHORE).

⁶⁴ San Luis Obispo County, CA Code § 23.08.165(c).

⁶⁵ See Garrett County, MD Code of Ordinances § 160.03(A) (available online at [http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettco_md/garrettcounnymarylandcodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:garrettco_md](http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettco_md/garrettcounnymarylandcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:garrettco_md)).

⁶⁶ See Marco Island, FL Code of Ordinances § 8-101(d).

from a building inspector evidencing compliance with all applicable operational standards, including minimum fire extinguisher and smoke detector requirements, emergency escape and rescue standards, and structural requirements.⁶⁷

The issuance of a rental registration or permit may also be conditioned on the property owner, manager, or designated agent⁶⁸ satisfying a mandatory training requirement. Completion of a Landlord Training Program is mandatory for all residential rental license holders in the City of Elgin, Illinois.⁶⁹ The Landlord Training Program is taught by police officers from the Crime-Free Housing Unit and covers multiple topics including criminal and civil tenant screening, crime-free lease addenda, civil evictions, and legal issues in rental housing.⁷⁰

(g) Operational Restrictions

Communities that permit long-term or short-term residential rentals often impose performance-type standards on the operation of rental properties. The rationale for this approach is that, rather than banning residential rentals, communities can mitigate the negative impacts often attributed to rental occupancies (e.g., overcrowding and disruptive conduct) by establishing a set of rules governing the occupation and operation of rental properties. Operational restrictions typically are found in rental regulations that contain a registration or permit requirement. In some cases, a violation of an operational regulation can result in the suspension or revocation of a rental permit, penalties that ostensibly give rental property owners a strong incentive to judiciously screen tenants and to operate the rental in conformance with applicable regulations. Below are examples of types of operational restrictions that are frequently incorporated into rental regulations:

(i) Maximum Occupancy Limits

This type of restriction limits the maximum overnight occupancy of a rental property based on the number of bedrooms in the home and/or on the septic capacity of the property. For example, the Isle of Palms, South Carolina limits the overnight occupancy of short-term rentals to two persons per bedroom plus an additional two persons.⁷¹ In Sonoma County, California, the maximum occupancy of a vacation rental home on a conditional septic system is set as the amount “equal to the design load of the septic system.”⁷²

⁶⁷ See Tillamook County (OR) Short Term Rental Ordinances, Sections 6 (Standards) and 9.A.b (Short Term Rental Permit Application Requirements).

⁶⁸ For a discussion of designated agent or designated representative requirements, see Section 3.3(g) of this paper.

⁶⁹ See City of Elgin, IL Landlord Training Program (available online at <http://www.cityofelgin.org/index.aspx?nid=1194>).

⁷⁰ See *id.*

⁷¹ See Isle of Palms, SC City Code § 5-4-202(1) (available online at https://www.municode.com/library/#!/sc/isle_of_palms/codes/code_of_ordinances?nodeId=COOR_TIT5PLDE_CH4ZO_ART9SHRMRE_S5-4-202MAOVOC).

⁷² See Sonoma County, CA Code of Ordinances § 26-88-120(f)(2) (available online at https://www.municode.com/library/#!/ca/sonoma_county/codes/code_of_ordinances?nodeId=CH26SOCOZORE_ART88GEUSBUEXUILI_S26-88-120VARE).

(ii) Rental Period

This restriction places a limit on the number of times a property may be rented for short-term occupancy. For example, the City of Santa Fe, New Mexico limits short-term rental units to a maximum of 17 rental periods per calendar year and permits no more than one rental within a seven consecutive day period.⁷³

(iii) Parking Requirements

This operational restriction may require that the short-term rented property provide more off-street parking than comparable properties that are occupied by owners or long-term tenants. For example, Coconino County, Arizona's vacation home rental ordinance requires that all vacation home rentals have one on-site parking space per bedroom, that all on-site parking spaces have "improved surfaces," and that all vehicles be parked on-site in the improved parking spaces.⁷⁴ By contrast, the Coconino County Zoning Ordinance requires that a single-family home in a residential district have two off-street parking spaces, regardless of the number of bedrooms.⁷⁵

(iv) Noise Levels

This operational restriction applies specific noise level limitations to activities associated with short-term rental properties. Sonoma County's vacation rental ordinance, for example, contains an "Hourly Noise Metric" table that imposes specific quantitative noise level limits on vacation rentals during "activity hours" (9:00 a.m. to 10:00 a.m.) and "quiet hours" (10:00 p.m. to 9:00 a.m.).⁷⁶ Other communities impose a significantly less precise noise limits on vacation rentals. The "Noise and Disturbance" provision of Coconino County's vacation home rental ordinance, for example, simply states that a vacation rental "shall not be utilized in any manner that produces excessive noise ... or any disturbances that disturb the peace and quiet enjoyment of neighboring residences."⁷⁷

(v) Posting

This requires owners to prominently display a copy of the operational restrictions and contact information for the owner, manager, or other representative of the rental property. The short-term rental regulations adopted by the City of New Braunfels, Texas, for example, contain the following "tenant indoor notification" requirement:

The operator shall post in a conspicuous location of the dwelling the following minimum information:

- (1) Maximum number of occupants.
- (2) Location of required off-street parking, other available parking and prohibition of parking on landscaped areas.

⁷³ See Santa Fe, NM City Code § 14-6.2(A)(6)(a)(ii) (available online at <http://clerkshq.com/default.ashx?clientsite=Santafe-nm>).

⁷⁴ See Coconino County, AZ, Vacation Home Rental Ordinance § 24.12(F)(6) (available online at <http://www.coconino.az.gov/DocumentCenter/View/9775>).

⁷⁵ See generally Coconino County, AZ, Zoning Ordinance § 19.2.

⁷⁶ See Sonoma County, CA Code of Ordinances § 26-88-120(f)(6).

⁷⁷ See Coconino County, AZ, Vacation Home Rental Ordinance § 24.12(F)(4).

- (3) Quiet hours and noise restrictions.
- (4) Restrictions of outdoor facilities.
- (5) 24-hour contact person and phone number.
- (6) Property cleanliness requirements.
- (7) Trash pick-up requirements, including location of trash cans.
- (8) Flooding hazards and evacuation routes. Including information on the emergency siren system.
- (9) Emergency numbers.
- (10) Notice that failure to conform to the occupancy and parking requirements is a violation of the City Code and occupant or visitor can be cited.
- (11) Other useful information about the community.⁷⁸

The City of Marco Island, Florida similarly requires that a notice containing 24-hour contact information, occupancy and parking limits for the unit, trash and recycling pick-up days, and a summary of the city's noise ordinance be "conspicuously posted" in each rental dwelling.⁷⁹

(vi) Mandatory Lease Provisions

Some communities also require rental property owners to incorporate the operational restrictions into all rental agreements. For example, in addition to requiring that the performance standards established for vacation rentals be posted in a prominent place within the unit, Sonoma County expressly requires that the owner "include them as part of all rental agreements."⁸⁰

(vii) Emergency Access Requirements

If located behind a locked gate or within a gated community, short-term rental units may be required to provide a gate code or lockbox with keys to local police, fire, or emergency services departments.⁸¹

(viii) Designated Representatives

This operational requirement mandates that the rental property owner provide a current 24-hour working phone number of the owner, manager, or other designated representative to local officials and, in some cases, to property owners within a certain distance of the rental unit. For example, Marco Island, Florida requires that a designated contact be named on each short-term rental registration application and that the designated contact be "available for contact by the City for each hour or each day, seven days per week."⁸² Some communities also specifically

⁷⁸ New Braunfels, TX Code § 144-5.17-4(g).

⁷⁹ See Marco Island, FL Code of Ordinances § 8-103 (available online at https://www.municode.com/library/#/fl/marco_island/codes/code_of_ordinances?searchRequest=%7B%22searchText%22:%22rental%22,%22pageNum%22:1,%22resultsPerPage%22:25,%22booleanSearch%22:false,%22stemming%22:true,%22fuzzy%22:false,%22synonym%22:false,%22contentType%22:%5B%22CODES%22%5D,%22productIds%22:%5B%5D%7D&nodeId=14000).

⁸⁰ Sonoma County, CA Code of Ordinances § 26-88-120(f)(15).

⁸¹ See, e.g., Sonoma County, CA Code of Ordinances § 26-88-120(f)(14).

⁸² Marco Island, FL Code of Ordinances § 8-102(1).

require that the designated representative be available during all rental periods within a certain distance (e.g., a one-hour drive) of the rental property.⁸³

(ix) Trash and Recycling Facility Storage

This operational restriction requires that trash and recycling bins be stored in a location that is not visible from public rights-of-way. Section 5.25.070 of the City of Palm Springs, California vacation rental ordinance, for example, states: “Trash and refuse shall not be left stored within public view, except in proper containers for the purpose of collection by the collectors and between the hours of five a.m. and eight p.m. on scheduled trash collection days.”⁸⁴

(h) Special Permit Requirement/Conditions of Approval

Rentals are sometimes classified as a special use or a conditional use in a community’s land use regulations. Under the Sonoma County Zoning Regulations, a vacation rental may be allowed by right or as a special use, depending on whether the application satisfies the applicable standards. Section 26-88-120(c) of the Sonoma County Zoning Regulations (Permit Requirements) states:

Vacation rentals that meet the standards outlined in this section shall be allowed as provided by the underlying zoning district, subject to issuance of a zoning permit. Vacation rentals that exceed the standards in this section may be permitted, subject to the granting of a use permit.⁸⁵

Where a special use or conditional use permit is required for a rental use, the permit granting authority typically has the authority to impose conditions of approval on the permit in order to mitigate any potential negative impacts of the use on neighboring properties or the community. The “use permit” provisions of the Sonoma County Zoning Regulations, for example, expressly authorize the board of adjustment to “designate such conditions in accordance with the use permit, as it deems necessary to secure the purposes of this chapter and may require such guarantees and evidence that such conditions are being or will be complied with.”⁸⁶

(i) Remedial Action Requirements

Some rental regulations require that the property owner or its agent take action in response to a complaint or to remedy a known violation. In Marco Island, Florida, a designated contact person—who must be available for contact 24-hours a day, 7-days a week—must respond to a complaint within one hour of receiving a call from the city.⁸⁷ Section 8-102(1) of the Marco Island Code further requires that the designated contact take steps to address the complaint and report back to the city:

⁸³ See, e.g., Sonoma County, CA Code of Ordinances § 26-88-120(f)(13).

⁸⁴ Palm Springs, CA Municipal Code § 5.25.070(i).

⁸⁵ Sonoma County, CA Code of Ordinances § 26-88-120(c). Under the Sonoma County Code, a “use permit” is a discretionary permit issued by the board of zoning adjustments for use a specific site for a particular purpose. *Id.* § 26-92-070.

⁸⁶ Sonoma County, CA Code of Ordinances § 26-92-080(a).

⁸⁷ Marco Island, FL Code of Ordinances § 8-102(1).

The designated contact shall promptly make at least three (3) attempts following the receipt of a complaint from the City to contact the tenants and resolve the complaint. The designated contact person is also responsible for documenting the complaint; the date and time of receipt of the complaint from the city; the date and time of attempts to contact the tenant(s) and the result of the contact; the nature of the response by the tenant(s); and forwarding that documentation to the City Manager within one (1) hour of their response to the initial complaint.⁸⁸

The Residential Rental Registration and Remedial Action Program adopted by the City of Charlotte, North Carolina requires the owner of any residential rental property that reaches a certain level of “disorder activity” (e.g., reported violent crimes) to meet with police officials and to prepare a Remedial Action Plan to address the problem.⁸⁹ The Remedial Action Plan is a “written plan agreed upon and signed by both the Police Official and Owner whereby the Owner agrees to implement redial measures on a residential rental property” and is based on the procedures and practices set forth in the Charlotte-Mecklenburg Police Department guidebook *Remedial Action Plan Manual: A Guide to Managing Rental Properties to Prevent Crime*.⁹⁰

(j) Restriction on Number of Unrelated Individuals Residing in a Dwelling Unit

In order to address overcrowding and rentals by large groups of students or vacationers, many communities restrict the number of unrelated individuals that can reside together in a dwelling unit. This type restriction is typically found in a land use or zoning regulation. For example, the Coconino County Zoning Ordinance defines “family” to mean “any number of individuals related by blood, marriage, affinity or legal adoption/guardianship, or a group of not more than five (5) unrelated persons living together as a single housekeeping unit in a single dwelling unit sharing common cooking facilities.”⁹¹ The five unrelated persons maximum is made applicable to vacation rentals by expressly limiting the overnight occupancy of a vacation rental unit to a “family.”⁹²

The same approach is sometimes used by communities—often college towns—to address perceived problems caused by the conversion of owner-occupied single-family homes to rental housing for students. In 2015 the City of Cedar Falls, Iowa amended its rental housing code to reduce the number of unrelated persons who can rent housing together from four to either two or three in certain residential zoning districts.⁹³ The reduced unrelated persons occupancy restriction was one of several approaches that Cedar Falls considered as a means of addressing perceived problems caused by groups of college students renting single-family homes in residential neighborhoods.

⁸⁸ *Id.*

⁸⁹ Charlotte, NC Residential Rental Registration and Remedial Action Program §§ 6-584, 585.

⁹⁰ See *id.* § 6-856(d). The *Remedial Action Plan Manual: A Guide to Managing Rental Properties to Prevent Crime* (CMPD, Nov. 2009) is available online at <http://charmeck.org/city/charlotte/CMPD/resources/Ordinances/Documents/RemedialActionPlan2010.pdf>.

⁹¹ Coconino County Zoning Ord. § 17(s).

⁹² Coconino County Zoning Ord. § 24.12(D)(2).

⁹³ See Cedar Falls, IA, Ordinance No. 2836 (available online at <http://www.cedarfalls.com/DocumentCenter/View/3715>).

As discussed in Sections 8.2(c) and 8.2(d) of this paper, laws that restrict the number of unrelated persons permitted to reside together can raise issues under the Equal Protection Clause of the 14th Amendment and the federal Fair Housing Amendments Act.

(k) Neighborhood Conservation Districts

Another approach that has been used by communities to address perceived problems with the conversion of owner-occupied single-family homes to rental units is the neighborhood conservation district. In general, a **neighborhood conservation district** is an “area that has a clear and consistent character defined by geographical boundaries” and is “established with the specific intention of conserving the neighborhood character of the designated district.”⁹⁴ In 2014 the City of Steubenville, Ohio adopted an ordinance enabling property owners in certain single-family zoning districts to petition the Planning and Zoning Commission and the City Council to establish district use regulations in their residential neighborhoods in order to restrict rental use of single-family detached dwellings.⁹⁵ The stated intent of the neighborhood conservation districts was to “preserve the attractiveness, desirability and privacy of residential neighborhoods by precluding all or certain types of rental properties, thereby precluding the deleterious effect rental properties can have on a neighborhood such as property deterioration, increased density, congestion, and noise and traffic levels leading to the reduction of property values.”⁹⁶

The neighborhood conservation district approach was also considered by the City of Galveston, Texas, where a member of the city council proposed an ordinance that would allow property owners to “zone out” short-term rental housing by petitioning for a rezone.⁹⁷ Under the proposal, in order to submit a petition for a rezoning to a “short-term-rental-banning R-0 Single Family Residential Zoning District,” the request must come from an area where 75 percent of dwellings are single family owner-occupied, of which 75 percent of these homeowners must sign a petition agreeing to a ban on short-term rentals and commercial uses.⁹⁸ The proposal reportedly was based on a neighborhood conservation district zoning category previously adopted by the city.⁹⁹

(l) Business Licensing Requirement

Another type of requirement that is sometimes imposed on rental property owners is a business license. For example, Section 6.26.020 of Provo, Utah’s Rental Dwellings code states: “It is unlawful for any person to keep, conduct, operate or maintain a rental dwelling or a short-term rental dwelling within the City without a business license for such dwelling.”¹⁰⁰ Unlike zoning permits, which generally run with the land, business licenses typically are personal to the license

⁹⁴ City of Seattle, Neighborhood Conservation Districts, Overview (available online at <http://www.seattle.gov/council/rasmussen/ncd.htm>).

⁹⁵ See Steubenville, OH, Neighborhood Conservation District Ordinance § 1175.02.

⁹⁶ *Id.*

⁹⁷ “Councilwoman: Use petitions for rezoning: Residential neighborhoods could ask to restrict short-term rentals,” *Galveston News* (Feb. 19, 2015) (available online at http://www.stroag.org/20150219_galvnews.html).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Provo (UT) City Code § 6.26.020(1) (available online at <http://www.codepublishing.com/ut/provo/?provo06/Provo0626.html>).

holder and are not transferrable. Provo's Rental Dwelling code follows this approach, stating that a "business license for a rental dwelling or a short-term rental dwelling is not transferable between persons or structures."¹⁰¹ Consequently, the buyer of a rental property in Provo must obtain a new rental dwelling or short-term rental business permit before renting out the property.

Other cities that require a business license for operation of a short-term rental include Newport Beach, California;¹⁰² Telluride, Colorado;¹⁰³ and Las Vegas, Nevada.¹⁰⁴

(m) Taxation of Short-Term Rentals

As discussed in Section 3.1(b) above, short-term rentals can be a significant source of tax revenue for communities with a robust tourist industry. In order to capture that tax revenue, some states classify short-term rentals as a hotel or tourist accommodation in their tax codes. Texas's Hotel Occupancy Tax statute, for example defines the term "hotel" to include any building that offers sleeping accommodations for consideration, including a "tourist home" or "tourist house," and imposes a six percent tax on the price paid for such accommodations.¹⁰⁵ Texas also authorizes Texas cities, towns and villages to impose and collect an additional nine percent tax on hotels, including short-term rental properties.¹⁰⁶

A bill introduced in the Massachusetts General Assembly in January 2015 would likewise tax short-term rentals at both the state and local level. Bill H.2618 would require that all short-term rental properties be registered with the state, would impose a 5 percent state excise tax on all short-term residential rentals, and would also authorize Massachusetts cities and towns to impose a local excise tax of up to 6 percent.¹⁰⁷

(n) Crime Free Housing Program

Some communities have implemented a crime free housing program aimed at improving the safety of multi-family rental housing by taking steps to reduce criminal activity. One such program is the Crime Free Multi-Housing Program, which has been adopted by nearly 2,000 cities in the United States.¹⁰⁸ The Crime Free Multi-Housing Program was developed by the

¹⁰¹ *Id.* § 6.26.020(2).

¹⁰² See City of Newport Beach, CA – Short Term Rentals (available online at

<http://www.newportbeachca.gov/government/departments/finance/revenue-division/short-term-rentals>).

¹⁰³ See Town of Telluride, CO – Short Term Rental Restrictions in the Residential Zone Districts (stating: "All short term rentals are subject to sales tax, excise tax and business licensing requirements.") (available online at <http://www.telluride-co.gov/DocumentCenter/View/260>).

¹⁰⁴ See City of Las Vegas, NV – Short Term Residential Rental (requiring a business license for short-term residential businesses) (available online at [http://www5.lasvegasnevada.gov/LCAT/Bus_Lic_Instructions.aspx?Category=S01&CategoryName=Short%20Term%20Residential%20Rental%20\(PM\)](http://www5.lasvegasnevada.gov/LCAT/Bus_Lic_Instructions.aspx?Category=S01&CategoryName=Short%20Term%20Residential%20Rental%20(PM))).

¹⁰⁵ See Texas Code §§ 156.001, 156.052. Accommodations of "at least 30 consecutive days, so long as there is no interruption of payment for the period," are exempt from the tax. *Id.* § 156.101.

¹⁰⁶ See Texas Code § 351.003 (Municipal Hotel Occupancy Tax).

¹⁰⁷ See Massachusetts Bill H.2618, §§ 2, 3 (2015).

¹⁰⁸ See Crime Free Multi-Housing Program (available online at <http://www.crime-free-association.org/multi-housing.htm>).

Mesa, Arizona Police Department in 1992 and is designed to reduce crime, drugs, and gangs on apartment properties.¹⁰⁹

The Crime Free Multi-Housing Program generally consists of the following three phases, each of which must be completed under the supervision of the local police department:

Phase I - Management Training (8-Hours) Taught by the Police

- Crime Prevention Theory
- CPTED¹¹⁰ Theory (Physical Security)
- Benefits of Resident Screening
- Lease Agreements and Eviction Issues
- Crime Free Lease Addendum
- Key Control and Master Key Use
- On-Going Security Management Monitoring and Responding to Criminal Activity
- Gangs, Drugs Activity, and Crime Prevention
- Legal Warnings, Notices & Evictions Working Smarter With the Police Fire and Life Safety Training Community Awareness

Phase II - CPTED - Survey by the Police

- Crime Prevention Through Environmental Design Survey (CPTED)
- Minimum door, window, and lock standards compliance inspection
- Minimum exterior lighting standards evaluation
- Key Control procedures evaluation
- Landscape maintenance standards compliance

Phase III - Community Awareness Training

- Annual crime prevention social taught by property management and police
- Community awareness and continuous participation is encouraged
- Full certification (gold certificate) permits the right to post the Crime Free Multi-Housing Program sign and advertise membership in the Crime Free Multi-Housing Program in the print media using the official logo. This certificate expires every year unless renewed following compliance with Phases I & II.¹¹¹

Property managers can become individually certified after completing training in each phase and the property becomes certified upon successful completion of all three phases.¹¹² The anticipated benefits of the Crime Free Multi-Housing Program are reduced police calls for service, a more stable resident base, and reduced exposure to civil liability.¹¹³

In most communities, rental property owner participation a crime free housing program is voluntary. However, some communities have made participation mandatory for rental properties that exceed an established threshold for criminal activity. For example, in the City of Hagerstown, North Carolina, participation in the police department sponsored Crime Free

¹⁰⁹ See *id.*

¹¹⁰ CPTED is an acronym for “Crime Prevention Through Environmental Design.”

¹¹¹ See <http://www.hagerstownmd.org/index.aspx?nid=505>; see also <http://www.crime-free-association.org/multi-housing.htm>.

¹¹² See *id.*

¹¹³ See *id.*

Housing Seminar for landlords generally is voluntary.¹¹⁴ However, if a landlord receives notice of more than one “qualifying call” to the police department or one qualifying call that involves a felony, then the landlord is required to attend a four-hour program as a condition on the issuance of a rental facility license.¹¹⁵

(o) New Strategies to Address Airbnb and other Sharing Economy Models

The rapid growth of Airbnb—an online platform that enables a “host” to rent out a spare room or an entire home to a guest—has led some communities to develop new strategies to address the perceived negative impacts of the practice. From the local government perspective, a key concern is that the potential profit from short-term rentals has created an incentive for rental property owners and investors to convert long-term rental properties into short-term rentals, thereby reducing the available supply of long-term rentals and driving up rental prices in the local market. To counter this trend, some communities have adopted short-term rental regulations that expressly require that the owner or “host” reside in the dwelling unit for a minimum number of days each calendar year. For example, San Francisco’s short-term residential rental ordinance requires that a “permanent resident” occupy a short-term rental unit for at least 275 days per calendar year and that the permanent resident maintain records demonstrating compliance with the requirement for a period of two years.¹¹⁶ Portland, Oregon’s Accessory Short-Term Rentals ordinance contains a similar requirement, which states:

A Type A accessory short-term rental must be accessory to a Household Living use on a site. This means that a resident must occupy the dwelling unit for at least 270 days during each calendar year, and unless allowed by Paragraph .040.B.2 or .040.B.3, the bedrooms rented to overnight guests must be within the dwelling unit that the resident occupies.¹¹⁷

Another concern is that online hosting platforms make it easier for an owner to use their home as a short-term rental without obtaining the necessary governmental permits or paying required lodging or use taxes. One way communities have addressed this issue is by requiring that the online hosting platform notify potential hosts that listing their property for rent is subject to local regulation. An example of this approach is San Francisco’s “Requirements for Hosting Platforms” provision, which states, in relevant part:

All Hosting Platforms shall provide the following information in a notice to any user listing a Residential Unit located within the City and County of San Francisco through the Hosting Platform’s service. The notice shall be provided prior to the user listing the Residential Unit and shall include the following information: that Administrative Code Chapters 37 and 41A regulate Short-Term Rental of Residential Units; the requirements

¹¹⁴ See Hagerstown, NC Rental Facilities Code § 197-7(A) (available online at <http://www.hagerstownmd.org/DocumentCenter/View/2317>).

¹¹⁵ See *id.* § 197-7(B).

¹¹⁶ San Francisco Code § 41A.5(g)(1) (available online at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf>).

¹¹⁷ Portland, OR Code § 33.207.040(A)(1) (available online at <http://www.portlandonline.com/auditor/index.cfm?c=28197&a=501886>).

for Permanent Residency and registration of the unit with the [Planning Department]; and the transient occupancy tax obligations to the City.¹¹⁸

A bill introduced in the California State Legislature in 2015 proposed that online hosting platforms be required to notify potential hosts that listing their residence for rent on the platform might constitute a violation of their lease and could result in legal action by the landlord, possibly including eviction.¹¹⁹

Some communities have also addressed the taxation issue by requiring that the online hosting platform remit the required tax payment. San Francisco imposes such a requirement:

A Hosting Platform shall comply with the requirements of the Business and Tax Regulations Code by, among any other applicable requirements, collecting and remitting all required Transient Occupancy Taxes, and this provision shall not relieve a Hosting Platform of liability related to an occupant's, resident's, or Business entity's failure to comply with the requirements of the Business and Tax Regulations Code.¹²⁰

Other cities that require online hosting platforms to collect taxes on behalf of a resident/host include Washington, D.C.; Portland, Oregon; San Jose, California; and Chicago.¹²¹

Communities have also attempted to address host and tenant liability by requiring that the short-term rental host maintain a minimum amount of liability insurance. In San Francisco, for example, short-term rental owners are required to maintain liability insurance in an amount of not less than \$500,000 and any tenants must be named as additional insured.¹²² Other cities that short-term rental hosts to carry liability insurance include Nashville, Tennessee;¹²³ Lincoln City, Oregon;¹²⁴ and Chicago.¹²⁵

3.4 Regulations that Indirectly Affect Residential Rentals

¹¹⁸ San Francisco Code § 41A.5(g)(4)(A).

¹¹⁹ See SB 761 (amended May 19, 2015) (available online at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_761&sess=CUR).

¹²⁰ San Francisco Code § 41A.5(g)(4)(B).

¹²¹ See "Airbnb is about to start collecting hotel taxes in more major cities, including Washington," *The Washington Post* (January 29, 2015) (available online at <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/>).

¹²² San Francisco Code § 41A.5(g)(1)(D).

¹²³ See "Nashville is About to Regulate Airbnb, But Enforcement is Another Story," *Nashville Public Radio* (February 17, 2015) (available online at <http://nashvillepublicradio.org/post/nashville-about-regulate-airbnb-enforcement-another-story>).

¹²⁴ See Lincoln City, OR – Vacation Rental Dwelling License Code § 5.14.060.B.7 (requiring that an applicant for a vacation rental dwelling license carry "liability insurance which expressly covers the vacation rental operations on the subject property in the amount of at least \$500,000, combined single limit.") (available online at <http://www.codepublishing.com/OR/LincolnCity/html/lincolncity05/lincolncity0514.html>).

¹²⁵ See "Vacation Rental Fact Sheet," (City of Chicago, Dept. of Business Affairs & Consumer Protection) (stating that vacation rental license applicants must provide to the city a "certificate of insurance evidencing homeowner's fire, hazard and liability insurance, and general commercial liability insurance with limits of not less than \$1,000,000 per occurrence") (available online at <http://chicago47.org/wp-content/uploads/Vacation-rental-factsheet.pdf>).

(a) Residential Zoning Districts that Prohibit Multifamily Development

As noted in Section 2.1 of this paper, a substantial percentage of the residential rental units in the United States are located in multifamily buildings. According to the American Housing Survey, about 19 percent of rental properties are located in small buildings with just two to four units, while large apartment buildings (i.e., those containing ten or more units) account for approximately 29 percent of all rental housing units nationwide.¹²⁶ Given the importance of multifamily apartment buildings in the rental market, zoning regulations that prohibit multifamily development in residential zoning districts can have a substantial impact on residential rentals.

