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Short-term Rentals and Property Rights

In the 2017 legislative session, Texas lawmakers considered numerous bills aimed at limiting the ability of local governments to pass ordinances regulating private property. One of these bills addressed short-term rentals (STRs). According to the Texas Tribune, proponents of SB451 (the Senate bill addressing STRs), said that the bill “would protect homeowners from strict local laws that infringe on property rights while still allowing local regulations that limit or prohibit short-term rentals.”¹ The bill did not pass, and the issue will likely be resurrected in the 2019 legislative session.

Critics of the legislature contend that the state should not intervene in local affairs, that the citizens of a community should be allowed to enact the ordinances that they desire, even those that restrict the use of private property.

Unfortunately, the debate over STRs has not considered all of the alternatives for dealing with the issue. Until the alternatives are considered, the status quo will continue to violate property rights and any bill passed by the legislature is unlikely to truly protect property rights. Let us begin by looking at what STRs are.

What is a Short-term Rental?

While STRs have long existed, they became more popular with the advent of services such as Airbnb. Like Uber, Airbnb serves as a middleman between those who have an asset and those who want to make use of that asset. Uber connects car owners with those who need a ride. Airbnb connects property owners with those who want a place to stay for thirty days or less.

STRs take two basic forms. The first is owner-occupied properties. In this situation, the owner rents a spare bedroom, garage apartment, or portion of his house. The second form is a property which is not owner occupied and the entire property is rented to a short-term tenant.

Many property owners use STRs as a way to supplement their income, and in some instances, it can prevent financial disaster. Charlotte Jorgensen is an example. When her husband missed six months of work due to illness, STR income from a garage apartment helped them pay their mortgage. Jorgensen makes more from STRs than she did when the apartment was used as a long-term rental, a claim made by many STR owners.²

For property owners, the additional income is a strong motivation to enter the market. For many travelers, STRs offer an attractive alternative to hotels. The popularity of Airbnb is clear evidence that both owners and travelers find the service beneficial.

1. Alex Samuels, “Short-term rental measure likely dead after conference committee action,” The Texas Tribune, May 28, 2017, <https://www.texastribune.org/2017/05/28/short-term-rental-measure-likely-dead-after-conference-committee-actio/>, accessed January 23, 2018.

2. Paul Flahive, “Deadline Looms For Legislature's Ban on Airbnb Bans,” Texas Public Radio, May 15, 2017, <http://tpr.org/post/deadline-looms-legislatures-ban-airbnb-bans>, accessed January 23, 2018.

While owner-occupied STRs have their critics, they are not nearly as controversial as those that are not owner-occupied. But both have been the target of local ordinances directed at controlling and regulating short-term rentals.

The Critics of STRs

The critics of STRs can be loosely grouped into two camps: those that focus on cultural arguments and those that focus on economic arguments. The two camps share the same basic premises, and their arguments often overlap. Let us look at each in turn.

The cultural critics of STRs present two predominant arguments. The first argument claims that STRs are nothing more than “party houses.” Tenants allegedly use STRs to throw raucous parties, engage in illegal activities, and generally disrupt a neighborhood. While it would be naïve to claim that such things don’t happen, critics paint STRs with a broad brush and exaggerate the frequency of such occurrences. In briefs filed by the litigation center for the Texas Public Policy Foundation challenging Austin’s 2016 STR ordinance, it was noted that the city had issued no citations for violating noise, trash, or parking ordinances in the four years prior to passage of the ordinance.³ If “party houses” were a significant problem, why were no citations issued during this time?

Anti-SRT legislation treats all SRT owners and tenants as the same, regardless of their individual actions. One bad SRT tenant doesn’t mean that they are all bad; one bad SRT owner doesn’t mean that they are all bad. The critics of STRs want to treat the practice as inherently disruptive, regardless of what the owners or tenants actually do. And that is the essence of the second argument offered by the cultural critics of short-term rentals.

Unlike long-term rental tenants, the tenants of STRs are transient. They may be around for a weekend or a few weeks, but they don’t build the neighborly ties that require time to develop. And many dislike STRs for this reason. For example, the president of one neighborhood association in San Antonio told Texas Public Radio that STRs change the “the residential or neighborhood character of the community.” He added that, “I think generally these issues is generally better dealt with at the local level.”⁴

In other words, some people don’t like the fact that the character of their neighborhood might change because of STRs. And they believe a neighborhood or community should be permitted to do just about anything it desires to protect the community’s character (including preservation and tree ordinances). Individual property owners should be compelled to abide by the decisions of the community, regardless of the owner’s own desires or judgment. This is collectivism.

