TEXAS CITIES HAVE AMPLE LEGAL AUTHORITY TO ADDRESS THE PROBLEMS STRs CREATE

Over the past few years, short-term rentals (STRs) have invaded many residential neighborhoods across Texas – often in open defiance of longstanding zoning ordinances that forbade rentals of less than 30 days. By injecting into neighborhoods zoned as single-family residential a revolving door of transients with little or no incentive to be good neighbors to people they will never see again, STRs have inflicted enormous misery on many communities.

On December 26, 2019, the Wall Street Journal published a well-researched and document investigative piece that shone the national spotlight on the harms created by Airbnb, one of the largest purveyors of STRs. It was entitled, "Shooting, Sex Crime and Theft: Airbnb Takes Halting Steps to Protect Its Users." The problems so often associated with STRs have forced cities across the country, and in fact across the globe, to take regulatory measures to protect their citizens.

Here in Texas and elsewhere STR owners and front groups have made sweeping and unfounded assertions that municipalities are legally powerless to protects their citizens from the problems STRs frequently generate. They assert that they have an almost unbounded "property right" to use their property for short-term rentals regardless of what the zoning ordinances may say.

However, the prevailing and well-established legal principles, as articulated by the Texas Supreme Court, confirm that courts must give great deference to zoning ordinances and only block them if they are unreasonable or arbitrary. In a fairly recent case, the Texas Court of Appeals in Waco summarized the well-settled law with respect to zoning ordinances as established by the controlling case of City of Pharr v. Tippitt, a case decided by the Texas Supreme Court in 1981. In a case entitled City of Gatesville, Texas v. Hughes, handed down in 2011, the Waco Court of Appeals ruled:

"Zoning is an exercise of a municipality's legislative powers. If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power.

A zoning ordinance is presumed to be valid and the burden is on the one seeking to prevent its enforcement, whether generally or as to particular property, to prove that the ordinance is arbitrary or unreasonable in that it bears no substantial relationship to the health, safety, morals or general welfare of the community. An extraordinary burden rests on the party attacking the ordinance." (Citations to cases omitted.)

Given the massive record in the public domain documenting the serious problems STRs frequently create for neighborhoods -- shootings, rowdy party houses late at night, parking congestion, a lack of affordable housing, and most importantly a fundamental threat to the very residential character of the community -- actions by cities that are reasonable, targeted at protecting neighborhoods and reaffirm existing zoning ordinances should clearly satisfy the test of having a "substantial relationship" to the health, safety, morals and general welfare of the local community.

An even more recent case, Starbright Car Wash LLC v. City of Belton, decided on December 10, 2019 by the Texas Court of Appeals in Belton, held that under the legal principles of the City of Pharr case, a city could lawfully rezone even if doing so interfered with the owner's previously approved use of property. The Court said:

"As stated above, property owners do not acquire a constitutionally-protected vested right in zoning classifications once made. The City retains its legislative authority to re-zone at any time as the public necessity demands."

Accordingly, since a city is legally free to rezone property to preclude a use previously approved so that it can serve "the public necessity," then plainly a city is entitled to even greater latitude to adopt zoning laws regulating STRs that simply enforce zoning laws that have long been on the books.

In an effort to bully city officials, STR owners and front groups stridently proclaim that a decision by the Austin Court of Appeals in November 2019, in a case called Zaatari v. City of Austin, sounded the death knell across all of Texas for the power of cities to regulate STRs. It is true that in a 2 to 1 decision, with a strong dissent, the Austin Court of Appeals refused to uphold an Austin ordinance that would terminate over a period of years licenses to operate non-owner occupied STRs (called Type 2) that it had formerly explicitly issued. However, that decision is an outlier that obviously did not follow the legal standards established by the Texas Supreme Court in the City of Pharr case. Indeed, the Zaatari decision was unprecedented and ignored decades of law with respect to the validity of zoning ordinances.

In any event, the fact that even the Austin Court of Appeals itself regarded its decision in Zaatari as one limited to the particular facts of that case, brought by plaintiffs who had asserted property rights based on the licenses that had been previously issued, was highlighted in that Court's decision on April 29, 2020 in the case of Anding v. City of Austin. In that case, the Austin Court of Appeals upheld against constitutional challenges substantial fines that had been imposed on defendants for operating an STR without the required STR license. The Court made clear in Anding that its decision in Zaatari blocked the City of Austin from eliminating Type 2 STR licenses as of 2022 and enforcing certain occupancy and noise restrictions. (See footnotes 1 and 2.) To this day, while the City of Austin is not taking further action against preexisting Type 2 STR licenses because of the decision in Zaatari, it will not issue new ones.

Importantly, the Austin Court of Appeals is only one of 14 Courts of Appeals in Texas, and its decisions do not control in areas outside of its geographical jurisdiction. Thus, most of the State of Texas, including Dallas, is not subject to that Court's rulings. Further, it is of critical importance to note that the City of Arlington in April 2019 adopted an ordinance that reaffirmed and enforced a ban on all forms of STRs, including owner-occupied, in certain residential areas of the City, and that in October 2019, the trial court in Fort Worth rejected requests by STR owners and front groups to block the ordinance. The STR owners and front groups in February 2020 asked the Fort Worth Court of Appeals to overturn the decision of the trial court. As of January 1, 2021, the Fort Worth Court of Appeals had taken no such action.

