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A New Federal Ruling Outlines Limits to Short Term Rental Regulation.

A new ruling out of the Fifth Circuit is likely to have significant impacts on the ways that municipalities may regulate short term rental properties ("STR's"). In *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022), the court reviewed a New Orleans ordinance which limited the right to use a residence as an STR to only people whose primary residence was in New Orleans.

In its holding, the court made two noteworthy determinations. First, it ruled that the City of New Orleans's regulation of STR's was not a "Taking", and therefore New Orleans was not required to provide compensation to people who alleged their property value was decreased by the ordinance. Second, the court determined that the ordinance violated the Commerce Clause because it discriminated against people who were not residents of the state of Louisiana.

This is one of the first substantial federal holdings related to STR ordinances, and while its application is technically limited to the Fifth Circuit, it still provides insight into what other rulings on this issue are likely to look like.

On the one hand, in determining that the ordinance was not a "Taking", the court gave the green light to some level of STR regulation by municipalities. In its ruling, the court determined that, at least based on the New Orleans licensing scheme, the ability to use a residence as an STR was a privilege, not a right. Further, the court was sympathetic to the impact that STR's can have on the full-time residents of a neighborhood and a city's cost of living, and generally agreed that keeping these negative aspects of STR's in check was a reasonable goal of a municipality's government. On the other hand, a municipality cannot restrict interstate commerce unless no more reasonable means of regulation are available. In this case, there were other means to address STR's that were not as sweeping as a blanket ban on non-resident ownership. In other words, while municipalities may regulate STR's, such regulations must be carefully considered and not overreach the municipality's authority.

To understand the potential impact of this ruling, it is useful to look at the effect it has already had on a town in Colorado. Frisco, a town of just under 3,000 people in the mountains of Summit County, is wrestling with an issue that is becoming increasingly common in many areas of the state, how to effectively and equitably regulate STR's. In June of 2022, Frisco's Housing Program Manager reported that of the city's roughly 3,600 residential units, 20% were being used as STR's and 45% were largely vacant second homes. This has contributed to a relative lack of affordable housing options, making it difficult for people working lower paying service jobs to live in the town where they are employed.

In order to combat this issue, Frisco's town councilors had been considering a new plan where they would (i) cap the number of STR licenses granted in the town based on the number of total residential units available and (ii) implement a two tier STR licensing system. One tier of STR license would be available for people whose primary residence was in Frisco, and another tier of license would be available to people whose primary residence was elsewhere. The STR cap would only be

applied to those holding the non-residential tier of STR license.

However, in light of the Fifth Circuit's ruling in *Hignell-Stark v. City of New Orleans* Frisco has decided to change course. Frisco will proceed with the proportional cap on STR licenses, but will forgo the two-tier licensing scheme which would have exempted residents from the STR cap. In this manner, Frisco hopes to shoot the gap between acceptable regulation and municipal overreach. It is likely that other cities will use the *Hignell-Stark* ruling as a touchstone to determine how much they can regulate STR's going forward. We will be following this development with interest to see how it plays out.

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