

## SEARCHING FOR THE RIGHT APPROACH: REGULATING SHORT-TERM RENTALS IN NORTH CAROLINA\*

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*Anyone who isn't confused doesn't really understand the situation.*<sup>1</sup>

### INTRODUCTION

North Carolina has long been a popular travel destination.<sup>2</sup> In 2016, nearly fifty million people visited North Carolina and tourism

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1. WALTER BRYAN, *THE IMPROBABLE IRISH* 14 (1969).

2. See Bryan Mims, *How North Carolina Became ‘Variety Vacationland’*, OUR STATE (July 23, 2015), <https://www.ourstate.com/how-north-carolina-became-variety-vacationland/> [https://perma.cc/C2FE-DZBH].

generated \$22.9 billion in visitor spending.<sup>3</sup> With visitors comes the need for lodging and, although many visitors and travelers opt to stay in traditional lodgings like hotels, a growing number of people are booking short-term rentals (“STRs”). While there are a number of legal and lay definitions of an STR, the majority of jurisdictions understand the term to mean private property rented for a certain period of time, such as thirty days, for the purpose of business or vacation lodging.<sup>4</sup> This lodging option has become increasingly popular as web-based platforms, such as Airbnb, continue to make it easier to find and book STRs.<sup>5</sup>

STRs offer convenient, and often cheaper, alternatives to hotels, but these rentals are not without controversy. Opponents of STRs argue that they diminish housing stock, cause cities to lose out on tax revenue, and disrupt community atmosphere and safety.<sup>6</sup> These

3. *NC Tourism Generates Record Visitor Spending in 2016*, WRAL (May 9, 2017), <http://www.wral.com/nc-tourism-generates-record-visitor-spending-in-2016/16690974/> [https://perma.cc/CQ6Q-BWUY].

4. See, e.g., BREVARD, N.C., UNIFIED DEV. ORDINANCE § 3.34 (2017); CITY OF WILMINGTON, SHORT-TERM RENTALS BENCHMARKING AND KEY ISSUES REPORT 1 (2016), <https://www.wilmingtonnc.gov/home/showdocument?id=2619> [https://perma.cc/9J48-HBVS].

5. See, e.g., AIRBNB, <https://www.airbnb.com> [https://perma.cc/YP4R-S7QC]. Airbnb is an online marketplace for rental properties including homes, apartments, and single rooms. See *About Us*, AIRBNB, <https://press.atairbnb.com/about-us/> [http://perma.cc/BBM6-RH9C].

6. See *Ewing v. City of Carmel-by-the-Sea*, 286 Cal. Rptr. 382, 388 (Cal. Ct. App. 1991) (discussing community nuisance); Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 313 (2016) (“Neighbors sometimes complain about Airbnb tenants, and it is plausible that Airbnb tenants create negative externalities such as being lost and asking for assistance, consuming rivalrous public resources (such as parking spaces), failing to care for shared resources, and generally perceiving that they are unaccountable for their actions because they are not staying in the community.” (footnote omitted)); Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 103–04 (2015); Alexander W. Cloonan, Comment, *The New American Home: A Look at the Legal Issues Surrounding Airbnb and Short-Term Rentals*, 42 U. DAYTON L. REV. 27, 42–43 (2017) (addressing the common arguments that STRs “create a nuisance in the community,” “destroy the residential character of a community,” and “are detrimental to the housing market and denigrate the supply of affordable housing across the nation” (footnotes omitted)); Rebecca Badgett, *The Airbnb Gold Rush: What’s a City to Do?*, COATES’ CANONS: N.C. LOC. GOV’T L. (Feb. 15, 2018), <https://canons.sog.unc.edu/airbnb-gold-rush-whats-city/> [https://perma.cc/FMU6-8YVF] (“There are four chief policy justifications for bringing STRs into the regulatory fold: (1) the desire to provide for the safety of renters, (2) the generation of transient occupancy tax revenue, (3) the duty to ensure that permanent residents have affordable housing options, and (4) the need to preserve neighborhood character (e.g. limit parking and overcrowding). There is also an equity argument to be made—STRs are viewed as unfairly competing with hotels and

services have presented particular challenges for communities that are heavily impacted by tourism and have sparked contentious legal discussions across the nation.<sup>7</sup>

North Carolina is not immune to such challenges. North Carolina's two largest cities, Charlotte and Raleigh,<sup>8</sup> as well as popular vacation destinations, including Asheville and Wilmington, have either already enacted or are considering local regulations governing short-term vacation rentals.<sup>9</sup> Additionally, the focus on STRs has highlighted significant gaps in North Carolina's existing statutes and local regulations that aim to regulate rental properties.<sup>10</sup>

Due to consumer trends and the now-established STR market, it seems unlikely that STRs will vanish. This means that waiting for a trend to pass may not be the most realistic option for North Carolina. Consequently, maintaining the current patchwork of state laws and local regulations that address STRs may ultimately prove unworkable as new issues arise and put stress on the current legal status quo.

This Comment does not attempt to explore every issue related to STRs in North Carolina, nor does it attempt to introduce an overarching regulatory framework. Instead, this Comment reviews the current ways that North Carolina and some of its cities have attempted to regulate STRs, identifies gaps in the current legal structure, and suggests areas for statutory and regulatory improvement. This Comment aims to contribute to the statewide discussion on STRs and, ultimately, help to create a coherent regulatory system in which citizens have a better understanding of the state and local laws that affect them as they rent out their properties or stay as guests at STRs.

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B&B's, which are required to pay local taxes and are subject to inspection for compliance with local health and safety codes.").

7. See, e.g., Thad Moore, *Airbnb, Expedia Weigh in on Charleston's Short-Term Rental Debate as Questions Come to the Fore*, POST & COURIER (Charleston Nov. 1, 2016), [https://www.postandcourier.com/business/airbnb-expedia-weigh-in-on-charleston-s-short-term-rental/article\\_b9fb0b62-a063-11e6-9314-d7ed2a1bd1e2.html](https://www.postandcourier.com/business/airbnb-expedia-weigh-in-on-charleston-s-short-term-rental/article_b9fb0b62-a063-11e6-9314-d7ed2a1bd1e2.html) [https://perma.cc/J48V-U7L8]; Katy Steinmetz, *Debate over Airbnb Rages in San Francisco Ahead of November Vote*, TIME (Sept. 30, 2015), <http://time.com/4056594/airbnb-san-francisco-vote/> [http://perma.cc/M8EC-QLRQ].

8. As of July 1, 2016, Raleigh's estimated population was 458,880 and Charlotte's estimated population was 842,051. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NC,charlottecitynorthcarolina,raleighcitynorthcarolina/POP060210> [https://perma.cc/86A7-RJD5]. For comparison, the estimated population of North Carolina at the same time was 10,146,788. *Id.*

9. See Badgett, *supra* note 6; Jorge Valencia, *Charlotte, Raleigh, Wilmington Wrestle with B&B Vs. Airbnb*, WUNC (Dec. 11, 2014), <http://wunc.org/post/charlotte-raleigh-wilmington-wrestle-bb-vs-airbnb#stream/0> [https://perma.cc/LE2N-6SJJ].

10. Badgett, *supra* note 6; see *infra* Parts II–III.

This Comment proceeds in four parts. Part I addresses some of the common issues that accompany STRs and examines the North Carolina laws that most closely relate to STRs. Part II highlights the gaps and issues with North Carolina's existing rental laws. Part III then investigates some of the approaches that Charlotte, Raleigh, Wilmington, and Asheville have taken to address the unique challenges that STRs pose.<sup>11</sup> Part III employs a relatively new framework for analyzing regulations aimed at the new businesses in the sharing economy.<sup>12</sup> The framework equips regulators with four regulatory options: "to *Block* the new business model from entering the market; to give the new business model a *Free Pass*, such that existing rules would not apply; to apply the existing regulatory structure, however imperfectly—a method [called] *OldReg*; or to develop a new regulatory structure entirely—[called] *NewReg*."<sup>13</sup> The specifics of each option are explained in greater detail in Part III. Finally, Part IV offers an assessment of the approaches that the featured cities have employed, explores the consequences of statewide legislation, and proposes some general considerations in the event that the General Assembly makes changes to North Carolina's applicable rental statutes.

### I. THE RISE OF SHORT-TERM RENTAL PLATFORMS

The concept of short-term renting and home-swapping has been around for decades,<sup>14</sup> but the internet enabled the expansion of STR services. Most STR services on the internet are considered to be part of the "sharing economy," which refers to an "economic model where people are creating and sharing goods, services, space and money with each other."<sup>15</sup> One of the first major web-based STR services

11. These cities were selected as an indicative subset of North Carolina's cities. Charlotte and Raleigh serve as examples of major urban areas, while Asheville and Wilmington serve as examples of popular vacation destinations. Furthermore, the actions taken by these cities affect a substantial number of North Carolina residents.

12. See generally Eric Biber et al., *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561 (2017) (offering the first comprehensive framework for how regulators should respond to disjunction between the existing regulatory scheme and new business innovation).

13. *Id.* at 1568.

14. See LEIGH GALLAGHER, *THE AIRBNB STORY: HOW THREE ORDINARY GUYS DISRUPTED AN INDUSTRY, MADE BILLIONS ... AND CREATED PLENTY OF CONTROVERSY* 149 (2017) (tracing home-swapping practices to the 1950s and the "modern-day, online short-term-rental industry" to the mid-1990s).

15. Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 150 (2016) (quoting *About Us*, CROWD COMPANIES, <http://crowdcompanies.com/about.html> [<http://perma.cc/Z8LN-E4WC>]). Most companies

was Vacation Rental By Owner (“VRBO”).<sup>16</sup> VRBO founders, Dave and Lynn Clouse, realized that there was no efficient or centralized system that aggregated all of the available properties in the vacation rental market.<sup>17</sup> Recognizing an opportunity, they created a web-based service that enabled people to “transact rental deals between one another directly.”<sup>18</sup> Their idea was a success, and “[b]y the mid-2000s, VRBO.com had grown to sixty-five thousand properties and twenty-five million travelers per year.”<sup>19</sup> VRBO was eventually acquired by HomeAway, another web-based STR company, in 2006.<sup>20</sup>

Two years later, Airbnb, another STR company, tapped into the growing market for STR properties and soon exceeded its predecessors and competitors.<sup>21</sup> Airbnb outpaced its competitors because it offered “a more user-friendly interface[,] . . . brought the owner and customer together in a new, more intimate way[,] . . . [and] was a self-contained system that handled everything: payments, messaging, and customer service.”<sup>22</sup> Aside from capturing the STR market as far as market share and growth projections, one of the biggest changes that Airbnb introduced to the STR market was the shift from large vacation properties to smaller homes, apartments, and single bedrooms.<sup>23</sup> This shift to smaller properties increased the

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operating in the sharing economy “offer a variety of Internet-based platforms and applications that create new ways for people to share goods and services with one another on a previously unimaginable scale.” Kaplan & Nadler, *supra* note 6, at 103. In recent years, the sharing economy has disrupted established markets by providing “innovative alternatives” to existing market offerings. *Id.* at 104. Common examples of the sharing economy include businesses such as Uber, a ride-sharing service, UBER, <https://www.uber.com> [<https://perma.cc/XB5A-WU3F>], and Airbnb, an STR platform, AIRBNB, *supra* note 5.

16. See GALLAGHER, *supra* note 14, at 149.

17. See *id.* (explaining that, at the time the Clouses developed VRBO, vacation rentals were handled in a fragmented manner by local real estate brokers, travel magazines, ads, or 1-800 numbers).

18. *Id.*

19. *Id.*

20. *Id.* at 150 (“HomeAway went on to build a hugely successful business, its roll-up strategy allowing it to scale from sixty thousand listings to the more than 1.2 million that the company has today. Like VRBO, HomeAway traditionally focused primarily on second-home rentals. Having bought up every significant player in the industry, HomeAway drew significant funding, raising more than \$400 million before going public in 2011.”).

21. See Biz Carson, *How 3 Guys Turned Renting an Air Mattress in Their Apartment into a \$25 Billion Company*, BUS. INSIDER (Feb. 23, 2016, 11:22 AM), <http://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2> [<http://perma.cc/6SJ3-L4AC>].

22. GALLAGHER, *supra* note 14, at 150.

23. *Id.* at 151 (“[I]n 2015, 70 percent of Airbnb’s full-home listings were studios, one-bedroom, and two-bedroom units, according to Airdna. So, for the first time, short-term

number of available STR properties and established STR markets in neighborhoods that previously had few or no STR properties.<sup>24</sup> This shift also forced communities to consider how they wanted to regulate STRs.

#### A. *Common Short-Term Rental Issues*

STRs pose issues that are both broad and narrow. The issues are broad in the sense that many sharing economy services have disrupted existing regulatory systems—which troubles existing market players and creates new opportunities for entrepreneurs—and have caused a “disjunction between the structure of the regulatory system and the industry that is being regulated: a *policy disruption*.”<sup>25</sup> They are narrow in the sense that STRs raise localized concerns that affect specific neighborhoods and individual property owners.

Sharing economy companies “operate in interstitial areas of the law because they present new and fundamentally different issues that were not foreseen when the governing statutes and regulations were enacted.”<sup>26</sup> The sharing economy rapidly changed the business of lodging in North Carolina, and this rapid change revealed gaps in the laws and legal instruments used to regulate property rentals.<sup>27</sup> North Carolina now faces a situation where the law must react to modern times.

For example, STRs raise numerous local issues, including zoning, land use, taxes, affordable housing, and livability concerns for neighbors.<sup>28</sup> Hotels and other traditional lodging services view the rise of web-based STR services as a threat to their businesses.<sup>29</sup> Neighbors do not want their neighborhood filled with unknown, transient

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rentals were no longer just the big homes in lake, beach, or mountain destinations. They were in the apartment right next door in the heart of every city around the world. That’s what made the platform grow so fast, and it’s what makes the company so threatening to hotels.”).

24. *See id.* at 154. (“There is in fact now a cottage industry of short-term-rental start-ups. Whether started before or after Airbnb, the category now includes dozens of other companies: Roomorama, Love Home Swap, Stay Alfred, and many more.”).

25. Biber et al., *supra* note 12, at 1565.

26. Kaplan & Nadler, *supra* note 6, at 104.

27. Badgett, *supra* note 6; *see infra* Parts II–III.

28. *See generally* Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the ‘Industry’?*, 65 PLAN. & ENVTL. L. 4 (2013) (discussing the local impact of STRs).

29. *See, e.g.*, Reity O’Brien, *In Cities and States Across the U.S., It’s the Hotel Industry Versus Airbnb*, MASHABLE (July 15, 2015), <http://mashable.com/2015/07/15/short-term-rentals-lobbying/#TT79faKTfqqJ> [<https://perma.cc/4VCR-6YJX>]; Valencia, *supra* note 9 (explaining that traditional business owners are “getting edged out by unfair competition” from STR services).

partiers.<sup>30</sup> Residents do not want to be pushed out of their homes and cities as affordable housing units are converted to STR properties.<sup>31</sup> Cities struggle to properly zone STR activity, worry about increased nuisances, and fear that they are missing opportunities to gain additional tax revenue.<sup>32</sup>

In response to these local issues, organizations formed across the country to ensure that STRs are properly regulated and operate in a civically responsible manner.<sup>33</sup> In North Carolina, groups of concerned citizens have called for regulation and argued against the spread of STRs in Raleigh,<sup>34</sup> Wilmington,<sup>35</sup> and Asheville.<sup>36</sup>

30. See, e.g., *Downtown Wilmington Issues*, RESIDENTS OF OLD WILMINGTON (July 13, 2017), [http://www.rowilmington.org/news\\_details.php?view=article&id=28](http://www.rowilmington.org/news_details.php?view=article&id=28) [https://perma.cc/NS98-63C3].

31. See, e.g., Robert McCartney, *Airbnb Becomes Flash Point in the District's Hot Debate Over Gentrification*, WASH. POST (Nov. 21, 2017), [https://www.washingtonpost.com/local/dc-news/airbnb-becomes-flash-point-in-the-districts-hot-debate-over-gentrification/2017/11/21/3c3bcd2-bf19-11e7-8444-a0d4f04b89eb\\_story.html?noredirect=on&utm\\_term=.50900fcf5189](https://www.washingtonpost.com/local/dc-news/airbnb-becomes-flash-point-in-the-districts-hot-debate-over-gentrification/2017/11/21/3c3bcd2-bf19-11e7-8444-a0d4f04b89eb_story.html?noredirect=on&utm_term=.50900fcf5189) [https://perma.cc/2P5F-UW5S]; *What is Short-Term Rental Abuse?*, KEEP NEIGHBORHOODS FIRST!, [http://www.keepneighborhoodsfirst.org/what\\_is\\_short\\_term\\_rental\\_abuse](http://www.keepneighborhoodsfirst.org/what_is_short_term_rental_abuse) [https://perma.cc/V5UG-BP9X].

32. See Andrea Leptinsky, *City of Austin Begins Work on Short-Term Rental Regulations*, COMMUNITY IMPACT NEWSPAPER (Austin Apr. 22–May 26, 2011), <https://communityimpact.com/wp-content/uploads/archives/CTA/issues/CTA-2011-04.pdf> [https://perma.cc/M88X-4SFV]; *Regulations of Short Term Rentals*, TOWN OF BLOWING ROCK (Nov. 2, 2017), <http://www.townofblowingrocknc.gov/Home/Components/News/News/68/16> [https://perma.cc/YZ66-HZNV] (“Problems associated with STRs in the single-family districts include noise, increased traffic, lack of neighborhood security due to unknown occupants, garbage not properly disposed, and traditional residential neighborhoods becoming commercial ‘hotel districts.’”).

33. See *About Us*, AIRBNBWATCH, <https://airbnbwatch.org/aboutus/> [https://perma.cc/DT5Y-ZJYK] (“AirbnbWATCH is a project of the American Family Voices, bringing together a collection of organizations dedicated to [advocating for the regulation of STRs].”); srunger72, *Neighbors for Overnight Oversight – An Advocacy Group*, AIRBNB ANALYST (Jan. 11, 2015), <http://the-airbnb-analyst.com/neighbors-overnight-oversight-advocacy-group/> [https://perma.cc/YWE5-WLT4] (“Neighbors for Overnight Oversight is a coalition of concerned neighbors working to ensure short-term online rental companies operate with proper oversight to keep our homes and communities safe.”).

