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LAND USE AND ZONING

Regulating and Prohibiting Short-Term Rentals

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When the home-sharing platform Airbnb announced last month that it had submitted a draft registration statement to the Securities and Exchange Commission relating to a proposed initial public offering of its common stock, a good deal of the commentary that followed focused on the impact of the COVID-19 pandemic on Airbnb's operations and profitability. What should not be overlooked, however, is the effect that state and local regulations limiting and even prohibiting short-term rentals have had—and continue to have—on Airbnb and similar home-sharing platforms, the customers who use these platforms to advertise short-term rentals (referred to as "hosts"), and the short-term rental industry in general. These rules include not only those in effect before the pandemic took hold, but many that have been enacted in the months since.

This column first discusses how several New York courts have ruled when facing challenges to the attempted regulation of short-term rentals. It then focuses on developments in New York City, including in the battle between Airbnb and the city itself.

The 'Webster' Case

Nearly a decade ago, in *Matter of DeVogelaere*, 87 A.D.3d 1407 (4th Dept. 2011), the Appellate Division, Fourth Department, issued a brief decision that illustrates the favorable view that courts typically have of short-term rental regulations.

> Whether Airbnb will be able to soften the blow that these rules impose on the company and its New York hosts remains to be seen.

Beginning in 2007, the owner of property located in a large lot single family residential district in the upstate town of Webster began to rent the property for periods ranging from one night to approximately three months. In 2010, the town amended its zoning ordinance to prohibit "[r]ental of a dwelling unit for a period of less than 28 continuous days."

The property owner went to court, seeking to overturn a decision by the town's code enforcement official that her use of the property for transient rentals was not permitted.

Supreme Court, Monroe County, dismissed the petition, and the property owner appealed to the Fourth Department.

The appellate court affirmed. It explained that a zoning board's interpretation of its zoning ordinance was entitled to "great deference" and that judicial review generally was limited to ascertaining whether its action was "illegal, arbitrary and capricious, or an abuse of discretion." The Fourth Department concluded that the town had "reasonably determined" that the property owner's serial rental of her property was prohibited under the zoning ordinance and that it did not constitute a legal nonconforming preexisting use. Accordingly, the property owner "had no right to continue such use."

The 'Taking' Case

Earlier this year, the Fourth Department rejected a constitutional challenge to a regulation governing short-

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term rentals in *Matter of Wallace v. Town of Grand Island*, 184 A.D.3d 1088 (4th Dept. 2020).

The case arose in 2012, when a property owner purchased a single-family residence located in the town of Grand Island for the purpose of renting it out on a short-term basis, that is, for periods of fewer than 30 days. The property owner never resided at the home.

In 2015, the town enacted a local law to prohibit short-term rentals in certain zoning districts, except where the owner also resided on the premises. The law contained a one-year amortization period that could be extended up to three times during which preexisting short-term rental properties could cease operation.

Following the enactment of the law, the property owner unsuccessfully applied for an extension of the amortization period and for a use variance permitting him to continue operating the property as a short-term rental. He subsequently went to court, seeking a declaration that the law was unconstitutional because it effected a regulatory taking of his property.

Supreme Court, Erie County, ruled in favor of the town, and the property owner appealed to the Fourth Department, which affirmed.

In its decision, the appellate court ruled that the law did not amount to a regulatory taking because it did not eliminate "all economically viable uses" of the property. The Fourth Department pointed out that the property owner had not established that the property was "not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use." Instead, the appellate court continued, the property owner's submissions showed a "mere diminution in the value of the property" that was "insufficient to demonstrate a [regulatory] taking."

The Fourth Department concluded that it was "immaterial" that the property owner could not use the property in the precise manner in which he intended because a property owner was "not constitutionally entitled to the most beneficial use" of his or her property.

Other Rulings

Certainly not all court challenges to local rules restricting short-term rentals have failed.

For example, in *Matter of Fruchter v. Zoning Board of Appeals of the Town of Hurley*, 133 A.D.3d 1174 (3d Dept. 2015), the Appellate Division, Third Department, reversed a decision by Supreme Court, Ulster County, that rejected a property owner's contention that a town code did not require a special use permit for the type of short-term rentals that he provided.

The Third Department observed that the town code did "not appear to have been updated to consider the ramifications from the emergence of the so-called 'sharing economy.'" It concluded that the property owner's actions did not fall within the activities requiring a special use permit by the town code and that the town code did not otherwise "expressly prohibit[ ] petitioner[ ] from renting [his] residence to vacationers[.]"

In another case decided on narrow grounds, *In re JNPJ Tenth Avenue, LLC v. Department of Buildings of City of New York*, 178 A.D.3d 636 (1st Dept. 2019), the Appellate Division, First Department, reversed a decision by Supreme Court, New York County, dismissing a property owner's challenge to a determination that it had violated New York City's administrative code by permitting a tenant's apartment to be used for "transient occupancy." The First Department concluded that the city had not demonstrated that the property owner "had either actual knowledge or the opportunity through reasonable diligence to acquire such knowledge" of the allegedly improper use.