The American Planning Association report *Zoning as a Barrier to Multifamily Housing Development* found zoning to be a significant barrier to multifamily development in the Boston, Massachusetts area:

In the Boston study area, where housing prices and rents are high and rising, there was clear evidence of barriers to multifamily housing. Although a significant share of the existing housing stock is multifamily, many communities have little or no land zoned for multifamily use, and multifamily housing starts have fallen precipitously. Analyses of local zoning codes and regulations also support the conclusion that there exist regulatory barriers to multifamily development.¹²⁷

By contrast, the report found that in Portland, Oregon, “significant quantities of land are zoned for multifamily use throughout the metropolitan area, and ... rents remain below many other metropolitan areas.”¹²⁸

(b) Minimum House Size Requirements

Residential rentals can also be indirectly affected by a regulation that imposes a minimum floor area requirement on single-family homes. For example, in the City of Arcadia, California, the zoning regulations for the R-O First One-Family Zone require that a single-family home “contain not less than one thousand two hundred (1,200) square feet of floor area, exclusive of porches, garages, entries, patios and basements.”¹²⁹ It can reasonably be argued that a minimum house size requirement forces developers to build larger, more expensive homes that are more likely to be owner-occupied than rental housing.

¹²⁶ *America's Rental Housing* at 12.

¹²⁷ *Zoning as a Barrier to Multifamily Housing Development* at 66 (American Planning Association, Planning Advisory Service Report No. 548, 2007) (available online at http://www.huduser.gov/portal/Publications/pdf/zoning_MultifmlyDev.pdf).

¹²⁸ *See id.*

¹²⁹ Arcadia (CA) Zoning Regulations § 9251.1.1 (available online at https://www.municode.com/library/ca/arcadia/codes/code_of_ordinances?nodeId=ARTIXDIUSLA_CH2ZORE_PT5REZO_DIV130000220001500012500FIOMIZO).

3.5 Regulation by Private Property Associations and Covenants

In addition to governmental regulation, rentals may also be subject to private regulation. These private controls typically are found in the covenants, conditions, and restrictions (CC&Rs) adopted by a homeowners association (HOA). CC&Rs can control virtually any aspect of a residential community, such as the use of property, the exterior color of a home, pets, or landscaping. CC&Rs can also be written to prohibit property owners from renting their homes.

Note: In most states, the requirements for the creation of an HOA and the adoption of CC&Rs are governed by state statute. For example, in Florida HOAs are governed by Chapter 720 (Homeowners' Associations) of the Florida Statutes. Another example is the state of Washington, where homeowners' associations are governed by Chapter 64.38 of the Revised Code of Washington.¹³⁰

Because the vacation rental concept is a relatively new one (the company Vacation Rentals by Owner, better known as VRBO, was established in 1995), the CC&Rs adopted by HOAs that were established long ago may not address vacation rentals. Without an explicit prohibition in the CC&Rs, it may be difficult for an HOA to prevent a property owner from renting out a home. For example, in one case in the state of Washington, a planned residential community had adopted CC&Rs that restricted the use of lots to single family residences and prohibited the use of any lot for commercial purposes.¹³¹ Although the covenants generally were silent on the subject of rentals, the HOA argued that vacation rentals were a commercial use that was expressly prohibited by the CC&Rs.¹³² The Washington Supreme Court, however, rejected the HOA's argument, ruling that rentals, no matter how long the term, are a residential use because the renter uses the home for the same purpose as the owner, namely "eating, sleeping, and other residential purposes."¹³³ It also rejected the argument that the payment of business and occupation taxes detracted from the residential character of the rental use.¹³⁴

3.6 Enforcement and Penalties

Communities typically enforce their rental regulations (a) in accordance with a generally applicable enforcement provision contained in the code of ordinances or zoning ordinance, or (b) through a specific enforcement provision incorporated into the rental regulations. Article 9 of the Isle of Palms, South Carolina Code of Ordinances is one example of a short-term rental ordinance that contains no specific enforcement provision, but is enforced under a generally applicable penalty provision.¹³⁵ Under the Isle of Palms Code of Ordinances, violation of the short-term rental ordinance is subject to the same penalties and procedures as a violation of any

¹³⁰ Other examples of state HOA statutes are: the Texas Residential Property Owners Protection Act (Title 11, Chapter 209, of the Texas Property Code); the North Carolina Planned Community Act (Chapter 47F of the North Carolina General Statutes); and the Minnesota Common Interest Ownership Act (Chapter 515B of the Minnesota Statutes).

¹³¹ *Wilkinson v. Chiwawa Communities Association*, 327 P.3d 614, 617 (Wash. 2014).

¹³² *Id.* at 618-19.

¹³³ *Id.* at 620.

¹³⁴ *Id.*

¹³⁵ See generally Isle of Palms, SC City Code §§ 5-4-201 to -206 (Short-Term Rentals) and § 5-4-7 (Violations and Penalties).

other provision the zoning code. Potential penalties for a violation are established under Section 5-4-7 of the Code of Ordinances, which states:

In case a structure or land is or is proposed to be used in violation of this chapter, the Zoning Administrator may, in addition to other remedies, issue and serve upon a person pursuing such activity or activities a *stop order* requiring that such person immediately cease all activities in violation of this chapter.

Any person violating any of the provisions of this chapter shall be deemed guilty of a *misdemeanor* and shall for each violation, upon conviction thereof, be punished as provided in section 1-3-66. Each day that a violation continues shall constitute a separate offense.¹³⁶

By contrast, the short-term rental ordinances of Sonoma County, California and Santa Fe, New Mexico contain specifically applicable enforcement provisions. Under Section 26-88-120(g) of the Sonoma County vacation rental ordinance, individuals who register an initial complaint about a vacation rental property are directed to the contact person identified in the zoning permit or use permit issued for the property. Subsequent complaints are addressed to code enforcement officials who are responsible for conducting an investigation to determine whether there was a violation of a zoning or use permit condition. Code enforcement may accept neighbor documentation consisting of photos, sound recordings and video as proof of an alleged violation. If code enforcement verifies that a violation has occurred, then a notice of violation is issued and a penalty may be imposed in accordance with Chapter 1 of the Sonoma County Code. In addition, under Section 26-88-120(g)(1), code enforcement officers are also given the discretion to schedule a revocation hearing with the board of zoning adjustment. If a vacation rental permit is revoked, then a new zoning or use permit for a vacation rental may not be reapplied for or issued for a period of at least one year.¹³⁷ Santa Fe's short term rental unit ordinance includes a specific provision that authorizes the city to revoke a short term rental permit upon conviction for a third violation of the ordinance.¹³⁸

Communities can also address many of the negative impacts often attributed to rental properties (e.g., excessive noise, late night parties, and insufficient property maintenance) by enforcing existing provisions of their code of ordinances or zoning ordinance. Below are some examples.

(a) Abatement of Nuisances

The term “**nuisance**” is generally defined as “a condition, activity, or situation (such as a loud noise or a foul odor) that interferes with the use or enjoyment of property.”¹³⁹ A nuisance can either be “private,” meaning it affects a private right not common to the public or causes a specific injury to one or a small number of people, or “public,” meaning it unreasonably interferes with a right common to the general public.¹⁴⁰

¹³⁶ Isle of Palms, SC City Code § 5-4-7 (Emphasis added).

¹³⁷ See generally Sonoma County, CA Code of Ordinances § 26-88-120(g).

¹³⁸ See Santa Fe, NM City Code § 14-6.2(A)(6)(a)(iv).

¹³⁹ BLACK'S LAW DICTIONARY at 1233 (10th ed., Thomson Reuters).

¹⁴⁰ See *id.* at 1235 (defining “private nuisance” and “public nuisance”).

Local governments generally have the power to regulate and abate public nuisances but not private nuisances.¹⁴¹ For example, the Marco Island City Code defines “**public nuisance**” to mean:

the commission or omission of any act, by any person, or the keeping, maintaining, propagation, existence or permitting of anything, by any person, by which the life, health, safety, or welfare of any person may be threatened or impaired. Additionally, permitted uses and conditional uses in any residentially zoned area which create smoke, dust, noise, odor, vibration, or glare which by themselves or in combination may be harmful or injurious to human health or welfare or which unreasonably interfere with the customary use and enjoyment of life or property are a public nuisance.¹⁴²

In addition, Section 18-36(4) of the City Code provides that: “No owner, lessee, occupant, guest, or agent for the owner shall allow the keeping of a public nuisance on any property, developed or undeveloped.” Marco Island’s public nuisance ordinance also requires that the “owners, lessees, occupants or agents for the owner of developed and undeveloped lots shall control all excessive growth of grasses or weeds within the right-of-way adjacent to their property by cutting or removing the grasses and weeds, and shall maintain the right-of-way free from any accumulation of abandoned property, litter, pollution, or other matter.”¹⁴³ Under Section 18-37 (Abatement of nuisances) Marco Island has the authority to levy fines and to order the abatement of public nuisances.

The City of Raleigh, North Carolina’s public nuisance code likewise makes it unlawful to make, maintain, or fail to abate a public nuisance.¹⁴⁴ If a public nuisance is not abated within ten days after written notice is given by the city, then the city can abate the conditions constituting the public nuisance and place a lien on the property to recover the cost of abatement plus a \$175 administrative fee.¹⁴⁵

(b) Enforcement of Building and Maintenance Codes

In addition to their building codes, many communities have adopted property maintenance codes that all property owners must satisfy. Rather than drafting their own property maintenance code, communities often adopt (sometimes with amendments) the International Property Maintenance Code (IPMC), which contains a comprehensive set of interior and exterior property maintenance requirements.¹⁴⁶ According to the International Code Council (ICC), as of February 2015, the

¹⁴¹ EUGENE MCQUILLIN, 6A THE LAW OF MUNICIPAL CORPORATIONS § 24:62 (3d. ed., 2015).

¹⁴² Marco Island, FL City Code § 18-32.

¹⁴³ Marco Island, FL City Code § 18-36(5)

¹⁴⁴ See City of Raleigh, NC – Health, Sanitation and Public Nuisances Code § 12-6002 (available online at https://www.municode.com/library/#!/nc/raleigh/codes/code_of_ordinances?searchRequest=%7B%22searchText%22%22%5C%22public%20nuisance%5C%22%22,%22pageNum%22:1,%22resultsPerPage%22:25,%22booleanSearch%22:false,%22stemming%22:true,%22fuzzy%22:false,%22synonym%22:false,%22contentType%22:%5B%22CODES%22%5D,%22productIds%22:%5B%5D%7D&nodeId=DIVIICOGGEOR_PT12LIRE_CH6HESAPUNU_S12-6004NUPRENABGRPR).

¹⁴⁵ See id. § 12-6003.

¹⁴⁶ See generally International Property Maintenance Code, 2012 ed. (International Code Council) (available online at <http://publicecodes.cyberregs.com/icod/ipmc/index.htm>).

IPMC has been adopted, with or without limitations, by hundreds of local jurisdictions in 38 states and the District of Columbia.¹⁴⁷

(c) Penalties

(i) Revocation or Suspension of Rental License

In some communities that impose licensing or permit requirements on residential rentals, the violation of the rental regulation can result in the suspension or revocation of a rental license or permit. For example, Sonoma County’s vacation home rental code authorizes the code enforcement officer to schedule a revocation hearing with the board of zoning adjustments upon determination that a violation has occurred.¹⁴⁸ If the vacation rental permit is revoked, then it cannot be reapplied for or re-issued for a period of at least one year.¹⁴⁹

Another example is Minneapolis, Minnesota’s “Rental Dwelling License” code, which authorizes the city council to “deny, refuse to renew, revoke, or suspend” a rental dwelling license for any dwelling that fails to comply with applicable licensing standards.¹⁵⁰ The Minneapolis City Council apparently is not shy about using the revocation penalty—the Minneapolis Housing Inspections Services website states: “We have increased our license revocations in the past few years for owners who have violated one or more rental license standards. Since 2005, the City of Minneapolis has increased the number of rental license revocations by over 500%.”¹⁵¹

Minneapolis also makes it difficult for an owner whose rental dwelling license has been revoked to become relicensed. Pursuant to Section 244.1910 (Licensing Standards) of the Rental Dwelling License code, any person who has had a license revoked is prohibited from obtaining any new rental dwelling licenses for a period of three years.¹⁵² In addition, any person who has had two or more licenses revoked or canceled is ineligible to hold a rental dwelling license for a period of five years.¹⁵³

(ii) Fines

The most common form of penalty for violation of a rental code is a monetary fine. The maximum fine amount for violation of a local ordinance or regulation in many cases is set by state statute. For example, in Illinois the maximum fine for violation of a municipal ordinance,

¹⁴⁷ See International Codes—Adoption by State (Feb. 2015) (available online at <http://www.iccsafe.org/gr/Documents/stateadoptions.pdf>); see also International Codes—Adoption by Jurisdiction (Feb. 2015) (available online at <http://www.iccsafe.org/gr/Documents/jurisdictionadoptions.pdf>).

¹⁴⁸ Sonoma County Code § 26-88-120(g)(1).

¹⁴⁹ *Id.*

¹⁵⁰ See City of Minneapolis, MN – Rental Dwellings License Code § 244.1940 (available online at https://www.municode.com/library/#!/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT12HO_CH24_4MACO_ARTXVIREDWLI).

¹⁵¹ See City of Minneapolis, MN – Housing Inspections Services – Holding Property Owners Accountable (available online at http://www.ci.minneapolis.mn.us/inspections/inspections_accountable).

¹⁵² See City of Minneapolis, MN – Rental Dwellings License Code § 244.1910(a)(13).

¹⁵³ See City of Minneapolis, MN – Rental Dwellings License Code § 244.1910(a)(13).

with limited exceptions, is \$750 for any one violation.¹⁵⁴ Other examples are the state of Montana, which limits the maximum fine for violation of a local ordinance to \$500,¹⁵⁵ and Minnesota, which has a statutory limit of a \$1,000 fine for violation an ordinance.¹⁵⁶

Under many local regulations each day of a continuing violation (e.g., repeatedly renting a dwelling unit without a required permit) is considered a separate offense. An example of this approach is the enforcement provision of Marco Island’s short-term rental ordinance, which states, in relevant part: “Any violation of the provisions of this Article may be prosecuted and shall be punishable as provided in section 1-14, or chapter 14, of the City of Marco Island Code of Ordinances, including but not limited to: (1) a fine of up to \$500 per violation, per day of continuing repeating violations.”¹⁵⁷ In Maui County, Hawaii, the penalty for operating an illegal transient vacation rental (i.e., without a permit) is an initial fine of \$1,000 plus a daily fine of up to \$1,000 per day.¹⁵⁸

¹⁵⁴ See 65 ILCS 5/1-2-1.

¹⁵⁵ See Montana Code § 7-5-109.

¹⁵⁶ See Minnesota Stat. Ann. § 609.034.

¹⁵⁷ Marco Island, FL Code of Ordinances § 8-104(b).

¹⁵⁸ See Maui County, HA – Transient Vacation Rentals webpage (available online at <http://www.mauicounty.gov/faq.aspx?TID=82>).

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 4. IMPACTS OF RENTAL REGULATIONS ON RENTAL PROPERTY OWNERS

4.1 Rental Income

For some residential rental property owners, the adoption of rental regulations may result in the loss of rental income altogether. The most obvious example is an owner of property located in a zoning district where short-term rentals are no longer allowed under a local ordinance.¹ In areas where rentals are allowed, other property owners might face the loss of rental income due to their inability, for financial or other reasons, to satisfy the requirements for obtaining a permit, such as minimum off-street parking or structural requirements. As discussed in Section 10.4(f) below, some rental regulations might also cause an owner to lose all rental income because of suspension or revocation of a rental permit, even if the reason for suspension or revocation is beyond the owner's control (e.g., tenant behavior).

There are several ways in which a rental regulation might also result in a decrease in rental income. An ordinance that restricts the number of times a short-term rental property may be rented per year could have a significant impact on the property's income potential. Santa Fe, New Mexico, for example, limits short-term rentals to 17 rental periods per year.² A maximum overnight occupancy provision could also negatively affect the income potential of a rental property by reducing the number of guests to whom a home may be rented. Maximum occupancy restrictions are often included in local land use regulations³ and are a common element of short-term rental restrictions.⁴

Rental restrictions can also cause a reduction in rental income where they have the effect of narrowing the field of potential tenants or discouraging vacationers from renting a home. For example, an ordinance that prohibits short-term occupants from parking a recreational vehicle on site or on the street might deter families who travel by RV from renting a home in Santa Fe.⁵

¹ As discussed in Section 4.4, if a zoning amendment changes residential rentals from a permitted use to a prohibited use, a rental use that was lawfully established prior to the adoption of the zoning amendment may be allowed continue as a nonconforming use under state and local zoning laws.

² See Santa Fe, NM City Code § 14-6.2(A)(6)(a)(ii)(B).

³ See, e.g., Minneapolis, MN Zoning Code § 546.30 (limiting the occupancy of dwelling units in certain residential zoning districts to "one (1) family plus up to two (2) unrelated persons living together as a permanent household, provided that the family plus the unrelated persons shall not exceed a total of five (5) persons").

⁴ See, e.g., Sonoma County's vacation rental ordinance, which generally limits the overnight occupancy of vacation rentals to "a maximum of two (2) persons per sleeping room or guestroom, plus two (2) additional persons per property, up to a maximum of twelve (12) persons, excluding children under three (3) years of age." Sonoma County, CA Code of Ordinances § 26-88-120(f)(2) (available online at https://www.municode.com/library/#/ca/sonoma_county/codes/code_of_ordinances?nodeId=CH26SOCOZORE_ART88GEUSBUEXUILL_S26-88-120VARE).

⁵ Section 14-6.2(A)(6)(a)(ii)(E) of the Santa Fe Short Term Rental Ordinance states: "Occupants shall not park recreational vehicles on site or on the street."

4.2 Property Values

Rental regulations can affect the value of an affected property in different ways, depending on whether the property was used as a rental prior to the adoption of the regulation.

(a) Value of Existing Rental Properties

In general, the value of a home that was used as a rental prior to the adoption of restrictions, but is either prohibited or restricted from future use as a rental, can be expected to *decrease*. That is particularly true in vacation destination communities, where homeowners often purchase second homes as investment properties.⁶ These potential buyers often plan to use the second home as a short-term rental property until they retire or otherwise become able to maintain the property as their full-time residence.⁷ Such buyers would tend to be less interested in purchasing in an area where the short-term rental market is highly uncertain or is constrained by burdensome regulations.

In some circumstances, it is conceivable that a short-term rental ordinance could *increase* the value of those homes that were used as short-term rentals prior to the adoption of the restrictions and become lawfully licensed for use under the new regulations. Under the general economic principle of supply and demand, if an ordinance has the effect of reducing the supply of short-term rental properties and the demand for short-term rental properties rises or remains constant, then the value of individual properties licensed as short-term rental properties after the adoption of regulations can be expected to rise.

(b) Value of Properties Not Previously Used as a Rental

The impact of rental restrictions on the value of properties that were not used as rentals prior to adoption of the restrictions will also vary. The value of a property that becomes licensed as a rental for the first time under a new ordinance conceivably could *increase* if the quantity of rental properties on the market falls as a result of the ordinance. It is conceivable that a rental regulation could also have a positive effect on the value of homes that are not licensed or used as a rental. For example, in residential neighborhoods where the existence of short-term rentals is considered a negative, an ordinance that prohibits future short-term rental activity in those neighborhoods could positively affect the value of homes in these locations.

Despite the popular notion that rentals have a negative impact on the value of neighboring single-family homes, there appears to be little empirical evidence to support or quantify that conclusion.⁸ A 2007 report on opposition to multifamily rental housing, the Harvard University

⁶ See Anne Miller, “Next Investment: Vacation Home or Income Property?,” *Realtor.com* (April 23, 2014) (available online at <http://www.realtor.com/advice/whats-best-option-next-investment-vacation-home-income-producing-rentals/>) (discussing the investment strategy of purchasing and holding a “vacation home or second home for many years with the goal of vacationing there, perhaps renting it out to others and retiring there, or selling the property when its market value has increased”).

⁷ See *id.*

⁸ See Michael Estrin, “Do rentals decrease nearby home values?,” *Bankrate.com* (available online at <http://www.bankrate.com/finance/real-estate/do-rentals-decrease-home-values.aspx>) (quoting William Rohe, Director of the Center for Urban and Regional Studies at the University of North Carolina at Chapel Hill: “I think

Joint Center for Housing Studies (JCHS) described how residents' concerns about property values often prompt local regulations:

Concerns that multifamily rental housing will lower the value of their single-family houses has driven many residents to oppose new apartment developments in or near their neighborhoods. Proposals for low-income apartments are especially likely to trigger property value concerns, but even market rate rental housing can give rise to arguments that apartments lower property values and damage the community's reputation. Local officials often echo these property value claims, either because they believe lower property values will injure their communities tax base or reputation or because they want to sound responsive to constituent concerns.⁹

The JCHS report found that most of the research done on the subject concluded that "in general, neither multifamily rental housing, nor low-income housing, causes neighboring property values to decline."¹⁰

(c) Resale Value

Regulations that permit short-term rentals but require the owner to obtain a nontransferable license or permit may have a negative impact on the resale value of affected property. A potential second home buyer who plans to periodically rent out the property in order to offset their purchase and operation and maintenance costs would tend to be less interested in purchasing in an area where the right to use a property as a short-term rental market is highly uncertain. The lack of certainty as to whether a home could be used a short-term rental might also make it more difficult for buyers to secure financing for a second home, because the potential purchaser would not be able to give the lender assurances that there will be a contingent stream of income to offset the carrying costs of the property, if necessary.

4.3 Operational Costs

Rental regulations tend to increase the cost of owning and operating a rental property in a number of ways. The regulations typically require owners to pay an up-front registration or permit fee and may also require payment of additional licensing fees on an annual or other recurring basis. In Marathon, Florida, for example, short-term rentals are subject to an initial licensing fee of \$750 and subsequent renewal fees of \$500 per year.¹¹ Inspection requirements can also add to the cost of operating a residential or short-term rental since, in most cases, the inspections are performed at the owner's expense. In Minneapolis, Minnesota, the conversion of

there is a stigma about renters, but the research just isn't there to say for certain that a given amount of rental properties in a neighborhood brings values down by a specific amount.").

⁹ Mark Obrinsky & Debra Stein, *Overcoming Opposition to Multifamily Rental Housing* at 10 (March 2007, Joint Center for Housing Studies, Harvard University) (available online at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rr07-14_obrinsky_stein.pdf).

¹⁰ *Id.*

¹¹ See City of Marathon, Florida Vacation Rental License Application Form (available online at <http://www.ci.marathon.fl.us/download/download.php?id=824>).

an owner-occupied home to a rental property requires that the property be inspected for compliance with the Housing Maintenance Code.¹² The fee for this inspection is \$1,000.¹³

Performance standards may also require an owner to undertake costly improvements in order to obtain a rental permit. An owner may be required to expand or pave an existing driveway in order to satisfy a minimum parking requirement or to upgrade electrical or sewer systems in order to qualify for a permit. Seattle's Rental Registration and Inspection Ordinance, for example, requires that all rental housing be inspected for compliance with the city's Housing and Building Maintenance Code and receive a certificate of compliance before a rental housing registration will be issued.¹⁴

In addition, a rental property owner who resides out of state may have to hire a property manager in order to satisfy a requirement that a designated representative be available at all times and within a certain proximity of the unit during any rental period. The City of Prior Lake, Minnesota requires that a "local agent" be designated for all short-term rentals. Section 315.407 of Prior Lake's Short-Term Rental Code states, in relevant part:

No short-term rental permit shall be issued without the designation of a local agent. The agent must live and work within 30 miles of the dwelling unit. The Agent may, but is not required to be, the owner. One person may be the agent for multiple dwelling units. At all times, the agent shall have on file with the Code Enforcement Officer a primary and a secondary phone number as well as a current address. The agent or a representative of the agent shall be available 24 hours a day during all times that the dwelling unit is being rented at the primary or secondary phone number to respond immediately to complaints and contacts relating to the dwelling unit. The Code Enforcement Officer shall be notified in writing within two (2) business days of any change of agent. The agent shall be responsible for the activities of the tenants and maintenance and upkeep of the dwelling unit and shall be authorized and empowered to receive service of notice of violation of the provisions of City ordinances and state law, to receive orders, and to institute remedial action to effect such orders, and to accept all service of process pursuant to law.¹⁵

Depending on location, property management fees for a vacation rental home can run anywhere from 10 percent to 30 percent of the rental fees.¹⁶

¹² See City of Minneapolis, MN Rental License Fees (available online at http://www.ci.minneapolis.mn.us/inspections/rental/inspections_rentlicensefee).

¹³ See *id.*

¹⁴ See generally Seattle, WA Housing Code, Ch. 22.214 (Rental Registration and Inspection Ordinance) (available online at https://www.municode.com/library/#!/wa/seattle/codes/municipal_code?nodeId=TIT22BUCOCO_SUBTITLE_IIIH_OCO_CH22.214REREINOR).

¹⁵ City of Prior Lake, MN Short-Term Rental Code § 315.407 (available online at <http://www.cityofpriorlake.com/documents/STRentalLicense.pdf>).

¹⁶ See Dan Weisman, "How to Manage Your Vacation Property When You're Out of Town," *Rentals.com Company Blog* (available online at <http://blog.rentals.com/how-to-manage-your-vacation-property-when-you%E2%80%99re-out-of-town/>).

Operational costs may also be increased by a rental regulation that requires the property owner to carry a minimum amount of liability insurance. In San Francisco, for example, short-term rental owners are required to maintain liability insurance in an amount of not less than \$500,000.¹⁷

4.4 Nonconforming Use Status

A property that was used as a rental prior to the adoption of an ordinance that no longer allows rentals may become a **nonconforming** use under state and local zoning laws. Although state and local laws zoning laws typically allow nonconforming uses to continue, the right to alter or expand a nonconforming use is usually limited and often requires the issuance of a special permit, or an equivalent form of zoning relief, from the local planning commission or board of appeals. The nonconforming use provisions of the City of Bend, Oregon’s Development Code are a good example of this type of restriction:

Where, at the time of adoption of this code, a use of land exists that would not be permitted by the regulations imposed by this code and was lawful at the time it was established, the use may be continued as long as it remains otherwise lawful, provided:

A. Expansion Prohibited. No such nonconforming use shall be enlarged, increased or extended to occupy a greater area of land or space than was occupied at the effective date of adoption or amendment of this code. No additional structure, building or sign shall be constructed on the lot in connection with such nonconforming use of land.

B. Location. No such nonconforming use shall be moved in whole or in part to any portion of its lot, or any other lot, other than that occupied by such use at the effective date of adoption or amendment of this code, unless such move would bring the use into conformance with this code.¹⁸

In addition, a nonconforming use that is discontinued for a specific period of time (typically one or two years) may be deemed abandoned, and thereafter prohibited from resuming at a future date.¹⁹

4.5 Owner Liability for Action of Tenant

Under some rental regulations, the property owner can be held liable and penalized for a violation that was committed by the tenant. Section 24.12(H)(2) of the Coconino County Vacation Rental Ordinance, for example, states: “the property owner ... shall be the party responsible for compliance with all provisions of this section and all applicable laws.”²⁰ On its face, this provision appears to make the property owner responsible (and subject to penalty, potentially including the revocation of the vacation rental permit) for any violation that occurs on

¹⁷ San Francisco Code § 41A.5(g)(1)(D).

¹⁸ City of Bend, OR Development Code § 5.2.100 (available online at <http://www.codepublishing.com/OR/bend/>).

¹⁹ See, e.g., City of Bend, OR Development Code § 5.2.100(C) (stating: “If the [nonconforming] use is discontinued or abandoned for any reason for a period of more than 12 months, any subsequent use of the land shall conform to the applicable standards and criteria specified by this code for the land use district in which such land is located.”).

²⁰ See Coconino County, AZ , Vacation Home Rental Ordinance § 24.12(H)(2) (available online at <http://www.coconino.az.gov/DocumentCenter/View/9775>).

a rental property, regardless of whether the violation was committed by a tenant or by the owner himself.²¹

²¹ See Coconino County, AZ , Vacation Home Rental Ordinance §§ 24.12(H)(2), 24.12(I)(c).

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 5. IMPACTS OF RENTAL REGULATIONS ON RENTERS

5.1 Rental Fees

As discussed in Section 4.3, the adoption of rental regulations can increase the cost of owning and operating a rental property in many ways. A rental property owner might have to pay registration, permit, and inspection fees. He may also have to undertake costly improvements, such as paving an existing driveway to satisfy a minimum parking requirement, or incur the expense of hiring a local property manager in order to satisfy a requirement that a designated representative requirement.

To the extent that local market conditions will allow, rental property owners are likely to increase rental rates as a means of recovering these added costs. If regulations expose a property owner to the risk of incurring a fine or having the owner's rental license suspended or revoked, then the owner may also increase the minimum security deposit as a means of deterring tenants from engaging in behavior that might violate the rental regulations.

5.2 Inventory of Rental Units

Rental regulations can cause a decline in the inventory of rental units in a community. For example, zoning regulations may prohibit short-term rentals in single-family residential zoning districts or within certain areas or neighborhoods. An owner who successfully operated a short-term rental property without complaint prior to the adoption of licensing requirements may be barred from continuing the rental use if the property does not conform to the new licensing criteria. More generally, owners may simply decide that they do not want to assume the increased cost and risk of continuing to use their property as a short-term rental, and withdraw their properties from the inventory of short-term rentals in the community.

