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### **Short-Term Rental Legal Update for June 20<sup>th</sup> Woodcreek City Council Special Meeting**

Last Friday the Texas Supreme Court issued its ruling in the preeminent case involving local government regulation of short-term rentals (“STR”), the *City of Grapevine v. Muns, et al* case<sup>1</sup>, where the Court **DENIED** the City of Grapevine ("City")'s petition for review, temporarily cementing the 2<sup>nd</sup> Court of Appeals' pro-STR decision and sending the case back to the lower court for trial. This was a significant win for the pro-STR group... albeit a temporary one.

First, let's discuss what this Order DOES NOT DO - **this is NOT a decision on the merits in favor of the pro-STR group.** The Supreme Court merely denied the City's appeal of their initial jurisdictional loss at trial & appellate court through opinions holding in favor of the pro-STR group (**summary**) "*There's enough of a claim from the pro-STR group to allow this case from the residents and company against the City to proceed to trial.*" A rough summary of the case:

#### **CASE HISTORY:**

##### **A. CITY BANS STRS; LOSES JURISDICTIONAL ARGUMENT IN FIRST PHASE OF LOWER COURT.**

1. In 2018 the **City** passed a change to their zoning ordinance expressly prohibiting **STRs in the City** ("the Ordinance"). As a result, the Muns led the pro-STR group and filed suit against the City, requesting the lower court declare the Ordinance violated their due process rights, was pre-empted, was a taking, and was unconstitutionally retroactive.
2. The **City** argued that the lower court lacked subject-matter jurisdiction over the case for a number of reasons, the most important (among others) being that **the Muns failed to exhaust their administrative remedies by not first going before the Board of Adjustment before filing the lawsuit** (**a bedrock principle that cities use to defeat lawsuits every day across this State**).
3. The lower court disagreed with the City's jurisdictional defenses, **ruling in favor of the Muns** that the City did not have immunity from this suit which sufficiently alleged that a taking had occurred, ordering them to trial. The City immediately appealed to the Second Court of Appeals.

<sup>1</sup> Case No. 22-0044, *City of Grapevine* (Petitioner) v. *Ludmilla B. Muns, Richard Mueller, Kari Perkins, Kevin Perkins, Pamela Holt, and A-1 Commercial and Residential Services, Inc.* (Respondents), on Petition for Review from the Second Court of Appeals

## **B. CITY APPEALS TO SECOND COURT OF APPEALS; LOSES ON JURISDICTIONAL QUESTION.**

4. The 2<sup>nd</sup> COA analyzed the "**exhaustion of remedies**" question and upended decades of precedent by stating the exhaustion of remedies doctrine did not apply here because the City never actually pursued enforcement... rather their letters were informational only. (*\*\*important due to Woodcreek's lack of a municipal court*). The Court ruled there could be no trigger of the 15-day deadline to administratively appeal a city decision if no 'enforcement action' had been issued. This was quite a stretch given the facts of the case but allowed the court to side-step the commonly-used defensive tactic by the city.
5. The 2<sup>nd</sup> COA also ruled that the City's existing zoning ordinance did not impose any "**occupation-duration requirements**" on residential homes and wholly failed to address leasing; whether short- or long-term. The Court thus concluded that in the absence of express language prohibiting STRs, the Court would not read into the ordinance a prohibition on STRs (*very similar fact pattern to Woodcreek*).
6. The 2<sup>nd</sup> COA also noted the "**unremarkable and well-established notion that private-property ownership is a fundamental right... that embraces such essential attributes as the right to use, lease, and dispose of it for lawful purposes.**" The Court thus concluded the pro-STR group had sufficiently alleged a "taking" that the City's outright ban of STRs interfered with their right to lawfully earn lease income from it. The Court gave a few examples similar to my question about the "*senior citizen who spends one weekend a month with her daughter in the city and rents out her home on AirBnB to help pay her steadily-rising property taxes.*"
7. The 2<sup>nd</sup> COA noted in its analysis of home-rule cities like Grapevine that general law cities (*such as Woodcreek*) are not self-governing and instead derive their power directly from the general laws of the Legislature, and thus any limitation on local laws will not be implied unless the general-law provisions are "**clear and compelling to that end**" - noting that any limitation (*either on cities or the homeowners*) to prohibit STRs "**must appear with unmistakable clarity.**" Like Woodcreek, Grapevine did not have language in their zoning ordinance which clearly prohibited STRs... instead they only had language OK'ing them in certain areas which they argued implied a prohibition on the others... but the Court rejected that argument would not read between the lines to imply a prohibition.
8. The 2<sup>nd</sup> COA suggested that this lawsuit was not a dispute over "**property owners' right to use their property in a certain way**"; but rather about owners' "**retaining their well-settled right to lease their property.**" It held that "**private property ownership is a fundamental right . . . which includes the right to lease to others.**" The Court correctly noted it was far too early to determine whether the Ordinance's time-based leasing restrictions were a due process violation; a question which goes to the merits of the case and is more proper for trial. *Muns' pro-STR group WINS the intermediate level of appeal.* The City then turned to the Supreme Court for their final available appeal *on the jurisdictional issues.*

## **C. CITY APPEALS TO SUPREME COURT - BUT THE COURT PUNTS THE ISSUE AND DENIES THE CITY'S APPEAL, INSTEAD SENDING CASE TO TRIAL IN LOWER COURT.**

9. **(Jan. '23) STRs at Capitol - Legislature Files pro-STR Pre-Emption Bill That Would Have Ended Both This Case and City Regulation of STRs ; But Bill is**