34. See Jane Porter & Franny Badger, *Why Some Raleigh Residents Are Uptight About Airbnb's*, INDY WEEK (Jan. 28, 2015), <https://www.indyweek.com/indyweek/why-some-raleigh-residents-are-uptight-about-airbnbs/Content?oid=4326816> [https://perma.cc/9MR7-ETF5].

35. See Hannah Leyva, *Residents Take Issue with Short Term Rentals in Historic District*, PORT CITY DAILY (Feb. 9, 2016), <https://portcitydaily.com/local-news/2016/02/09/residents-take-issue-with-short-term-rentals-in-historic-core/> [https://perma.cc/R2B4-8QJJ].

36. See Joel Burgess, *Update: Asheville's Downtown Vacation Rental Ban Passed Quickly*, CITIZEN TIMES (Asheville Jan. 9, 2018, 7:37 PM), <http://www.citizen-times.com/story/news/local/2018/01/09/asheville-downtown-vacation-rentals-airbnbs-banned-6-1-city-council-vote/1019195001/> [https://perma.cc/M2WY-WWBF].

Cities and states across the nation are experimenting with methods to handle the rise of STRs. For example, Venice, Florida, limits STR properties to certain local jurisdictions or zones.<sup>37</sup> Towns in central California regulate the proximity of STRs to other types of rental properties.<sup>38</sup> Many jurisdictions, like Isle of Palms, South Carolina, and Sonoma County, California, have enacted performance-based restrictions, like occupancy limits.<sup>39</sup> Palm Springs, California, St. Helena, California, and Maui County, Hawaii all impose intricate permitting systems for STRs.<sup>40</sup> At the state level, Arizona passed legislation governing STRs.<sup>41</sup>

In contrast to passing new state laws, many towns and cities simply started policing their existing zoning laws and ordinances to prevent public nuisances associated with rental properties.<sup>42</sup> No single approach has taken hold across the nation, and if there is any trend, it is a trend of fragmentation—that is, each jurisdiction takes a slightly different approach. A recent STR report by the city of Wilmington, North Carolina, which looked at a variety of cities' responses, put it succinctly: "there are no clear best practices or standards for addressing the issue of peer-to-peer [short-term] rentals."<sup>43</sup> The variance in property laws and municipal laws, like lodging ordinances and zoning laws, may explain this fragmentation. Confusion may also explain the trend, as states and municipalities face unforeseen issues and as citizens, property owners, and renters attempt to understand what is legally required of them.

37. Gottlieb, *supra* note 28, at 5.

38. *Id.* ("In Mendocino County, California, there must exist a minimum ratio of 13 long-term rental properties to every one short-term residential rental property.").

39. *Id.* ("Occupancy limits may eliminate community character concerns by limiting the number of guests who are not attached to the community and mitigate the adverse environmental impacts resulting from overloading the infrastructure.").

40. *Id.*

41. See Act of May 2, 2016, ch. 208, § 1, 2016 Ariz. Sess. Laws 1575, 1575 (overruling any existing municipal ordinance prohibiting STRs).

42. Gottlieb, *supra* note 28, at 6.

43. PLANNING COMM'N, CITY OF WILMINGTON, LAND DEVELOPMENT CODE AMENDMENT 4 (2017), <https://www.wilmingtonnc.gov/home/showdocument?id=6760> [<https://perma.cc/G2RW-Q6AN>].



Additionally, the legal community struggles to “[b]alance the legitimate livability concerns with the rights of property owners to use their property as they choose.”<sup>44</sup> The livability versus property rights tension is anchored on one side by reasonable concerns about how a property owner’s use of his property impacts the lives and properties of neighbors, and the general principle that a property owner has the right to use his property as he sees fit on the other.<sup>45</sup>

## II. NORTH CAROLINA’S SHORT-TERM RENTAL LAWS

North Carolina has joined the ranks of jurisdictions that are wrestling with the various issues related to STRs and deciding how best to regulate these properties. North Carolina is a popular vacation destination,<sup>46</sup> which naturally lends itself to a strong STR property market. Consequently, there has been a recent uptick in people using web-based STR services in North Carolina.<sup>47</sup> This uptick adds pressure and urgency to the existing debates throughout the state.<sup>48</sup> The on-going debates, along with the associated proposals and actions, highlight the gaps in North Carolina law regarding STRs.

While North Carolina has statutes related to vacation rentals and lodging, the statutes are either not on point or have critical definitional gaps. North Carolina’s common law offers relief in the form of restrictive covenants, but that option is limited because many restrictive covenants did not anticipate the issue of STRs when they were drafted. Instead, municipal laws, such as ordinances, are emerging as the leading tool to address STRs. Municipal laws are flexible and can be tailored to local concerns, but there may be a valid concern that state statutes do, or at least could, preempt municipal laws related to STRs. This section explores the advantages and disadvantages of the North Carolina laws that most closely address STRs in more detail. The most applicable laws include the North

44. *Id.* at 16.

45. *See, e.g.,* Watts v. Pama Mfg. Co., 256 N.C. 611, 617, 124 S.E.2d 809, 813–14 (1962).

46. Mims, *supra* note 2.

47. Paul A. Specht, *Raleigh Ranks 3rd for Airbnb Guests in NC*, NEWS & OBSERVER (Raleigh Mar. 2, 2017, 3:46 PM), <http://www.newsobserver.com/news/business/article136027243.html> [https://perma.cc/797J-AC2A] (“The number of people using Airbnb in North Carolina doubled between 2015 and 2016, generating a combined \$51 million for hosts in the state last year, the company announced Thursday.”).

48. *See, e.g.,* Joel Burgess, *Asheville Short-Term Rentals, Airbnbs Now Face \$500 Fines*, CITIZEN TIMES (Asheville Aug. 25, 2015, 8:49 PM), <https://www.citizen-times.com/story/news/local/2015/08/25/short-term-rental-airbnb-debate-packs-city-hall/32367343/> [https://perma.cc/8F9V-M7DH].

Carolina Vacation Rental Act (“NCVRA”),<sup>49</sup> the Residential Rental Agreements Act (“RRAA”),<sup>50</sup> the innkeeper and hotel statutes, and the law of restrictive covenants. For organizational purposes, each applicable law is addressed in a separate subsection.

*A. North Carolina Vacation Rental Act*

North Carolina has a number of statutes that, at first glance, seem to cover STRs. Yet through specific exemptions and definitions, these statutes omit broad categories of STRs. For example, the NCVRA seems to be directly on point. However, the statute lacks much content related to STRs beyond the definition of a vacation rental, which fails to capture all STR options.

The NCVRA was passed recognizing “that the growth of the tourism industry in North Carolina has led to a greatly expanded market of privately owned residences that are rented to tourists for vacation, leisure, and recreational purposes” and for the purpose of “regulating the competing interests of landlords, real estate brokers, and tenants” that arise when renting property.<sup>51</sup> The NCVRA defines a vacation rental as “[t]he rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return.”<sup>52</sup> The NCVRA and its amendments set forth requirements for vacation rental agreements,<sup>53</sup> handling and accounting of funds,<sup>54</sup> expedited eviction proceedings,<sup>55</sup> landlord and tenant duties,<sup>56</sup> and evacuations and early terminations.<sup>57</sup> The NCVRA also extends a landlord’s duty of care to vacation rental property, stating that “[a] landlord of a residential property used for a vacation rental shall . . . keep the property in a fit and habitable condition.”<sup>58</sup> The provisions of the NCVRA apply to any person or entity “who acts as a landlord or real estate broker engaged in the rental or management of

49. North Carolina Vacation Rental Act, ch. 420, 1999 N.C. Sess. Laws 1667 (codified at N.C. GEN. STAT. §§ 42A-1 to -40 (2017)).

50. Residential Rental Agreements Act, ch. 770, 1977 N.C. Sess. Laws 1006 (codified as amended at N.C. GEN. STAT. §§ 42-38 to -44 (2017)).

51. N.C. GEN. STAT. § 42A-2 (2017).

52. *Id.* § 42A-4(3).

53. *Id.* § 42A-11.

54. *Id.* §§ 42A-15 to -19.

55. *Id.* §§ 42A-24 to -27.

56. *Id.* §§ 42A-31 to -33.

57. *Id.* §§ 42A-36 to -37.

58. *Id.* § 42A-31(2).

residential property for vacation rental as defined in this Chapter.”<sup>59</sup> Importantly, the NCVRA *does not* apply to

- (1) Lodging provided by hotels, motels, tourist camps, and other places subject to regulation under Chapter 72 of the General Statutes. (2) Rentals to persons temporarily renting a dwelling unit when traveling away from their primary residence for business or employment purposes. (3) Rentals to persons having no other place of primary residence. (4) Rentals for which no more than nominal consideration is given.<sup>60</sup>

The NCVRA’s exclusions and definitions are critical because they highlight the gaps that STRs create in the NCVRA’s framework. The NCVRA’s definition of a rental property “limits both the duration of covered vacation rentals and the character of the covered tenants.”<sup>61</sup> The NCVRA only applies to a rental that is less than ninety days in length and requires that the tenants are renting for recreational purposes and intend to return to their permanent residences.<sup>62</sup> Therefore, the NCVRA does not apply if the tenant is seeking lodging for a purpose other than vacation. Nor does it apply if the tenant does not intend to return to his primary residence or stay for ninety days or more. Disturbingly, the “vacation rental” definition could mean that vacation rentals that extend beyond ninety days fall outside of the statutory duty of care because they are no longer considered vacation rentals.<sup>63</sup>

There would not be a major issue with the NCVRA’s framework if these exceptions were uncommon uses of STRs. However, these uses are fairly common. In 2017, over 250,000 employers, including Alphabet, Inc. (Google’s parent company) and Morgan Stanley, used Airbnb to book business travel.<sup>64</sup> Moreover, people may use services like Airbnb or VRBO to rent properties for more than ninety days.<sup>65</sup>

59. *Id.* § 42A-3(a).