Some communities have argued that the growing popularity of short-term rentals—predominantly through Airbnb and other online platforms—has had a negative effect on the inventory of available long-term rental properties. A 2014 report by the New York State Attorney General, for example found that in 2013 more than 4,600 residential units in New York City were dedicated primarily or exclusively to short-term rentals.¹ The report, noted that most of the buildings converted to short-term rentals were located in popular neighborhoods in Brooklyn and Manhattan, and observed that:

A dozen buildings in those same neighborhoods had 60 percent or more of their units used at least half the year as private short-term rentals, suggesting that the buildings were operating as de facto hotels.²

¹ *Airbnb in the City* (Oct. 2014, New York State office of the Attorney General) (available online at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>).

² *Id.* at 12.

Similar concerns have been raised in other communities where Airbnb has grown in popularity. In the City of Boulder, Colorado, for example, the City Council directed staff to draft a short-term rental ordinance out of concern that investors were buying property for use as short-term rentals, thereby reducing the supply of long-term and affordable housing for residents.³

5.3 Intrusive Inspection Requirements

Rental regulations often require that a rental unit be inspected for compliance with applicable building and fire codes and other local regulations prior to the issuance of a rental license or permit. Some also require that rental units be inspected on a regular basis (e.g., annually) or upon any change in tenancy or ownership. These inspections normally are performed by a local building inspector or other code enforcement personnel and may require that both the exterior and the interior of the building be inspected. In Marco Island, Florida, for example, short-term rentals are subject to “an initial inspection to ensure compliance with the applicable Florida Building Code, and Fire Prevention Code provisions” and annual re-inspections thereafter.⁴

From the tenant’s perspective, a mandatory rental unit inspection can be intrusive and burdensome.⁵ Depending on the scope of the required inspection, the tenant may have to allow inspector to enter the rental unit and provide access to bedrooms, bathrooms, and other areas of the unit where a person’s expectation of privacy is greatest.

As discussed in Section 8.2(c), rental inspection requirements can raise serious concerns under the Fourth Amendment of the U.S. Constitution, which safeguards the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁶ For example, rental regulations that contain an inspection requirement typically do not contain a provision that expressly requires the inspector to have a warrant to inspect a rental property. An ordinance may also be unclear as to what notice, if any, must be given to the owner and tenants of a rental property before an inspection is conducted.

In addition, a rental regulation may not adequately define the parameters of the required inspection. For example, it is not clear whether the inspections required by Marco Island’s short-term rental ordinance are limited to the exterior of the building, or if the building interior is also subject to inspection.

³ See Erica Meltzer, “Boulder council: Preserving housing for residents will guide short-term rental regulations,” Daily Camera (June 2, 2015) (available online at http://www.dailycamera.com/news/boulder/ci_28240692/boulder-short-term-rental-owners-plea-flexibility).

⁴ Marco Island, FL Code § 8-101(c). A limited exception to the annual re-inspection requirement is carved out for short-term rental dwellings that were permitted after March 1, 2002—those rentals are subject to biennial re-inspections through 2025, and annual re-inspections thereafter. See *id.*

⁵ In a case involving municipal code inspections, the U.S. Supreme Court declared that “administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment.”⁵ See *Camara v. Municipal Court of City & Cty. of San Francisco*, 387 U.S. 523, 534 (1967) (citing *Frank v. State of Maryland*, 359 U.S. 360, 79 S. Ct. 804 (1959)).

⁶ U.S. Const., amend. IV. Any government action that intrudes on a person’s “reasonable expectation of privacy” violates the Fourth Amendment, and “[h]omes and other residences are virtually always areas in which a person residing has a reasonable expectation of privacy.” William E. Ringel, *Searches and Seizures Arrests and Confessions* § 2:2 (2011).

5.4 Mandatory Lease Provisions

Rental regulations can also affect tenants by requiring that residential rental agreements contain certain provisions that otherwise might not be included. In 2015 the Town of Kure Beach, North Carolina, for example, considered an ordinance that would have required all vacation rental permit holders to include in their rental agreements a statement that:

tenants shall not violate federal, state, or local laws, ordinances, rules, or regulations; engage in disorderly or illegal conduct; engage in activities or conduct creating or resulting in unreasonable noise, disturbances, and public nuisances; allow an unreasonable amount of garbage, refuse, and rubbish to accumulate on the property; illegally park vehicles in conjunction with their use of the vacation home; and overcrowd the vacation home premises.⁷

The proposed ordinance, which was tabled by the Kure Beach Planning and Zoning Commission,⁸ also would have required all rental agreements to contain a statement that a “material breach” of above-quoted provision would result in a termination of the rental agreement.⁹

By requiring that these provisions be included in every rental agreement, a rental regulation like the one proposed in Kure Beach would, in effect, make any violation of the rental regulation or any other applicable law a breach of the rental agreement, thereby placing the tenant at risk of eviction or other action by the landlord, in addition to any enforcement action taken by the government. Absent such a regulatory mandate, it is unlikely that a residential rental agreement or short-term rental lease would include these type of provisions.

⁷ Town of Kure Beach, NC: Proposed Vacation Rental Ordinance § 9(c) (available online at <http://townofkurebeach.org/Data/Sites/1/media/government/planning-zoning/proposed-vacation-rental-ordinance-version-four-final-2-5-15.pdf>).

⁸ See <http://www.wect.com/story/28694632/kure-beach-officials-decide-against-using-proposed-rental-property-ordinance>.

⁹ Town of Kure Beach, NC: Proposed Vacation Rental Ordinance § 9(d).

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 6. COMMUNITY IMPACTS OF RENTAL REGULATIONS

6.1 Local Real Estate Market

In vacation destination communities, many property owners depend on the income gained from short-term rentals to afford the cost of living or to pay their mortgages, real estate taxes, association dues, and other expenses.¹ If that income is taken away or severely reduced by short-term rental restrictions, the only alternative for those homeowners might be to sell their homes immediately in order to avoid foreclosure or a distressed sale. A widespread ban on short-term rentals that results in a substantial number of homes being sold or foreclosed upon may flood the market, causing property values to fall and remain depressed for a period of time.

Some communities believe that short-term rental regulations are necessary to protect the supply of available long-term rental housing units. The report *Airbnb, Rising Rent, and the Housing Crisis in Los Angeles* used a 21-unit apartment building to describe how Airbnb creates an incentive for rental property owners to convert long-term rental housing to short-term rental units:

Located one block from the Venice Boardwalk, the 21 units in the Morrison [Apartments in Venice Beach] are covered by the City of Los Angeles Rent Stabilization Ordinance. Coldwell Banker Commercial (CBC) recently listed the Morrison for sale. In an Exclusive Offering Memorandum obtained by a member of the Venice Neighborhood Council, CBC presents the conversion of the Morrison to AirBnB units as the prudent financial choice for prospective owners.

CBC estimates that a landlord could expect about \$200,000 in net annual income by renting these rent-controlled units out on the open market. If the new landlord converts the building into AirBnB units, CBC estimates they could expect to bring in more than \$477,000 per year, assuming a 67 percent occupancy rate. The projected rate of return under the Morrison's residential configuration is estimated to be 5.6 percent, while the projected rate of return for configuring the Morrison as an AirBnB building is 13 percent.²

The Los Angeles report used data on “whole apartments” listed on Airbnb to describe how short-term rentals affect the supply of available long-term housing:

Whether a market is digital or physical, basic economic principles of supply and demand are still operative. Traditionally, the rental housing market and the hospitality industry do not intersect. However, AirBnB has created a platform that allows landlords to pit

¹ According to an Airbnb survey of its users, 62% noted that income generated via Airbnb helped them to stay in their homes. See *Short-Term Rentals and Impacts on the Apartment Market* at 4 (Rosen Consulting Group, Oct. 2013) (available online at <http://publicpolicy.airbnb.com/wp-content/uploads/2014/04/Short-TermRentalsandImpactonApartmentMarketNY1.pdf>).

² *Airbnb, Rising Rent, and the Housing Crisis in Los Angeles* at 16 (LAANE, March 2015) (available online at <http://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf>).

tourist dollars against renter dollars. Landlords can potentially earn significantly more money by converting traditional rental stock into AirBnB units, as many appear to have done.

Los Angeles cannot afford to lose housing units. The Los Angeles Department of City Planning's Housing Needs Assessment shows that the city needs an additional 5,300 units of affordable housing each year to keep up with demand. However, Los Angeles developers have only averaged about 1,100 units of affordable housing per year since 2006. The 7,316 whole apartments currently listed on AirBnB represents nearly seven years' of affordable housing construction at the current rate of housing development.³

A May 2015 report by the San Francisco Budget and Legislative Analyst's Office on the impact of short-term rentals on housing in the city (the "San Francisco BLA Report") also concluded that short-term rentals have a negative impact on the supply of housing available for the long-term rental market.⁴ The San Francisco BLA Report divided Airbnb users into two categories: (1) "**casual hosts**," defined as hosts who occasionally make their residences available for short-term rentals for supplemental income; and (2) "**commercial hosts**," defined as those who probably do not live or could not live in their short-term rental unit and therefore rent it out as a means of generating income.⁵ To assess the impact of short-term rentals on the city's available housing stock, the San Francisco BLA Report focused solely on commercial host data, since casual hosts presumably reside in their units full-time.⁶ The report estimated that 1,251 entire homes or apartments were listed by commercial hosts on Airbnb and assessed the impact of those listings as follows:

At 0.3 percent, the estimated 1,251 entire units being rented out by commercial Airbnb hosts is relatively small compared to the entire 376,083 units of housing in San Francisco, but larger when compared to the number of units available for rent at any one time, which was reported to be 8,438 in 2013 by the American Community Survey conducted by the U.S. Census Bureau. *From this perspective, entire homes listed by commercial hosts take away an estimated 14.8 percent of the total rental housing available for rent Citywide, and private and shared rooms that might otherwise be occupied by roommates take even more units off the rental market.*⁷

The 2014 report "Airbnb in the City" by the New York Attorney General (the "NY AG Report") reached a similar conclusion in its analysis of "commercial users" of Airbnb.⁸ It stated:

Thousands of residential units in New York City were dedicated primarily or exclusively to private short-term rentals. In 2013, over 4,600 unique units were each booked as

³ *Id.* at 16.

⁴ Policy Analysis Report: Analysis of the Impact of Short-Term Rentals on Housing (San Francisco Budget and Legislative Analyst, May 13, 2015) (available online at 's Office

⁵ See San Francisco BLA Report at 2.

⁶ See San Francisco BLA Report at 11.

⁷ See San Francisco BLA Report at 11 (emphasis added).

⁸ *Airbnb in the City* (Oct. 2014, New York State office of the Attorney General) (available online at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>). The NY AG Report defined "commercial user" as a small group of hosts (6%) who "dominated the platform during [the study] period, offering up to hundreds of unique units, accepting 36 percent of private short-term bookings, and receiving \$168 million, 37 percent of all host revenue." *Id.* at 2.

private short-term rentals for three months of the year or more. Of these, nearly 2,000 units were each booked as private short-term rentals on Airbnb for at least 182 days—or half the year. While generating \$72.4 million in revenue for hosts, this rendered the units largely unavailable for use by long-term residents. Notably, more than half of these units had also been booked through Airbnb for at least half of the prior year (2012).⁹

By contrast, a 2013 report by the Rosen Consulting Group (the “RCG Report”) concluded that the number of housing units made available for short-term rental use is too small to have a meaningful impact on the overall housing market in New York City:

The impact of short-term rentals on supply/demand forces in urban housing markets are minimal, but admittedly difficult to quantify. RCG believes that the New York housing market is driven by local economic fundamentals, including job creation and demographic trends. The moderate pace of hiring in the region combined with a large demographic wave of young adults within the prime renter-age cohort provided a strong level of housing demand. With short-term rentals in particular, while the number of listings increased substantially in recent months, the number of housing units relative to the overall size of the residential stock is too small to impact housing trends.¹⁰

The RCG Report concludes: “While short-term rental activity is on the rise throughout the world, facilitated by technology and firms such as Airbnb, it is not having a meaningful impact on rental housing markets.”¹¹

6.2 Property Values

Rental regulations can affect property values in different ways. Generally speaking, if identified negative impacts of long-term or short-term rentals in a district or neighborhood are reduced or eliminated by rental regulation, then property values in the district or neighborhood may *increase*. On the other hand, the restrictions imposed on the use of properties by a rental housing regulation may cause property values in the district or neighborhood to *decrease*. The precise impact that a rental regulation has on property values will depend on various factors, including the general character of the community (e.g., vacation destination versus non-destination community), the precise terms of the ordinance, local and national economic conditions, and local real estate market conditions.

6.3 Tourism

Short-term rental restrictions may negatively impact local tourism in several ways. First, they can have a negative impact on the occupancy rates of vacation rentals by increasing the per-person cost of short-term rentals. Local regulations can increase the per-person cost of a rental by limiting the maximum occupancy of a short-term rental unit. Short-term rental restrictions may also cause rental property owners to increase their rental rates and minimum security deposits in order to cover the increased cost of operating a short-term rental and the risk of

⁹ *Id.* at 12.

¹⁰ *Short-Term Rentals and the Impact on the Apartment Market* at 3 (Rosen Consulting Group, Oct. 2013) (available online at <http://publicpolicy.airbnb.com/wp-content/uploads/2014/04/Short-TermRentalsandImpactonApartmentMarketNY1.pdf>).

¹¹ *Id.* at 5.

incurring a fine or having their rental licenses revoked or suspended. All else being equal, the higher rental rates paid by smaller groups of tenants, increase the per-person cost of short-term rentals in communities with short-term rental ordinances.

Second, tourists who become aware of the new restrictions may perceive them as being motivated by, and evidence of, an “anti-tourist” sentiment among full time residents of the community. Regulations that single out short-term rentals for different treatment may implicitly brand short-term renters as being potentially disruptive even though an individual tenant may have done nothing wrong. Provisions that allow random inspections of short-term rentals without imposing reasonable restrictions on the time or manner of those inspections may be perceived as an invasion of privacy and an unreasonable disruption of a family vacation. A perceived anti-tourist sentiment may ultimately discourage tourists from vacationing in that community.

A January 2010 report prepared by the Napa Valley Vacation Rental Alliance, argued that the availability of short-term rental properties could determine where a family or group of friends vacationing together chooses to stay. The report states:

Throughout the world, some travelers prefer private dwellings to hotels. For instance, those traveling as a family or group of friends often want spacious accommodations and kitchens. This market segment will not substitute conventional lodging if vacation rentals are not provided, they will simply go elsewhere. Thus, by eliminating vacation rentals, Napa County would deter a substantial number of visitors who currently spend on restaurants, wine, attractions and services and who would instead spend for leisure outside our County.¹²

The 2008 study “Economic Impact of Transient Vacation Rentals (TVRs) on Maui County”¹³ commissioned by the Realtors® Association of Maui (the “Maui TVR Study”) reached a similar conclusion. Acknowledging that “the TVR industry is concerned about . . . the potential enactment of legislation meant to marginalize [the TVR] industry, and the potential economic consequences of such policies,” the Maui TVR Study concluded:

The extent of the loss of the TVR industry due to government regulations depends to what extent TVR visitors substitute an alternative Maui County accommodation type to TVRs if they are unavailable or not sufficiently available to meet the current and expected future demand level for their accommodation type. In a global market place with alternatives to Maui destinations offering a literal potpourri of accommodation experiences, the modern, well-informed and sophisticated visitor can find the accommodations experience that best fits their tastes and preferences.

Based on the increasing market share of TVRs on Maui from 2000 to 2006 relative to other accommodation types one can reasonably surmise that the modern visitor

¹² Napa Valley Vacation Rental Alliance (NVVRA): A Coalition of Napa County Stakeholders (prepared for Napa County by Napa Valley Vacation Rental Alliance (NVVRA), Jan. 2010) (available on-line at <http://www.white.com/nvvra/media/WHY%20CODIFYING%20VACATION%20RENTALS%20NOW%20IS%20GOOD%20PUBLIC%20POLICY.pdf>).

¹³ “Economic Impact of Transient Vacation Rentals (TVRs) on Maui County,” prepared by Dr. Thomas Loudat & Dr. Prahlad Kasturi for the Realtors® Association of Maui (Jan. 8, 2008) (hereinafter the “Maui TVR Study”).

increasingly prefers a TVR or its equivalent experience. Thus, even though elimination of Maui TVRs may not result in the loss of all TVR visitors who may substitute an alternative Maui County accommodation type yet available, we would still expect a significantly negative economic impact in Maui County if TVRs are eliminated or significantly reduced.¹⁴

Recent studies show that short-term rentals account for a significant portion of the lodging market. A market study of vacation rentals in the U.S. found that travelers spent \$23 billion on vacation rentals in 2012, nearly one-fifth of the total U.S. lodging market.¹⁵

The 2014 study “Economic Impact: Florida’s Vacation Rental Industry”¹⁶ used survey data and visitor spending estimates provided by Florida’s official tourism marketing corporation to calculate the economic impact of vacation rentals in terms of employment, visitor spending, and the overall state economy. It concluded:

- Florida’s vacation rental market has a total impact on economic output of \$31.1 billion.
- Florida’s vacation rental industry directly or indirectly supports a total of 322,032 jobs in Florida annually.
- The total labor income generated by those 322,032 jobs is approximately \$12.64 billion per year.
- The total estimated spending by visitors staying in vacation rental units is \$13.43 billion.
- Total owner-management spending across all licensed rental units in Florida is \$3.3 billion.¹⁷

As discussed in Section 6.4, the vacation rental industry can also have a significant impact on local economies.

6.4 Local Economy

Local economies that depend heavily on the tourist economy are more susceptible to the potential impacts of short-term rental restrictions. Even a slight impact on tourism in these communities can have a significant negative effect on the viability and success of restaurants, retail establishments, and other local businesses that provide services to tourists. The potential dollar impacts of a reduction in visitor numbers due to a short-term rental restriction is illustrated by the daily spending calculations of the Maui TVR Study, which calculated that transient vacation rental visitors spent an average of \$159.16 per day in Maui County.¹⁸ Based on 2006 transient vacation rental visitor data (105,967) and a 6.85 day average length of stay, the study

¹⁴ Maui TVR Study at 1-2.

¹⁵ See Dennis Schaal, “Vacation Rentals in the U.S. Are Now a \$23 Billion Industry,” *Skift* (Oct. 23, 2013) (available online at <http://skift.com/2013/10/25/vacation-rentals-in-the-u-s-are-now-a-23-billion-industry/>) (citing the PhoCusWright study “U.S. Vacation Rentals 2009-2014: A Market Reinvented”).

¹⁶ *Economic Impact: Florida’s Vacation Rental Industry* (2014, prepared by Thinkspot for the Florida Vacation Rental Managers Association) (hereinafter “*Florida Vacation Rental Study*”) (available online at http://gometeoric.com/wp-content/uploads/2014/03/FVRMAEconImpactReport_FINAL.pdf).

¹⁷ *Florida Vacation Rental Study* at 1.

¹⁸ See Maui TVR Study at 16.

concluded that transient vacation rentals produced more than \$115 million in total revenue from lodging, food and beverage, entertainment, shopping, and other county businesses and services.¹⁹

Studies also demonstrate the significant impact that the vacation rental industry can have on local economies. A 2013 study of private home rentals by the University of New Orleans Hospitality Research Center described the impact of private home vacation rentals on the New Orleans metro area economy as follows:

In 2013, approximately 100,000 visitors to the New Orleans area stayed in private home rentals. These visitors made a substantial contribution to the New Orleans metro area economy. They generated a total economic impact of \$174.8 million, comprised of \$99.8 million in direct spending and \$74.9 million in secondary spending. Visitor spending also resulted in the creation or support of nearly 2,200 full-and part-time jobs. These jobs are expected to create a total of \$56.1 million in additional earnings for residents of the New Orleans area.

Visitor spending is also estimated to generate a total of \$10.8 million in tax revenue for state and local governments. Of that total, roughly \$6.1 million will go to the State of Louisiana, and \$4.7 million will be claimed by local governments in the New Orleans area.²⁰

Studies on the local impact of short-term rentals in the Myrtle Beach Area of South Carolina²¹ and Coachella Valley, California²² reached similar conclusions. The Coachella Valley study, for example, concluded that short-term rentals spending was an important part of the tourism industry, “ultimately creating thousands of jobs and millions of dollars of earnings and tax revenue for the community each year.”²³

6.5 Source of Tax Revenue

Short-term rental restrictions can be a significant source of tax revenue in communities that are authorized by state law to impose and collect a tax on short-term rentals. For example, in 2014 the City of Newport Beach, California reportedly collected approximately \$1.95 million in short-term rental tax revenue.²⁴ The City of San Clemente, California, reportedly collects about \$280,000 per year on just 300 registered short-term rental properties.²⁵

Airbnb has used the lure of significant tax revenue in its attempts to legitimize its presence in jurisdictions where the short-term rental of a home is unlawful. For example, on April 15, 2015

¹⁹ See Maui TVR Study at 16-17

²⁰ Private Home Rentals: Visitor Survey Results and Economic Impact Analysis 2013 (July 2014, prepared by The University of New Orleans Hospitality Research Center for the Alliance for Neighborhood Prosperity) (available online at <http://neworleanscitybusiness.com/files/2014/09/Private-Home-Rentals-2013.pdf>).

²¹ See *The Local Impact of Participating Short Term Rentals in the Myrtle Beach Area* (Spring 2014, TXP Inc.) (available online at <http://www.stradvocacy.org/media/TXP-STRAC-Impact-Report-Myrtle-Beach.pdf>).

²² See *The Local Impact of Participating Coachella Valley Short Term Rentals* (Spring 2014, TXP Inc.) (available online at <http://www.stradvocacy.org/media/TXP-STRAC-Impact-Report-Coachella-0312141.pdf>).

²³ *Id.* at 7.

²⁴ “Rental properties: Beach cities balancing potential revenue with parties, loud music, disrespect,” *Orange County Register*, May 26, 2015) (available online at <http://www.ocregister.com/articles/beach-663028-rentals-short.html>).

²⁵ *Id.*

(Tax Day) the company sent a letter to the New York State Legislature stating that it would like to pay tens of millions of dollars in hotel and tourist taxes to the state.²⁶ The letter read:

Dear Members of the New York State Senate and Assembly,

As New York families finish their taxes, we write to once again renew our request to work with you to ensure the Airbnb community can contribute even more tax revenue to the State.

While other companies frequently attempt to avoid paying taxes, Airbnb has been working with governments around the world to help collect more tax revenue. We provide 1099 forms to help our hosts pay income taxes on the money they earn while sharing their space. We have also begun collecting and remitting hotel and tourist taxes in San Francisco, Portland, San Jose, Chicago, Washington, D.C., and Amsterdam and will expand this initiative to include other jurisdictions in the coming weeks and months.

We would like to implement a similar program in New York, but current State and New York City tax rules do not allow Airbnb to help collect and remit hotel and tourist taxes on behalf of our hosts and guests.

We were hopeful that New York State would address this matter in this year's budget. Unfortunately, one of the casualties of this year's budget negotiations was a provision governing taxes in online marketplace transactions that could have generated millions of dollars of vital revenue for New Yorkers.

The tax on electronic commerce would have required certain websites (or marketplace providers) to collect New York sales tax on sales made by remote sellers. It would have also enabled Airbnb to help collect and remit tens of millions of dollars in hotel and tourist taxes to the State of New York on behalf of our hosts and guests, the benefits of which would have been felt in every corner of our state.

We continue to urge State and City leaders to let our community contribute more tax revenue to New York. We urge members of the New York State Senate and Assembly to pass at least the portion of this legislation that would allow Airbnb to collect and remit taxes as quickly as possible.

Thank you for your consideration.

Sincerely,
David Hantman
Airbnb²⁷

Airbnb has estimated that it could produce as much as \$65 million annually in hotel occupancy taxes in New York state alone.²⁸

²⁶ "Why Airbnb just wrote a letter to New York legislators begging to pay more taxes," *Business Insider* (April 15, 2015) (available online at <http://www.businessinsider.com/airbnb-sends-letter-to-ny-state-legislature-2015-4>).

²⁷ *Id.*

²⁸ See "As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There," *Techcrunch* (Jan. 16, 2015) (available online at <http://techcrunch.com/2015/01/16/airbnb-65-million-in-ny/>).

In Massachusetts, the General Assembly is deliberating a bill that would impose a 5 percent state excise tax on short-term residential rentals and authorize cities and towns to impose a local excise tax of up to 6 percent.²⁹ A 2014 report commissioned by the Island Housing Trust concluded that somewhere between 20 and 25 percent of homes on Martha’s Vineyard are rented at some point in the year.³⁰ Using a 5 percent tax rate, the report estimated a local tax on short-term rentals could yield a revenue stream of \$3.4 million for summer rentals alone, and nearly double that amount (\$6.3 million) including offseason rentals.³¹

6.6 Affordable Housing

(a) Impact of Short-Term Rentals

Short-term rentals can affect housing costs in a community. When property owners elect to rent their homes on a short-term basis rather than renting on a longer-term basis (e.g., by the season or by the year), “they essentially squeeze the supply of housing, pushing up the demand, and subsequently, the cost” of housing in the community.³² As discussed in Section 6.1, an analysis of Airbnb rentals in Los Angeles described how short-term rentals can affect the supply of affordable housing:

The Los Angeles Department of City Planning’s Housing Needs Assessment shows that the city needs an additional 5,300 units of affordable housing each year to keep up with demand. However, Los Angeles developers have only averaged about 1,100 units of affordable housing per year since 2006. The 7,316 whole apartments currently listed on AirBnB represents nearly seven years’ of affordable housing construction at the current rate of housing development.³³

In vacation destination communities, where land prices tend to be inflated and second homes are prevalent, long-term rental housing often is in short supply. A study of affordable housing in the Rocky Mountain communities observed that the supply of affordable housing is especially problematic in resort communities:

In most Rockies resort communities there simply are not enough affordable housing units, forcing locals to commute hours to work while second-homes sit vacant; in these areas affordable housing is a crisis. Second, third, or even fourth-home owners flooding Rocky Mountain resort towns transform small, inexpensive communities surrounding resort destinations into towns resembling Gucci-fringed Aspen and faux-cowboy Jackson

²⁹ See Massachusetts Bill H.2618 §§ 2, 3 (2015).

³⁰ See “Senator Wolf backs legislation to allow towns to tax vacation rentals,” MV Times (June 10, 2015) (available online at <http://www.mvtimes.com/2015/06/10/senator-wolf-backs-legislation-to-allow-towns-to-tax-vacation-rentals/>).

³¹ See *id.*

³² See Nate Hutcheson, “Short-Term Vacation Rentals: Residential or Commercial Use?,” *Zoning News* (March 2002, American Planning Association) (hereinafter “APA Report”).

³³ *Airbnb, Rising Rent, and the Housing Crisis in Los Angeles* at 16.

Hole. Finding affordable housing for locals and service workers in these communities is difficult when the median house price is far from affordable, given their annual income.³⁴

The Town of Breckenridge, Colorado, home to the Breckenridge Ski Resort and within close proximity to three other ski resorts in Summit County, exemplifies the problem. A 2014 case study of affordable housing in Breckenridge explained how the high-end second home market has effectively priced local residents out of the real estate market.

As of 2010, Breckenridge had a population of 4,540 persons. Residents resided in only 28% of the 6,911 housing units in town—meaning about 1,946 housing units were occupied by year-round residents, with the remaining 4,965 units occupied by temporary visitors and owned by second homeowners.

Home prices far exceed what local can afford to pay for housing. The average sale price of residences in ... Breckenridge was \$585,509 (\$382 per square foot). These are affordable for households earning ... \$135,000 per year. In comparison, the median household income in 2012 was ... \$70,000 in Breckenridge. The average wage paid in the County was only \$33,000.

Because the cost of construction in the area and the premium that housing marketed to second homeowners can demand, much of the private market builds to meet visitor demands. This means that even attached condominium product that may otherwise be affordable for locals are typically high-amenity with high homeowner association fees that make them unaffordable.³⁵

Beach communities likewise can suffer from a shortage of long-term rental housing. On the Island of Martha's Vineyard, only 44 percent of houses are occupied year-round.³⁶ With a strong market demand for seasonal homes, the median home price of \$650,000 would require a purchaser to have an income of \$132,000, more than twice the Vineyard's median income of \$57,553.³⁷ Year-round rental housing, the most affordable option on the Vineyard, has been described as "virtually nonexistent."³⁸

(b) Speculative Buying and Investment in Short-Term Rentals

In some cases, allowing short-term rentals may fuel speculation in rising housing markets by allowing investors to cover the carrying costs of a house for a period of time while the property

³⁴ Wiley Rogers, "Affordable Housing in the Rockies: Housing a Region in Transition at __ (2008 Colorado College State of the Rockies Report Card) (available online at <https://www.coloradocollege.edu/dotAsset/293cae6f-8a9e-4a33-bff0-d37f17197b3b.pdf>).