In short, the claim by STR owners and front groups that Texas law forbids cities across the State from adopting reasonable zoning ordinances to address the real-life and severe misery that STRs often produce in residential neighborhoods is self-serving spin. Cities should, of course, hear out their residents on this issue and take appropriate measures to ensure that healthy residential neighborhoods are not turned into blighted zones populated by mini-hotels.

REMARKS OF DAVE SCHWARTE – FOR TXNEIGHBORHOODCOALITION.COM

Good morning. My name is Dave Schwarte. I'm a longtime resident of Arlington, Texas. I have been a practicing Texas attorney for over 40 years and was heavily engaged in regulatory matters and litigation for two major North Texas corporations. I am a founder of the TXneighborhoodcoalition, a grassroots coalition of neighborhoods whose mission is to protect the integrity of residential neighborhoods in the face of the invasion by short-term rentals.

I was actively involved in the successful effort here in Arlington to save our neighborhoods from being overrun by short-term rentals. The problems had become so severe by 2018 that voters descended on City Hall in droves demanding action. Thankfully the city stepped up and in April 2019 enacted ordinances that were a compromise, allowing STRs for the first time in much of the city, including the entertainment district, but maintaining the longstanding ban on rentals of less than 30 days in most single-family residential neighborhoods.

As expected, these ordinances were challenged in court by STR advocates. They filed suit in Fort Worth in October 2019. After a hearing, the STR owners' request for a temporary injunction was denied. The STR group appealed, but our ordinances remain fully in force today.

My purpose today is to assure you that, despite all of the fear, uncertainty, and doubt being spread by STR front groups, Dallas and other cities have substantial legal power under existing Texas law to address by way of zoning laws the many problems STRs create in residential areas.

As I think the City's legal counsel can confirm, Texas zoning law is controlled by a Texas Supreme Court decision in 1981 called City of Pharr v. Tippitt. In a nutshell, the law in Texas is that zoning ordinances are presumed to be valid. The burden is on the one seeking to prevent enforcement to prove that the zoning ordinance is "arbitrary or unreasonable" in that it bears "no substantial relationship to the health, safety, morals, or general welfare of the community." Courts have emphasized that "[a]n extraordinary burden rests on the party attacking the ordinance."

Given the massive record in the public domain documenting the serious misery STRs create in residential neighborhoods – problems my colleagues from our coalition have explained today -- zoning actions by cities they are reasonable, targeted at protecting neighborhoods, and supported by an appropriate administrative record, should clearly satisfy that test.

Anyone harboring any lingering doubts about the serious harm short term rentals cause in neighborhoods need only read the Airbnb filing of November 16, 2020 with the SEC as part of its going public process. As you likely know, untrue statements or material omissions in these SEC filings can result in substantial civil and even criminal penalties.

At page 45 of its SEC filing, Airbnb confessed outright to the problems STRs spawn. It said:

> "The actions of hosts, guests, and other third parties have resulted and can further result in fatalities, injuries, other bodily harm, fraud, invasion of privacy, property damage, discrimination, brand and reputational damage, which have created and could continue to create potential legal or other substantial liabilities for us. We do not verify the identity of all of our host and guests nor do we verify or screen third parties who may be present during a reservation made through our platform."

Of course, I've heard the hype that a 2019 decision by the Austin Court of Appeals in a case called Zaatari is the death knell for city efforts to ban or regulate short term rentals via zoning ordinances. That spin is simply not true. First, while the Austin Court of Appeals, in a 2 to 1 decision with a compelling dissent, did block parts of the Austin ordinance, the facts of that case were unique. The city of Austin had expressly licensed non owner occupied STRs (called Type 2) and then after a few years -- because of massive citizen outcry -- revoked those licenses with an expiration date of 2022. So, you had plaintiffs who argued that they had invested in reliance on the STR permits. That is not the case in most Texas cities and certainly not so in Dallas. In fact, my warning to you is that licensing short term rentals before you have adopted appropriate limitations, such as forbidding them in residential areas, is a trap. As the Zaatari case demonstrates, once you have issued those licenses you can expect the STR front groups to claim you can never end them.

You should also know that the effects of the Zaatari case are narrow. Today, Austin is not issuing any new Type 2 licenses. And in a later case called Anding, the very same Court of Appeals upheld a substantial fine for failure to obtain the required STR license. Finally, there are 14 courts of appeals in Texas, and the decisions of the Austin Court of Appeals are not binding outside its geographical area, and area that does not include Dallas.

In summary, the settled Texas case law give cities the right to enact reasonable zoning ordinances governing short-term rentals, and to block them STR operators would have to bear the heavy burden of proving the ordinance is arbitrary or unreasonable.