60. *Id.* § 42A-3(b).

61. John V. Orth, *Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act*, 78 N.C. L. REV. 783, 795–96 (2000).

62. N.C. GEN. STAT. § 42A-4(3) (2017).

63. See Orth, *supra* note 61, at 796 (discussing gaps in legal coverage created by the definitions in the NCVRA).

64. Olivia Zaleski, *Airbnb Goes After Business Travelers with New Booking Tool*, BLOOMBERG LAW (Apr. 28, 2017, 1:29 PM), <https://www.bloomberg.com/news/articles/2017-04-28/airbnb-goes-after-business-travelers-with-new-booking-tool> [<https://perma.cc/3BBC-294V> (dark archive)].

65. See *Monthly Stays Made Easier with Airbnb*, AIRBNB, <https://www.airbnb.com/sublets> [<https://perma.cc/2QQV-MX8U>] (allowing users to select a maximum of six months for their length of stay); *Top 50 New York Vacation Rentals*, VRBO, <https://www.vrbo.com/results?pets=false&q=New+York%2C+NY%2C+USA&>

Whether a guest intends to return to his primary residence is more difficult to determine, but, hypothetically, a situation in which an individual uses Airbnb or VRBO to book an STR while searching for a new primary residence would not be covered by the NCVRA. In short, the NCVRA creates an imperfect statutory framework for governing STRs because its definitions and exclusions create many gaps in legal coverage.

### *B. Residential Rental Agreements Act*

Another statute that appears to touch on, but does not quite cover, the concept of STRs is the RRAA. The RRAA “determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within [North Carolina].”<sup>66</sup> Like the NCVRA, the RRAA extends the duty of care to residential landlords.<sup>67</sup> The RRAA also addresses utility conservation, victim protection, tenant’s duties, early termination protections, and late fee authorizations.<sup>68</sup>

While an STR site like Airbnb can be used to find permanent or long-term housing, the RRAA excludes “transient occupancy” in public accommodations, like hotels and motels, and vacation rentals covered by the NCVRA.<sup>69</sup> Furthermore, the RRAA excludes rentals of dwellings used as anything other than primary residences.<sup>70</sup> The specific exclusion for vacation rentals highlights “an unfortunate gap in the statutory coverage” because vacation rentals for more than ninety days are neither covered by the RRAA nor the NCVRA.<sup>71</sup> The gap includes the same duty of care coverage concern raised in the NCVRA section: If the rental falls outside of the statutory definitions, does the landlord’s duty of care still apply?<sup>72</sup> Unfortunately, it may not.

The gap in coverage of rentals between the RRAA and the NCVRA creates an awkward gap for rentals that extend beyond

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to-date=07%2F31%2F2018&children=0&from-date=05%2F14%2F2018&adults=1&uuiid=[https://perma.cc/XY7V-8TBL] (showing that, as of May 7, 2018, there were over 300 listings on VRBO for May 14 through July 31 for one adult). To illustrate, a consultant on a long-term engagement may find that renting an apartment through Airbnb is cheaper than booking a hotel room.

66. N.C. GEN. STAT. § 42-38 (2017).

67. *Id.* § 42-42(a)(2) (requiring landlords to “[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition”); *see also* Orth, *supra* note 61, at 785.

68. N.C. GEN. STAT. §§ 42-42.1 to -46 (2017).

69. *Id.* § 42-39(a)-(a1).

70. Orth, *supra* note 61, at 796–97.

71. *Id.*

72. *Id.* at 789.

ninety days, which is a type of rental many services like Airbnb and VRBO offer. In this statutory dead zone, it is unclear whether there is any guidance for STRs that fall outside of the statutory timeframes. In short, the RRAA is not aimed at regulating STRs and is unlikely to mesh with STRs.

### C. *Innkeeper & Hotel Statutes*

An STR could understandably be viewed as a hotel or inn. Many short-term vacation rentals offer amenities that are similar to the amenities that hotels provide,<sup>73</sup> and some properties are exclusively used as STRs.<sup>74</sup> From this perspective, STRs ostensibly fall under the legal authority of North Carolina's hotel and innkeeper laws.

Viewing an STR as a hotel, boardinghouse, or inn, however, would be inconsistent with North Carolina's case law, which shows that the general definition of an STR does not fit within the state's understanding of these establishments.<sup>75</sup> STRs are not commonly advertised as boardinghouses or as hotels open to the entire public.<sup>76</sup> Other states have also rejected the definition of STRs as hotels; however, a New York court recently compared an STR to an "illegal hotel."<sup>77</sup> Additionally, the NCVRA and the RRAA would likely preempt the hotel and inn statutes because they specifically address rentals.<sup>78</sup> Therefore, STRs are unlikely to be governed by North Carolina's hotel and innkeeper laws.

73. Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT'L & COMP. L. REV. 129, 141 (2016).

74. This concept is similar to individuals who purchase vacation homes as investment properties and rent them out instead of visiting or living in the property.

75. *Holstein v. Phillips*, 146 N.C. 366, 370, 59 S.E. 1037, 1039 (1907) (defining the keeper of a boardinghouse as "one who reserves the right to select and choose his patrons, and takes them in only by special arrangement, and usually for a definite time" while defining "[a]n 'inn' or 'hotel' . . . as a public house of entertainment for all who choose to visit it").

76. In fact, Airbnb hosts reserve the right to turn down guests and can put their own time limits on a guest's stay. *Can I Decline Booking Inquires or Reservation Requests?*, AIRBNB, <https://www.airbnb.com/help/article/360/can-i-decline-booking-inquires-or-reservation-requests> [<https://perma.cc/L6WM-UV63>]; *How Do I Set the Minimum and Maximum Number of Nights a Guest Can Book?*, AIRBNB, <https://www.airbnb.com/help/article/880/how-do-i-set-the-minimum-and-maximum-number-of-nights-a-guest-can-book> [<https://perma.cc/99PV-47U4>].

77. *See Brookford, LLC v. Penraat*, 8 N.Y.S.3d 859, 860–62, 874–75 (N.Y. Sup. Ct. 2014).

78. *See infra* Part III.D.

#### D. Restrictive Covenants

Contracting parties in North Carolina can effectively prohibit STRs by creating an expressly-worded restrictive covenant. Restrictive covenants “are contracts [associated with property] which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property.”<sup>79</sup> The original parties to a restrictive covenant may structure the terms of the covenant “in virtually any fashion they see fit.”<sup>80</sup> Generally, restrictive covenants are valid as long as they “do not impair the enjoyment of the estate and are not contrary to the public interest.”<sup>81</sup>

Unfortunately, many restrictive covenants predate the rise of STRs and, thus, do not directly address STRs. When a restrictive covenant does not directly address STRs, it is necessary to interpret the original intent of the restrictive covenant to determine its effect on STRs.<sup>82</sup> If there are ambiguities in the covenant, “they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land.”<sup>83</sup> Unrestrained means that the owner may use his property in any way he desires.

For example, in *Russell v. Donaldson*,<sup>84</sup> the North Carolina Court of Appeals addressed whether an ambiguous restrictive covenant prevented homeowners from renting out their property as an STR.<sup>85</sup> The specific issue in that case was whether the terms of the restrictive covenant, which prohibited business and commercial uses of the properties at issue, prevented the owners from using the properties as short-term vacation rentals.<sup>86</sup> The defendants, who all lived in the same neighborhood in the North Carolina mountains, had entered into STR agreements for their properties in an alleged breach

79. *Armstrong v. Ledges Homeowners Ass’n*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006).

80. *Wise v. Harrington Grove Cmty. Ass’n*, 357 N.C. 396, 401, 584 S.E.2d 731, 735 (2003), *superseded on other grounds by statute*, Act of Aug. 23, 2005, ch. 422, sec. 1, § 47F-3-102, 2005 N.C. Sess. Laws 1598, 1598 (codified at N.C. GEN. STAT. § 47F-3-102 (2017)).

81. *Id.* at 400, 584 S.E.2d at 735 (quoting *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 436, 527 S.E.2d 40, 42 (2000)).

82. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) (“In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.”).

83. *J. T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981).

84. 222 N.C. App. 702, 731 S.E.2d 535 (2012).

85. *Id.* at 702, 731 S.E.2d at 536.

