



TOWN OF
BRECKENRIDGE

Short Term Rentals

The Tools We Use that Shape Our Communities



Keely Ambrose
Breckenridge Town Attorney



Who is Your Community?

- Residents
 - Full time
 - Part time
- Property Owners
- Voters
- Visitors
- Business Owners
- Employees

What Really Is a Short Term Rental?



- Technically, most codes define it as “rentals of less than 30 days” or similar
- Practically and most commonly, it is the act of renting out a residential unit as commercial lodging for anywhere between a single night and a week
 - Within the Town of Breckenridge, 74% of stays are between 1-7 nights
 - Different communities will have different percentages based on the reasons people go there
- What we think of as the classic short term rental today started out as a “home-sharing” model, where the homeowner continued to live in the house while renting out a room
 - VRBO started in 1995
 - Airbnb started in 2008
- Has morphed into a business model as a hotel alternative



TOWN OF
BRECKENRIDGE

STRs in your Community



- Hotel alternative
 - Provides a different experience
 - Can be better for families/large groups
- Economic benefits
 - Expand/diversify bed/visitor base
 - Add jobs
 - Can increase home values
- Can be located anywhere
 - Residential neighborhoods
 - Condo complexes
 - Timeshares/mixed use/condo-tel



TOWN OF
BRECKENRIDGE

So Why are We Regulating?



- Many of the benefits have a corresponding impact
- Impacts – Direct
 - Parking
 - Noise
 - Trash
 - Water/Sewer Use
 - Fire
 - Public Health – spas and pools



TOWN OF
BRECKENRIDGE

Indirect Impacts



- Traffic
- EMS
- Roads and Infrastructure
- Taxes
- Housing
 - Increasing home values may affect the ability of your residents to afford to live in their community
 - Increased employees from STRs may further create pressure on the existing housing stock

POLL



- How many communities here have short term rentals?
- How many communities regulate short term rentals?
- For those that regulate short term rentals, what would you say about the success of your regulations in addressing the issues you set out to address?
 - Successful
 - Not successful
 - Too soon to tell
- What is your biggest concern with regulating short term rentals?
 - Litigation
 - Negatively affecting property values/interfering with the “free market”
 - Inability to or difficulty enforcing
 - Difficulty in measuring success



TOWN OF
BRECKENRIDGE



Regulatory Tools

- Health and Safety Regulations
 - Noise
 - Trash
 - Parking
 - Property Manager/Response Requirements
 - Occupancy
- Licensing – can create different license types
- Monitoring software
- Zoning/Creation of Districts or Zones
- Caps
 - Caps on number of licenses in a given area
 - Limitations on number of nights/bookings
- Limits on transferability
- Impact and Lodging Fees

Developing your Regulations



- Clearly define your goals
- Utilize studies and empirical evidence
 - Nexus studies for fees
 - Survey data and online metrics to evaluate caps
- Consider enforceability and your existing enforcement practices while drafting regulations
- Listen to constituents and create active opportunities for feedback and input
- Be cautious about distinguishing between residents and non-residents

- Don't get bothered or distracted by the noise – keep your goals at the forefront!



Drawbacks to Regulation

- Expense
 - More staff time needed to enforce your regulations
 - Software for monitoring
 - Heavy legal involvement – may need outside help
- Local/Resident/Owner pushback
 - If STRs are a hot button issue in your community, be prepared
 - STRs have very invested stakeholders
 - Homeowners
 - Property Managers
 - Realtors
 - Sometimes middle ground is difficult to find
- Litigation



TOWN OF
BRECKENRIDGE

What Happens if you Get Sued?



- Don't Panic!
- Robust legal protections for actions taken by local government
- Legislative actions generally receive significant deference
 - Constitutional claims – usually a rational basis review
 - State claims – deference given to local government's interpretation of code
- Discovery for challenges related to legislative action can be substantial – prep early if you have indications there will be litigation



TOWN OF
BRECKENRIDGE



- Filed in Federal District Court – all federal claims dismissed
- Equal protection -14th amendment
 - Creation of different zones for different areas is arbitrary – court said no, under a rational basis review, zoning is a legitimate police power of local government, deference is given to local government decisions about how to regulate local issues
 - Local ordinance upheld if there is “any reasonably conceivable state of facts that could provide a rational basis” for the regulation
 - *Colorado Manufactured Hous. Ass’n v. City of Salida*, 977 F.Supp. 1080 (D. Colo. 1997)
 - *Grigsby v. Estes Park*, 23-CV-1349-DDD-SBP (D. Colo. Feb 6. 2024)
 - Licensing requirements for different types of licenses – abandoned argument, focus on retirees that isn’t really relevant; good dicta about not reading requirements into ordinance
- Dormant Commerce Clause
 - License caps and “local license” requirement burden interstate commerce
 - Four factor analysis – nature of local benefits, the burden imposed on interstate commerce, is the burden clearly excessive in relation to the local benefits, can the local interest be promoted
 - *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022) – the City’s residency requirement for STRs discriminated against out of state property owners from “participating altogether” in the market for STRs
 - *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019) – upheld City’s STR regulation requiring someone to live on the property full time, it didn’t have to be the property owner, ordinance did not “obviously advantage” City residents at expense of out of state property owners
 - County Regulation allowed a renter to be the basis for the “local license” exception to the caps