³⁵ *The Impact of Affordable Workforce Housing on Community Demographics, Economies, and Housing Prices and Options—Case Study: The Town of Breckenridge, Colorado* at 4-5 (WSW Associates, Jan. 2014) (hereinafter "Breckenridge Case Study") (available online at <http://www.affordableownership.org/wp-content/uploads/2015/03/Impacts-of-Workforce-Housing.pdf>).

³⁶ Martha's Vineyard Island Plan – Section 8, Housing at 8-2 (Martha's Vineyard Commission, 2009) (available online at <http://www.islandplan.org/doc.php/Island%20Plan%20-%20208.%20Housing.pdf?id=2654>).

³⁷ *Id.* at 8-2.

³⁸ Barry Stringfellow, "Martha's Vineyard housing shortage reaches critical mass," *MV Times* (Feb. 18, 2015) (available online at <http://www.mvtimes.com/2015/02/18/marthas-vineyard-housing-shortage-reaches-critical-mass/>).

appreciates in value and then sell it for a profit.³⁹ This concern was voiced by the City Council of Boulder, Colorado in June 2015, then it directed staff to prepare a short-term rental ordinance in order to address the problem of investors buying so much property for use as short-term rentals that they were “displacing housing for residents.”⁴⁰

6.7 Governmental Administrative Costs

Rental regulations tend to create additional administrative burdens on local government, including the processing of permit, licensing and registration applications. In addition, local building officials are likely to be faced with an increased volume of required inspections. Code enforcement personnel and the police officers may be required to assume additional enforcement duties under a rental ordinance. For example, when the City of Milwaukee, Wisconsin expanded its Residential Rental Inspection Program in January 2010, it published a “Frequently Asked Questions” webpage that addressed the a question about fees by explaining that the fees were necessary to “offset the cost of additional staff needed” to implement the program.⁴¹

In the City of Lancaster, California, a fiscal analysis of a proposed Rental Housing Business License and Preservation Program detailed the following impacts to the city:

Increase permanent staff by adding three Code Enforcement Officers and one administrative clerk in the Code Enforcement Division of the Housing & Neighborhood Revitalization Department to implement the Rental Inspection Program and the Group Home Ordinance. Hiring of additional staff will require an ongoing annual increase to the budget as follows: \$273,000 salaries and fringe benefit, \$9,000 vehicle fuel, \$1,350.00 for uniforms and one time increase of \$17,000 for office equipment, furniture and supplies and \$60,000 to purchase vehicles. The budget amend above reflects salary costs and rental inspection revenues for 6 months.⁴²

In a vacation-destination community, the financial burden of administering a short-term rental ordinance may be substantial, particularly where a high volume of short-term rental properties causes the local government to hire additional staff or pay increased overtime costs to current staff in order to implement the short-term rental program. When the City of Santa Monica, California passed an ordinance that prohibits residents from renting out their home when they’re not present, the city determined that it would need to hire additional staff in order to enforce the measure.⁴³ In April 2015, Santa Monica’s acting chief administrative officer for code

³⁹ See *id.*

⁴⁰ See Erica Meltzer, “Boulder council: Preserving housing for residents will guide short-term rental regulations,” Daily Camera (June 2, 2015) (available online at http://www.dailycamera.com/news/boulder/ci_28240692/boulder-short-term-rental-owners-plea-flexibility).

⁴¹ City of Milwaukee, WI - Frequently asked Questions for Residential Rental Inspection (RRI) Program (available online at <http://city.milwaukee.gov/DNS/RRI>).

⁴² City of Lancaster, CA – Staff Report on Proposed Ordinance for Rental Housing Business License and Preservation Inspection Program (Jan. 9, 2007) (available online at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=12&ved=0CCMQFjABOAo&url=http%3A%2F%2Fwww.cityoflanasterca.org%2FModules%2FShowDocument.aspx%3Fdocumentid%3D1479&ei=C9WeVbWRCcurNunkurgK&usq=AFQjCNGThK8KZla0-L6NiDzwl6gH7jrtUA>).

⁴³ “Santa Monica council unanimously approves Airbnb regulations; hosts to pay tax,” 89.3 KPCC (May 13, 2015) (available online at <http://www.scpr.org/news/2015/05/12/51625/airbnb-says-santa-monica-proposed-legislation-is-u/>).

enforcement determined that, due to the “proliferation of Airbnb,” the city needed to hire two additional code enforcement officers and one administrative staff person in order to crack down on the problem of illegal short-term rentals.⁴⁴

In the City of Boulder, Colorado, a staff report on a proposal to expand the city’s rental licensing code to expressly permit short-term rentals stated that the regulation of short-term rentals “will require the expenditure of city funds for which there is no budget” and “will require additional staff.”⁴⁵

⁴⁴ “Santa Monica Officials Look to Crack Down on Illegal Short Term Rentals,” *Santa Monica Lookout*, April 24, 2015 (available online at http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2015/April-2015/04_24_2015_Santa_Monica_Officials_Look_To_Crack_Down_on_Illegal_Short_Term_Rentals.html).

⁴⁵ City of Boulder, CO – City Council Agenda Staff Report (June 2, 2015) (available online at <https://www-static.bouldercolorado.gov/docs/short-term-rentals-city-council-1-201506021017.pdf>).

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 7. UNINTENDED CONSEQUENCES OF RENTAL REGULATIONS

7.1 “Underground Market” for Rental Units

Regulations that prohibit or impose high permit and licensing fees, onerous inspection requirements, and performance standards that are difficult or costly for owners to satisfy might have the unintended effect of creating an underground market for short-term rentals, in which owners continue to rent their properties without obtaining the requisite permits.¹ For example, in 2013—a year before the City of Portland, Oregon passed an ordinance legalizing, but regulating, short-term rentals—as many as 1,000 Portland residents reportedly were renting out a home or a room in their home through online rental platforms such as Airbnb and VRBO.² In the City of Santa Monica, California, city officials believed that as many as 1,700 illegal short-term vacation rentals were operating in the city, triggering a need for the city to hire additional code enforcement and administrative personnel to address the problem.³

According to the article “How to Safely Make Money on Short-Term Rentals,” short-term rentals are often used as a way to avoid foreclosure and can cover a substantial portion of the mortgage on a vacation home:

According to vacation rental website HomeAway, about 21% of its customers listed a property in 2009 after a recent job loss, the inability to sell a home or foreclosure risk. It makes sense: 48% of customers with financed properties can cover 75% of their mortgage by renting it short-term.⁴

Owners who depend on rental income to pay their mortgages to pay the maintenance costs of a second home may be willing to risk incurring fines and other penalties if an ordinance creates obstacles that cannot be overcome or that may make it economically infeasible to obtain a rental permit.⁵

¹ See “Short-Term Rental Apartments Face Rising Calls for Regulation, *The New York Times*, July 17, 2014 (available online at <http://www.nytimes.com/2014/07/18/greathomesanddestinations/short-term-rental-apartments-face-rising-calls-for-regulation.html>) (quoting Homeaway’s chief strategy officer as saying that “Overly restrictive laws or bans are akin to the U.S.’s Prohibition era in the 1930s. They are ineffective and drive the activity underground, which is clearly detrimental to all.”).

² See “House rentals hide in shadows: Web short-term vacation rooms proliferate while avoiding hotel taxes and oversight,” *Portland Tribune*, Jan. 3, 2013 (available online at <http://portlandtribune.com/pt/9-news/125888-house-rentals-hide-in-shadows>).

³ “Santa Monica Officials Look to Crack Down on Illegal Short Term Rentals,” *Santa Monica Lookout*, April 24, 2015 (available online at http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2015/April-2015/04_24_2015_Santa_Monica_Officials_Look_To_Crack_Down_on_Illegal_Short_Term_Rentals.html).

⁴ “How to Safely Make Money on Short-Term Rentals,” *Fox Business*, Sept. 14, 2011 (available online at <http://www.foxbusiness.com/personal-finance/2011/09/14/how-to-safely-make-money-on-short-term-rentals/>).

⁵ See “Renting rooms one way to avoid foreclosure,” *Seattle Times*, July 23, 2010 (available online at <http://www.seattletimes.com/business/real-estate/renting-rooms-one-way-to-avoid-foreclosure/>); see also “More destinations shut the door on vacation rentals, *USA Today*, August 6, 2010 (commenting that the ban on short-term rentals in New York City apartments, most of which are already prohibited under many condominium and co-op bylaws, “will simply go further underground”).

7.2 Uncertainty in the Rental Housing Market

A rental regulation that makes a required rental permit non-transferrable can introduce a degree of uncertainty into the rental market. For example, under the City of Anaheim, California's short-term rental program short-term rentals permits are non-transferable—any change in ownership requires that a new rental permit application be submitted and a new registration fee paid.⁶ The non-transferability of a short-term rental creates uncertainty about whether a buyer will be allowed to rent out a home in order to offset the purchase and maintenance costs, which could have a negative impact on the market for second homes. In a community with a strong second-home market, the result could be that houses will decrease in value because they will appeal only to the limited market of buyers who have no interest in making the property available to short-term renters. The lack of certainty as to whether a home could be used as a vacation rental might also make it more difficult for buyers to secure financing for a second home in those areas, because the potential purchaser will not be able to give the lender assurances that there will be a contingent stream of income to offset the carrying costs of the property, if necessary.

A short-term rental regulation that authorizes the suspension or revocation of a short-term rental permit can also introduce a degree of uncertainty in the short-term rental housing market. Vacation travelers often reserve short-term housing accommodations several months in advance of a planned vacation, particularly when the stay is planned during a destination's peak visitation period. Under those circumstances, for example, it is conceivable that a family may make a reservation and pay a deposit several months in advance of a holiday ski vacation only to discover later that the home they had reserved is no longer available because its short-term rental permit was suspended or revoked. In some cases, by the time a vacation home renter makes that discovery, it may be too late to find suitable alternative short-term housing, leaving the vacationer with a negative impression of the local community—an impression that the vacationer is likely to share with others.

7.3 Potential Liability for Realtors®

Rental regulations have the potential to expose Realtors® to liabilities and penalties for a violation. For example, in 2014 the City of Fairlawn, Ohio considered adopting an amendment to its landlord licensing code that contained the following provision:

Landlord License Required. Any owner, agent, person or entity desiring to receive income from the rental of an apartment, house or other residential dwelling unit must possess a Landlord License before receiving rental income.⁷

This language could be interpreted to require that a Realtor® have a landlord license if he or she collects rent from a tenant. This concern might arise, for example, if the Realtor® serves a management function for a landlord who resides elsewhere, or even, possibly, if the Realtor®

⁶ See City of Anaheim, CA – Short-Term Rental Program (available online at <http://www.anaheim.net/articlenew2222.asp?id=5284>).

⁷ See City of Fairlawn, OH – Proposed Ordinance 2014-073 § 1504.05(a) (available online at <http://www.cityoffairlawn.com/DocumentCenter/View/3426>).

marketing the property for lease needs to collect a deposit of first month's rent with the signing of a new lease.

The proposed Fairlawn ordinance also contained a provision that forbid an “owner, *agent* or person in charge” of a residential unit from renting or leasing it for residential occupancy unless the owner obtained a certificate of inspection for the rental unit in question. This provision can be read as imposing an affirmative duty on an agent—e.g., a Realtor[®] who is brokering a residential property for lease or rent—to ensure that the property owner has a current inspection certificate before having a prospective tenant enter into a lease agreement. A violation of either of these provisions would subject a Realtor[®] to potential administrative and/or criminal penalties under Chapter 1520 of the Fairlawn City Code.

7.4 Unnecessary Duplication of Existing Codes

As discussed in Section 3.1, communities often adopt rental regulations for the purpose of protecting the residential neighborhoods from the negative impacts that often are associated with rental housing, such as excessive noise, late night parties, trespassing, increased traffic, and other activities that disrupt the neighborhood character. In order to address these perceived negative impacts, communities often include performance-type standards in their rental regulations, such as maximum occupancy restrictions, noise limitations, and minimum parking requirements. To the extent that the conditions addressed by these performance standards (i.e., overcrowding, excessive noise, and off-street parking) are attributable to rental properties, the adoption of performance standards generally makes sense. However, these types of performance standards can unnecessarily duplicate existing provisions of a community's building, nuisance, and other codes. Generally speaking, such duplication will result in regulatory provisions that are either redundant or inconsistent.

For example, the rental regulations that were proposed for the City of Marco Island, Florida in 2014 were intended to “insure [that] property owners adjacent to rental units are not being adversely impacted by unruly renters (noise, trash, vehicle parking).”⁸ To address those concerns, the proposed rental regulations included provisions that banned noise disturbances after 10:00 pm, required trash to be stored in covered containers, and established minimum off-street parking requirements for rental properties.⁹ While these provisions arguably made sense, the Marco Island City Code already contained generally applicable provisions that addressed noise (Article IV – Noise Control), trash (Article II – Nuisance, Litter, Weed, Plant, and Right-of-Way Control Ordinance), and parking (Article II, Stopping, Standing and Parking).

A similar duplication of existing code provisions arose with respect to the vacation rental ordinance proposed for Sonoma County, California in 2010. The proposed ordinance contained a set of “Performance Standards” that were intended to “ensure that vacation rentals are compatible with and do not adversely impact surrounding residential and agricultural uses.” The proposed “Performance Standards,” which included noise limits and trash and recycling

⁸ See City of Marco Island, FL - Proposed Rental Regulations and Planning Board Memorandum, August 6, 2014 (available online at <http://www.cityofmarcoisland.com/modules/showdocument.aspx?documentid=15739>).

⁹ See *id.*

requirements, likewise duplicated generally applicable provisions of existing Sonoma County codes.

7.5 Shifting Rentals to Areas Where They Currently Are Not a Problem

As discussed in Sections 3.3(a) and (c), communities sometimes respond to concerns about short-term rentals by banning them in certain neighborhoods or zoning districts. For example, a community might ban short-term rentals from all or some of its designated single-family zoning districts. In 2015, the resort town of Ocean City, Maryland debated the creation of a new zoning district that would ban residential rentals for a term of less than a year.¹⁰ The proposed R-1A single-family residential district was substantially similar in all respects to the R-1 single-family residential district that already existed under the Ocean City Zoning Ordinance, with the exception that the proposed R-1A district would prohibit short-term rentals, while the existing R-1 district did allow short-term rentals.

The proposal to establish the R-1A district is reportedly was driven by the residents of a particular neighborhood known as the Mallard Island subdivision. A newspaper article reported that nearly 80 percent of the property owners in the Mallard Island subdivision signed a petition requesting that the neighborhood be rezoned to R-1A, even though the district does not currently exist.¹¹ The City Zoning Administrator explained the proposal as follows:

What is being requested by the Mallard Island subdivision is they will like a hybrid single family residential district ... an R-1A single family district will prohibit short-term rentals and allow only year-round rentals where you cannot rent less than 12 months. It would protect single family neighborhoods from not having transient rentals.¹²

If established by the City Council of Ocean City,¹³ the proposed R-1A district presumably would benefit Mallard Island (which reportedly generates most of the complaints received by Ocean City about short-term rentals) and other neighborhoods that are opposed to short-term rentals. However, the R-1A district could have the effect of shifting short-term rentals away from Mallard Island and into other Ocean City neighborhoods where they currently are not a problem.

¹⁰ See “Ocean City returns to question of vacation rentals,” *The Baltimore Sun*, July 7, 2015 (available online at <http://touch.baltimoresun.com/#section/-1/article/p2p-83943420/>).

¹¹ “OC Weighing New Housing District That Would Prohibit Short-Term Rentals in Certain Areas,” *The Dispatch* (May 7, 2015).

¹² *Id.*

¹³ As of July 2015, the city council was still debating the proposal. See “Ocean City returns to question of vacation rentals,” *The Baltimore Sun*, July 7, 2015.

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 8. RENTAL REGULATIONS AND PROPERTY RIGHTS

8.1 The Bundle of Property Rights

Property ownership in the United States is commonly expressed metaphorically as a “bundle of rights” or a “bundle of sticks.”¹ The concept of property ownership as a bundle of rights “is an abstract notion that analytically describes property as a collection of rights vis-à-vis others, rather than rights to a ‘thing,’ like a house or a piece of land.”² The bundle of rights pertaining to ownership includes the rights to possess and use the property, the right to exclude others from the property, and the right to gain income from the property by “foregoing personal use . . . and allowing others to use it.”³ At the same time, zoning and environmental regulations impose limitations on the “absolute” nature of property ownership. Today, it is commonly understood and generally accepted that some degree of such regulation is a condition of owning property under our American system.

8.2 The Right to Rent Private Property

Among the core rights that a property owner typically has, and that an owner does not expect to be deprived of by regulation, is the right to lease or rent the property on a temporary basis to another party. That party temporarily acquires, in exchange for payment of rent, one of the “sticks” in the bundle of property rights—the right to use and occupy the property for the agreed upon rental period to the exclusion of all others.⁴

In a 2001 decision that invalidated a variance condition prohibiting a home from being used for rental purposes, the Supreme Court of Connecticut recognized the bundle of rights view of property ownership and identified the “right of rent” as one of the sticks in that bundle. The Court stated:

[It] is undisputable that the right of property owners to rent their real estate is one of the bundle of rights that, taken together, constitute the essence of ownership of property.... The question that the present case poses, therefore, is whether, under the facts of this case, the continued maintenance of the no rental condition serves “a legal and useful purpose.” We conclude that it does not.

Owners of a single-family residence can do one of three economically productive things with the residence: (1) live in it; (2) rent it; or (3) sell it. Thus, if the owners of a single-family residence do not choose, for reasons of family size or other valid reasons, to live

¹ See Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VERMONT L. REV. 247 (2007) (hereinafter “Johnson”).

² Johnson at 247.

³ Johnson at 253.

⁴ See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996) (noting that conventional “bundle of rights” formulation and various views of the “bundle of rights”).

in the house they own, their only viable options are to rent it or to divest themselves entirely of their ownership by selling it.⁵

In invalidating the variance condition, the court observed:

Stripping the plaintiffs of essentially one-third of their bundle of economically productive rights constituting ownership is a very significant restriction on their right of ownership. In addition, when the variance was granted in 1986, the no rental condition deprived the plaintiffs only of the right to rent their property on a seasonal basis. With the change in the zoning regulations, however, the plaintiffs now also have lost the more significant right to rent their property on a year-round basis, resulting in a total loss of the right to rent.⁶

Though the *Gangemi* decision pertained to a variance condition prohibiting a home from being used for rental purposes, the reasoning of the Supreme Court of Connecticut can be applied to the general context of residential rental regulations.

8.3 Local Government Authority to Regulate

An ordinance that outright prohibits property owners from renting their homes, or restricts their right to rent by subjecting residential rentals to a discretionary permit requirement, clearly impairs the fundamental right of private property owners to rent their properties by stripping them of “one-third of their bundle of economically productive rights” that constitute ownership. The question is the degree to which this significant governmental restriction of a productive property right has been held to be valid, and under what circumstances.

In general, rental regulations are adopted under the general police power delegated to local governments by the state constitution or by statute, or pursuant to the zoning authority granted to local governments by a state zoning enabling statute. These sources of local regulatory authority are discussed below.

(a) Police Power

The concept of “**police power**” is generally understood to mean “the exercise of the sovereign right of a government to promote order, safety, health, morals and the general welfare of society within constitutional limits.”⁷ The police power is an inherent attribute of sovereignty that does not depend on a constitutional reservation.⁸ Because the police power resides in the states, it is generally held that local governments have no police power unless it has been delegated to them

⁵ *Gangemi v. Zoning Bd. of Appeals of the Town of Fairfield*, 763 A.2d 1011, 1015-16 (Conn. 2001) (citing J. DUKEMINIER & J. KRIER, PROPERTY at 86 (3d ed. 1993) (stating (“[property] consists of a number of disparate rights, a ‘bundle’ of them: the right to possess, the right to use, the right to exclude, the right to transfer”). (Emphasis added)

⁶ *Id.* at 1016. (Emphasis added)

⁷ See 6 ROHAN: ZONING AND LAND USE CONTROLS, Ch. 35, Sources of Zoning Power, § 35.03[1] (LexisNexis Matthew Bender) (hereinafter “ROHAN”).

⁸ EUGENE MCQUILLIN, 6A THE LAW OF MUNICIPAL CORPORATIONS § 24:2 (3d. ed., 2015) (hereinafter “MCQUILLIN”).

by the state constitution or by enabling legislation.⁹ For example, in Ohio the police power is delegated to municipalities by Article 18, Section 3 of the Constitution of the State of Ohio, which states:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.¹⁰

Article XI, Section 7 of the California Constitution contains a similarly broad grant of authority: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”¹¹

(b) Zoning Power

The zoning power—generally defined as the governmental right to control the use of real property—is a form of the police power.¹² The power to zone is exercised primarily by local government. However, as noted above, local governments have no inherent police powers and therefore have no inherent power to zone. Consequently, before a local government can legally exercise the zoning power, it must receive a delegation of that power from the sovereign that inherently possesses it, namely, the state.

In the landmark decision *Village of Euclid v. Amber Realty Co.*,¹³ the U.S. Supreme Court made clear that the police power was the source of local zoning power. In validating the zoning ordinance adopted by the Village of Euclid, Ohio, the Court stated:

The ordinance now under review and all similar laws and regulations must find their jurisdiction in some aspect of the police power, asserted for the public welfare. The line in which this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to grate cities, might clear be invalid as applied to rural communities.... Thus the question whether the power exists to forbid the erection of a building of a particular kind or of a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and locality.¹⁴

Today, the vast majority of states have authorized local governments to enact zoning regulations through enabling legislation.¹⁵ Many of these enabling laws were modeled in whole or in part after the Standard Zoning Enabling Act, a model act prepared by the Commerce Department in 1924 that provided for a general delegation of power from the state to a municipality to regulate the basic power to zone.

⁹ *See id.*

¹⁰ Ohio Const. Art. 18 § 3.

¹¹ California Const. Art. XI § 7.

¹² MCQUILLIN § 35.01.

¹³ *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)

¹⁴ *Id.* at 388.

¹⁵ *See* ROHAN § 35.03[2][b] (citing the zoning enabling statutes enacted by 45 states).

8.4 Authority to Regulate Residential Rentals

(a) Regulation of Residential Rentals Under General Police Power Authority

Communities that have adopted a rental ordinance often cite the general police power as the source of their authority to regulate residential rentals. The adopted ordinances typically begin with a series of “whereas” clauses (i.e., findings) that describe the alleged adverse impacts that rentals have on neighboring properties or the community, followed by a finding that the regulation of such rental properties is necessary to promote the public health, safety and welfare.

One example of this approach is the vacation rental ordinance adopted by the Village of Bal Harbour, Florida in May, 2011.¹⁶ Several “whereas” clauses of the Bal Harbour ordinance describe the negative impacts of vacation rentals on residential neighborhoods, stating in relevant part that:

[Vacation rentals] can result in incompatible adverse impacts on neighborhoods, including, but not limited to, increased noise, garbage, litter and traffic, changes to the private residential character of the neighborhood ... increase[d] demands on water and wastewater and on the Village’s code enforcement, police, fire and emergency services beyond those demands created by residential dwelling units ... [and that] short-term vacation rental use and longer term residential use are generally incompatible due to the rapid turnover associated with short-term vacation rental use and its disruptive effect on the peaceful use and enjoyment of residential areas¹⁷

The “whereas” clauses conclude that the “regulation of vacation rentals is *necessary to protect the public health, safety, and welfare* of the Village, its residents and its visitors” and that “the adoption of [the vacation rental ordinance] is in the best interest and welfare of the residents of the Village.”¹⁸ The Bal Harbour ordinance also expressly cites Article VII, Section 2 of the Florida Constitution, and Chapter 166, Florida Statutes, which “provide municipalities with the authority to exercise any power for municipal purposes, except where prohibited by law, and to adopt ordinances in furtherance thereof.”¹⁹

Another example is the vacation rental licensing ordinance adopted by the City of Evanston, Illinois, which cites Article VII, Section (6)a of the Illinois Constitution as the source of its authority to “exercise any power and perform any function pertaining to its government and affairs” and to “adopt ordinances ... and regulations that protect the public health, safety, and welfare of its residents.”²⁰ Section 5-9-1 of the Evanston ordinance states: “The purpose of this

¹⁶ Bal Harbour Village, FL – Ordinance No. 2011-549, Providing for Vacation Rental Use Regulations (available online at <http://www.balharbourgov.com/static/sitefiles/events/BHV20120919075459.pdf>).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2-3 (emphasis added).

¹⁹ *Id.* at 2.

²⁰ Evanston (IL) Ordinance No. 50-O-13 (Enacting a New Title 5, Chapter 9 of the City Code to Require the Licensing of Vacation Rentals) (available online at <https://www.cityofevanston.org/assets/50-O-13%20Licensing%20of%20Vacation%20Rentals%20Ordinance.pdf>).

Chapter is to promote the *public health, safety, and welfare* by licensing the operation of Vacation Rentals within the City of Evanston.”²¹

(b) Regulation of Residential Rentals Under the Zoning Power

As discussed in Section 8.3(b), the zoning power of local government is a form of the police power. Consequently, state zoning enabling statutes generally contain the same “public health, safety and welfare” language contained in constitutional or statutory provisions delegating the police power to local government. For example, the general grant of zoning authority in Michigan’s zoning enabling statute states, in relevant part:

A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of one or more districts within its zoning jurisdiction which regulate the use of land and structures ... *to promote public health, safety, and welfare.*²²

Communities that choose to regulate short-term rentals as a land use—e.g., by designating short-term rentals a special use or conditional use and requiring a discretionary permit—typically do so through an amendment to their zoning regulations. For example, the City of Venice, Florida adopted its “resort dwellings” ordinance—which prohibits new resort dwelling units in the RE and RSF single-family zoning districts—as Section 86-151 of the city’s Land Development Code.²³ Miami Beach, Florida, which bans short-term rentals in certain residential districts, also adopted its short-term rental regulations as an amendment to its zoning code.²⁴

8.5 Limitations on Government Authority to Regulate Rental Housing

(a) General Principle

A key characteristic of the *police power* is that it is a “reasonable preference of public over private interests.”²⁵ The lawful exercise of the police power necessarily interferes in some respects with the rights of individuals, but “is justified on the ground and only to the extent that it is required in order to protect the personal and property rights of others, and advance the best interests of society.”²⁶ Court decisions have established that property owners are entitled to use and enjoy their property subject only to the reasonable exercise of the police power. A law or regulation that deprives an owner of a property right “cannot be sustained under the police power unless due regard for the public health, safety, comfort, or welfare requires it.”²⁷

²¹ Evanston (IL) City Code § 5-9-1.

²² Michigan Zoning Enabling Act § 125.3201(1) (emphasis added).

²³ City of Venice, FL Land Development Code § 86-151 (Resort Dwellings).

²⁴ The Miami Beach, FL short-term rental regulations are codified in various sections of Chapter 142 (Zoning Districts and Regulations) of the Miami Beach Code of Ordinances.

²⁵ MCQUILLIN § 24.5 (citing *City of West Covina v. Perkins*, 525 U.S. 234 (1999), *Miller v. Schoene*, 276 U.S. 272 (1928)).

²⁶ MCQUILLIN § 24.5.

²⁷ MCQUILLIN § 24.22 (citations omitted).

(b) Constitutional Limits on the Police Power

Local government regulations can raise federal constitutional questions based on federal constitutional provisions that are drawn from the **Bill of Rights**²⁸ and the **supremacy clause**²⁹ which, together, establish the “floor” of federally protected rights, below which states and local governments may not go in imposing regulations. But the constitutions of the states and related court decisions can *expand* (i.e., give greater protection) on these rights.

(i) Due Process

The right to due process exists under both federal constitutional law and state constitutional law. The Fourteenth Amendment to the U.S. Constitution prohibits any governmental action that deprives “any person of ... liberty or property, without **due process** of law.” This clause imposes both substantive and procedural requirements.³⁰ The *substantive component* of the federal due process clause, known as “substantive due process,” tests the governmental purposes implemented by land use regulations. To satisfy substantive due process, a regulation must advance a legitimate governmental purpose.³¹ In general, a local land use ordinance will survive a federal substantive due process challenge if there exists a “rational relationship” between the provisions of the ordinance and a legitimate governmental interest.³² A local ordinance may be challenged on federal substantive due process grounds either on its face, or as applied to a particular case. When a landowner makes a *facial* challenge to a zoning ordinance, “he or she argues that *any* application of the ordinance is unconstitutional.”³³ On the other hand, when a landowner makes an *as applied* challenge, he or she attacks “only the specific decision that applied the ordinance to his or her property, not the ordinance in general.”³⁴ The federal constitutional claim is that the ordinance or provision, on its face or as applied, violates substantive due process because there is no rational relationship between the provision or ordinance in question and a legitimate governmental purpose.