86. *Id.* at 703, 731 S.E.2d at 536–37.

of the restrictive covenant governing their respective properties.<sup>87</sup> The plaintiffs argued that the defendants' actions violated the clause in the neighborhood's restrictive covenant that prohibited "business or commercial use" of the homeowners' properties.<sup>88</sup> The defendants contended that they were not violating the restrictive covenant, or even engaging in commercial activity.<sup>89</sup> The court held that a "negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals."<sup>90</sup> The court reasoned that "the restrictive covenant and the surrounding context fail[ed] to define 'business or commercial purpose'"<sup>91</sup> and that such an ambiguity should be resolved "in favor of the unrestrained use of the land."<sup>92</sup>

*Russell* indicates that parties creating a restrictive covenant must use explicit language if they intend to prevent properties from being used as short-term vacation rentals. The holding also signaled that, absent an express contractual definition of commercial activity that includes STRs, short-term residential vacation rentals are not considered commercial. Given the number of preexisting restrictive covenants in the state, this holding could have broad implications for future lawsuits in North Carolina that address STRs in areas zoned for residential use or governed by a restrictive covenant excluding commercial uses. For the drafters of restrictive covenants who included a provision prohibiting "business or commercial uses" in the hopes that it would prevent property owners from renting out their land, the holding in *Russell* likely came as an unwelcome surprise.

Going forward, parties in North Carolina can effectively prohibit STRs if they create an explicitly-worded restrictive covenant. Yet, this approach only works with new restrictive covenants. In situations where there is an existing restrictive covenant that either contains ambiguous language similar to the covenant in *Russell* or does not address the use of STRs, parties to a restrictive covenant have the option to amend the restrictive covenant.<sup>93</sup> Amendments to a restrictive covenant must be reasonable.<sup>94</sup> Whether an amendment is reasonable "may be ascertained from the language of the declaration,

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 707, 731 S.E.2d at 539.

91. *Id.* at 705, 731 S.E.2d at 538.

92. *Id.*

93. *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 559, 633 S.E.2d 78, 87 (2006).

94. *Id.* at 548, 633 S.E.2d at 81.

deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community."<sup>95</sup> The test of reasonableness for amendments is more prohibitive than the broad latitude given to parties drafting the original restrictive covenant. Furthermore, these amendments need to be approved by homeowners, and it may be practically difficult to pass an amendment that further restricts homeowners' use of their property.<sup>96</sup> Importantly, there are specific statutory procedures for amending a restrictive covenant for planned communities and condominiums.<sup>97</sup> Nonetheless, the use of restrictive covenant amendments to ban or limit STRs is likely one legally sound solution to the issues at hand.

### III. NORTH CAROLINA MUNICIPALITIES' SHORT-TERM RENTAL LAWS

This subsection contains the most comprehensive analysis of relevant law because North Carolina counties and municipalities use local regulations and ordinances as the main tool for regulating STRs.<sup>98</sup>

Under North Carolina law, counties may enact zoning ordinances that limit an owner's use of his property.<sup>99</sup> While counties have broad latitude in implementing their zoning powers, such powers are not unlimited but are constrained to the powers outlined in the enabling statutes.<sup>100</sup> Furthermore, zoning ordinances may not

95. *Id.*

96. See Craig D. Justus & Esther E. Manheimer, Don't Vacation in My Backyard!: Short-Term Rentals, the New Nimby, North Carolina Bar Association Real Property Section Annual Meeting (May 20, 2017) (on file with the North Carolina Law Review).

97. See N.C. GEN. STAT. § 47F-2-117 (2017) (referencing planned communities); *id.* § 47C-2-117 (referencing newer condominiums); see also *id.* §§ 47A-18, 47C-1-102 (referencing older condominiums); Justus & Manheimer, *supra* note 96.

98. See, e.g., *Short-Term Rentals*, CITY OF BREVARD, <https://www.cityofbrevard.com/383/Short-Term-Rentals> [<https://perma.cc/PC46-E2VS>]; Carolyn Morrisroe, *Asheville Shuts Door on Short-Term Rentals*, MOUNTAIN XPRESS (Jan. 10, 2018), <https://mountainx.com/news/asheville-shuts-door-on-short-term-rentals/> [<https://perma.cc/YGZ2-5PXX>].

99. N.C. GEN. STAT. § 153A-340(a) (2017); Davidson Cty. Broad. Co. v. Iredell Cty., 790 S.E.2d 663, 667 (N.C. App. 2016) ("It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition 'that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.'" (quoting *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 639, 54 S.E. 453, 461 (1906))), *discretionary review denied*, 369 N.C. 530 (2017).

100. *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 151, 731 S.E.2d 800, 808 (2012).



be arbitrary and must be enacted pursuant to a comprehensive land use plan.<sup>101</sup> When questions arise regarding the interpretation of a zoning ordinance, the ordinances “are to be liberally construed in favor of freedom of use” because a zoning ordinance limits a property owner’s right of use.<sup>102</sup> Zoning regulations “should be given a fair and reasonable construction” and “cannot be construed to include or exclude by implication that which is not clearly their express terms.”<sup>103</sup> Basically, a court will not restrict a property owner’s right of use of his property if the prohibitions in an allegedly restrictive county zoning ordinance are unclear or ambiguous.<sup>104</sup>

Cities and towns may also enact zoning ordinances.<sup>105</sup> Like county ordinances, city ordinances should be clear in their language and intent.<sup>106</sup> Any judicial review of a city ordinance will assess whether the municipality’s exercise of police power is constitutional and “will not include an analysis of the motives which prompted the passage of this ordinance, because ‘so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision.’”<sup>107</sup> In short, a North Carolina court will only strike down a municipal ordinance if it violates the State or Federal Constitution.

In the context of STRs, counties and municipalities have the power to regulate STRs using zoning ordinances, but North Carolina

101. In general, a municipality’s zoning actions enjoy a presumption that they are reasonable and valid. *McDowell v. Randolph Cty.*, 186 N.C. App. 17, 21, 649 S.E.2d 920, 924 (2007). “Ordinarily, the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously.” *Nelson v. City of Burlington*, 80 N.C. App. 285, 287, 341 S.E.2d 739, 741 (1986).

102. *In re Application of Rea Constr. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968).

103. 1 E.C. YOKLEY, *ZONING LAW AND PRACTICE* 284–85 (2d ed. Supp. 1963).

104. *See generally* *Byrd v. Franklin Cty.*, 368 N.C. 409, 778 S.E.2d 268 (2015) (holding that a county land use ordinance would not be construed to implicitly prohibit shooting ranges because it failed to expressly allow them).

105. N.C. GEN. STAT. § 160A-174(a) (2017) (“A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.”); *S. Ry. Co. v. City of Winston-Salem*, 275 N.C. 465, 468, 168 S.E.2d 396, 398 (1969) (noting that the General Assembly has granted municipalities the ability to exercise police power); *Turner v. City of New Bern*, 187 N.C. 541, 542–43, 122 S.E. 469, 470–71 (1924) (holding that a city’s police power extends to all the great public needs).

106. *See Town of Atlantic Beach v. Young*, 307 N.C. 422, 426, 298 S.E.2d 686, 689 (1983) (holding that there is no room for construction of an ordinance where the language is clear and unmistakable in its meaning), *appeal dismissed*, 462 U.S. 1101 (1983).

107. *Id.* at 428, 298 S.E.2d at 690 (quoting *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968)).

law requires that a zoning ordinance contain explicit language regarding STRs if the ordinance aims to regulate STRs.<sup>108</sup>

Various municipalities across North Carolina have enacted local ordinances governing STRs, and a number of municipalities are currently working on local ordinances to address the issue.<sup>109</sup> North Carolina's two largest cities, Charlotte and Raleigh, are currently determining the proper course of action regarding STRs.<sup>110</sup> And, while cities like Charlotte and Raleigh are dealing with the presence of STRs and their associated issues, the cities and towns that have wrestled the most with STRs are not major financial or business hubs but rather major vacation destinations. Two of North Carolina's most well-known vacation destinations, Wilmington and Asheville, serve as examples.<sup>111</sup> Other cities in North Carolina have addressed STRs, but this Comment will focus exclusively on an indicative subset of cities—Charlotte, Raleigh, Asheville, and Wilmington—to illustrate the various ways municipalities are responding to the problems STRs raise.

While there are some commonalities, each city uses a fairly different set of ordinances to address the same problem. Given that these are major cities within the state, it is likely that if there is ever a statewide STR law, some of these cities' approaches will help shape that law.

For clarity, the following subsections and analyses are loosely organized around a framework introduced in a recent paper addressing regulatory responses to business innovation.<sup>112</sup> In that work, the authors outline a “regulatory toolkit for policy disruptions created by business innovation” and argue that there are four regulatory tools that policymakers can use when addressing

108. *In re Application of Rea Constr. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968).

109. Lauren K. Ohnesorge, *Beware Airbnb, VRBO Property Owners! Raleigh May Start Citation Process*, TRIANGLE BUS. J. (Nov. 21, 2017, 5:28 PM), <https://www.bizjournals.com/triangle/news/2017/11/21/again-raleigh-fails-to-pass-airbnb-vrbo.html> [https://perma.cc/E87Q-Y99J]; *Short-Term Rentals*, CITY OF WILMINGTON, <https://www.wilmingtonnc.gov/departments/city-manager/short-term-rentals> [https://perma.cc/HJP4-7ZWD (dark archive)]; see also TOWN OF BLOWING ROCK, *supra* note 32.