Ruelle case Cont'd

- Substantive Due Process (14th Amendment)
 - Deprivation of property without due process – in this case to use and lease property
 - 10th Circuit rule is that for legislative action, the standard is whether the government's action infringed on a fundamental right – *Halley v. Huckaby*, 902 F.3d 1136 (10th Cir. 2018)
 - Fundamental Rights Analysis
 - What is a fundamental right? When the courts (SC or 10th Cir) have already determined that a fundamental right exists or the right is one that is objectively among those deeply rooted in the history and tradition of the nation or so implicit in the concept of ordered liberty as to be fundamental
 - Has the claimed right been infringed through total prohibition or direct and substantial interference?
 - Is the government action interfering with the right narrowly tailored to achieve a compelling government purpose
 - The right to rent one's property has not been established as a fundamental right
 - Plaintiff's conceded they do not have a fundamental right to an STR license
 - Rational basis therefore applies and Court had already found that there was sufficient rational basis for the regulation in ordinance language
- State Law Claims
 - Improper termination of a non-conforming use argument is only one that remained
 - Plaintiffs re-filed in state court alleging similar constitutional arguments under state law as well as additional takings, illegal rent control, and non-conforming use arguments
 - Currently pending motion to dismiss



TOWN OF
BRECKENRIDGE

Colorado Property Owners for Property Rights v. Town of Breckenridge



- Filed in State District Court and removed to Federal – all federal claims dismissed
- Equal Protection
 - Intermediate scrutiny should be applied because an “important right” is implicated – court said no
 - Cited *Ruelle* case regarding the lack of suspect classifications in this type of case
 - Right to dispose of one’s property in any way they wish or the right to use property for commercial and residential purposes are not fundamental interests entitled to higher scrutiny. *Lehman v. City of Louisville*, 967 F.2d 1474, 1476 (10th Cir. 1992); *W. Income Props. Inc. v. City & Cty. Of Denver*, 485 P.2d 120 (Colo. 1971)
 - Ordinance can’t survive rational basis scrutiny because they discriminate based on arbitrary zone designations
 - Court rejected this argument, reinforced the long-standing legal presumption that the legislative decisions of an elected body come with a strong presumption of validity and challengers have the burden of showing there is no conceivable basis for the statutory classification. *F.C.C. v Beach Commc’ns, Inc.* 508 U.S. 307, 314-15 (1993)
 - Doesn’t have to be the *best* way to address the problem



TOWN OF
BRECKENRIDGE

CPOPR case Cont'd



- Substantive Due Process
 - Dismissed on same basis as equal protection claim
- Dormant Commerce Clause
 - Can't cause disparate impact between in and out of state economic interests
 - Court found no explicit terms on the face of the ordinance that apply differently to in or out of state interests
 - Court also found that the benefits potentially derived by those occupying long-term rentals could not form the basis for a dormant commerce clause claim
 - *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) – just because a statute may apply most often to out of state entities does not mean it is discriminatory for dormant commerce clause purposes
- State Law Claim – Rent Control
 - Remanded and dismissed by agreement of the parties



TOWN OF
BRECKENRIDGE

Regulatory Tips and Tricks



- Keep it simple (if you can!)
- Take enough time to get it right – utilize a moratorium if you need it
- Affirmatively require licensing and make property owner responsible
- Consider how and when you impose penalties and fines
 - Admin fines and penalties are better for the owner
 - Citations into municipal court are better for on-the-spot enforcement
- Don't forget the dormant commerce clause lessons of the *Santa Monica* and *New Orleans* cases
- Require listing platforms to remove noncompliant properties*
- Importance of ordinance language – robust and comprehensive findings
- Statistics are important both before, during, and after the passage of your STR ordinance – don't stop collecting data



TOWN OF
BRECKENRIDGE

A Final Note on Regulation



You hear a lot about interference in the marketplace...



The End



QUESTIONS?



TOWN OF
BRECKENRIDGE

Thank you for attending!

- Please don't forget to rate this session in the CML conference app.
- In the app, navigate to this session and click on SURVEY.
- Each time you evaluate a session, you are entered into a drawing to win a 2-night stay in a Junior Suite at Hotel Alpenrock.
- We appreciate your feedback!