The corollary to this federal substantive due process requirement is the requirement under state constitutions that every local enactment “bear a rational relationship to a legitimate governmental purpose and be free from arbitrary and capricious governmental actions.”³⁵ The state constitutional claim is that the ordinance or provision, on its face or as applied, bears no rational relationship to a legitimate governmental purpose and therefore is arbitrary and capricious.

²⁸ The first ten amendments to the U.S. Constitution.

²⁹ This clause, found in the second paragraph of Article VI of the federal constitution, states that there are certain minimum constitutional requirements that the states must observe.

³⁰ Generally speaking, the principle of procedural due process is that when the state or federal government acts in such a way that denies a citizen of a life, liberty, or property interest, the person must first be given notice and the opportunity to be heard.

³¹ See SALKIN § 15:2.

³² See *id.*

³³ *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1198-99 n.1 (8th Cir. 1997) (emphasis added).

³⁴ See SALKIN § 15:2.

³⁵ MCQUILLIN § 24.29.

(ii) Equal Protection

Equal protection guarantees also are found under both federal constitutional law and state constitutional law. The federal Equal Protection Clause of the Fourteenth Amendment commands that no state shall “deny to any person within its jurisdiction the equal protection of the laws,” which states the basic principle that all persons similarly situated should be treated alike.³⁶ The general rule is that a state or local law is presumed to be valid and will be sustained if the classification drawn by the law is rationally related to a legitimate state interest.³⁷ If a local or state law does not involve a suspect classification (e.g., one that treats persons differently on the basis of race, alienage, or national origin) or a fundamental right (e.g., the right to vote, the right to interstate travel), then an equal protection challenge is analyzed under the rational basis test. The **rational basis test** is a deferential test, under which an ordinance generally will be upheld by a court if there is any “reasonably conceivable state of facts that could provide a rational basis for the classification.”³⁸ Moreover, under the rational basis test a legislative body is not required to articulate its reasons for enacting an ordinance, because “[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”³⁹ This means that a court may find a rational basis for a law or ordinance, even if it is one that was not articulated by the legislative body.

A 2009 law review article observed that state equal protection principles are similar to but, in some cases, extend beyond the scope of federal equal protection:

Similar wording on state and local governmental duties are repeated in many American state constitutions. In South Carolina, Illinois, Louisiana, Maine, North Carolina, Nebraska, Georgia, and Montana, no person is to be “denied the equal protection of the laws.” In Texas and Massachusetts, constitutional equalities are more specific as it is declared that equality under law “shall not be denied or abridged because of sex, race, color, creed, or national origin.” Equal protection sometimes is an affirmative duty, rather than a constraint, as in Kansas where governments “are instituted for th[e] equal protection and benefit” of “the people.” “While the federal conception of equality has become relatively static, its state counterpart is dynamic ... [so that c]onstitutional equality is now a joint federal and state enterprise.”⁴⁰

Since 2000, as a result of the U.S. Supreme Court decision in *Village of Willowbrook v. Olech*,⁴¹ “selective enforcement” claims in land use cases may also be brought under the Equal Protection clause. Selective enforcement claims generally assert that a municipality arbitrarily applied its land use ordinance to a conditional use permit or other land use approval, or that enforcement of the ordinance was arbitrarily selective.⁴² In *Olech*, the village refused to supply water to the

³⁶ See generally *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

³⁷ See generally *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

³⁸ *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, (1980).

³⁹ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096 (1993).

⁴⁰ Jeffery A. Parness, *American State Constitutional Equalities*, 45 GONZAGA L. REV. 773, 780 (2009/10).

⁴¹ *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000).

⁴² BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* § 1:20 (Thomson-Reuters/West: 2015) (hereinafter “BLAESSER & WEINSTEIN”).

plaintiffs unless they granted the village an easement that it had not required of other property owners. It was alleged that the village did so to retaliate for the plaintiffs having brought an earlier, unrelated suit against the village. The question before the Supreme Court was whether an individual who does not have a suspect classification or fundamental interest claim can nevertheless establish a “class of one” equal protection violation when vindictiveness motivated the disparate treatment. The Court held:

Our cases have recognized successful equal protection claims brought by a “class of one,” where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that “the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”⁴³

From a plaintiff’s perspective, the difficult part of the *Olech* decision is its requirement that selective enforcement claims involve intentional treatment. Moreover, it is unclear whether the intentional treatment rule requires merely an intent to do an act or, more specifically, the intent to harm or punish an individual for the exercise of lawful rights.⁴⁴ Since *Olech*, most cases involving “class of one” equal protection claims that assert selective enforcement have not been successful.⁴⁵

(iii) Takings

It is well established that a land use regulation that is excessively restrictive may constitute a “**taking**” of property for which compensation must be paid under the state constitution and the Fifth and Fourteenth Amendments to the United States Constitution.⁴⁶ The prevailing test for determining whether a regulatory taking has occurred was established in the landmark case of *Penn Central Transportation Co. v. City of New York*,⁴⁷ decided by the United States Supreme Court in 1978. The *Penn Central* test requires a balancing of the public and private interests involved in each case, weighing the following three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner’s “distinct investment-backed expectations;” and (3) the character of the governmental action (i.e., physical invasion v. economic interference).⁴⁸

⁴³ *Olech*, 528 U.S. at 564 (citations omitted).

⁴⁴ See BLAESSER & WEINSTEIN § 1:20.

⁴⁵ See generally BLAESSER & WEINSTEIN § 1:20, fn. 7.

⁴⁶ PATRICIA E. SALKIN, 2 AMERICAN LAW OF ZONING § 16:1 (5th ed. 2008) (hereinafter “SALKIN”).

⁴⁷ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

⁴⁸ SALKIN § 16:9 (citing *Penn Central*, 438 U.S. at 124).

As discussed in Section 8.3(d)(ii) of this paper, some states have adopted private property rights protection laws that generally require a state or local government to pay compensation to a landowner when a land use regulation causes any decrease in the value of affected property. The less demanding standard of these statutes (i.e., any decrease in property value versus the loss of all economically viable use) makes them more likely to succeed than a takings claim.

(iv) Unreasonable Search and Seizure

From the perspective of affected property owners and tenants, a rental regulation—and in particular, its inspection requirements—can raise serious concerns under the Fourth Amendment of the U.S. Constitution, which safeguards the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁴⁹ In *Camara v. Municipal Court of City & County of San Francisco*,⁵⁰ the U.S. Supreme Court held that the Fourth Amendment applies to civil searches (e.g., municipal code inspections) as well as criminal searches.⁵¹

(c) Statutory Limitations

(i) Statutes Limiting Local Authority to Regulate Residential Rentals

States generally have not enacted legislation that specifically addresses the authority of local governments to regulate short-term rentals. An exception to this general rule is the state of Florida, which in 2011 enacted legislation that specifically limited the authority of local governments to regulate or prohibit short-term rentals. Section 509.032(7) of the Florida Lodging Statute (entitled “**Preemption**”⁵² Authority”) stated, in relevant part:

A local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.⁵³

However, in 2014 the Florida State Legislature amended Section 509.032(7) in a manner that expanded the authority of local governments to regulate vacation rentals.⁵⁴ Where the 2011 statute prohibited Florida municipalities from regulating vacation rentals “based solely on their

⁴⁹ U.S. Const., amend. IV. Any government action that intrudes on a person’s “reasonable expectation of privacy” violates the Fourth Amendment, and “[h]omes and other residences are virtually always areas in which a person residing has a reasonable expectation of privacy.” William E. Ringel, *Searches and Seizures Arrests and Confessions* § 2:2 (2011).

⁵⁰ *Camara v. Municipal Court of City & Cty. of San Francisco*, 387 U.S. 523 (1967).

⁵¹ See *Camara*, 387 U.S. at 534.

⁵² “Preemption” is a doctrine based on the Supremacy Clause of the U.S. Constitution that holds that certain matters are of such national, as opposed to local, character that federal laws preempt or take precedence over state laws on such matters. As such, a state may not pass a law inconsistent with the federal law. The doctrine of *state law* preemption holds that a state law displaces a local law or regulation that is in the same field and is in conflict or inconsistent with the state law. Article VI, Section 2, of the U.S. Constitution, commonly referred to as the “Supremacy Clause,” provides that the “Constitution, and the Laws of the United States ... shall be the supreme Law of the Land.”

⁵³ Fla. Stat. § 509.032(7)(b) (2011).

⁵⁴ See Ch. 2014-71, Laws of Florida.

classification, use, or occupancy, the 2014 amendment now only prohibits municipalities from regulating the “duration or frequency of vacation rentals.” As revised, Section 509.032(7) now states, in relevant part:

- (b) *A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals.* This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.
- (c) Paragraph (b) does not apply to any local law, ordinance, or regulation exclusively relating to property valuation as a criterion for vacation rental if the local law, ordinance, or regulation is required to be approved by the state land planning agency pursuant to an area of critical state concern designation.⁵⁵

After the 2014 amendment went into effect, the Florida Attorney General was asked whether Section 509.032(7)(b) permitted cities to regulate the location of vacation rentals through zoning. In Opinion No. 2014-09, the Attorney General responded:

Section 509.032(7)(b), Florida Statutes, as amended by Chapter 2014-71, Laws of Florida, allows a local government to regulate vacation rentals, but continues to preclude any local law, ordinance or regulation which would prohibit vacation rentals or restrict the duration or frequency of vacation rentals. It would appear therefore, that zoning may not be used to prohibit vacation rentals in a particular area where residential use is otherwise allowed.⁵⁶

As of the date of this paper, Florida appears to be the only state to have enacted legislation that expressly grants or limits the authority of local governments to regulate or prohibit short-term rentals. It is conceivable, however, that the Florida law may become a model for other states. This would appear to be the most likely in those states where short-term rentals comprise a meaningful segment of the tourist lodging industry.

(ii) Fair Housing Laws

In 1968, Congress enacted the comprehensive federal **Fair Housing Act** (the “FHA”) as Title VIII of the Civil Rights Act of 1968.⁵⁷ The FHA initially prohibited discrimination on the basis of “race, color, religion, or national origin” and was amended in 1974 to prohibit discrimination based on “gender.”⁵⁸ The FHA was further amended in 1988 by the enactment of the Fair Housing Amendments Act (the “FHAA”), which added to its prohibitions discrimination based on handicap or familial status (i.e., families with children).⁵⁹

⁵⁵ Fla. Stat. § 509.032(7).

⁵⁶ See Florida AGO 2014-09 (available online at <http://www.myfloridalegal.com/ago.nsf/Opinions/5DFB7F27FB483C4685257D900050D65E>).

⁵⁷ Fair Housing Act of 1968, 42 U.S.C. §§ 3591 et seq.

⁵⁸ Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 729 (1974).

⁵⁹ Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604. The FHA, as amended by the Fair Housing Amendments Act of 1988, is hereinafter referred to as the FHAA.

The FHAA prohibits discrimination in the sale, rental, and financing of housing based on race, color, religion, sex, national origin, familial status, or a disability.⁶⁰ Under the FHAA, it is unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁶¹ It is likewise unlawful to refuse to make “reasonable accommodations” to facilitate occupancy by handicapped persons.⁶²

Under the FHAA, “handicap” is broadly defined to include any person: (1) with a physical or mental impairment which substantially limits one or more of such person’s major life activities; (2) with a record of having such an impairment; or (3) regarded as having such an impairment.⁶³ The FHAA applies not just to direct providers of housing, such as landlords and real estate companies, but also to municipalities, as well as banks and other lending institutions.⁶⁴ The FHAA provides that any state or local regulation “that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.”⁶⁵

Of relevance to the OHI Amendments, the FHAA applies to local zoning restrictions that result in housing discrimination against people with handicapped status.⁶⁶ A zoning ordinance could violate the FHAA either by discriminating against people with handicapped status on its face or in its implementation. In particular, local zoning restrictions and decisions may violate the FHAA provisions prohibiting acts that “otherwise make unavailable or deny”⁶⁷ a dwelling because of handicap and that make unlawful the “refusal to make *reasonable accommodations*”⁶⁸ to afford the handicapped equal housing opportunity.

The FHAA definition of discrimination against handicapped persons includes the “refusal to make *reasonable accommodations* in rules, policies, practices or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.”⁶⁹ The courts have applied this “reasonable accommodations” duty in the context of local governmental land use and zoning regulation.⁷⁰ In determining whether a proposed “accommodation” is reasonable and required by the FHAA in this regulatory context, the courts generally apply a “balancing of interests” standard, including consideration of:

⁶⁰ U.S. Department of Housing and Urban Development, *Title VIII: Fair Housing and Equal Opportunity* http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8 (last visited April 30, 2015); 42 U.S.C. § 3604(a).

⁶¹ 42 U.S.C. § 3604(a) (emphasis added).

⁶² 42 U.S.C. § 3604(f)(3)(B).

⁶³ RATHKOPF’S THE LAW OF ZONING AND PLANNING § 25:9 (4th ed.) (hereinafter “RATHKOPF”) (citing 42 U.S.C. § 3602(h)).

⁶⁴ U.S. Department of Justice, The Fair Housing Act, http://www.justice.gov/crt/about/hce/housing_coverage.php (last visited April 30, 2015).

⁶⁵ 42 U.S.C. § 3615.

⁶⁶ See RATHKOPF § 25:8.

⁶⁷ 42 U.S.C. § 3604(f)(1).

⁶⁸ 42 U.S.C. § 3604(f)(3)(B) (emphasis added).

⁶⁹ 42 U.S.C. § 3604(f)(3)(B) (emphasis added).

⁷⁰ See RATHKOPF § 25:10.

- (1) whether the accommodation proposed is necessary to provide an equal opportunity for housing;
- (2) the degree of the fiscal or administrative burdens imposed on the governmental defendant by the proposed accommodation; and
- (3) the extent to which the proposed accommodation will adversely impact legislative goals or policies.⁷¹

A leading treatise on zoning law provides the following examples of “reasonable accommodations” that have been required in cases involving local zoning regulations:

In the context of zoning restrictions, waiver of a specific restriction may be required unless to do so imposes undue fiscal or administrative burdens on the municipality or significantly undermines the basic zoning policy furthered by the restriction. As a practical matter, courts have been inclined to require the waiver of minor violations or unduly burdensome restrictions. In particular cases, courts may require the waiver of zoning district allowed use restrictions, yard and setback restrictions, unduly burdensome safety requirements, distancing requirements, and restrictions on the number of unrelated or allowed occupants. Permit conditions imposed must be related to the actual needs and abilities of the group home residents.⁷²

Zoning ordinances often restrict the number of unrelated occupants who may reside together in a single-family zoning district. The FHAA specifically exempts from its scope “reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”⁷³ The circuit courts initially were divided as to whether this exemption extended to zoning restrictions based on the number of unrelated occupants. The U.S. Supreme Court settled the dispute in the 1995 case of *City of Edmonds v. Oxford House, Inc.*, which held that the exemption does not apply to limitations on unrelated occupants.⁷⁴ The following excerpt from a leading treatise on planning and zoning law summarizes the key points of the *City of Edmonds* decision:

In *City of Edmonds*, the ordinance defined “family” as “an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage.” Only a family, as defined, could reside in a single-family zone. The city took the position that its single-family restrictions were covered by the exception and were therefore outside the reach of the Fair Housing Act. Oxford House argued that the exemption should apply only when a maximum occupancy restriction exists for all occupants, not just unrelated occupants. In the Supreme Court’s 6-3 decision, Justice Ginsburg, in ruling that the city’s restriction was not exempt under the Fair Housing Act, stated:

The defining provision at issue describes who may compose a family unit; it does not prescribe “the maximum number of occupants” a dwelling unit may house. We hold that ... [the Fair Housing Act] does not exempt prescriptions of the family-defining kind, i.e., provisions designed to foster the family character of a

⁷¹ RATHKOPF §§ 25:10, 25:15 (citations omitted).

⁷² RATHKOPF § 25:15.

⁷³ 42 U.S.C. § 3607(b)(1).

⁷⁴ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776 (1995).

neighborhood. Instead, ... [the] absolute exemption removes from the FHA's scope only total occupancy limits, i.e., numerical ceilings that serve to protect overcrowding in living quarters.

Throughout the opinion, the Supreme Court contrasted the city's family-defining restrictions with true maximum occupancy restrictions, which "cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms." In a passage that should give municipal officials clear guidance about the kind of restrictions that are not exempt from the Fair Housing Act, the Court observed:

But Edmonds' family composition rule surely does not answer the question: "What is the maximum number of occupants permitted to occupy a house?" So long as they are related "by genetics, adoption, or marriage," any number of people can live in a house. Ten siblings, their parents and grandparents, for example could dwell in a house in Edmonds' single-family residential zone without offending Edmonds' family composition rule.⁷⁵

Notably, *City of Edmonds* did not hold that a limitation on the number of unrelated occupants per se violates the FHAA, only that such restrictions do not qualify for the statutory exemption and therefore are subject to a discrimination and reasonable accommodation analysis. The lower courts have disagreed about whether such occupancy restrictions violate the FHAA where they are facially neutral (i.e., applicable to all unrelated persons, not just to the handicapped).⁷⁶

A rental regulation that limits the number of unrelated persons who can rent a home arguably raise the same issues as an ordinance that restricts the number of unrelated persons allowed to reside in a single-family home.

(iii) Private Property Rights Protection Acts

As discussed in Section 8.3(c)(iii) of this paper, it is very difficult for a landowner to succeed on a takings challenge to a land use regulation due to the need to show that no economically viable use of the land remains. However, some states have adopted statutes that protect private property rights by requiring state and local governments to pay compensation where a land use regulation inordinately burdens, restricts, or limits private property without amounting to an unconstitutional taking.

One example is the *Bert J. Harris, Jr. Private Property Rights Protection Act*, (the "Bert Harris Act") adopted by the Florida Legislature in 1995. The Bert Harris Act states, in relevant part:

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government.⁷⁷

⁷⁵ RATHKOPF § 25:16 (quoting *City of Edmonds*, 115 S. Ct. at 1779, 1782) (emphasis added).

⁷⁶ RATHKOPF § 25:16 (citations omitted).

⁷⁷ Fla. Stat. § 70.001(2).

Another example is Arizona’s Private Property Rights Protection Act⁷⁸ (the “Arizona Private Property Rights Protection Act” or “Act”), which was passed by the voters in November 2006 as Proposition 207. The Arizona Private Property Rights Protection Act requires the state and local governments to pay compensation to the landowner when a land use regulation results in any decrease in the value of a property.⁷⁹ Section 12-1134 of the Act (Diminution in value; just compensation) states:

If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.⁸⁰

As discussed in Section 8.6(e) of this paper, at least one Arizona city has already been forced to defend a short-term rental ordinance against a claim for just compensation under the Act.

8.6 Regulation of Residential Rentals Under the General Police Power

(a) Findings from NAR Land Use Initiative Program

As noted in Section 8.4(a), communities that have residential rental regulations often adopt them under their general police power authority (which is delegated to local governments by the state constitution or statute) to promote the public health, safety, and welfare. An analysis of proposed rental regulations reviewed by Robinson & Cole under the *NAR Land Use Initiative Program* reveals that 67% of the rental regulations reviewed were proposed for adoption under the general police power. An analysis of these proposed police power (i.e., non-zoning) regulations further revealed that the regulatory techniques most frequently used in these non-zoning rental regulations were: *registration or licensing requirements*, which were included in 86% of all non-zoning proposals; *inspection requirements*, which were included in 54% of all non-zoning proposals; and *maximum occupancy restrictions, noise limits, and geographic restrictions*, each of which appeared in 25% of all non-zoning rental regulations reviewed.

These common types of rental restrictions—and any other restriction that is adopted under the general police power—are subject to the constitutional and statutory limitations on the police power discussed in Section 8.5(b) of this paper. Below are examples of how these constitutional and statutory limitations have been applied by the courts to rental regulations.

(b) Substantive Due Process Applied to Rental Regulations

In a 1991,⁸¹ the California Court of Appeals upheld the City of Carmel-by-the-Sea’s transient rental ordinance on both substantive due process and equal grounds.⁸² In rejecting these claims, the court found that the ordinance was “rationally related” to the goals and policies set forth in

⁷⁸ Arizona Rev. Stat. §§ 12-1131 through 12-1138.

⁷⁹ See Ariz. Rev. Stat. Ann. § 12-1131 et seq.; see also Jeffrey L. Sparks, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 ARIZ. L. REV. 211 (2009).

⁸⁰ *Id.* (quoting Ariz. Rev. Stat. Ann. § 12-1134(A)).

⁸¹ *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579 (6th Dist. Cal. 1991).

⁸² *Id.* at 1596.

the city’s general plan, as well as the stated purpose of the R-1 district.⁸³ In support of its conclusion, the court explained that short-term rentals were inconsistent with the residential character of the community:

It stands to reason that the “residential character” of a neighborhood is threatened when a significant number of homes—at least 12 percent in this case, according to the record—are occupied not by permanent residents but by a stream of tenants staying a week-end, a week, or even 29 days. Whether or not transient rentals have the other “unmitigatable, adverse impacts” cited by the council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. 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.⁸⁴

Referring back to its discussion of Carmel’s stated goals, the court concluded:

We have already determined that the ordinance is rationally related to the stated goal. Carmel wishes to enhance and maintain the residential character of the R-1 District. Limiting transient commercial use of residential property for remuneration in the R-1 District addresses that goal.⁸⁵

In general, a short-term rental restriction seems likely to survive substantive due process scrutiny if the local jurisdiction articulates a legitimate governmental interest (e.g., the protection of residential character in predominantly single-family neighborhoods), and can produce some findings connecting short-term rental activity to the types of neighborhood and community impacts described in Carmel’s transient rental ordinance.

(c) Equal Protection Applied to Rental Restrictions

As noted above, the plaintiffs in the case *Ewing v. City of Carmel-by-the-Sea* also challenged the city’s transient rental ordinance on equal protection grounds. Because the California Court of Appeals found that Carmel-by-the-Sea’s transient rental ordinance did not involve a suspect classification or a fundamental right, it likewise rejected the plaintiff’s equal protection claim under the same deferential rational basis test discussed above in connection with substantive due process claims.⁸⁶

⁸³ See *id.* at 1589.

⁸⁴ *Id.* at 1591.

⁸⁵ *Id.* at 1596.

⁸⁶ See *id.* (applying the rational basis test in upholding the city’s transient rental ordinance on equal protection grounds).

In an Arkansas case,⁸⁷ the plaintiffs asserted an equal protection claim against a City of Norfolk ordinance that restricted short-term rentals to the BI Commercial Business Central District. The plaintiff argued that the ordinance treated them arbitrarily and differently than others regarding the rental of residential property.⁸⁸ After finding that there was a legitimate purpose for the short-term rental ordinance (namely that it addressed concerns brought by residents about the short-term rental use of a home in a residential neighborhood), the court summarily denied the equal protection claim on the ground that the ordinance “bears a rational relationship to the city’s purpose for enacting the ordinance.”⁸⁹

(d) Takings Claims Asserted Against Rental Regulations

In a 1993 case, the Oregon Supreme Court upheld the short-term rental ordinance adopted by the City of Cannon Beach.⁹⁰ The Cannon Beach ordinance (Ordinance 92-1) prohibited the creation of new transient occupancy uses and required existing transient occupancy uses to end by 1997. The petitioners, a group of rental property owners, claimed that Ordinance 92-1 constituted a taking of property without just compensation under the Fifth and Fourteenth Amendments.⁹¹ The Supreme Court of Oregon, however, upheld the ordinance, focusing ultimately on the economic impact of the restrictions:

We next consider whether Ordinance 92-1, by prohibiting transient occupancy, denies property owners economically viable use of their properties. We conclude that it does not. On its face, Ordinance 92-1 permits rentals of dwellings for periods of 14 days or more. The ordinance also permits the owners themselves to reside in the dwellings. Although those uses may not be as profitable as are shorter-term rentals of the properties, they are economically viable uses.⁹²

As the court’s analysis indicates, plaintiffs who challenge a short-term rental restriction as a taking of property face an uphill battle. As a practical matter, it is difficult to argue that a short-term rental prohibition denies the owner of *all* economically viable use of his land, particularly where longer-term rentals are still allowed.

Nevertheless, in 2015 a Texas appellate court upheld the issuance of a temporary injunction prohibiting the Village of Tiki Island, Texas from implementing an ordinance that banned short-term rentals, despite evidence that the ordinance reduced the value of the plaintiff’s property by less than ten percent.⁹³ In affirming the temporary injunction, the court observed that the ordinance “had an economic impact on [plaintiff’s] property, that she had a reasonable, investment-backed expectation that she could engage in short-term rentals ... [and that the] allegations, taken as true and construed liberally in her favor, establish a viable taking claim.”⁹⁴

⁸⁷ *Aamodt v. City of Norfolk*, 2011 WL 4499364 (W.D. Ark).

⁸⁸ *Id.* at *3.

⁸⁹ *Id.* at *3.

⁹⁰ *Cope v. City of Cannon Beach*, 855 P.2d 1083 (Or. 1993).

⁹¹ *See id.* at 1084.

⁹² *Id.* at 1086-87 (internal citations omitted).

⁹³ *See Village of Tiki Island v. Ronquille*, 2015 WL 1120915 (Tex. App. Houston (1st Dist.)).

⁹⁴ *Id.* at *16.

(e) Protection Against Unreasonable Search and Seizure in Mandatory Inspection Provisions

As of the date of this paper, it does not appear that an unreasonable search and seizure claim against an inspection provision contained in a rental regulation has been decided by the appellate courts. However, such claims have been decided in the context of a mandatory inspection requirement under a municipal building code.

The case of *Camara v. City of San Francisco* involved a San Francisco ordinance that gave city inspectors the right to enter any building at reasonable times “so far as may be necessary for the performance of their duties.”⁹⁵ After refusing on three occasions to give inspectors access to his apartment without a search warrant, a tenant was prosecuted under another ordinance that made it a crime to refuse to comply with the inspectors’ requests.⁹⁶ The tenant argued that the warrantless search requested by the building inspectors violated his Fourth Amendment rights.⁹⁷ The Court agreed, stating:

In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment’s protections.⁹⁸

In 1984, and again in 2002, the Florida Attorney General issued advisory opinions that addressed the question whether a local government inspector had the authority to enter onto private premises to conduct an inspection or assure compliance with local codes without (a) the consent of the owner or occupant, or (b) a warrant.⁹⁹ Following substantially the same discussion of the Fourth Amendment protection against unreasonable searches and seizures—and its counterpart under the Florida Constitution, Article I, section 12—both opinions reach the same conclusion, stating, in the same words:

[I]t is my opinion that a municipal code inspector is *without authority* to enter onto any ... residential property to assure compliance with or to enforce the various technical codes of the municipality or to conduct any administrative inspections or searches without the consent of the owner ... or occupant of such premises, or without a duly issued search or administrative inspection warrant.¹⁰⁰

⁹⁵ *Camara v. Municipal Court of City & Cty. of San Francisco*, 387 U.S. 523, 526 (1967).

⁹⁶ *Camara*, 387 U.S. at 527.

⁹⁷ *Camara*, 387 U.S. at 527.

⁹⁸ *Camara*, 387 U.S. at 534 (citing *Frank v. State of Maryland*, 359 U.S. 360, 79 S. Ct. 804 (1959)).

⁹⁹ See Attorney General Opinion 84-32 (available online at

<http://www.myfloridalegal.com/ago.nsf/Opinions/486093F9C929D04A85256583006C8F9C>); see also Attorney General Opinion 2002-27 (available online at

<http://www.myfloridalegal.com/ago.nsf/printview/830A105DC73A104D85256B910071CDD4>).

¹⁰⁰ AGO 2002-27.

A rental regulation that authorizes municipal inspectors to enter upon a rental property of the purpose of conducting a mandatory inspection but does not explicitly require that the inspector obtain the consent of the owner or occupant or a duly issued search or administrative inspection warrant are vulnerable to claims that the regulation does not conform to the requirements of the Fourth Amendment to the U.S. Constitution.