110. Real Estate & Bldg. Indus. Coal., *Charlotte Considering Changes to Rental Registration Ordinance*, IN THE LOOP (Nov. 10, 2016), <https://rebiccharlotte.com/2016/11/10/charlotte-considering-changes-to-rental-registration-ordinance/> [https://perma.cc/844R-6WSJ]; Valencia, *supra* note 9.

111. See, e.g., Tim Buckland, *Short-term Rentals Back Before Wilmington Officials*, STARNEWS ONLINE (Wilmington Jan. 2, 2018, 10:51 AM), <http://www.starnewsonline.com/news/20180102/short-term-rentals-back-before-wilmington-officials> [https://perma.cc/T9R8-3G6W]; Morrisroe, *supra* note 98.

112. Biber et al., *supra* note 12, at 1561–62.

disruptions caused by sharing economy services, such as Uber and Airbnb.<sup>113</sup>

The four tools—“Block,” “Free Pass,” “OldReg,” and “NewReg”—are as follows:

**Block:** to “[i]nterpret [existing] legal rules to block the new form of business and preserve existing regulatory and business structures.”

**Free Pass:** to “[a]llow the business innovation to proceed without changing the regulatory structure, potentially consigning the previous business model and its associated regulatory structure to extinction.”

**OldReg:** to “[a]llow the new firm to enter the market, but apply existing legal rules.”

**NewReg:** to “develop new regulatory structures and legal categories entirely.”<sup>114</sup>

The following subsections examine the impact that STRs have in the local market of these four North Carolina cities and explore the regulatory “tools” that these cities use to address the growth of STRs. The cities and their respective approaches are addressed in order of least restrictive municipal ordinances to most restrictive.

#### A. *Charlotte—A “Free Pass” Municipality*

As North Carolina’s financial hub and one of its fastest growing cities,<sup>115</sup> Charlotte certainly has a market for STR property, and, indeed, STRs have been very successful in the city.<sup>116</sup> In 2016, Airbnb in Charlotte “welcomed 33,700 guests and earned \$4.5 million for its hosts.”<sup>117</sup> Despite the volume of STR properties, Charlotte has few

113. *Id.* at 1605.

114. *Id.*

115. Ely Portillo, *This Number Shows Why Developers Aren’t Worried They’re Building Too Many Apartments in Charlotte*, CHARLOTTE OBSERVER (May 26, 2017, 6:42 AM), <http://www.charlotteobserver.com/news/business/biz-columns-blogs/development/article152694539.html> [<https://perma.cc/4ZBH-LMBM>].

116. See Specht, *supra* note 47.

117. *Id.*; see also Katherine Peralta, *Listing on Airbnb Is an Increasingly Lucrative Side Job in Charlotte*, CHARLOTTE OBSERVER (Mar. 2, 2017, 10:34 AM), <http://www.charlotteobserver.com/news/business/biz-columns-blogs/whats-in-store/article135945353.html> [<https://perma.cc/5Y48-SEBP>].

restrictions on STRs. Additionally, the City of Charlotte has not yet experienced or moderated public and heated debates about STRs.<sup>118</sup>

Charlotte's approach to STRs is best characterized as "Free Pass" because there are no STR-specific ordinances, the city is not currently considering specific STR ordinances, and a loose collection of general rental and property ordinances are being enforced to manage STRs. The few city and county ordinances that apply to STRs tend to be general ordinances affecting a variety of properties rather than ordinances aimed specifically at STRs.<sup>119</sup>

First, the Residential Rental Registration and Remedial Action Program Ordinance requires residents to register their rental property.<sup>120</sup> This ordinance has been subject to legislative scrutiny and modification. In 2016, the North Carolina General Assembly passed Session Law 2016-122, which updated section 153A-364 of the General Statutes of North Carolina and invalidated the ordinance which "require[d] all landlords to register with the city."<sup>121</sup> Section 153A-364 "regulates rental registration programs and ordinances throughout the state" and "prohibits mandatory rental property registration."<sup>122</sup> The Charlotte City Council responded to this legislation by considering several recommendations including "conforming the ordinance to only require registration when the risk threshold is met" and "eliminat[ing] criminal penalties and replac[ing] them with civil penalties of \$50 per occurrence."<sup>123</sup> However, it appears that the City Council has not made all of the recommended changes to the ordinance because all property owners are still required to register per the current ordinance.<sup>124</sup> Charlotte's most salient argument that it is not in violation of section 153A-64 may be "that short term vacation rentals should not be classified as residential rental properties; rather, . . . a short term vacation rental is used for hospitality, not as a residence, during the vacation rental

118. See, e.g., Burgess, *supra* note 48.

119. See *Charlotte*, AIRBNB, <https://www.airbnb.com/help/article/944/charlotte--nc> [https://perma.cc/5ASA-WS6B].

120. CHARLOTTE, N.C., CODE OF ORDINANCES § 6-582(a) (2018).

121. Act of July 1, 2016, ch. 122, sec. 1, § 153A-364(c), 2016 N.C. Sess. Laws 682, 682-84 (codified at N.C. GEN. STAT. § 153A-364(c) (2017)); Ely Portillo, *N.C. Lawmakers to Charlotte: You Can't Make All Landlords Register with City*, CHARLOTTE OBSERVER (July 10, 2016, 6:44 AM), <http://www.charlotteobserver.com/news/business/biz-columns-blogs/development/article88318857.html> [https://perma.cc/UG6S-3LB9].

122. N.C. GEN. STAT. § 153A-364(c) (2017); Real Estate & Bldg. Indus. Coal., *supra* note 110.

123. Real Estate & Bldg. Indus. Coal., *supra* note 110.

124. CHARLOTTE, N.C., CODE OF ORDINANCES § 6-582(a) (2018).

season.”<sup>125</sup> Therefore, the statutory “prohibition on residential rental property registration would not apply to short-term vacation rentals.”<sup>126</sup> The General Assembly has not clarified “how a short term vacation rental should be characterized” under section 153A-64.<sup>127</sup>

Those renting out property as an STR may also need to pay local taxes, such as a room occupancy tax.<sup>128</sup> For Airbnb hosts in Charlotte, “Airbnb collects and remits the Mecklenburg room occupancy tax and the North Carolina sales tax.”<sup>129</sup> Those renting out their property may also need to acquire a business license and pay the associated business license tax.<sup>130</sup> Along with the registration ordinance and taxes, all STRs are subject to the minimum building and housing standards<sup>131</sup> and the applicable zoning ordinance for the property.<sup>132</sup>

Overall, Charlotte’s approach to STRs is relatively hands-off. The registration ordinance seems to create a system aimed at managing disruptive or criminal conduct rather than limiting the presence of STRs.<sup>133</sup> The city’s occupancy and sales taxes and business license requirements are not targeted at any business in particular, especially not STR properties. The zoning ordinances and housing standards are also non-specific. The scope of the registration ordinance, which is arguably the most intrusive ordinance, is debatable, and if it were to be modified to align with the recent legislation, it would hardly inhibit STRs.

The fact that Charlotte is a “Free Pass” municipality, in the sense that it does not have any local ordinances specifically aimed at

125. Tyler Mulligan, *Periodic Inspections, Permits, and Registration of Rental Property: Changes in 2017*, COATES’ CANONS: N.C. LOC. GOV’T L. (Mar. 22, 2017), <https://canons.sog.unc.edu/periodic-inspections-permits-registration-residential-rental-property-changes-2017/> [http://perma.cc/QHR5-2MFQ].

126. *Id.*

127. *Id.*

128. Mecklenburg Cty., N.C., *Room Occupancy Tax*, MECKNC.GOV, <https://www.mecknc.gov/TaxCollections/BusinessTaxes/Pages/RoomOccupancyTax.aspx> [perma.cc/T8RM-D6NK] (“Property owners who rent accommodations for fifteen (15) or more days per year must collect room occupancy taxes from their tenants and remit the tax to the Mecklenburg County Tax Collector . . .”).

129. *Charlotte*, *supra* note 119.

130. CHARLOTTE, N.C., CODE OF ORDINANCES §§ 13-26(a), -27, -76(272) (2018).

131. CHARLOTTE, N.C., CODE OF ORDINANCES § 6-588(f)(1) (2018); *see also* CHARLOTTE, N.C., CODE OF ORDINANCES §§ 10-1 to -173 (2018) (excluding mention of STRs).

132. *See* CHARLOTTE, N.C., CODE OF ORDINANCES app. A (2018).

133. CHARLOTTE, N.C., CODE OF ORDINANCES § 6-580 (2018) (“The purpose of this article is to establish a registration requirement for owners of residential rental property so that the city may expeditiously identify and contact the owner when excessive levels of disorder activity have occurred on or in the property.”).

regulating or curtailing STRs, does not necessarily mean that the City of Charlotte and Mecklenburg County are not contemplating changes.<sup>134</sup> To be sure, in light of the statewide debate over STRs and their associated issues, it may be a matter of time before Charlotte considers more restrictive ordinances. Alternatively, Charlotte serves as a good example of a North Carolina city managing STRs with minimal ordinances and regulations.