Collectivism holds that individuals are subordinate to the group, such as the neighborhood, the community, the tribe, or the nation. Collectivism holds that individuals must sacrifice their self-interest to the “public interest.” According to collectivism, the individual should not be free to act as he chooses, but only as the group permits. The economic arguments against STRs embrace the same premise.

Economic critics claim that STRs turn residential properties into commercial enterprises and should be banned from residential areas. But a long-term rental property is just as much a commercial enterprise. Whether a property is used for short-term or long-term rental, the owner is receiving money for the use of his property. The amount of time involved is irrelevant. If the critics of STRs were consistent, they would call for broader violations of property rights—a complete ban

3. Chance Wheldon, “Short-term rental owners win again in Texas Courts,” TribTalk, September 22, 2017, <https://www.tribtalk.org/2017/09/22/short-term-rental-owners-win-again-in-texas-courts/>, accessed January 24, 2018.

4. Flahive.

on all rental properties in residential neighborhoods. The fact that they aren't doing that is revealing. They aren't opposed to commercial activities in residential areas. They are opposed to commercial activities that they don't like. And when they don't like something, they believe that the individual property owner should be subordinate to what the community likes.

A second economic argument claims that STRs drive up the cost of housing by removing long-term rentals from the market and driving up the cost of those remaining on the market. In 2014, National Public Radio reported that short-term rentals were being blamed for San Francisco's outrageously high housing costs. Ted Gullicksen of the San Francisco Tenants Union said, "The underlying problem in San Francisco is the conversion of rent-controlled apartments to other uses, be they condo or tourist, which is taking sorely needed rent-controlled units off the market."⁵

The critics conveniently ignore the fact that San Francisco had a housing problem long before Airbnb existed. Further, the critics conveniently ignore the fact that rent control and other rights-violating regulations make it increasingly difficult, and sometimes impossible, to provide affordable housing. When an owner has the option of transforming a property from being marginally profitable because of rent control, zoning, preservation, and other land-use regulations to being modestly profitable as an STR, the rational decision is to opt for higher profits.

Restrictions and bans on short-term rentals are simply another form of land-use regulation. In short, the proposed solution to the problems caused by previous government intervention is more government intervention.

A third economic argument is that STR owners are evading hotel and occupancy taxes, and thereby depriving communities of badly needed revenues. At least one city—Fort Worth—has attempted to overcome this by requiring STR owners to get a bed and breakfast license.

But this argument is déjà vu all over again. The same basic argument has been used against Uber. When Uber enters a new market, the incumbents—existing taxi companies—cry foul. Uber, they whine, isn't subjected to the same regulations, fees, and taxes as they are, and therefore has an unfair competitive advantage. On the surface, this might seem like a legitimate complaint. But let's go below the surface.

If existing companies are subject to a plethora of regulations, fees, and taxes, shouldn't they object to this extortion? Shouldn't they be demanding more freedom, rather than demanding more shackles be placed on Uber and Airbnb? Shouldn't they demand a truly free market in which each business competes on the merits of its products and services, rather than rely on political pull to restrict competition? Instead, they are resorting to the Tanya Harding approach to "competition"—bashing a superior competitor so that they can't compete.

In truth, the incumbents are relying on cronyism in an attempt to arbitrarily restrict entry into a market. Taxi companies do it with Uber and the hotel industry does it with Airbnb. The incumbents use their political connections to lobby regulations that make it harder for new competitors to enter the market. But while cronyism might grease the political wheels, many property owners are having none of it.

Rejecting Cronyist Regulations

While local ordinances restrict, and in some cases prohibit, STRs, many property owners are simply defying the law and challenging government officials to catch them. In 2016, *Texas Monthly* reported that

5. Ben Trefney, "Critics Blame Airbnb For San Francisco's Housing Problems," National Public Radio, August 11, 2014, <https://www.npr.org/2014/08/11/338830807/crcriti-blame-airbnb-for-san-francisco-s-housing-problems>, accessed January 29, 2018.

there's no real correlation between the regulations imposed by cities on short-term rentals and the availability of those rentals themselves. People seem content to engage in a form of self-interested civil disobedience when it comes to disregarding laws that they don't like—and companies like Airbnb are happy to help them do it....