(f) Private Property Rights Protection Acts

As noted in Section 8.4(c)(iii), the Arizona Private Property Rights Protection Act (the “Act”) requires that state and local governments pay compensation to the landowner when a land use regulation results in any decrease in the value of a property.¹⁰¹ Section 12-1134 of the Act (Diminution in value; just compensation) states:

If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.¹⁰²

In the case *Sedona Grand, LLC. v. City of Sedona*, the plaintiff, a residential property owner, filed a claim under the Act asserting that Sedona’s short-term rental ordinance (which effectively banned vacation rentals) caused the plaintiff “to suffer losses as a result of the reduction of its previously existing rights to use, lease and sell” its property.¹⁰³ As an initial matter, the court ruled that the Sedona ordinance “regulates transactions involving the possession of real property, and is therefore a land use law within the meaning of [the Act].”¹⁰⁴ The city argued that the short-term rental ordinance was exempt under Section 12-1134(B)(1) of the Act, which provides an exemption for land use laws that are enacted for “the protection of the public’s health and safety.”¹⁰⁵ In particular, Sedona argued that the stated purpose of the ordinance was to “to safeguard the peace, safety and general welfare of the residents of Sedona and their visitors and guests.”¹⁰⁶ But the court rejected Sedona’s argument, stating:

We hold that a mere declaration of purpose is insufficient to invoke the exemption, and that a government entity seeking to avoid paying compensation must present evidence that its *principal purpose* in passing a land use law is one that qualifies for exemption under the Act.¹⁰⁷

The court further explained that under the Act a local government “must establish by a preponderance of the evidence that the law was enacted for the *principal purpose of protecting*

¹⁰¹ See Ariz. Rev. Stat. Ann. § 12-1131 et seq.; see also Jeffrey L. Sparks, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 ARIZ. L. REV. 211 (2009).

¹⁰² *Id.* (quoting Ariz. Rev. Stat. Ann. § 12-1134(A)).

¹⁰³ *Sedona Grand, LLC. v. City of Sedona*, 229 Ariz. 37, 39, 270 P.3d 864, 866 (Ariz. Ct. App. 2012).

¹⁰⁴ *City of Sedona*, 229 Ariz. at 40.

¹⁰⁵ *City of Sedona*, 229 Ariz. at 41 (quoting A.R.S. § 12-1134(B)(1)).

¹⁰⁶ *City of Sedona*, 229 Ariz. at 42 (quoting Sedona Code § 8-4-2 (Statement of Purpose)).

¹⁰⁷ *City of Sedona*, 229 Ariz. at 38.

the public's health and safety before the exemption can apply.”¹⁰⁸ The court found that Sedona failed to satisfy this burden and explained its reasoning as follows:

Here, the nexus between prohibition of short-term occupancy and public health is not self-evident, and the governing body must do more than incant the language of a statutory exception to demonstrate that it is grounded in actual fact. Indeed, the Ordinance's own text suggests that its purpose is to protect the character of neighborhoods. This may be a desirable goal to policy makers, but neighborhood character and public health are entirely distinct concepts. To invoke the exception, the City must provide evidence beyond mere “legislative assertion” to carry the burden that the Act assigns to it.¹⁰⁹

Consequently, the court ruled that Sedona's short-term rental ordinance was not exempt from the Act and remanded the matter to the trial court for further determinations.

8.7 Regulation of Residential Rentals Through Zoning

(a) Findings from NAR Land Use Initiative Program

As noted in Section 8.4(b), local governments also regulate residential rental regulations through zoning—one third (33%) of the proposed rental regulations reviewed by Robinson & Cole under the *NAR Land Use Initiative Program* were proposed for adoption as an amendment to the community's zoning ordinance. An analysis of these proposed zoning regulations further revealed that the regulatory techniques most frequently used in zoning rental regulations were: *registration or licensing requirements*, which were included in 79% of all zoning proposals; *geographic restrictions*, which appeared in 64% of all zoning proposals; *maximum occupancy restrictions*, which appeared in 43% of all zoning proposals reviewed; *noise limits*, which appeared in 21% of all zoning proposals; and *quantitative restrictions* and *inspection requirements*, each of which appeared in 14% of all zoning-based rental regulations reviewed.

It is evident from this analysis of *Land Use Initiative* requests that rental regulations that are adopted through zoning often incorporate many of the same types of provisions that police power-based rental regulations typically would contain. Because zoning is a form of the police power, the incorporation of police power-type provisions (e.g., registration or licensing requirements, maximum occupancy restrictions, noise limits, and inspection requirements) in zoning-based rental restrictions is not surprising.

Because zoning is a form of the police power, any rental regulation adopted by local government through zoning is subject to the same constitutional and statutory limitations on the police power discussed in Sections 8.5(b) and 8.6 of this paper. In addition, rental regulations adopted through zoning are subject to limitations applicable to the zoning power.

¹⁰⁸ *City of Sedona*, 229 Ariz. at 42 (emphasis added).

¹⁰⁹ *City of Sedona*, 229 Ariz. at 43.

(b) Regulation of the “Use” Not the “User”

A key characteristic of local *zoning power* is the well-recognized principle is that “zoning deals with land use, not the owner, operator, or occupant of the land.”¹¹⁰ Zoning inherently pertains to land rather than to the landowner—it “deals basically with land use and not with the person who owns or occupies it.”¹¹¹ The purpose of zoning is to separate

incompatible land uses, and to provide for an orderly and comprehensive scheme of land development within the community that facilitates the adequate provision of infrastructure resources and the overall comfort, convenience, and welfare of the community.¹¹²

Neither the form of one’s interest in property (i.e., owner or renter) nor the duration of the occupancy (e.g., short-term vs. long-term) is relevant to the issue of use. Courts have consistently interpreted “residential use” to mean the use of property “for living purposes, as a dwelling, or as a place of abode.”¹¹³ The transitory or temporary nature of a rental use does not defeat its residential status.¹¹⁴

In a 2006 case decided by the Court of Appeals of Maryland, the question before the court was whether a restrictive covenant that restricted the use of lots to “single family residential purposes only” prohibited the owners of affected lots from renting their homes on a short-term basis.¹¹⁵ The court observed that “the crux of the [plaintiff’s] argument is that a homeowner’s use of his or her home ‘primarily to make money’ by renting it does not constitute a ‘residential use,’ even though the tenant uses the home as a residence for a short term.”¹¹⁶ The court rejected the plaintiff’s argument, stating”

While the owner may be receiving rental income, the use of the property is unquestionably “residential.” The fact that the owner receives rental income is not, in any way, inconsistent with the property being used as a residence. The [plaintiffs], by focusing entirely upon the owner’s receipt of rental income, ignore the residential use by the tenant.¹¹⁷

The Court of Appeals of Maryland further explained that:

“Residential use,” without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode. The word “residential” has been applied to apartment buildings, fraternity houses, hotels, and bed

¹¹⁰ RATHKOPF’S THE LAW OF ZONING AND PLANNING § 2:16 (Zoning regulates the use of land—Identity or status of land users) (hereinafter “RATHKOPF”) (citing cases in Connecticut, Iowa, Louisiana, Maryland, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, and Washington). (Emphasis added)

¹¹¹ See *FGL & L Prop. Corp. v. City of Rye*, 485 N.E. 986, 989 (N.Y. 1985).

¹¹² RATHKOPF § 1:12.

¹¹³ *Lowden v. Bosley*, 909 A.2d 261, 267 (Md. 2006).

¹¹⁴ See *id.* See also *In re Toor*, 59 A.3d 722, 727 (Vt. 2012); *Estates at Desert Ridge Trails Home Owners’ Association v. Vazquez*, 300 P.3d 736 (N.M. Ct. App. 2013).

¹¹⁵ *Lowden v. Bosley*, 909 A.2d 261 (Md. 2006).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

and breakfasts, because such structures are used for habitation. The transitory or temporary nature of such use does not defeat the residential status.

The [plaintiffs], as well as some out-of-state case on which they rely, seem to view the owner's receipt of income from a residential tenant as inconsistent with "residential" use. There is no inconsistency. The owner's receipt of rental income in no way detracts from the use of the properties as residences by the tenants. There are many residential uses of property which also provide a commercial benefit to certain persons. Both in Maryland and in a great majority of other states, over 30 percent of homes are rented rather than owned by the families residing therein, thus providing much rental income to landlords. In addition to conventional rentals, a commercial benefit may be realized from residential property by persons holding ground rents, mortgages, or deeds of trust. When a property is used for a residence, there simply is no tension between such use and a commercial benefit accruing to someone else.¹¹⁸

In a 2014 case, the Washington Supreme Court likewise ruled that residential rentals, no matter how long the term, are a residential use because the renter uses the home for the same purpose as the owner, namely "eating, sleeping, and other residential purposes."¹¹⁹ State courts in Indiana¹²⁰ and Alabama¹²¹ have also ruled that short-term rentals are a residential use.

At least one court has also ruled that the payment of business and occupation taxes did not detract from the residential character of the rental use.¹²²

Consistent with these principles, zoning restrictions that limit the use of land based on the identity or status of the *users* of the land generally will be held invalid by the courts.¹²³ A zoning regulation that "limits the use of land based on the race, economic status, age, blood relationship, or identity of the user or owner may be held invalid on either due process or equal protection grounds as a restriction by classification that is unrelated to any legitimate public purpose."¹²⁴ Such restrictions also may be held *ultra vires*, that is, as beyond the scope of authority delegated by a zoning enabling act.¹²⁵ A controlling rationale in such cases is that while zoning authorizes regulation of the use of land, it may not be exercised as an *ad hominem* privilege to control the landowner or occupant.¹²⁶

¹¹⁸ *Id.* (Emphasis added)

¹¹⁹ *Wilkinson v. Chiwawa Communities Association*, 327 P.3d 614, 620 (Wash. 2014).

¹²⁰ See RATHKOPF'S THE LAW OF ZONING AND PLANNING § 81:11 (4th ed.) (hereinafter "RATHKOPF") (citing *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825 (Ind. 2011) (holding that homeowners' short-term rental of their home was a violation of town's ordinance prohibiting commercial use of property)).

¹²¹ See *id.* (citing *Slaby v. Mountain River Estates Residential Ass'n, Inc.*, 2011 WL 4790638 (Ala. Civ. App. 2011) (holding that cabin owners' short-term rental of their property did not violate the terms of the restrictive covenant limiting the use of the property to single-family residential purposes because they rented their property to groups who used the cabin for residential purposes only)).

¹²² *Wilkinson v. Chiwawa Communities Association*, 327 P.3d at 620.

¹²³ RATHKOPF § 1:12.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 5 RATHKOPF'S LAW OF ZONING AND PLANNING § 81:4 (4th ed. 2010) (emphasis added) (internal citations omitted).

8.8 Limits on Outright Ban or Amortization of Residential Rentals

An ordinance that outright prohibits property owners from renting their homes, either on a citywide basis or within certain residential zoning districts, clearly impairs the fundamental right of private property owners to rent their properties by stripping them of “one-third of their bundle of economically productive rights” that constitute ownership. Consequently, an outright ban is more likely to be held invalid than an ordinance that permits residential rentals, but regulates them through reasonable licensing or registration requirements or operational restrictions. In fact, many of the short-term rental cases discussed in Sections 8.6 and 8.7 of this paper pertained to either a partial¹²⁷ or citywide¹²⁸ ban on short-term rentals.

Because they are the most onerous type of residential rental regulation, outright bans implicate virtually every type of constitutional or statutory limit on the police power, including takings and state private property rights protection laws. As noted in Section 3.3(b) of this paper, amortization is, in effect, a type of ban that includes a grace period (generally a set number of months or years) in order to give affected property owners time to recoup their investment before being forced to discontinue the use without compensation. The majority rule is that provisions for amortization of nonconforming uses are valid if the amortization period is reasonable.¹²⁹ In determining the reasonableness of an amortization period, the courts generally seek to balance the public gain that will be gained from the particular regulation against the private loss sustained by the property owner.¹³⁰ As a result, the validity of an amortization clause does not depend on precise compensation of an owner’s monetary loss where the public good outweighs the private loss.¹³¹

However, in some states amortization of a nonconforming use is *per se* unconstitutional. For example, in a 1991 case the Pennsylvania Supreme Court ruled that “municipalities lack the power to compel a change in the nature of an existing lawful use of property.”¹³² In reaching that conclusion, the court reasoned that:

A lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain.

...

¹²⁷ See *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579 (6th Dist. Cal. 1991); *Aamodt v. City of Norfolk*, 2011 WL 4499364 (W.D. Ark.); and *Cope v. City of Cannon Beach*, 855 P.2d 1083 (Or. 1993).

¹²⁸ See *Village of Tiki Island v. Ronquille*, 2015 WL 1120915 (Tex. App. Houston (1st Dist.)).

¹²⁹ ROHAN § 41.04[3] (citing a North Carolina case in which an amortization period of three years was upheld).

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² *Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board of the Township of Moon*, 584 A.2d 1372, 1374 (Pa. 1991).

The Pennsylvania Constitution, Pa. Const. art. I, § 1 ... protects the right of a property owner to use his or her property in any lawful way that he or she so chooses. If government desires to interfere with the owner's use, where the use is lawful and is not a nuisance nor is it abandoned, it must compensate the owner for the resulting loss. A gradual phasing out of nonconforming uses which occurs when an ordinance only restricts future uses differs in significant measure from an amortization provision which restricts future uses and extinguishes a lawful nonconforming use on a timetable which is not of the property owner's choosing.¹³³

Under this reasoning, the Pennsylvania Supreme Court ruled that “amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution, Pa. Const. art. I, § 1.”¹³⁴

¹³³ *Id.*

¹³⁴ *Id.*

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 9. POTENTIAL POSITIVE EFFECTS OF RENTAL REGULATIONS

This section discusses the potential positive effects that rental regulations can have on a community. Not surprisingly, these potential positive effects are closely aligned with the regulatory objectives (i.e., the reasons cited by communities for adopting rental regulations) discussed in Section 3 of this paper. These positive effects are described as “potential” because, as of the date of this paper, there is virtually no empirical evidence demonstrating that rental regulations have produced such positive effects.

9.1 Greater Compliance with Maintenance, Building and Nuisance Codes

As discussed in Section 3.1(e), achieving a greater level of compliance with property maintenance, building, and public nuisance codes is sometimes cited as justification for the adoption of rental regulations. For example, the City of Gary, Indiana’s rental registration and inspection ordinance states that its purpose is to “facilitate enforcement of minimum standards for the maintenance of existing residential buildings and thereby prevent slums and blight.”¹

Communities seeking to increase the level of code compliance in rental properties typically do so by requiring that rental properties be registered with or licensed by the local government, and providing in the regulations that the registration or license can be suspended or revoked for violation of any applicable law. For example, the “Rental Dwelling License” code adopted by the City of Minneapolis, Minnesota authorizes the city council to “deny, refuse to renew, revoke, or suspend” a rental dwelling license for any dwelling that fails to comply with applicable licensing standards.² Sonoma County, California’s vacation home rental code similarly authorizes the county code enforcement officer to schedule a revocation hearing with the board of zoning adjustments upon determination that a violation has occurred.³

Some communities have also sought to improve the level of code compliance in rental properties by requiring that all residential rental agreements contain provisions that expressly require tenants to comply with *all* applicable laws. In 2015 the Town of Kure Beach, North Carolina, for example, considered an ordinance that would have required all vacation rental permit holders to include in their rental agreements a statement that “tenants shall not violate federal, state, or local laws, ordinances, rules, or regulations.”⁴ The proposed ordinance, which was tabled by the Kure Beach Planning and Zoning Commission,⁵ also would have required all rental agreements

¹ See City of Gary, IN Rental Registration/Inspection Program Fact Sheet.

² See City of Minneapolis, MN – Rental Dwellings License Code § 244.1940 (available online at https://www.municode.com/library/#!/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT12HO_CH24_4MACO_ARTXVIREDWLI).

³ Sonoma County Code § 26-88-120(g)(1).

⁴ Town of Kure Beach, NC: Proposed Vacation Rental Ordinance § 9(c) (available online at <http://townofkurebeach.org/Data/Sites/1/media/government/planning-zoning/proposed-vacation-rental-ordinance-version-four-final-2-5-15.pdf>).

⁵ See <http://www.wect.com/story/28694632/kure-beach-officials-decide-against-using-proposed-rental-property-ordinance>.

to contain a statement that a “material breach” of above-quoted provision would result in a termination of the rental agreement.⁶ The rationale is that, if the law itself is not sufficient to deter renters from engaging in unlawful conduct, the knowledge that the rental agreement could be terminated—for example, for having a party that results in a call to the police—might make renters think twice about their behavior.

9.2 Stabilization of Neighborhoods

As discussed in Section 3.1(a), the protection of neighborhood character is the most commonly cited municipal purpose for regulating rental housing. The need to protect the residential character is frequently cited as justification for a proposed vacation rental ordinance or a restriction on single-family home rentals. Communities generally cite the need to protect neighborhoods from the types of disturbances that often are associated with short-term tenants, such as excessive noise, late night parties, trespassing, increased traffic, and other activities that disrupt the residential character. They also cite the need to protect the physical characteristics of residential neighborhoods. The underlying rationale is that rental properties generally are not owner-occupied and therefore are less likely to be cared for to the same degree as permanent residences.

In theory, rental regulations can protect the residential character and stabilize neighborhoods in two ways. First, a regulation can prohibit rentals outright (either citywide or in certain zoning districts) or restrict the number of rentals permitted within the community by adopting a quantitative restriction or a proximity restriction.⁷ In the alternative, communities may choose to permit long-term or short-term residential rentals, but address the perceived negative impacts by imposing performance-type standards on the operation of rental properties. The rationale for this approach is that, rather than banning residential rentals, communities can mitigate the negative impacts often attributed to rental occupancies (e.g., overcrowding and disruptive conduct) by establishing a set of rules governing the occupation and operation of rental properties. For a comprehensive discussion of operational restrictions, see Section 3.3(g).

9.3 Increased Landlord Accountability

Closely related to greater compliance with property maintenance, building, and public nuisance codes is the potential for increased landlord accountability. Some rental regulations hold landlords accountable any violation that occurs on a rental property, regardless of whether the landlord is directly responsible. An example of this approach is the City of Minneapolis, Minnesota, which states the following on a webpage entitled “Holding Property Owners Accountable”:

The City of Minneapolis does not tolerate landlords who violate rental licensing standards. We hold property owners responsible for the condition of their properties and hold owners responsible to proactively plan for, address and respond to issues of tenant behavior. Landlords are required by law to comply with the conditions of their rental

⁶ Town of Kure Beach, NC: Proposed Vacation Rental Ordinance § 9(d).

⁷ See Section 3.3(d) for a discussion of the quantitative restrictions and Section 3.3(e) for a discussion of proximity restrictions.

license and must be responsive to problems on their properties. Maintaining a rental license in the City of Minneapolis is a privilege.⁸

The effectiveness of Minneapolis's no-tolerance policy, however, is open to question, as the same webpage states:

Unfortunately, the City of Minneapolis has not been able to convince all property owners to comply with our laws. As a result, properties have been condemned for maintenance, licenses have been revoked and in some instances, properties have been demolished.⁹

The City of New Braunfels, Texas also holds rental property owners accountable for violations of the short-term rental regulations, even if the violation is committed by a tenant. Section 144-5.17-7(b) (Enforcement/Penalty) of New Braunfels's short-term rental ordinance states: "Violations of any subsection of this [ordinance] may revoke the short term rental permit in accordance with subsection 144-5.17-8, Revocation."¹⁰

9.4 Increased Tax Revenue

Rental regulations can benefit communities by generating additional tax revenue by either improving the rate of collection in a community where rentals already are required to pay a lodging or use tax, or by imposing a new tax on rentals. The potential revenue from a lodging or use tax on rental properties can be significant, particularly for communities with a robust tourism industry.

Given the rapid growth of Airbnb and other online short-term rental platforms, a common concern among municipalities is that online hosting platforms make it easier for an owner to use their home as a short-term rental without paying required lodging or use taxes. For some communities, the amount of tax revenue not being collected from short-term rentals may be significant. According to a 2014 report by the Attorney General of the State of New York, private short-term rentals in New York City incurred more than \$33 million in unpaid hotel taxes from 2010 through June 2014.¹¹ Airbnb itself has estimated that it could produce as much as \$65 million annually in hotel occupancy taxes in New York state.¹²

Communities that have been more successful in collecting taxes on short-term rental activity include the City of Newport Beach, California, which collected approximately \$1.95 million in

⁸ City of Minneapolis, MN: Housing Inspections Services – Holding Property Owners Accountable (available online at http://www.ci.minneapolis.mn.us/inspections/inspections_accountable).

⁹ *Id.*

¹⁰ New Braunfels, TX Code § 144-5.17-7(b) (available online at https://www.municode.com/library/#!/tx/new_braunfels/codes/code_of_ordinances).

¹¹ *Airbnb in the City* at 9 (Oct. 2014, New York State office of the Attorney General) (available online at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>).

¹² See "As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There," *Techcrunch* (Jan. 16, 2015) (available online at <http://techcrunch.com/2015/01/16/airbnb-65-million-in-ny/>).

short-term rental tax revenue in 2014,¹³ and the City of San Clemente, California, which reportedly collects about \$280,000 per year on just 300 registered short-term rental properties.¹⁴

To improve the collection of taxes, some communities have adopted regulations requiring that **online hosting platforms**¹⁵—rather than the hosts—collect and remit the required tax payments. San Francisco imposes such a requirement:

A Hosting Platform shall comply with the requirements of the Business and Tax Regulations Code by, among any other applicable requirements, collecting and remitting all required Transient Occupancy Taxes, and this provision shall not relieve a Hosting Platform of liability related to an occupant's, resident's, or Business entity's failure to comply with the requirements of the Business and Tax Regulations Code.¹⁶

In January 2015, the City of Portland, Oregon amended its short-term rental ordinance to require online “booking agents” to “collect, report and remit transient lodging taxes” to the city.¹⁷ The “findings” adopted by the City Council made clear that the amendment was specifically intended to improve the rate of tax collection from short-term rentals, stating, in relevant part:

2. The City is aware that ... [many] Short-Term Rental Hosts (“Hosts”) have not registered with the Revenue Division and *are not collecting and/or remitting the appropriate transient lodging or business license (income) taxes....*
3. The City has determined that finding these non-compliant Hosts and properties is difficult as they are often rented or “booked” through online agents (“Booking Agents”) that refuse to provide the short-term rental location address or contact information of the Host, or to remit transient lodging taxes on behalf of the Hosts....
4. The City believes that compelling Booking Agents to provide Host information will raise compliance, permit fees and transient lodging tax revenue....
5. The City believes that, to the extent Booking Agents are booking rooms and accepting payments on behalf of their Hosts, they should also collect and remit the City transient lodging tax on behalf of their Hosts.¹⁸

¹³ “Rental properties: Beach cities balancing potential revenue with parties, loud music, disrespect,” *Orange County Register*, May 26, 2015) (available online at <http://www.ocregister.com/articles/beach-663028-rentals-short.html>).

¹⁴ *Id.*

¹⁵ San Francisco defines “online hosting platform” to mean:

A person or entity that provides a means through which an Owner may offer a Residential Unit for Tourist or Transient Use. This service is usually, though not necessarily, provided through an online platform and generally allows an Owner to advertise the Residential Unit through a website provided by the Hosting Platform and provides a means for potential tourist or transient users to arrange Tourist or Transient Use and payment, whether the tourist or transient pays rent directly to the Owner or to the Hosting Platform.

San Francisco Code § 41A.4.

¹⁶ San Francisco Code § 41A.5(g)(4)(B).

¹⁷ See City of Portland, OR – Ordinance Amending Transient Lodgings Tax (available online at <http://media.oregonlive.com/front-porch/other/Short-term%20rental%20ordinance.pdf>).

¹⁸ *Id.* § 1 (emphasis added).

According to an “impact statement” attached to the Portland ordinance, the requirement that online Booking Agents collect and remit the transient lodging tax to the city will yield an additional \$500,000 in revenues annually.¹⁹

9.5 Protection of Long-Term Rental Housing Inventory

In some communities, the rapid growth of Airbnb and other online hosting platforms has raised the concern that rental property owners and investors are converting long-term rental properties into short-term rentals, thereby reducing the available supply of long-term rentals and driving up rental prices in the local market. As discussed in Section 6.1, an analysis of Airbnb rentals in Los Angeles described how short-term rentals can affect the supply of affordable housing:

The Los Angeles Department of City Planning’s Housing Needs Assessment shows that the city needs an additional 5,300 units of affordable housing each year to keep up with demand. However, Los Angeles developers have only averaged about 1,100 units of affordable housing per year since 2006. The 7,316 whole apartments currently listed on AirBnB represents nearly seven years’ of affordable housing construction at the current rate of housing development.²⁰

Short-term rentals can affect housing costs in a community. When property owners elect to rent their homes on a short-term basis rather than renting on a longer-term basis (e.g., by the season or by the year), “they essentially squeeze the supply of housing, pushing up the demand, and subsequently, the cost” of housing in the community.²¹

To prevent the loss of long-term rental housing, some communities have adopted regulations that expressly require that short-term rental “hosts” reside in the dwelling unit for a minimum number of days each calendar year. For example, San Francisco’s short-term residential rental ordinance requires that a “permanent resident” occupy a short-term rental unit for at least 275 days per calendar year and that the permanent resident maintain records demonstrating compliance with the requirement for a period of two years.²² Portland, Oregon’s Accessory Short-Term Rentals ordinance contains a similar requirement, which states:

A Type A accessory short-term rental must be accessory to a Household Living use on a site. This means that a resident must occupy the dwelling unit for at least 270 days during each calendar year, and unless allowed by Paragraph .040.B.2 or .040.B.3, the bedrooms rented to overnight guests must be within the dwelling unit that the resident occupies.²³

¹⁹ *See id.*

²⁰ *Airbnb, Rising Rent, and the Housing Crisis in Los Angeles* at 16 (LAANE, March 2015) (available online at <http://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf>).

²¹ *See* Nate Hutcheson, “Short-Term Vacation Rentals: Residential or Commercial Use?,” *Zoning News* (March 2002, American Planning Association).

²² San Francisco Code § 41A.5(g)(1) (available online at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf>).

²³ Portland, OR Code § 33.207.040(A)(1) (available online at <http://www.portlandonline.com/auditor/index.cfm?c=28197&a=501886>).

The vacation rental ordinance adopted in 2015 by the City of Santa Monica, California takes a similar approach. Santa Monica’s “Home Sharing and Vacation Rentals” ordinance divides short-term rentals into two categories: (1) “vacation rentals,” in which a guest has “exclusive private use of the unit” for less than thirty days; and (2) “**home-sharing**,” in which the primary resident of the property lives “on-site during the visitor’s stay.”²⁴ Under the “Home Sharing and Vacation Rentals” ordinance, vacation rentals are banned citywide, while home-sharing is permitted, provided that the owner obtains a business license and pays a 14% hotel tax on all home sharing stays.²⁵

²⁴ See generally Santa Monica, CA Ordinance No. CSS (available online at <http://www.smgov.net/departments/council/agendas/2015/20150512/s2015051207-A-1.htm>); see also Sam Sanders, “Santa Monica Cracks Down on Airbnb, Bans ‘Vacation Rentals’ Under a Month,” NPR (May 13, 2015) (available online at <http://www.npr.org/sections/thetwo-way/2015/05/13/406587575/santa-monica-cracks-down-on-airbnb-bans-vacation-rentals-under-a-month>).

²⁵ See *id.*

RESIDENTIAL RENTALS

The Housing Market, Regulations, and Property Rights

SECTION 10. STRATEGIES FOR ADDRESSING PROPOSED RENTAL REGULATIONS

10.1 Question Local Authority to Adopt Rental Regulations

The first question that should be asked when a city or town proposes to adopt a residential rental ordinance is whether the local legislative body has the authority to do so. As discussed in Section 8.3, communities typically cite the police power or the zoning authority granted by a state zoning enabling act as the basis of their authority to adopt rental regulations. However, local officials or a local governing body should not be allowed to skirt the issue by providing a general and unsupported reference to the police power or zoning enabling act. Instead, Realtors[®] should question whether the legislative body has sought and received an opinion from its legal counsel regarding its authority to adopt the specific type of regulation being considered for adoption. If it has not, then Realtors[®] should urge local officials to table the proposal pending receipt of such a legal opinion.

Realtors[®] should consider obtaining the advice of local counsel regarding the community's authority to adopt a residential rental regulation, and whether the proposal may be vulnerable to challenge on the ground discussed in Section 8 of this paper.

10.2 Consistency With Statutory Planning and Procedural Requirements

In some states, the adoption of a local law or regulation is subject to statutory planning and procedural requirements. Such statutes may require that a local law or regulation be consistent with the community's general plan or that the potential environmental impacts of the proposed law or regulation be determined prior enactment.