*B. Raleigh and Wilmington—"NewReg" Municipalities*

As this subsection explains, Raleigh is currently considering regulating STRs, and Wilmington recently passed an STR ordinance. Raleigh is still using its existing regulations to address STRs and could be considered an "OldReg" municipality under a strict application of the four regulatory approaches. However, because Raleigh is actively developing new laws to deal with the effects of STRs, "NewReg" is the most fitting description.

1. Raleigh—"NewReg"

In 2016, Airbnb reported 19,400 guests and \$2.4 million in host earnings in Raleigh.<sup>135</sup> STRs have also been lucrative for the city itself, as Raleigh has collected more than \$288,000 in taxes from Airbnb.<sup>136</sup> Similar to Charlotte, Raleigh currently has no specific local ordinances directed at regulating STRs.<sup>137</sup> In contrast to Charlotte, operating an STR is "technically banned" in certain areas due to zoning laws.<sup>138</sup> One of the incidents that fueled Raleigh's STR debate occurred when a resident of a downtown neighborhood received a warning citation for hosting Airbnb stays because his property was

134. See generally Valencia, *supra* note 9 (outlining some common issues raised when discussing STR regulation); see also Real Estate & Bldg. Indus. Coal., *supra* note 110.

135. Peralta, *supra* note 117. Raleigh ranked third in North Carolina cities ranked by number of guests and host earnings.

136. Lauren K. Ohnesorge, *Airbnb Hosts: This is Why Raleigh Should Finally Pass Regulations* Tuesday, TRIANGLE BUS. J. (Nov. 20, 2017, 12:15 PM), <https://www.bizjournals.com/triangle/news/2017/11/20/airbnb-hosts-this-is-why-raleigh-should-finally.html> [https://perma.cc/JFK6-AA5U (dark archive)].

137. Paul A. Specht, *Raleigh City Council Divided in Vote on Airbnb Rules*, NEWS & OBSERVER (Raleigh June 8, 2016, 10:09 AM), <http://www.newsobserver.com/news/local/counties/wake-county/raleigh-report-blog/article82473832.html> [https://perma.cc/JCS8-28SK] ("Raleigh currently has no regulations governing those who rent out their properties for less than 30 days.").

138. *Id.*

not zoned for bed-and-breakfast use.<sup>139</sup> In 2014, “city leaders . . . opted to pause enforcement until they adopt[ed] STR rules.”<sup>140</sup>

Over three years later, Raleigh is still “holding off on enforcing citations against Airbnb hosts violating city code with their listing” as its leaders struggle to find a solution.<sup>141</sup> Following a string of failed votes in 2016, Raleigh’s City Council “launched a task force to talk to stakeholders, look at STR practices in other cities and recommend a set of regulations sometime [in 2017].”<sup>142</sup> In May 2017, Raleigh’s Short Term Residential Rental Task Force ultimately recommended a proposed ordinance aimed at regulating STRs.<sup>143</sup>

The proposed ordinance defines a “Short Term Residential Lodging Facility” as “[t]he rental of a single-, two- or multiunit dwelling to accommodate visitors, vacationers or travelers where the rental occurs for less than 30 days at a time.”<sup>144</sup> Under this proposed definition, stays in a rental over thirty days are not STRs and, instead, are “boardinghouse[s],” which are governed by a separate local ordinance.<sup>145</sup> This proposed ordinance creates separate rules for owners of STR properties depending on how long a guest rents their property. It also places time limits on a guest’s stay, stating “[n]o short-term lodger shall remain in any short term residential lodging facility for longer than 30 consecutive days” and “[f]ollowing the expiration of the 30 day period, no short-term lodger shall occupy the same dwelling without a gap of at least 7 consecutive calendar days.”<sup>146</sup>

The proposed ordinance divides STR properties into three categories:

139. Lauren K. Ohnesorge, *Why Raleigh Found an Airbnb Host in Violation of City Code*, TRIANGLE BUS. J. (Dec. 1, 2014, 9:59 AM), <https://www.bizjournals.com/triangle/blog/techflash/2014/12/why-raleigh-found-an-airbnb-host-in-violation-of.html> [<https://perma.cc/ART5-AZ2D>].

140. Specht, *supra* note 137.

141. Ohnesorge, *supra* note 139.

142. Specht, *supra* note 47.

143. SHORT TERM RESIDENTIAL RENTAL TASK FORCE, CITY OF RALEIGH, REPORT DELIVERED TO CITY COUNCIL ON JUNE 6, 2017, at 1 (2017), <http://www.raleighnc.gov/content/BoardsCommissions/Documents/CityCouncil/AgendaPacketWk1/17ZReportShortTermRentalTaskForce.pdf> [<https://perma.cc/5PF3-QWE9>].

144. SHORT TERM RESIDENTIAL RENTAL TASK FORCE, CITY OF RALEIGH, RECOMMENDATION – MAY 18, 2017, at 2 (2017), <http://www.raleighnc.gov/content/BoardsCommissions/Documents/CityCouncil/AgendaPacketWk1/17ZReportShortTermRentalTaskForce> [<https://perma.cc/5PF3-QWE9>] (as appended to SHORT TERM RESIDENTIAL RENTAL TASK FORCE, *supra* note 143).

145. *Id.* at 1–2.

146. *Id.* at 3.

**Type I rental:** a short-term rental of less than thirty days in which the owner or property manager is present during the entire period of the rental.

**Type II rental:** a short-term rental of less than thirty days in which the owner or property manager is not required to be present during the entire period of the rental, but must reside on the property for more than 180 days of the year.

**Type III rental:** a short-term rental of less than thirty days where neither the owner or property manager resided on the property.<sup>147</sup>

All three “require[] a zoning permit, proof of insurance and mailed notices to adjacent neighbors.”<sup>148</sup> If the occupants or owners of the property are convicted of a criminal offense associated with the property for a verified violation twice in a calendar year, the permit will be revoked.<sup>149</sup>

Despite the task force’s recommendations, Raleigh has yet to pass an ordinance governing STRs.<sup>150</sup> Looking ahead, it seems likely that Raleigh will pass a targeted STR ordinance. If passed as proposed, Raleigh will set an example for other North Carolina cities as the first major metropolitan area in North Carolina to pass targeted STR ordinances. The implications could be interesting: Will Raleigh’s STR market decrease? How will services like Airbnb respond?

## 2. Wilmington—“NewReg”

In 2016, Wilmington property owners earned \$2 million hosting 17,000 guests in STRs.<sup>151</sup> Based on AirDNA data, there were “roughly 400 active whole-house lodging and homestay uses within [Wilmington] city limits” in September 2017 alone.<sup>152</sup>

The City of Wilmington has actively addressed STRs since late 2015.<sup>153</sup> After years of deliberation, the Wilmington City Council

147. SHORT TERM RESIDENTIAL RENTAL TASK FORCE, *supra* note 143, at 2.

148. Ohnesorge, *supra* note 136.

149. *Id.*

150. Ohnesorge, *supra* note 109.

151. Peralta, *supra* note 117.

152. PLANNING COMM’N, CITY OF WILMINGTON, *supra* note 43, at 3. AirDNA is a leading data analytics company that focuses on real estate and the STR market. *See* AIRDNA, <https://www.airdna.co> [<https://perma.cc/U9FP-WDEP>].

153. PLANNING COMM’N, CITY OF WILMINGTON, *supra* note 43, at 1.



passed an STR ordinance in June 2018.<sup>154</sup> Under the new ordinance, “homestay lodging—renting rooms with the host in residence—will be allowed in all residential districts and some commercial and mixed-use districts,” while “[w]hole-house lodging [will] only be permitted in some mixed-use and commercial districts.”<sup>155</sup> It seems that there may still be adjustments to the recently passed ordinance because the “Council will revisit whole-house short-term lodging” in October 2018.<sup>156</sup> The new STR ordinance also requires all STR properties to be registered, limits certain types of lodging to designated zoning areas, and establishes a system in which registration is revoked if the host incurs three violations or criminal convictions in one year.<sup>157</sup> Wilmington’s STR ordinance takes effect in March 2019.<sup>158</sup>

Wilmington’s new ordinance is similar to Raleigh’s proposed ordinance in both the registration requirements and the division of different types of STR properties. These similarities could signal that such provisions are acceptable solutions to citizens’ concerns about STRs. These similarities may also signal an early trend toward standardization of STR ordinances within North Carolina.

### C. Asheville—A “NewReg” and (Potentially) “Block” Municipality

No discussion of STRs in North Carolina is complete without touching on the STR ordinances of Asheville, “where a tourism-driven economy has resulted in a boom for vacation rentals.”<sup>159</sup> Asheville has been ground zero for STRs in North Carolina, both in volume and in the intensity of the debate. In 2016, Airbnb reported that Asheville properties hosted 104,500 guests (over three times as many as Charlotte’s, the second-place city, 33,700 guests) and hosts earned \$13.1 million.<sup>160</sup>

Asheville’s regulatory approach can easily be classified as a “NewReg” municipality because it has had STR ordinances for a

154. Vince Winkle, *Wilmington Now Has Short-Term Rental Ordinance*, WHQR (June 20, 2018), <http://whqr.org/post/wilmington-now-has-short-term-rental-ordinance#stream/0> [<http://perma.cc/FE9G-4HZV>]; *Wilmington City Council Approves Short-Term Rental Regulations*, WECT (June 20, 2018, 12:45 AM), <http://www.wect.com/story/38463269/wilmington-city-council-approves-short-term-rental-regulations> [<https://perma.cc/X8EC-YNND> (dark archive)].