Significantly, however, the First Department confirmed that, under the city's administrative code, "penalties may be imposed on building owners for their tenants' use of their apartments for transient occupancy" and that "an owner may be found to have permitted tenants to use their apartments for transient occupancy upon evidence that it either had knowledge of such transient occupancy or had the opportunity to acquire knowledge of the transient occupancy through the exercise of reasonable diligence."

The 'Airbnb' Action

Perhaps the most feverishly litigated case involving short-term rental regulations was brought in the U.S. District Court for the Southern District of New York by Airbnb against New York City. *Airbnb, Inc. v. City of New York*, 373 F.Supp.3d 467 (S.D.N.Y. 2019).

Airbnb (and a second home-sharing service, HomeAway.com, Inc.) challenged a city ordinance that would have required them to submit, on a monthly basis, a report of transactions for which they received fees. Each monthly transaction report had to include, for every short-term rental listed on their platforms, the short-term rental's physical

address as well as the host's full legal name, physical address, phone number, and email address, among many other things.

Airbnb sought to enjoin enforcement of the ordinance, arguing that it unconstitutionally compelled it to turn over information in which it had a protected Fourth Amendment interest without any opportunity for pre-compliance review before a neutral decision-maker. Airbnb moved for a preliminary injunction.

In a January 2019 ruling, the court granted the motion. It first found that the ordinance was subject to the Fourth Amendment because it put in place a "search and seizure" regime that implicated the protected privacy interests of the home-sharing services whose user records had to be produced monthly to the city.

Then, the court decided that the ordinance, involving what it characterized as a "breathtaking . . . governmental appropriation of private business records" that was "unsupported by individualized suspicion or any tailored justification" and that lacked "a mechanism for pre-compliance review," did not qualify as a reasonable search and seizure.

After finding that the other factors for preliminary injunctive relief were met, the court issued a preliminary injunction.

But that was not the end of the case.

The Settlement

This past June, Airbnb and the city settled the lawsuit.

Under the settlement, Airbnb and other short-term rental platforms will share information with the city on a quarterly basis. They will be required to include all listings that generate five or more nights of bookings per quarter, so long as a listing offers an entire home or allows three or more guests to stay at one time. Information will not have to be provided for private or shared room listings with a capacity of two or fewer guests, for listings rented for fewer than five nights per quarter, or for listings in qualifying traditional hospitality locations, based on a list the city will publish. *See* City of New York and Airbnb Reach Settlement Agreement (June 12, 2020), *available at* https://www1.nyc.gov/office-of-the-mayor/news/432-20/city-new-york-airbnb-reach-settlement-agreement.

Because it appears that the city won most of what it had sought under the ordinance that Airbnb challenged, one might wonder why Airbnb agreed to settle. The answer may relate to other short-term rental rules that the company is hoping to modify. In a statement to its New York City hosts, *available at* https://news.airbnb.com/a-message-to-our-new-york-city-hosts/, Airbnb explained that it believed that the settlement "will build the trust necessary to enact further reforms of New York State's short-term rentals regulations."

What could Airbnb have in mind? Undoubtedly it is concerned about a law enacted in 2010 by the New York State legislature prohibiting the rental of most apartments for a period of fewer than 30 days in "Class A" multiple dwellings—that is, buildings occupied for permanent residence purposes by three of more families living independently—unless a permanent resident remains on the premises. *See* N.Y. Multiple Dwelling Law § 4(8). The law's stated purpose is to regulate the adverse effects of short-term rentals in residential buildings, including "overcrowding of multiple dwelling rooms, inadequate provision for light and air, and insufficient protection against the defective provision for escape from fire, and improper sanitation of multiple dwellings."

New York State is not alone among jurisdictions in the United States (and, in fact, elsewhere around the world) that have sought to rein in Airbnb and similar short-term rental platforms. Indeed, New York City law itself prohibits the short-term rental of entire multiple dwelling units and one- and two-family units occupied for permanent residence purposes. *See* N.Y.C. Admin. Code §§28-210.3, 28-118.3.2, 27-2004, 27-265; N.Y.C. Building Code §§310.1.2, 310.2. *See, also,* New York City Emergency Executive Order No. 141 (Aug. 18, 2020), *available at* https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-141.pdf (imposing COVID-19-related requirements).

Conclusion

Whether Airbnb will be able to soften the blow that these rules impose on the company and its New York hosts remains to be seen. It has successfully negotiated separate arrangements with other governments and it is not out of the question that it will be able to do so with New York officials. But the possibility that it will fail should not be ignored.