(a) General Plan Consistency Requirement

In some states, the zoning enabling statute requires that the zoning regulations adopted by a community be consistent with the community's comprehensive plan (known in some jurisdictions as a general plan or master plan).¹ For example, Arizona's enabling legislation states, in relevant part: "All zoning and rezoning ordinances or regulations adopted under this article shall be consistent with and conform to the adopted general plan of the municipality, if any, as adopted under article 6 of this chapter."² In Rhode Island, where local planning is mandated by the Comprehensive Planning and Land Use Regulation Act of 1988, local governments are expressly required to "conform [their] zoning ordinances and maps with [their] comprehensive plan within eighteen (18) months of plan adoption."³

¹ See generally ROHAN: ZONING AND LAND USE CONTROLS § 37.03[3] (discussing the consistency requirements of state zoning enabling statutes).

² Ariz. Rev. Stat. § 9-462.01(F).

³ R.I. Gen. Laws § 45-22.2-5(a)(3).

In light of these consistency requirements, a proposed rental regulation should always be reviewed for consistency with the adopted comprehensive plan. In particular, Realtors[®] should carefully review any chapter of the comprehensive plan that might contain policies relevant to long-term or short-term rentals, such as the land use, housing, and economic development chapters. For example, in a vacation destination community, the comprehensive plan is likely to contain policies that support local tourism and may establish goals for the expansion of recreational opportunities and tourist accommodations. A rental ordinance that would prohibit or restrict short-term rentals arguably would be inconsistent with such policies and goals.

(b) Environmental Review Process

In some states, the potential environmental consequences of a proposed ordinance must be considered prior to adoption by the local legislative body. For example, in California, the California Environmental Quality Act (“CEQA”) applies to state and local government decisions to approve or undertake any project that could have adverse environmental consequences.⁴ The statute requires a process, rather than a particular outcome. That process is intended to:

(1) inform government decisionmakers and the public about the potential environmental effects of proposed activities; (2) identify the ways that environmental damage can be avoided or significantly reduced; (3) prevent significant environmental damage by requiring changes in projects, either by the adoption of alternatives or imposition of mitigation measures; and (4) disclose to the public why a project was approved if that project would have significant environmental effects.⁵

Although some projects are exempt from CEQA and others only require limited review of potential environmental consequences, if the agency determines that a project may have significant effects on the environment, an environmental impact analysis and report (“EIR”) must be performed. The EIR is only required to cover the impacts of the proposed project, but it may be used to analyze broader policy issues, including cumulative and growth-inducing impacts, so that the single review process may satisfy CEQA requirements of future projects.⁶

Cities and counties in California that have rental regulations generally have determined that the enactment of a rental ordinance does not require CEQA review. For example, in adopting amendments to its vacation rental ordinance in 2010, the Sonoma County Board of Supervisors found:

The adoption of the proposed regulations is exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15301 (Existing Facilities) of the State CEQA Guidelines because allowing vacation rentals meeting the standards adopted herein to be located within existing single-family residences will not involve an expansion of use beyond that currently existing; and further, is exempt under Section 15061 (b)(3) because it can be seen with certainty that adoption of the Ordinance does not result in a physical change in the environment. Implementation of the regulations does not increase

⁴ CECILY TALBERT BARCLAY, CURTIN’S CALIFORNIA LAND USE AND PLANNING LAW 151 (30th ed. 2010) (hereinafter “CURTIN’S”).

⁵ *Id.* (citing Cal. Pub. Res. Code §§ 21000, 21001).

⁶ *Id.* at 162.

residential density or the intensity of use as the standards adopted herein are consistent with otherwise allowable residential use and any activities that may exceed the residential character would be subject to further discretionary review.⁷

Similar findings were made by the cities of Seal Beach,⁸ Rolling Hills,⁹ Aliso Viejo,¹⁰ and Palm Desert, California.¹¹ Although communities have generally reached the same conclusion, namely that their short-term rental regulations are exempt from CEQA, should actively monitor and participate in the public hearing processes and should carefully evaluate the CEQA analysis and findings associated with a proposed rental regulation.

10.3 Question the Need for Residential Rental Regulations

Even if a local government has the authority to adopt a residential rental ordinance, Realtors[®] should question whether there truly exists a need for the restrictions. For example, in some cases, the perceived need for a short-term rental ordinance may be based solely on anecdotal evidence about the alleged problems caused by short-term rental tenants (e.g., overcrowding, excessive noise, late-night parties, or increased traffic or parking problems) rather than on documented evidence that short-term rental tenants are causing problems. If nothing more than anecdotal evidence is provided in support of a proposed rental ordinance, the ordinance may be vulnerable to claims that it was adopted arbitrarily without any rational basis.

Where proposed rental restrictions appear to be supported solely by anecdotal evidence, Realtors[®] should question whether empirical studies using data from police call logs, code enforcement activity, and prosecutorial records have actually established the alleged adverse impacts to the community, and the degree to which those impacts are attributable to rental properties. Below are some examples of the types of inquiries Realtors[®] can make of local government officials:

- What number of complaints logged by the local code enforcement and police departments were generated by residential rentals? Does the data evidence an increase in the number of complaints attributable to rentals over the last five years?
- How do the complaints concerning rentals relate to the number of individuals occupying the rental that is the subject of the complaint? Does the city or town have factual support to justify a proposed occupancy limit for residential rental

⁷ Sonoma County, CA Ordinance No. 5908, Sec. 1.5 (available online at <http://www.sonoma-county.org/prmd/docs/vacrent/vacation-rentals-final-ordinance.pdf>).

⁸ City of Seal Beach, CA – Ordinance Prohibiting Rental of Residential Property on a Short-Term Basis, Sec. 3.A (finding the ordinance to be “categorically exempt from review” pursuant to CEQA Sections 15305 and 15061(b)(3)) (available online at <http://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Hot-Issues/vacation-rentals/City-Ordinances/Seal-Beach>).

⁹ City of Rolling Hills, CA Ordinance No. 342 (Prohibiting short term rental of single-family residences) (available online at <http://rolling-hills.org/DocumentCenter/View/856>).

¹⁰ City of Aliso Viejo, CA (Ordinance confirming existing prohibition of short-term rentals in residential districts) (available online at <http://civicaweb.santabarbaraca.gov/civicax/filebank/blobdload.aspx?BlobID=157305>).

¹¹ City of Palm Desert, CA Ordinance No. 1236 (Requiring a conditional use permit for short-term rentals) (available online at <http://qcode.us/codes/palmdesert/revisions/1236.pdf>).

housing and to what extent does this limitation exceed the occupancy limits applicable to other types of housing?

- Does a specific type of complaint (e.g., noise disturbance, litter or trash, parking violations, or late night parties) constitute a large percentage of the total number of complaints recorded in the last five years? If so, does a provision of the local zoning or general ordinance already regulate the offending behavior? If it is possible to address the majority of the problems by enforcing existing nuisance regulations, rather than by imposing new maximum occupancy limits on rentals, it may call into question the need for the proposed ordinance.
- Does a disproportionate number of complaints arise from a small number of rental properties? If yes, then a more appropriate response might be to adopt narrowly tailored regulations. An example of this approach would be a regulation that would apply only after one or more violations are found on a property, rather than imposing the cost and disruption of new regulations on all owners of rental property.

10.4 Suggest Alternatives to Rental Regulations

(a) Enforcement of Existing Ordinances

Communities that wish to address the potential negative impacts of long-term or short-term rentals on residential neighborhoods likely already have regulations in place that are aimed at curtailing those types of impacts on a community-wide basis. In many cases the existing ordinances already address the types of behaviors and activity that would be the focus of rental performance standards or operational restrictions. Below are some examples.

(i) Noise Restrictions

As discussed in Section 3.1(a)(i) of this paper, excessive noise is a problem that permanent residents often attribute to residential rentals, particularly short-term rentals and student rentals in a college towns. However, local governments typically already have a noise control ordinance in place that addresses excessive noise. For example, the City of San Luis Obispo, California's Noise Control Ordinance Noise Control Ordinance (Chapter 9.12 of the San Luis Obispo Municipal Code) expressly states that any noise in violation of Chapter 9.12 is a public nuisance, punishable by civil or criminal action. The term "noise disturbance" is defined to mean:

any sound which (a) endangers or injures the safety or health of human beings or animals, or (b) annoys or disturbs reasonable persons of normal sensitivities, or (c) endangers or injures personal or real property, or (d) violates the factors set forth in Section 9.12.060 of this chapter. Compliance with the quantitative standards as listed in this chapter shall constitute elimination of a noise disturbance.¹²

¹² City of San Luis Obispo, CA Municipal Code § 9.12.020(U) (available online at <http://www.codepublishing.com/ca/sanluisobispo/>).

Additionally, specific types of noise violations that commonly arise in residential neighborhoods are expressly prohibited by Section 9.12.050 of the San Luis Obispo ordinance, including the following:

- Noise disturbances that are “plainly audible at a distance of fifty feet from the noisemaker,” unless the noise does not penetrate beyond the boundaries of the noisemaker’s own premise.¹³
- Operating, playing or permitting the operation or playing of any radio, television set, phonograph, drum, musical instrument, or similar device between the hours of 10:00 PM and 7:00 AM in such a manner as to create a noise disturbance audible across a property line.¹⁴
- Operating, playing or permitting the operation or playing of any radio, television set, phonograph, drum, musical instrument, or similar device in a manner that creates a noise disturbance at any time in excess of noise levels defined in Section 9.12.060 (measured by decibel levels and duration of the disturbance).¹⁵

(ii) Public Nuisance Ordinance

As discussed in Section 3.6(a) of this paper, local governments generally have the power to declare and abate public nuisances.¹⁶ For example, the Marco Island City Code defines “public nuisance” to mean:

the commission or omission of any act, by any person, or the keeping, maintaining, propagation, existence or permitting of anything, by any person, by which the life, health, safety, or welfare of any person may be threatened or impaired. Additionally, permitted uses and conditional uses in any residentially zoned area which create smoke, dust, noise, odor, vibration, or glare which by themselves or in combination may be harmful or injurious to human health or welfare or which unreasonably interfere with the customary use and enjoyment of life or property are a public nuisance.¹⁷

In addition, Section 18-36(4) of the City Code provides that: “No owner, lessee, occupant, guest, or agent for the owner shall allow the keeping of a public nuisance on any property, developed or undeveloped.” Marco Island’s public nuisance ordinance also requires that the “owners, lessees, occupants or agents for the owner of developed and undeveloped lots shall control all excessive growth of grasses or weeds within the right-of-way adjacent to their property by cutting or removing the grasses and weeds, and shall maintain the right-of-way free from any accumulation of abandoned property, litter, pollution, or other matter.”¹⁸

Legal remedies to abate public nuisances generally include the filing of a criminal complaint, or a civil action, or an administrative abatement.

¹³ See San Luis Obispo Municipal Code § 9.12.050(A).

¹⁴ See San Luis Obispo Municipal Code § 9.12.050(B)(1)(a).

¹⁵ See San Luis Obispo Municipal Code § 9.12.050(B)(1)(b).

¹⁶ EUGENE MCQUILLIN, 6A THE LAW OF MUNICIPAL CORPORATIONS § 24:62 (3d. ed., 2015).

¹⁷ Marco Island, FL City Code § 18-32.

¹⁸ Marco Island, FL City Code § 18-36(5)

This type of public nuisance ordinance can and should be used by communities as a tool for addressing many of the complaints commonly associated with short-term rentals, including late-night parties, excessive noise, and lack of property maintenance.

(iii) Property Maintenance Standards

As discussed in Section 3.1(a)(ii), another common complaint is that rental properties generally are not owner-occupied and therefore are less likely to be cared for to the same degree as permanent residences. As a result, some communities have cited inadequate property maintenance as justification for the adoption of a residential rental ordinance. For example, the City of Frisco, Texas cited inadequate property maintenance by absentee owners as justification for requiring the owners of single-family rental properties to register with the city. Many communities have adopted property maintenance codes that *all* property owners must satisfy. Communities often adopt (sometimes with amendments) the International Property Maintenance Code (IPMC), which contains a comprehensive set of interior and exterior property maintenance requirements.¹⁹ According to the International Code Council (ICC), as of February 2015, the IPMC has been adopted, with or without limitations, by hundreds of local jurisdictions in 38 states and the District of Columbia.²⁰

(iv) Nighttime Curfews

To the extent that underage drinking and juvenile crime are a significant contributors to excessive noise and party disturbances in short-term rental properties in residential neighborhoods, a nighttime curfew ordinance that prohibits persons under the age of 18 years from being on or about public streets and public places during specified hours of the day could be an effective deterrent. The effectiveness of nighttime curfews is evidenced by a 2005 survey published by National League of Cities, in which 96% of communities that have nighttime curfew ordinances reported that they help combat juvenile crime.²¹ It bears noting, however, that a juvenile curfew ordinance generally would not be applicable to college students and other youthful offenders over the age of eighteen. To the extent that parties hosted and attended by college-aged young people are perceived as causing the disturbances that are of greatest concern, a curfew ordinance would probably have little, if any, effect.

(v) Parking Regulations

Communities often address the problem of improperly parked vehicles and excessive numbers of vehicles parked in residential neighborhoods through off-street parking regulations. These regulations may include provisions that prohibit vehicle parking within front yard setback areas

¹⁹ See generally International Property Maintenance Code, 2012 ed. (International Code Council) (available online at <http://publicecodes.cyberregs.com/icod/ipmc/index.htm>).

²⁰ See International Codes—Adoption by State (Feb. 2015) (available online at <http://www.iccsafe.org/gr/Documents/stateadoptions.pdf>); see also International Codes—Adoption by Jurisdiction (Feb. 2015) (available online at <http://www.iccsafe.org/gr/Documents/jurisdictionadoptions.pdf>).

²¹ See “Youth Curfews Continue to Show Promise, National League of Cities (Jan. 13, 2006) (available online at <http://www.nlc.org/documents/Find%20City%20Solutions/IYEF/Violence%20Prevention/Instapoll-youth-curfews-2005.pdf>).

in residential zoning districts and that restrict vehicle parking to hard surface driveways or designated parking areas. Regulations may also prohibit parking on grass areas, sidewalks, or within a certain distance of side property lines.

(b) Adoption of Ordinances that Target Community-Wide Issues

As discussed in Section 10.4(a), many of the problems commonly attributed to residential rental properties (e.g., overcrowding, excessive noise, late-night parties, or increased traffic or parking problems) can be addressed by enforcement of noise, public nuisance, property maintenance, and parking regulations. Communities that have not yet adopted such regulations, should be encouraged to adopt such generally applicable regulations rather than singling out short-term rental properties for regulation.

10.5 Stakeholder Input and Collaborative Problem-Solving

(a) Input of Stakeholders

Realtors® should also urge that local government officials seek and consider input from individuals and organizations with a stake in the residential rental industry as early in the process as possible. Stakeholder groups should include representatives of local homeowner associations, rental property management associations, the local Realtor® associations, the chamber of commerce, local tourism bureau, and other organizations involved in the short-term rental industry.

Realtors® should actively monitor and participate in the public hearing process. Early on, Realtors® should request an invitation to participate in any stakeholder groups formed by the local government prior to the public hearing process. Local governments often allow interested parties to discuss their concerns with local officials responsible for drafting and advising the local legislative body on a proposed ordinance at the beginning of the process. To the extent possible, Realtors® should take advantage of this opportunity to meet with the local planner or other staff members who may be drafting a proposed residential rental ordinance.

State and local open public meetings laws generally require local legislative bodies to publish notice of scheduled public hearings, typically in the local newspaper, by posted notice at city or town hall, and/or on the official website of the city or town. If a draft of the proposed rental ordinance is available prior to the public hearing, Realtors® should request a copy and review it thoroughly in advance of the hearing.²² Realtors® should be prepared to submit written comments and/or to testify at the public hearing about their concerns with the proposal.

(b) Collaborative Problem Solving

By inviting stakeholder input, communities can create the opportunity to collaborate with rental property owners and associations to address the perceived problems with residential rental properties without adopting an ordinance or regulation. A good example of this collaborative problem solving approach is the “Collaboration Corvallis” project, a partnership formed in 2011 between the city of Corvallis, Oregon, community members, and Oregon State University to

²² The Realtor® association may obtain assistance in this effort through NAR’s Land Use Initiative program.

“enhance the livability of both the community and the university ... and to manage the impacts of growth at the university and in the city.”²³ The Collaboration Corvallis project includes a number of working groups, each with a specific mission. The Neighborhood Parking & Traffic Mitigation working group, for example, was tasked with recommending effective solutions to traffic and parking issues generated by the growth of the university, while the Neighborhood Livability work group was formed to “work with community members, neighborhood residents and stakeholders, including Oregon State faculty, staff and students to address a wide range of livability issues,” including the following:

- Recommending municipal code amendments and OSU student conduct standards to help achieve and maintain livability standards; and
- Evaluating and recommending funding mechanisms to support [and] enhanced code enforcement and student conduct programs.²⁴

The Collaboration Corvallis project is an ongoing effort that has produced a number of positive results, many of which were recognized by the *Corvallis Gazette-Times* in an editorial entitled “As I See It: Collaboration Corvallis producing results,” the text of which is presented below:

As a new school year approaches, residents can expect to see a number of new or expanded initiatives as a result of Collaboration Corvallis, the three-year effort designed to strengthen the relationship between the city of Corvallis and Oregon State University.

Now entering its second year, Collaboration Corvallis seeks to enhance community livability by understanding and actively addressing issues related to growth and development, both at OSU and in the city. As co-chairs of the collaboration’s Steering Committee, we see the importance of this work reflected in the commitment of time and expertise shown by work group members, city and university staff, and the community at large.

Here’s a look at some of the key actions currently underway that originated from each of the three work groups.

Neighborhood Livability:

- This fall, Oregon State is implementing a requirement that first-year students live in on-campus housing their freshman year.
- OSU funded an off-campus living guide to communicate community expectations to students and other guests.
- Special Response Notices to address municipal code violations have increased in neighborhoods, with higher fees implemented for initial police responses.
- OSU added two full-time staff members — and this fall will add two half-time graduate student staff members — to the Office of Student Conduct to proactively address student behavior on and off campus, and work more closely with local

²³ See Collaboration Corvallis (available online at <http://blogs.oregonstate.edu/collaboration/about/>).

²⁴ See Neighborhood Livability at <http://blogs.oregonstate.edu/collaboration/livability/>.

residents, students, community organizations and law enforcement. The new employees will expand community outreach, education and enforcement programs in Corvallis neighborhoods. Oregon State also has hired an assistant director of fraternity & sorority life, whose duties include building strong relationships between fraternities and sororities and community stakeholders.

- The City Council approved revised ordinances that increase fines for alcohol-related issues.
- The council authorized a local option levy that includes hiring of three additional police officers with a focus on livability. Voters will consider this levy in November.
- To learn from other college towns and share best practices, the city and OSU joined the International Town & Gown Association and sent staff to the association's 2013 conference.

Neighborhood Planning:

- The City Council changed the Land Development Code to change parking requirements for four- and five-bedroom units. The council will consider additional code changes this fall.
- OSU is building a new residential hall and expanding occupancy in other residence halls to accommodate more on-campus housing.

Parking and Traffic:

- Corvallis Transit System service has been expanded with increased OSU financial support.
- The city and OSU each substantially increased funding to the Linn-Benton Loop.
- The City Council has agreed to expand residential parking districts in the city.
- Oregon State will improve its on-campus shuttle service and expand the use of parking facilities on the south side of campus by offering incentives and future variable pricing plans for campus parking.
- OSU has increased funding so additional bikes can be added to the bike loan program to expand the ways that students and faculty sustainably move around campus and the community.²⁵

While some of these actions might be infeasible or impractical for other communities, the collaborative approach taken by the City of Corvallis and Oregon State University, and the results being achieved by the Collaboration Corvallis project, can serve as a model for the

²⁵ "As I See It: Collaboration Corvallis producing results," *Corvallis Gazette-Times* (Sept. 13, 2013) (available online at http://www.gazettetimes.com/news/opinion/as-i-see-it/as-i-see-it-collaboration-corvallis-producing-results/article_f62afa5e-1c3e-11e3-b9e7-001a4bcf887a.html).

communities to emulate in formulating a solution to the perceived problems with residential rental properties.

10.6 Propose Best Practice Rental Regulations as Alternatives

This section presents several types of “best practice” provisions that have been implemented in jurisdictions that have residential rental restrictions and which Realtors® may find acceptable, depending upon local market conditions. Each section begins with a brief description of the type of best practices. This description is followed by one or more examples of the best practice technique as adopted by local jurisdictions.

(a) Adopt Narrowly-Tailored Regulations

An effective rental ordinance should be narrowly tailored to address the specific needs of the local community. The potential for over-regulation is a legitimate concern, particularly when a proposed ordinance is driven by the vocal complaints of one or more permanent residents about their negative experiences with nearby renters. Residents often complain, for example, that short-term rentals are inherently incompatible with residential neighborhoods and demand an outright prohibition against the use. In those circumstances, the concern is that elected officials, in an effort to please their constituency, may acquiesce to those demands without carefully considering: (a) whether there truly exists a need for short-term rental restrictions; and (b) if a need exists, what regulatory approach is best-suited to addressing the particular needs of the community.

Residential rental restrictions can be tailored to fit the specific needs of the community in several important ways. As a threshold matter, communities should consider the degree to which a rental regulation is justified. If a community’s overriding concern is that a significant number of residential properties that are being used as short-term rentals are failing to report and pay local and state transient occupancy taxes, then an ordinance requiring short-term rental owners to register their properties with the local government and penalizing noncompliance may be sufficient to address that concern. To the extent that short-term rentals are a problem only in certain residential neighborhoods, a rationally justified ordinance that applies only in those areas would be a more appropriate response than one that regulates the use more broadly, even in areas where short-term rentals not only are accepted, but also are highly desired.

The rapid growth of Airbnb and similar online rental platforms has raised the concern that an increasing number of owners are converting long-term rental properties into short-term rentals, resulting in a decline in the available supply of long-term rental housing. A related concern is that “commercial users” of Airbnb are purchasing rental properties for the purpose of converting them to short-term rentals. An October 2014 report by the New York State Attorney General found that “commercial users” of Airbnb (i.e., hosts that offered three or more rental units) represented just six percent of Airbnb hosts in New York City, but generated 36% of the total reservations and 37% of the total Airbnb revenue in the city.²⁶ To the extent that the loss of available long-term rental housing to short-term rentals is a concern, communities can address

²⁶ *Airbnb in the City* (Oct. 2014, New York State office of the Attorney General) (available online at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>).

the problem by requiring that the owner or “host” reside in the dwelling unit for a minimum number of days each calendar year. In the alternative, communities may choose to draw a line between short-term rentals, in which an entire dwelling unit is rented out, and “home sharing,” in which a host rents out a spare room but resides on-site throughout the visitor’s stay.

Best Practice Example: Clatsop County, Oregon. In Clatsop County, the Comprehensive Plan/Zoning Map divides the county into about forty zoning district designations, including more than a dozen residential districts.²⁷ The county’s short term vacation rental ordinance, however, applies only to properties within the Arch Cape Rural Community residential district.²⁸

Comment: The Clatsop County ordinance is a best practice example of narrowly tailoring because it applies only to a specific residential district rather than city-wide.

Best Practice Example: San Francisco, California. San Francisco’s short-term residential rental ordinance requires that a “permanent resident” occupy a short-term rental unit for at least 275 days per calendar year and that the permanent resident maintain records demonstrating compliance with the requirement for a period of two years.²⁹

Comment: The San Francisco ordinance is a best practice example of narrowly tailoring because it addresses the problem of converting long-term rental properties into short-term rentals by requiring that a “permanent resident” occupy a short-term rental unit rather than banning short-term rentals outright.

Best Practice Example: Santa Monica, California. In May 2015 the Santa Monica City Council adopted a “Home-Sharing Ordinance” that authorizes “home-sharing, which is defined as an activity whereby a resident hosts visitors in their home, for periods of 30 consecutive days or less, while at least one of the primary residents lives on-site throughout the visitor’s stay.”³⁰

Comment: The Santa Monica ordinance is a best practice example of narrowly tailoring because it addresses the problem of converting long-term rental properties into short-term rentals by permitting “home-sharing” rather than banning all types of short-term rentals outright.

(b) “Grandfathering” Provisions

Short-term rentals that lawfully existed prior to the enactment of a short-term rental ordinance, but are not allowed under the newly adopted ordinance—either because the use is prohibited outright or because the applicant is unable to satisfy the criteria for obtaining a permit—should be allowed to continue (i.e., “grandfathered”) if the property owner is able to demonstrate that the short-term rental use pre-dated the ordinance. Zoning ordinances typically contain a general nonconformity provision that establishes the requirements for a use or structure to secure a legal nonconforming status. However, short-term rental ordinances may also contain specific

²⁷ See Clatsop County, OR Land and Water Development and Use Ordinance, Table 3.010 (available online at http://www.co.clatsop.or.us/sites/default/files/fileattachments/land_use_planning/page/612/zoning_Ordinance_80-14_codified_08-25-14.pdf).

²⁸ See Clatsop County, OR Land and Water Development and Use Ord. § 4.109 (Arch Cape Short Term (Vacation) Rentals).

²⁹ See San Francisco Code § 41A.5(g)(1) (available online at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf>).

³⁰ See City of Santa Monica, CA – Overview of Home-Sharing Ordinance (available online at <http://www.smgov.net/Departments/PCD/Permits/Short-Term-Rental-Home-Share-Ordinance/#1. Why>).

grandfathering clauses that allow short-term rentals in existence on the effective date of the ordinance to continue even if the property cannot satisfy the applicable requirements.

Best Practice Example: Kauai County, Hawaii. Under Section 8-3.3 of the Kauai County Code, transient vacation rentals are generally prohibited in the R-1, R-2, R-4, and R-6 residential zoning districts, except within the designated Visitor Destination Areas established under the Code. However, under Sections 8-17.9 and 8-17.10, single-family transient vacation rentals in non-Vacation Destination Areas that were in lawful use *prior* to the effective date of the ordinance are allowed to continue, subject to obtaining a “Nonconforming Use Certificate.” To obtain a Nonconforming Use Certificate, an owner must provide a sworn affidavit and demonstrate to the satisfaction of the Planning Director that the “dwelling unit was being used as a vacation rental on an ongoing basis prior to March 7, 2008.”³¹

The owner of operator of a transient vacation rental unit bears the burden of proof in establishing that the use is properly nonconforming based on records of occupancy and tax documents, including relevant State of Hawaii general excise tax and transient accommodations tax filings, federal and/or state income tax returns for the relevant time period, reservation lists, and receipts showing payment.³² **Comment:** The Kauai County ordinance is a best practice example of grandfathering because it allows single-family vacation rentals that were lawfully established prior to the effective date of the ordinance to continue.

Best Practice Example: Monterey County, California. Monterey County’s short-term rental ordinance grandfathers short-term rental units that were in operation before the ordinance was adopted. Section 21.64.280 of the Zoning Ordinance provides:

Transient use of residential property in existence on the effective date of this Section shall, upon application, be issued an administrative permit provided that any such units devoted to transient use are registered with the Director of Planning and the administrative permit application is filed within ninety (90) days of the effective date of this Section.... The owner/registrant shall have the burden of demonstrating that the transient use was established. Payment of transient occupancy taxes shall be, but is not the exclusive method of demonstrating, evidence of the existence of historic transient use of residential property.³³

Comment: The Monterey County ordinance is a best practice example of grandfathering because it allows single-family vacation rentals that existed prior to the effective date of the ordinance to continue.

(c) Quantitative Restrictions

From a property owner’s perspective, the use of quantitative restrictions (i.e., fixed caps, proximity restrictions, and maximum short-term to long-term occupancy ratios) as a means of

³¹ Kauai County Code § 8-17.10(c) (available online at <http://qcode.us/codes/kauaicounty/>).

³² Kauai County Code § 8-17.10(e).

³³ Monterey County, CA Zoning Ordinance § 21.64.280(d)(1)(b) (available online at https://www.municode.com/library/ca/monterey_county/codes/code_of_ordinances?nodeId=TIT21ZO_CH21.64SPRE_21.64.280ADPETRUSREPRRE).

mitigating the impacts of short-term rentals can be viewed in two ways. On one hand, such limitations on the number of short-term rentals allowed in a community are preferable to an outright prohibition on the use. On the other hand, for property owners desiring to enter the short-term rental market after the effective date of a short-term rental ordinance, a quantitative restriction may act as a barrier to entry. Quantitative restrictions therefore may constitute a reasonable compromise position in circumstances where community support is divided on a proposed short-term rental ban.

Jurisdictions considering a quantitative restriction should carefully consider which technique is best suited to further the needs and goals of the community. For example, if a community finds that the negative impacts of short-term rentals are manifested only when they exist in clusters or in close proximity to one another in a residential neighborhood, then a *proximity restriction* would be a more effective technique than a fixed cap or ratio. On the other hand for a community seeking to maintain a balance between its long-term housing needs and visitor-oriented accommodations, a maximum *ratio* of long term residential dwelling units to short-term rental permits would be more effective than a fixed cap or proximity restriction.