Yeah, it's mostly illegal to list your property on Airbnb in Fort Worth, but nobody is actually paying attention, and the city can scarcely afford to devote the resources it would need to enforce the law more stringently.⁶

In other words, while cities are trying to stop STRs, property owners aren't cooperating. They are using their property as they think best.

While the Texas Institute for Property Rights does not advocate breaking the law, it is easy to understand why some property owners are doing so. If they are faced with the choice of breaking the law or losing their home, many are choosing the former. But even if an owner isn't facing such a dire choice, a moral principle is involved. He has a moral right to use his property as he deems best. He has a moral right to create and trade values.

Property rights protect our freedom to create, use, keep, trade, and dispose of values. In the case of STRs, property owners desire to use their property to earn some extra money. Yet, the law prohibits them from voluntarily trading with willing and consensual individuals.

Government officials, along with busy-body neighbors, want us to believe that they represent the "public interest." And they want us to believe that banning or severely restricting STRs serves the collective—"the public."

But STR owners and their tenants are just as much a part of the public as anyone else. In the end, those who want to ban STRs want their interests to supersede the interests of others. And they want to use government force to impose their interests on everyone else. This is the inevitable result when collectivism predominates.

If some members of the public believe that their interests are served by offering their home as an STR, they have a moral right to do so. If other members of the public want to rent that home, they have a moral right to do so. If the tenants use that property to create a nuisance or disrupt a neighborhood, then the police should deal with that disruption. But STRs should not be banned because of a few bad players. Existing nuisance laws already address raucous parties and disrupting a neighborhood, whether the disruption occurs at an STR, a long-term rental, or an owner-occupied home. Banning short-term rentals is pre-emptive; it treats property owners as guilty prior to the occurrence of any rights-violating activity.

To be clear, the mere fact that some individuals engage in some activity does not mean that it should be legal. Some individuals commit murder, burglarize homes, or drive while intoxicated. These are crimes because they initiate force (or pose an objective threat) against others, and thereby violate the rights of others. Short-term rental owners do not initiate force, and therefore do not violate anyone's rights. Restrictions on the use of one's property do initiate force. In short, the argument to protect property rights is moral in nature. Banning, or even restricting, STRs is immoral.

Ironically, the advocates of ordinances banning or restricting STRs argue for local control. But what is more local than the individual property owner? If city officials claim to know what is best for

6. Dan Solomon, "What Do All The Regulations Facing Airbnb And Homeaway Really Mean?" Texas Monthly, March 28, 2016, <https://www.texasmonthly.com/the-daily-post/texas-cities-regulate-services-like-airbnb/>, accessed January 24, 2018.

a community, then doesn't the property owner know what is best for his property? In truth, those who favor banning or severely restricting short-term rentals don't want local control. They want a community based tyranny.

State Intervention

The state has a legitimate and proper reason to intervene in this controversy. The proper purpose of government, indeed the only purpose of government, is the protection of individual rights, including property rights. Just as the federal government should intervene when state governments violate individual rights, the state government should intervene when local governments violate individual rights. To refuse to do so is to allow local governments tyrannical control over residents and a usurpation of the state government's responsibility.

But the state should not replace local regulations with state-wide regulations. It should simply protect individual rights, including property rights.

Consider slavery as an example. The federal government did not declare some forms of slavery acceptable and other forms unacceptable. It did not say that one could own slaves if he treated them well. It did not say that an individual could hold another person as a slave four days of the week, but the slave must be free the other three days of the week. The federal government banned slavery in any form and under any conditions.

Similarly, the state should not pretend that some violations of property rights are acceptable, so long as they don't go "too far." The state should not prohibit local governments from banning STRs (or any voluntary interaction between consenting adults), but allow local governments to regulate them out of existence through licensing, taxes, and fees. The state should simply protect the freedom of individuals to act on their own judgment and engage in the economic trades that they believe will improve their lives.

SB451 (the bill addressing local regulation of STRs) was introduced as a bill to protect property rights. The bill stated that "a municipality may not adopt or enforce a local law that restricts the use of or otherwise regulates a short-term rental based on the property's classification, use, or homestead status."⁷ However, local governments would be allowed to pass regulations controlling:

1. zoning in accordance with the laws of this state;
2. residential use;
3. occupancy limitations;
4. noise
5. property maintenance; and
6. nuisance.⁸

In other words, the bill would have prohibited local governments from explicitly targeting STRs. But it would have allowed them to pass ordinances that would only apply to STRs and essentially legislate short-term rentals out of existence through zoning, occupancy limitations, or property maintenance requirements.

