

Banning short-term rentals.

There are several options for municipalities to deal with short-term rentals. A municipality can (1) ban short-term rentals; (2) pass a zoning ordinance to regulate them; (3) pass a town-wide regulation to regulate them; or (4) do nothing. I will briefly discuss the option of banning short-term rentals. The neighboring town of Noank in Groton has banned short-term rentals. Consequently, we know that it can be done, and some towns have actually have done it. This discussion is not an exhaustive argument in favor of banning short-term rentals; if it was then it would take the whole meeting. Therefore, I am going to focus on one main issue – the issue of the constitutionality of banning short-term rentals; and one minor issue, a particular East Lyme Zoning Ordinance, which might impact this issue as it currently exists.

1. Zoning laws vs. the constitutional rights of property owners

Banning short-term rentals is an option for a municipality which wants to proactively preserve the character of a town.¹ Zoning is a tool with which to accomplish this goal. The purpose of zoning laws is to restrict certain classes of buildings and uses to certain localities within the community,² and stabilizing property uses.³ Zoning divides a community into geographical zones, such as residential, business and industrial, to ensure that the uses on the individual properties within the zones are compatible with each other.⁴

Zoning power is a fundamental authority used by modern cities to structure their development and is considered a legitimate exercise of the state's police power unless the zoning ordinance is arbitrary or unreasonable and without a substantial relation to the public health, safety, morals, or general welfare.⁵ It is the policy of the law not to uphold restrictions upon the free and unrestricted alienation of property unless they serve a legal and useful purpose.⁶ Many short-term rentals are done in single-family residences. Our courts have held that owners of a single-family residence can do one of three economically productive things with their residence: (1) live in it; (2) rent it; or (3) sell it. Short-term rentals

¹ There is strong Supreme Court precedent favoring the municipality's capacity to preserve neighborhood character. This ideal encompasses things such as aesthetics and prevention of nuisances so that "family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Cory Scanlon, Comment, Re-zoning the Sharing Economy: Municipal Authority to Regulate Short-Term Rentals of Real Property, 70 SMU L. REV. 563 (2017). <https://scholar.smu.edu/smulr/vol70/iss2/11> Citing 204. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

² 12 Havemeyer Place Co. v. Gordon, 76 Conn. App. 377 citing *Weyls v. Zoning Board of Appeals*, 161 Conn. 516, 519, 290 A.2d 350 (1971).

³ *Abbadessa v. Board of Zoning Appeals*, 134 Conn. 28, 34, 54 A.2d 675;

⁴ 12 Havemeyer Place Co. v. Gordon, 76 Conn. App. 377 citing *SSM Associates Ltd. Partnership v. Plan & Zoning Commission*, 15 Conn. App. 561, 566 n.4, 545 A.2d 602 (1988), aff'd, 211 Conn. 331, 559 A.2d 196 (1989).

⁵ Cory Scanlon, Comment, Re-zoning the Sharing Economy: Municipal Authority to Regulate Short-Term Rentals of Real Property, 70 SMU L. REV. 563 (2017) <https://scholar.smu.edu/smulr/vol70/iss2/11> citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

⁶ *Peiter v. Degenring*, 136 Conn. 331, 336, 71 A.2d 87 (1949).

invoke the right to rent the property. Therefore, the question for us is whether a homeowner has a constitutionally protected right to rent their property on a weekly or daily basis, or even on an hourly basis if we wish to slide down the slippery slope.

Since the highest and best use of any particular parcel is not a controlling purpose of zoning, nor is the maximum possible enrichment of a particular landowner,⁷ then it appears that a municipality could conceivably withstand a constitutional challenge by a short-term rental owner. Many of the short-term rental owners who spoke at our public hearings argued that they could only afford their homes if they could collect the higher rents produced by short-term renting. However, arguably, the bundle of rights a property owner has may not constitutionally include short-term rentals; as long as a property owner still has the right to rent their property for long-term, then banning short-term rentals may be a valid option.

The U.S. Constitution provides protection for private property owners when the government intervenes through official regulations restricting an owner's rights in land or housing. When the government acts through regulatory intervention that restricts the private use of land and housing, the property rights of affected owners are protected under the Fourteenth Amendment and the Takings Clause of the Fifth Amendment of the U.S. Constitution. However, as with most if not all constitutional rights, the right of a property owner to rent their single-family property on a weekly or daily basis, is not absolute.

Zoning, urban planning, public design controls, and other forms of government intervention by regulation will not be held confiscatory simply because regulation prohibits the owner from making the most profitable use of the property or results in a substantial diminution in market value of the land. Therefore, banning short-term rentals is a viable option. It might not be the best option, or the least controversial option, or produce the least amount of litigation, but it is a viable option.

2. Banning short-term rentals based upon East Lyme zoning ordinance against certain “home occupations”.

East Lyme Zoning Ordinance 20.3 defines “HOME OCCUPATION, SERVICE OR PROFESSION” as “*including, but is not limited to, the office, studio or workshop of an architect, artist, dentist, dressmaker, economist, engineer, insurance agent, lawyer, milliner, musician, photographer, physician, psychologist, real estate broker, serviceman or a dwelling used for laundering, preserving and cooking. Such uses as restaurants, tearooms, funeral homes, barbershops, beauty parlors, tourist homes and animal hospitals shall not be deemed to be a home occupation, service or profession.*” (**emphasis added**)

The term “tourist home” is not defined in the East Lyme Zoning Ordinances. However, the term “tourist home” could present a problem for the continued operation of short-term

⁷ 12 Havemeyer Place Co. v. Gordon, 76 Conn. App. 377 citing *State National Bank v. Planning & Zoning Commission*, 156 Conn. 99, 101, 102, 239 A.2d 528;

rentals in a single-family residence, and it could be a basis upon which to support a ban of short-term rentals. A “tourist home” was a term that was used more frequently during the early part of the twentieth century to refer to privately owned homes wherein the homeowner would open their home as a place to stay for travelers. They seemed to go out of fashion with the proliferation of highways, which then spurred the growth of motels and hotels.

The advent of Airbnb suggests that transient lodging is coming full circle from lodging travelers in private homes in the early history of our country, to the rise of motels and hotels, and now the return of private homes as lodging which thereby infringes upon the domain of the hospitality industry. However, the continued exclusion of “tourist homes” from allowable “home occupations” in East Lyme’s Zoning Ordinances seems to be an example that all things old become new again. Apparently, the original drafters of the East Lyme Zoning Ordinances saw something in a “tourist home” that they did not believe should be allowed in a home as a home occupation.

This zoning ordinance may be considered language already existing in the town’s zoning ordinances, which expressly prohibits short-term rentals.