Best Practice Example: Mendocino County, California. Section 20.748.005 of the Mendocino County Code states that the county’s “single unit rentals and vacation rentals” ordinance is intended, in part, “to restore and maintain a balance between the long-term housing needs of the community and visitor oriented uses.”³⁴ To maintain that balance, the ordinance requires the county to “maintain, at all times, for new vacation home rentals or single unit rentals approved subsequent to the effective date of this section, a ratio of thirteen (13) long term residential dwelling units to one (1) single unit rental or vacation home rental.”³⁵ While the ordinance does not require any reduction in the number of single unit rentals and vacation rentals in existence on the effective date of the ordinance, no new applications may be approved unless and until thirteen new residential dwelling units have been completed since the single unit rental or vacation home rental permit was approved.³⁶ **Comment:** The Mendocino County ordinance is a best practice example of a quantitative restriction because it allows vacation rentals, subject to the maximum ration of one vacation rental per thirteen long term residential dwellings, rather than prohibiting vacation rentals outright.

Best Practice Example: San Luis Obispo County, California. The vacation rental ordinance adopted by San Luis Obispo County was adopted for the general purpose of ensuring that short-term rental uses “will be compatible with surrounding residential uses and will not act to harm and alter the neighborhoods they are located within.”³⁷ More specifically, the county found that “residential vacation rentals have the potential to be incompatible with surrounding residential uses, especially when several are concentrated in the same area, thereby having the potential for a deleterious effect on the adjacent full-time residents.”³⁸ Accordingly, rather than prohibiting

³⁴ Mendocino County, CA Code § 20.748.005 (available online at https://www.municode.com/library/ca/mendocino_county/codes/code_of_ordinances?nodeId=MECOCO_TIT20ZO_OR_DIVIIIMETOZOCO_CH20.748SIUNREVAHORE).

³⁵ Mendocino County, CA Code § 20.748.020(A).

³⁶ See Mendocino County, CA Code § 20.748.020(B).

³⁷ San Luis Obispo County, CA Code § 23.08.165(1) (available online at <http://www.slocounty.ca.gov/Assets/PL/Ordinances/vacationrentals.pdf>).

³⁸ *Id.*

vacation rentals in county neighborhoods, San Luis Obispo County adopted the following proximity restriction on the use:

[N]o residential vacation rental shall be located within 200 linear feet of a parcel on the same block on which is located any residential vacation rental or other type of visitor-servicing accommodation that is outside of the Commercial land use category.³⁹

Comment: The San Luis Obispo County ordinance is a best practice example of a quantitative restriction because it addresses the problem of overconcentration of vacation rentals by implementing a proximity restriction rather than prohibiting vacation rentals outright.

(d) Operational Restrictions

Although short-term rental restrictions commonly include some operational restrictions, the restrictions often unnecessarily duplicate generally applicable regulations already adopted by the local jurisdiction. Several of these types of regulations are discussed in Section 10.3 above. In general, the types of negative impacts most commonly cited by communities with short-term rental restrictions—late-night music and partying, garbage left out on the street on non-pickup days, illegal parking, and negligent property maintenance—are community-wide concerns that are best regulated with a generally applicable ordinance rather than one that singles out short-term rentals for disparate treatment. It stands to reason that the impacts that these types of activities have on residential neighborhoods are the same regardless of whether they are produced by long-term residents or short-term renters. Therefore, the best practice technique for addressing those concerns is to adopt a general ordinance that governs the activity or behavior in all areas of the community.

(e) Licensing/Registration Requirements

Virtually all short-term rental ordinances require owners who intend to offer their property for use as a short-term rental to obtain a license or permit prior to commencing the use. In general, licensing and registration requirements enable local governments to create and maintain a database of dwelling units being operated as short-term rentals for code enforcement and transient occupancy tax collection in jurisdictions authorized to collect such taxes. The procedures and criteria for obtaining a short-term rental license or permit should be clearly set out in the local ordinance. Short-term rental licensing and registration applications should be processed administratively and without need for a public hearing. Such licensing/registration requirements should not require a conditional use permit or a similar-type zoning permit.

For communities seeking to enhance the collection of transient occupancy taxes, a short-term rental ordinance should place the burden of collecting and remitting such taxes on the hosting platform (e.g., Airbnb) rather than on individual hosts.

Best Practice Example: City of Palm Springs, California. In the City of Palm Springs, residential property owners are required to register the property as a vacation rental prior to commencing the use. Section 5.25.060 of the Palm Springs Municipal Code requires owners to

³⁹ San Luis Obispo County, CA Code § 23.08.165(c).

submit a registration form that is furnished by the city and that requires certain information to be provided, including, for example: (1) the name, address, and telephone number of the owner and his agent, if any; (2) the address of the vacation rental unit; (3) the number of bedrooms in the rental unit; and (4) evidence of a valid business license issued for the business of operating vacation rentals, or submission of a certificate that owner is exempt or otherwise not covered by the city's Business Tax Ordinance for such activity.⁴⁰ Vacation rental registration also requires the owner to pay a fee in an amount to be established by the city council, subject to the limitation that the registration fee "shall be no greater than necessary to defer the cost incurred by the city in administering the [vacation rental registration]."⁴¹ *Comment:* The Palm Springs ordinance is a best practice example of a registration requirement because it is not overly burdensome and limits the registration fee amount to the costs incurred by the city in administering the registration.

Best Practice Example: San Francisco, California. In San Francisco, online hosting platforms are responsible for "collecting and remitting all required Transient Occupancy Taxes."⁴²

Comment: The San Francisco ordinance is a best practice example because it makes online hosing platforms, rather than hosts, responsible for collecting and remitting the required Transient Occupancy Tax.

Best Practice Example: City of Encinitas, California. In the City of Encinitas, short-term rental permits likewise require submittal of an application form and payment of a fee no greater than necessary to defer the cost incurred by the city in administering the short-term rental permit program. Short-term rental permits will be granted "unless the applicant does not meet the conditions and requirements of the permit, or fails to demonstrate the ability to comply with the Encinitas Municipal Code or other applicable law."⁴³ *Comment:* The Encinitas ordinance is a best practice example of a registration requirement because it limits the registration fee amount to the costs incurred by the city in administering the registration.

(f) Inspection Requirements

As noted in Section 3.3(f), many communities require rental properties to pass certain inspections prior to the issuance or renewal of a rental permit. However, mandatory inspection requirements arguably do not advance a community's interests in protecting and maintaining residential character or preventing the adverse effects of transient occupancy on residential neighborhoods. Therefore, if a rental ordinance is specifically adopted for reasons related to protection of residential character, then a mandatory inspection requirement is unnecessary and should not be imposed upon rental property owners.

Best Practice Examples: Douglas County, Nevada and Sonoma County, California. The short-term rental ordinances adopted by these communities were generally adopted for reasons related to the impacts of short-term rental uses on residential neighborhoods. However, none of

⁴⁰ City of Palm Springs, CA Municipal Code § 5.25.060 (available online at <http://www.qcode.us/codes/palmsprings/>).

⁴¹ City of Palm Springs, CA Municipal Code § 5.25.060(b).

⁴² See San Francisco Code § 41A.5(g)(4)(B).

⁴³ See City of Encinitas, CA Municipal Code § 9.38.040(A)(3) (available online at <http://www.qcode.us/codes/encinitas/>).

these ordinances include a mandatory inspection requirement, either at the time of initial permit issuance or thereafter.⁴⁴ **Comment:** The Douglas County and Sonoma County ordinances are best practice examples because they do not contain a mandatory inspection requirement.

Mandatory inspection requirements may be justified in cases where a short-term rental ordinance is adopted for the purpose (at least in part) of ensuring the safety of short-term rental tenants. For example, one of the stated purposes of the transient private home rental ordinance adopted by the City of Big Bear Lake, California is “to ensure ... that minimum health and safety standards are maintained in such units to protect the visitor from unsafe or unsanitary conditions.”⁴⁵ It stands to reason that a provision requiring inspection of transient private rental homes in Big Bear Lake to determine compliance with such minimum health and safety standards would further that purpose.

However, even if a mandatory inspection requirement can be justified, the scope of the inspection program should be limited to the initial permit issuance and thereafter only on a reasonable periodic basis. Provisions requiring short-term rental units to be inspected annually (typically as a condition precedent to the issuance of a permit renewal), such as Section 17.03.310(D)(2) of the Big Bear Lake ordinance, are unnecessarily burdensome on owners and the local government alike.

Best Practice Example: City of Cannon Beach, Oregon. Under Section 17.77.040 of the Cannon Beach Zoning Code, at the time of application for a new transient rental permit (or new vacation home rental permit) the dwelling is subject to inspection by a local building official to determine conformance with the requirements of the Uniform Housing Code. Thereafter, twenty percent of the dwellings that have a transient rental or vacation home rental permit are inspected each year, so that over a five-year period, all such dwellings have been re-inspected.⁴⁶

Comment: The Cannon Beach ordinance is a best practice example because it establishes a more reasonable periodic inspection requirement than the annual requirement that communities often impose on short-term rentals.

Best Practice Example: Tillamook County, Oregon. The Tillamook County Short Term Rental Ordinance requires that all short-term rentals be inspected in connection with the initial permit application, but thereafter requires an inspection only if (1) there has been a fire, flood or other event that caused substantial damage to the structure; (2) the permit was revoked; (3) there

⁴⁴ See generally Douglas County, CA County Code § 5.40 (Vacation Rentals in the Tahoe Township) (available online at <http://dcnvda.org/userpages/CountyCodes.aspx>); Sonoma County, CA County Code § 26-88-120 (available online at https://www.municode.com/library/ca/sonoma_county/codes/code_of_ordinances?searchRequest=%7B%22searchText%22:%22inspection%22,%22pageNum%22:7,%22resultsPerPage%22:25,%22booleanSearch%22:false,%22stemming%22:true,%22fuzzy%22:false,%22synonym%22:false,%22contentTypes%22:%5B%22CODES%22%5D,%22productIds%22:%5B%5D%7D&nodeId=16331).

⁴⁵ City of Bear Lake, CA Municipal Code § 17.03.310(A) (available online at https://www.municode.com/library/ca/big_bear_lake/codes/code_of_ordinances?searchRequest=%7B%22searchText%22:%22rental%22,%22pageNum%22:1,%22resultsPerPage%22:25,%22booleanSearch%22:false,%22stemming%22:true,%22fuzzy%22:false,%22synonym%22:false,%22contentTypes%22:%5B%22CODES%22%5D,%22productIds%22:%5B%5D%7D&nodeId=MUNICIPAL_CODE_TIT17LAUS_CH17.03GEPR_17.03.310TRPRHORE).

⁴⁶ See City of Cannon Beach, OR Zoning Code § 17.77.040(A)(2)(a) (available online at <http://www.qcode.us/codes/cannonbeach/>).

has been an addition or substantial modification to the structure; or (4) the permit has lapsed for more than 180 days.⁴⁷ **Comment:** The Tillamook County ordinance is a best practice example because it requires that a short-term rental be inspected after the permit is issued only under specific limited circumstances.

(g) Enforcement Provisions

When short-term rental restrictions are adopted pursuant to a local government's zoning authority and incorporated into the jurisdiction's zoning code, it is reasonable to expect the ordinance to be enforced in accordance with the generally applicable enforcement provisions of the zoning code, if one exists. Similarly, it is reasonable to expect that short-term rental registration and licensing provisions that are incorporated into a community's general (non-zoning) code to be enforced pursuant to the generally applicable code enforcement provision. The short term rental regulations adopted in Clatsop County, Oregon and Monterey County, California, for example, are enforced in accordance with generally applicable enforcement and penalty provisions.⁴⁸

It is not uncommon, however, for communities to enact special enforcement and penalty provisions in their short-term rental ordinances. Many short-term rental ordinances contain enforcement and penalty provisions that penalize violations more severely than other types of code violations. In Palm Springs, California, for example, a first violation of the Vacation Rental Ordinance is subject to a \$250 fine and subsequent violations are subject to a fine of \$500.⁴⁹ By contrast, under Section 1.06.040 of the Palm Springs Municipal Code, the general penalties for code violations are \$100 for the first administrative citation and \$250 for the second. The Vacation Rental Ordinance does not explain why violations of that ordinance are penalized more severely than other types of code violations.

Enforcement provisions should not penalize short-term rental property owners (or their agents) for violations beyond their control. For example, if a short-term rental *tenant* violates a noise level restriction, the property owner should not be held responsible for the violation.

Best Practice Example: Douglas County, Nevada. Chapter 5.40 of the Douglas County Code regulates vacation home rentals in the Tahoe Township. Although the vacation home rental ordinance imposes certain operational restrictions on permitted rental units (e.g., parking and occupancy limitations and trash/refuse container rules), Section 5.40.110 states that a permit may be suspended or revoked only for a violation committed by the owner.

5.40.110 Violation and administrative penalties.

- A. The following conduct is a violation for which the permit [sic] suspended or revoked:

⁴⁷ See Tillamook County, OR Short Term Rental Ordinance § 7(d), (e) (available online at <http://www.co.tillamook.or.us/gov/comdev/documents/STVR/Amendment%201-Ordinance%2069%20Filed.pdf>).

⁴⁸ See generally Clatsop County Land and Water Development and Use Ordinance § 4.115; see also Monterey County, CA Code of Ordinances § 21.64.280.D.3.

⁴⁹ See City of Palm Springs, CA Municipal Code § 5.25.090(a).

1. The owner has failed to comply with the standard conditions specified in section 5.40.090(A) of this code; or
2. The owner has failed to comply with additional conditions imposed pursuant to the provisions of section 5.40.090(B) and (C) of this code; or
3. The owner has violated the provisions of this chapter; or
4. The owner has failed to collect or remit to the county the transient occupancy and lodging taxes as required by Title 3 of this code; or
5. Any false or misleading information supplied in the application process; or
6. The permit number was not included in all forms of advertisement; or
7. The occupancy was not included in all forms of advertisement, or the occupancy was not advertised correctly.

Comment: The Douglas County ordinance is a best practice example because it limits the suspension and revocation remedies to violations that are committed by the owner. A vacation rental permit cannot be suspended or revoked due to a violation committed by a vacation rental tenant.

Prior to the imposition of fines or other penalties, a short-term rental ordinance should conform to the due process requirements established under state law and/or the local jurisdictions charter or code of ordinances. At a minimum, before fines or other penalties are imposed, property owners should be given notice of, and an opportunity to cure, any alleged violation, except where exigent public safety concerns exist. As demonstrated in the best practice examples below, property owners should be given the opportunity to request a public hearing and have the right to appeal a local government's decision to suspend or revoke a short-term rental permit.

Best Practice Example: City of Encinitas, California. Under Section 9.38.060 of the City of Encinitas short-term rental ordinance, penalties may be imposed and permits may be suspended only in accordance with the following provisions:

- A. The City Manager shall cause an investigation to be conducted whenever there is reason to believe that a property owner has failed to comply with the provisions of this chapter. Should the investigation reveal substantial evidence to support a finding that a violation occurred, the investigator shall issue written notice of the violation and intention to impose a penalty, or penalty and suspend the permit. The written notice shall be served on the property owner and operator or agent and shall specify the facts which in the opinion of the investigator, constitute substantial evidence to establish grounds for imposition of the penalties, or penalties and suspension, and specify that the penalties will be imposed and/or that the permit will be suspended and penalties imposed within 15 days from the date the notice is given unless the owner and/or operator files with the City Clerk the fine amount and a request for a hearing before the City Manager.
- B. If the owner requests a hearing within the time specified in subsection A of this section, the City Clerk shall serve written notice on the owner and operator, by mail, of the date, time and place for the hearing which shall be scheduled not less than 15 days, nor more than 45 days of receipt of request for a hearing. The City Manager or his/her designee shall preside over the hearing. The City Manager or his/her designee shall impose the penalties, or penalties and suspend the permit only upon a finding that a violation has been proven by a preponderance of the evidence, and

that the penalty, or penalty and suspension are consistent with this chapter. The hearing shall be conducted according to the rules normally applicable to administrative hearings. A decision shall be rendered within 30 days of the hearing and the decision shall be appealable to the City Council if filed with the City Clerk no later than 15 days thereafter, pursuant to Chapter 1.12.⁵⁰

Comment: The Encinitas ordinance is a best practice example of an enforcement provision because it establishes a process for the investigation of complaints and the imposition of penalties for violation of the short-term rental ordinance.

Best Practice Example: City of Cannon Beach, Oregon. Section 17.77.050(B) of the Cannon Beach Zoning Code provides another example of the notice and public hearing process afforded to short-term rental property owners prior to the imposition of fines or the revocation of a permit.

5. The city shall provide the permit holder with a written notice of any violation of subsection (A)(4) of this section that has occurred. If applicable, a copy of the warning notice shall be sent to the local representative.
6. Pursuant to subsections (B)(4)(b) through (d) of this section, the city shall provide the permit holder with a written notice of the permit suspension and the reason for that suspension. The permit holder may appeal the suspension to the city council by filing a letter of appeal with the city manager within twenty days after the date of the mailing of the city manager's order to suspend the permit. The city manager's suspension shall be stayed until the appeal has been determined by the city council. The city council shall conduct a hearing on the appeal within sixty days of the date of the filing of the letter of appeal. At the appeal, the permit holder may present such evidence as may be relevant. At the conclusion of the hearing, based on the evidence it has received, the council may uphold, modify, or overturn the decision of the city manager to suspend the permit based on the evidence it received.
7. Pursuant to subsection (B)(4)(e) of this section, the city shall provide the permit holder with a written notice that it intends to revoke the permit and the reasons for the revocation. The city council shall hold a hearing on the proposed revocation of the permit. At the hearing, the permit holder may present such evidence as may be relevant. At the conclusion of the hearing, based on the evidence it has received, the council may determine not to revoke the permit, attach conditions to the permit, or revoke the permit.
8. A person who has had a transient rental occupancy permit or a vacation home rental permit revoked shall not be permitted to apply for either type of permit at a later date.⁵¹

Comment: The Cannon Beach ordinance is a best practice example of an enforcement provision because it establishes a process, including written notice to the property owner and a public hearing, before a permit may be suspended or revoked.

⁵⁰ City of Encinitas, CA Municipal Code § 9.38.060.

⁵¹ City of Cannon Beach, OR Zoning Code § 17.77.050(B)

10.7 Pursue Proactive Strategy: State Legislation to Require More Uniform, Fairer, and Market-Sensitive Regulations

Rather than taking a reactionary approach to proposed rental regulations, Realtors® should consider the proactive strategy of pursuing state legislation governing local rental regulations. As discussed in Section 8.1(c), the legislative approach has been used with some success in Florida, where in 2011 the state legislature enacted a law that specifically limited the authority of local governments to regulate or prohibit short-term rentals. Section 509.032(7) of the Florida Lodging Statute (entitled “Preemption Authority”) stated, in relevant part:

A local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.⁵²

However, in 2014 the Florida State Legislature amended Section 509.032(7) in a manner that expanded the authority of local governments to regulate vacation rentals.⁵³ Where the 2011 statute prohibited Florida municipalities from regulating vacation rentals “based solely on their classification, use, or occupancy, the 2014 amendment now only prohibits municipalities from regulating the “duration or frequency of vacation rentals.”⁵⁴

Although the 2014 amendment did expand the scope of local authority to regulate vacation rentals in Florida, it arguably represented a victory for property rights and vacation rental advocates. That is because the original version of the bill (Senate Bill 356)—which was supported by the Florida League of Cities—would have repealed the 2011 legislation, giving local governments far greater latitude in regulation vacation rentals, including the authority to ban short-term rentals altogether.⁵⁵ Proposed amendments to Senate Bill 356 that would have authorized local governments to impose minimum stay requirements on vacation rentals were also rejected by the legislature.⁵⁶

10.8 Bring Legal Challenges to Rental Regulations

As discussed in Section 8, rental regulations may be vulnerable to challenge on several grounds, including the authority of the local government to adopt the regulations and whether proper procedures were followed by the governing body. Other potential grounds for legal challenge include constitutional due process, equal protection, takings, and unreasonable search and seizure claims. Rental regulations may also be susceptible to challenge on statutory grounds, including the Fair Housing Amendments Act and state property rights statutes, such as Arizona’s Private

⁵² Fla. Stat. § 509.032(7)(b) (2011).

⁵³ See Ch. 2014-71, Laws of Florida.

⁵⁴ See Fla. Stat. § 509.032(7)(b), which states, in relevant part: “A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals.”

⁵⁵ See Florida Senate Bill 356 (2014) – “Filed” version (available online at <http://www.flsenate.gov/Session/Bill/2014/0356/?Tab=BillText>).

⁵⁶ See Florida Senate Bill 356 (2014) – “First Engrossed” and “Second Engrossed” versions (available online at <http://www.flsenate.gov/Session/Bill/2014/0356/?Tab=BillText>).

Property Rights Protection Act and Florida's Bert J. Harris, Jr. Private Property Rights Protection Act.

For Realtors® who are unsuccessful in their opposition to a proposed rental regulation, legal action can be an effective strategy for fighting the regulation after it has been adopted. A successful challenge could result in all or a portion of an ordinance being invalidated. A potential positive outcome could also be achieved through settlement. A local government that lacks the necessary resources or is simply loath to engage in a lengthy court may be motivated by the filing of a law suit to reconsider a challenged ordinance or possible amendments that could result in the case being settled without a trial.

APPENDIX A

LIST OF JURISDICTIONS CITED IN WHITE PAPER

City of Aliso Viejo, CA: 10.2(b)
City of Anaheim, CA: 3.2(b), 7.2
City of Arcadia, CA: 3.4(b)
City of Austin, TX: 3.1(b)
City of Bear Lake, CA: 3.1(d)
City of Bend, OR: 4.4
City of Big Bear Lake, CA: 10.6(e)
City of Boulder, CO: 2.4(b), 5.1, 6.6(b), 6.7
City of Boston, MA: 3.4(a)
City of Cannon Beach, OR: 3.3(b), 8.6(d), 10.6(e), 10.6(f)
City of Carmel-by-the-Sea, CA: 8.6(b), 8.6(b)
City of Cedar Falls, IA: 3.2(b), 3.3(j)
City of Charlotte, NC: 3.3(i)
City of Chicago, IL: 1.2, 3.3(o)
City of Clinton, MS: 3.1(a)(ii)
City of Elgin, IL: 3.3(f)
City of Encinitas, CA: 10.6(d), 10.6(f)
City of Evanston, IL: 8.3(b), 8.4(a)
City of Fairlawn, OH: 7.3
City of Frisco, TX: 3.1(a)(ii)
City of Galveston, TX: 3.3(k)
City of Gary, IN: 3.1(d), 3.1(e), 9.1
City of Hagerstown, NC: 3.3(n)
City of Islamorada, FL: 1.2
City of Isle of Palms, SC: 3.3(g), 3.6
City of Key West, FL: 1.2
City of La Crosse, WI: 3.2(b)
City of Lancaster, CA: 6.7
City of Las Vegas, NV: 3.3(l)
City of Lincoln City, OR: 3.3(o)
City of Los Angeles, CA: 3.1(a)(i), 6.1, 6.6(a), 9.5
City of Manhattan Beach, CA: 3.3(a)
City of Marathon, FL: 4.3
City of Marco Island, FL: 3.3(f), 3.3(g), 3.3(i), 3.6(a), 3.6(c)(ii), 5.3, 7.4
City of Mesa, AZ: 3.3(n)
City of Miami Beach, FL: 3.3(a), 8.4(b)
City of Milwaukee, WI: 6.7
City of Minneapolis, MN: 3.1(f), 3.6(c)(i), 4.1, 4.3, 9.1, 9.3
City of Myrtle Beach, SC: 6.3
City of Nashville, TN: 3.3(o)
City of New York, NY: 2.4(b)

City of New Braunfels, TX: 3.1(f), 3.3(g), 9.3
 City of New Orleans, LA: 6.2
 City of Newport Beach, CA: 3.3(b), 3.3(l), 6.5, 9.4
 City of Norfolk, AR: 8.6(c)
 City of Ocean City, MD: 7.5
 City of Palm Desert, CA: 10.2(b)
 City of Palm Springs, CA: 3.3(g), 10.6(d), 10.6(f)
 City of Portland, OR: 2.3, 3.3(o), 3.4(a), 7.1, 9.4
 City of Prior Lake, MN: 4.3
 City of Provo, UT: 3.3(l)
 City of Raleigh, NC: 3.6(a)
 City of Rolling Hills, CA: 10.2(b)
 City of Saint Paul, MN: 3.1(a)(i), 3.1(a)(ii)
 City of San Clemente, CA: 6.5, 9.4
 City of San Francisco, CA: 3.1(a)(i), 3.3(o), 4.3, 6.1, 9.4, 10.6(a), 10.6(d)
 City of San Jose, CA: 3.3(o)
 City of San Luis Obispo, CA: 10.4(a)(i)
 City of Santa Fe, NM: 3.3(d)(1), 3.3(g), 3.6, 4.1
 City of Santa Monica, CA: 3.3(a), 6.7, 7.1, 10.6(a)
 City of Seal Beach, CA: 10.2(b)
 City of Seattle, OR: 4.3
 City of Sedona, AZ: 8.6(f)
 City of South Lake Tahoe, CA: 3.3(c)
 City of Steubenville, OH: 3.3(k)
 City of Telluride, CO: 3.3(l)
 City of Venice, FL: 3.1(a)(i), 3.3(c), 8.4(b)
 City of Waconia, MN: 3.1(a)(ii)
 City of Washington, D.C.: 3.3(o)
 Commonwealth of Massachusetts: 3.1(b), 3.3(m), 6.5
 County of Buncombe County, NC: 3.1(c)
 County of Calaveras County, CA: 3.3(b)
 County of Clatsop County, OR: 10.6(a), 10.6(f)
 County of Coconino County, AZ: 3.3(g), 3.3(j), 4.5
 County of Douglas County, NV: 10.6(e), 10.6(f)
 County of Garrett County, MD: 3.3(f)
 County of Kauai County, HI: 1.2, 10.6(b)
 County of Maui County, HI: 1.2, 3.3(d)(1), 3.6(c)(ii), 6.2, 6.4
 County of Mendocino County, CA: 3.3(d)(2), 10.6(c)
 County of Monterey County, CA: 10.6(b), 10.6(f)
 County of Napa County, CA: 6.2
 County of Pima County, AZ: 3.1(b)
 County of San Luis Obispo County, CA: 3.3(e), 10.6(c)
 County of Sonoma County, CA: 1.2, 3.3(g), 3.3(h), 3.6, 3.6(c)(i), 4.1, 9.1, 10.2(b), 10.6(e)
 County of Tillamook County, OR: 3.3(f), 10.6(e)
 Island of Martha's Vineyard, MA: 6.5, 6.6(a)
 Region of Coachella Valley, CA: 6.3

State of Arizona: 8.5(c)(iii), 8.6(f), 10.2(a)
State of California: 3.3(o), 10.2(b)
State of Florida: 3.5, 6.2, 6.4, 8.5(c)(i), 8.5(c)(iii)
State of Illinois: 3.6(c)(ii)
State of Michigan: 8.4(b)
State of New York: 3.1(b), 5.2, 6.1, 6.5
State of Rhode Island: 3.1(b), 10.2(a)
State of Texas: 3.1(b), 3.3(m)
State of Washington: 3.5
Town of Breckenridge, CO: 6.6(a)
Town of Jamestown, NC: 2.4(c)
Town of Kure Beach, NC: 3.1(e), 5.4, 9.1
Village of Bal Harbour, FL: 8.4(a)
Village of Tiki Island, TX: 8.6(d)

APPENDIX B

INDEX OF KEY TERMS

(Section Number Indicates Where Term is Defined)

Affordable Housing: 2.3
Amortization: 3.3(b)
Bed and Breakfast: 2.2(e)
Bill of Rights: 8.5(b)
Casual Host: 6.1
Commercial Host: 6.1
Due Process: 8.4(c)(i)
Dwelling Unit: 1.2
Equal Protection: 8.5(b)(ii)
Fair Housing Act: 8.5(c)(ii)
Home Sharing: 9.5
Moratorium: 3.2(a)
Neighborhood Character: 3.1(a)
Neighborhood Conservation District: 3.3(k)
Nonconforming: 4.4
Nuisance: 3.6(a)
Online Hosting Platform: 9.4
Police Power: 8.3(a)
Public Nuisance: 3.6(a)
Rational Basis Test: 8.5(b)(ii)
Sharing Economy: 2.4(a)
Short-Term Rental Housing: 1.2
Supremacy Clause: 8.5(b)
Taking: 8.5(b)(iii)