## **Defeated and Replaced w/ Watered-Down STR Task Force Bill.**

10. While the **Supreme Court** considered whether to take up the Grapevine STR case reviewing hundreds of pages of briefing and legal arguments filed over the next 16 months by the Parties as well as "friend of the court" *amicus curiae* briefs by organizations like TML and TCAA. Everyone agrees this is an incredibly important issue and seeks the benefits of a definitive ruling from the Court; including the Muns/pro-STR group who surprisingly sought an appeal of their own lower court and 2<sup>nd</sup> COA wins; an almost unheard of situation, to cement their win into law/precedent.
11. Now before the **Supreme Court**, the City focused its argument on the **exhaustion of remedies** issue, which if the 2<sup>nd</sup> COA's holding were upheld and adopted by the Supreme Court would be earth-shattering for cities. The Muns focused their argument on freedom, capitalism, and concerns over the **creation of a gigantic surveillance deep-state** necessary to regulate STRs. It was a compelling set of briefs from the Parties.
12. On June 16, 2023 the **Supreme Court punted the case**, issuing a one-page **ORDER DENYING PETITION FOR REVIEW**, which means they decline to hear the City's complaints. Thus, the 2<sup>nd</sup> COA's opinion stands for now, has no statewide effect, and the case will be sent back to the lower court to proceed with trial.
13. The **Supreme Court's** concurring opinion issued with the **DENIAL ORDER** explained it's punting of this important issue by stating:

*"This case, therefore, starts out as a less-than ideal vehicle for resolving the constitutional issues that are presented. But I think there is even more, because it may also be premature for us to render a final decision that binds all our cities, the legislature, and the lower courts. Given the seeming prevalence of short-term rental bans, and of the opposition against them, I am confident that other cases - unburdened by potentially dispositive collateral questions - will lead to a better vehicle for this Court to address the bans' constitutionality."*

**D. CONCLUSION:** The Supreme Court likely will not have the time to rule on this issue before it goes back before the Legislature in 2025. This was a fairly obvious, and not entirely unpredictable, way to avoid setting state-wide precedent that would have made such STR bans illegal, and created significant financial exposure for cities. The Court was in a no-win situation, much like the Council, and took the easy way out. The case will now go back to the trial court for a trial on the merits of the issues... but in all likelihood will be settled before getting to that point.

### **CITY ATTORNEY LEGAL ANALYSIS: WOODCREEK REGULATION OF SHORT-TERM RENTALS**

*Local governments will face an increasingly hostile environment with future STR regulations. To have the best chance at survival they must be narrowly-tailored and preserve existing uses. Decisions on changes to STR regulations must be driven by data and must attempt to address issues specifically outside of previous regulations such as noise, parking, and property values (which are impacted by leases of all durations; not just short-term ones).*

## **A. CONSIDERATIONS FOR ZONING/LAND-USE REGULATION OF SHORT-TERM RENTALS**

1. Express language must be set forth in land-use regulations; if you have to read between the lines your regulation may not survive legal challenge.
2. Outright prohibitions of short-term rentals will likely both fail to survive a legal challenge and would likely subject the city to damages and the recovery of attorney fees.
3. Permitting existing users is an absolutely essential intermediate step in the process.
4. A temporary moratorium on issuing new permits would make sense in light of uncertainty from courts and the legislature.

The City of Woodcreek does not appear to have any internal processes in place for inventorying the supply of currently operating short-term rentals. Any future attempt to regulate in this area would be strongest if the governing body took into consideration information on the existing supply of STRs within the community before adopting broad-stroke amendments.

The advisory boards and governing body would be wise to consider the following three subsets of STR owner/operators when crafting its proposed regulations for the City of Woodcreek.

1. Existing STR operators who are fully in compliance with local and state regulations;
2. Existing STR operators who are not in compliance with local and state regulations;
3. Future STR operators who may wish to operate as an STR at some future time.

Any regulation that the City of Woodcreek attempts to implement which has a retroactive effect of prohibiting future rentals by an existing owner/operator of an STR in Woodcreek would face a strict-scrutiny analysis; and in Texas courts' distaste of "big government" creates an uphill battle.

Thus following the City Council's stated preference to "act conservatively and keep us out of court" when it comes to general policy considerations... a middle-ground approach of something *more than* a hands-off approach but *less than* a full outright ban/regulation would be considered.

*Recall that just a few months ago the P&Z was considering an outright ban of STRs, the Legislature was considering a pre-emption bill that would have banned all future regulation of short-term rentals by cities, and the Supreme Court had issued no guidance on the issue. Since then the regulatory environment has shifted dramatically but provided some clarity on the issue.*

## **B. SUGGESTIONS FOR ZONING/LAND-USE REGULATION OF SHORT-TERM RENTALS**

Taking a conservative legal approach which reflects the Council's and citizens' interest in this issue, my suggestion would be the city council consider a temporary moratorium with the following provisions:

1. Immediately adopt a permitting program for STRs to determine the City's inventory;
2. Immediately determine whether existing operators are in compliance with existing laws;
3. Implement a conditional-use permitting program for existing lawful STR operators;
4. Implement a temporary moratorium on new permitted STRs pending legislative/legal guidance through revisions to the zoning code's permissive uses and duration of leases;
5. Create an enforcement mechanism with a municipal court that would offer an option to the county/district courts when the city seeks to enforce whatever changes it adopts; and
6. Effectively communicate the changes in the law to those most closely impacted by the decision, and let them participate in the process of shaping those regulations in the future.