A bill that prohibits some violations of property rights, while allowing others to remain does not protect property rights. It might reduce the damage and destruction, but we should not pretend that it protects property rights.

7. "Texas Senate Bill 451," LegiScan, <https://legiscan.com/TX/text/SB451/2017>, accessed January 29, 2018.

8. Ibid.

Unfortunately, even some owners are calling for state regulation. They believe that they are faced with the choice of draconian city regulations or more benign state regulations. But no regulation is benign to its victims.

If the owners of STRs and their defenders in the legislature want to protect property rights, then there is only one way to do it—on principle.

The Principles of Property Rights

The right to property means the freedom to create, use, keep, trade, and dispose of values. A property owner has a right to use his property as he chooses, so long as he does not violate the freedom of other others to use their property as they choose. Property rights, like all rights, pertain to action. Rights protect our freedom to act as we think best for our lives. And that includes using our property as we think best.

Owning a gun does not violate anyone's rights. Waving it in your neighbor's face does. Using one's property as an STR does not violate anyone's rights. Hosting a loud party late at night that keeps the neighbors awake does, and this is true whether the host is the property's owner or a short-term tenant.

It is important to understand that property rights do not give the owner carte blanche to do anything he chooses. As noted, he cannot use his property in a way that violates the rights of others. Throwing a loud party late into the night is one example. Violating the deed restrictions of a homeowner's association (HOA) is another.

Many Texas neighborhoods are subject to HOA deed restrictions (or covenants). These are contractual agreements between property owners that stipulate certain requirements or restrictions on the use of property. But unlike regulations, deed restrictions respect property rights.

Deed restrictions are voluntary; regulations are coercive. Deed restrictions allow a property owner to act on his own judgment. If he finds the covenants too restrictive, he doesn't have to purchase the property. In contrast, regulations are imposed upon him, regardless of his own desires or judgment and often after he has purchased the property.

If deed restrictions in a neighborhood prohibits STRs, then a property owner must honor that prohibition. To do otherwise is to break his contract with his neighbors, and thereby violate their property rights.

It is understandable that individuals might be upset when the character of their neighborhood changes. Many buy a home in a particular neighborhood because of its character. But change is an inevitable part of life. If an individual wants to resist change, he has a right to do so. However, he has no right to use the coercive power of government to prevent others from embracing change and acting accordingly.

If we want the freedom to live as we choose, to use our property as we think best, then we must respect and defend the freedom of others to do the same, even if we disagree with their choices. Individual rights do more than protect what is popular. They protect the freedom of individuals to engage in actions that are unpopular. And that includes using one's property as an STR.

The Choice Facing STR Owners

Many owners in Texas have made the choice to use their property for short-term rentals, often in defiance of local ordinances. They should not choose between peacefully using their property to enhance their lives and violating the law.

The choice facing STR owners is not local regulations or state regulations. The choice facing STR owners is regulations or property rights. The two cannot co-exist. Regulations, no matter their source, restrict the right to property.

Property rights, like all rights, are not conditional on the approval or permission of others. They protect our freedom to act independently—on the basis of our own judgment—to create, attain, use, and trade values. Any restriction on that freedom diminishes our ability to flourish. And this is true whether the restriction is enacted in city hall, Austin, or Washington.

Short-term rentals have enhanced the lives of many property owners. Some have used the additional income to make purchases that would have otherwise been unaffordable. Some have used the income to avert financial disaster. But no matter how the income is used, each individual has a moral right to use his property as he believes best. If STR owners want the freedom to use their property to enhance their lives, this is the principle that they must defend.

The Choice Facing the Legislature

The Texas legislature has expressed a desire to protect property rights. But its efforts have been inconsistent. And a primary reason is the absence of a principled statement regarding the meaning of property rights.

To defend a principle, one must begin by clearly understanding and stating that principle. And one must do so without equivocation or apology.

Property rights is an abstract concept. Yet, it has very real implications and applications to every Texan. Property rights not only protect what we have, but our freedom to create, attain, and use values in the future. They are important for today. They are equally important for tomorrow.

In 2019, the Texas legislature will have a choice. It can defend property rights with platitudes and bromides. Or, it can defend property rights on principle.

Property rights are a primary enabler of individual flourishing. Property rights protect our freedom to attain and use the values that enhance our lives. By defending property rights on principle, the legislature will do more than protect the freedom of Texans to flourish. They will demonstrate how to make America great again.

The Texas Institute for Property Rights provides analysis, training, and resources for legislators, businesses, organizations, and property owners.

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