155. Winkle, *supra* note 154.

156. *Id.*

157. ORDINANCE AMENDING THE LAND DEVELOPMENT CODE CHAPTER 18 (2018), [http://wilmington.granicus.com/MetaViewer.php?view\\_id=25&clip\\_id=4951&meta\\_id=189215](http://wilmington.granicus.com/MetaViewer.php?view_id=25&clip_id=4951&meta_id=189215) [<https://perma.cc/6KQA-VKNH>].

158. Winkle, *supra* note 154.

159. Morrisroe, *supra* note 98.

160. Peralta, *supra* note 117.

number of years, which were developed in response to a spike in STRs.<sup>161</sup> The city may also now be considered a “Block” municipality because recent actions not only introduced new laws but used existing laws to “block the new form of business and preserve existing regulatory and business structures.”<sup>162</sup> The recent expansion of Asheville’s zoning prohibitions on STRs essentially “blocks” new STRs from a large section of the city.

Prior to January 2018, Asheville had various restrictions on STRs that were largely based on zoning districts. STRs in residential zones were banned, as were STRs “in commercial and mixed-use areas covered by the River Arts District and Haywood Road form-based codes.”<sup>163</sup> Also, despite the city’s restrictions, STRs “were mainly still permitted in the Central Business District of downtown Asheville.”<sup>164</sup>

In January 2018, Asheville’s City Council “approved wording amendments to the city’s Unified Development Ordinance that define short-term vacation rentals separately from other types of lodging and severely restrict where they are allowed.”<sup>165</sup> Short-term vacation rentals are now defined as “dwelling unit[s] with up to six guest rooms that is used and/or advertised through an online platform, or other media, for transient occupancy for a period of less than one month.”<sup>166</sup> These STRs are only permitted in areas zoned as the “resort district” of the town and are no longer allowed in the city’s Central Business District.<sup>167</sup> Housing units which are already approved and permitted for STR use “can continue to be rented that way, but must now get an annual permit from the city.”<sup>168</sup> In contrast to STRs, “[h]omestays, where residents can rent out up to two guest rooms in their homes, will still be allowed.”<sup>169</sup>

Asheville not only has some of the most restrictive STR ordinances in North Carolina but it also stands out because it actively enforces its ordinances.<sup>170</sup> In July 2016, the City Council “allocated additional resources and staff to [the city’s Development Services Division] to facilitate the permitting of [h]omestays and enforcement

161. Burgess, *supra* note 48.

162. Biber et al., *supra* note 12, at 1605; *see also* Burgess, *supra* note 48 (explaining that city officials are against STRs).

163. Morrisroe, *supra* note 98.

164. *Id.*

165. *Id.*

166. ASHEVILLE, N.C., CODE OF ORDINANCES § 7-2-5 (2018).

167. Morrisroe, *supra* note 98.

168. *Id.*

169. *Id.*

170. In contrast to Raleigh’s moratorium on enforcement. *See supra* Part III.B.1.

of illegal STRs.”<sup>171</sup> In November 2016, the city contracted with Host Compliance “to assist with locating STR violations throughout the City.”<sup>172</sup> By June 2017, Asheville reduced the number of STR properties by twenty-three percent.<sup>173</sup> Simply put, Asheville’s approach to regulating STRs establishes the outer limit of the regulatory spectrum in North Carolina.

*D. Future of Ordinances and the Issues That May Arise*

It is likely that cities and towns in North Carolina will continue to use local ordinances as the primary method of regulating STRs since it is the clear trend for the few North Carolina cities that have addressed the issue thus far. It may be too early to judge the ultimate effectiveness of using ordinances as the primary tool because North Carolina cities are still actively reshaping policies and ordinances, and it seems that the regulatory environment will remain dynamic for some time. While there is considerable variety in the local ordinances, even among the four cities that this Comment explores, there are certain provisions, like requiring registration and establishing certain zones for STRs, that could become standard provisions. Admittedly, there are not enough local ordinances in North Carolina to make sweeping predictions, but it is reasonable to anticipate that smaller North Carolina cities or towns will follow the lead of Asheville, Raleigh, or Wilmington and use existing STR ordinances as a starting point for creating their own. Cities or towns could also model their laws off of Charlotte’s “Free Pass” approach if their local ordinances and zoning laws are comprehensive.

The definition of an STR, which currently varies among municipalities in terms of length of stay, may stabilize over time as more municipalities formulate their own definitions. If North Carolina municipalities continue to utilize different definitions for STRs, homestays, and similar properties, then the result will be a patchwork of legal definitions that trigger different legal requirements throughout the state. If other North Carolina municipalities use the enacted ordinances of Asheville or Wilmington,

171. CHRIS COLLINS, CITY OF ASHEVILLE, STAFF REPORT TO MAYOR AND COUNCIL MEMBERS (2017), <http://www.ashevillenc.gov/civicax/filebank/blobdload.aspx?blobid=27866> [<https://perma.cc/DH7R-N5A6>].

172. *Id.* Host Compliance is a technology firm that provides “short-term rental compliance monitoring and enforcement solutions to local governments.” *About Host Compliance*, HOST COMPLIANCE, <https://hostcompliance.com/about/> [<https://perma.cc/4EXK-L4PS>].

173. COLLINS, *supra* note 171, ex. 1.

or the currently proposed ordinances of Raleigh or Wilmington, as models, then there could be a shift toward more uniform STR ordinances and definitions across the state.

One potential roadblock to future ordinances governing STRs recently arose in the form of a bill passed for purposes largely unrelated to STRs. House Bill 142, which “was passed as the compromise measure to repeal the state’s controversial HB2 law,”<sup>174</sup> may have inadvertently created an issue for local municipalities because it states that “[n]o local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations.”<sup>175</sup> If the phrase “public accommodations” in House Bill 142 is interpreted to include STRs, House Bill 142 may prevent future ordinances until 2020.<sup>176</sup> So far, the concern is less realistic than originally perceived; Asheville amended its STR ordinances in January 2018,<sup>177</sup> Raleigh is still actively considering its first short-term ordinance, and Wilmington openly argued against House Bill 142’s effect on its ability to pass local ordinances governing STRs.<sup>178</sup> Today, the State has not yet taken action to block new STR ordinances.

Another issue stemming from the use of ordinances as the default legal tool to regulate STRs is the argument that the State has preempted any local ordinances regulating STRs because the NCVRA already covers them.<sup>179</sup> This argument is rooted in the principle that a city or municipality does not have the power to adopt an ordinance that conflicts with state law.<sup>180</sup> As previously stated, the

174. Tim Buckland, *HB2 Repeal May Stall Wilmington’s Short-Term Rental Debate*, STARNEWS ONLINE (Wilmington Apr. 3, 2017, 11:33 AM), <http://www.starnewsonline.com/news/20170403/hb2-repeal-may-stall-wilmingtons-short-term-rental-debate> [https://perma.cc/XF8G-Y5XA].

175. Act of Mar. 30, 2017, ch. 4, sec. 3, § 143-760, 2017 N.C. Sess. Laws 16, 16 (codified at N.C. GEN. STAT. § 143-761 (2017)).

176. *Id.*; see also Buckland, *supra* note 174.

177. Morrisroe, *supra* note 98.

178. Tim Buckland, *Wilmington Says NC Law Has ‘No Impact’ on Short-Term Rental Regs*, STARNEWS ONLINE (Wilmington Apr. 6, 2017, 11:53 AM), <http://www.starnewsonline.com/news/20170406/wilmington-says-nc-law-has-no-impact-on-short-term-rental-regs> [https://perma.cc/5KA8-ZU32].

179. Caitlin Byrd, *Lawsuit: Can Asheville Ban Short-Term Rentals?*, CITIZEN TIMES (Asheville Oct. 29, 2015, 12:47 PM), <http://www.citizen-times.com/story/news/local/2015/10/29/lawsuit-can-asheville-ban-short-term-rentals/74769460/> [https://perma.cc/VZ9Z-4JD8]; see also N.C. GEN. STAT. § 42A-2 (2017) (stating the purpose and scope of the NCVRA); Amended Complaint at 14, *Robertson v. City of Asheville*, No. 15-CVS-4688 (N.C. Super. Ct. Dec. 17, 2015).

180. *Smith v. Keator*, 21 N.C. App. 102, 105, 203 S.E.2d 411, 414 (1974), *aff’d*, 285 N.C. 530, 206 S.E.2d 203 (1974).

State grants counties and municipalities the power to pass ordinances, and that power cannot extend beyond the legislature's grant.<sup>181</sup> Furthermore, if the preemption argument were ever fully litigated, the question a court must ask is whether the "police power has been exercised within the constitutional limitations imposed by both the state and federal constitutions" and "will not include an analysis of the motives which prompted the passage of [the] ordinance."<sup>182</sup>

Regardless, whether the definition of an STR contained in the NCVRA is comprehensive enough to sustain a preemption argument is unclear. The NCVRA is predominantly aimed at creating a system for expedited eviction and standardizing payment structures,<sup>183</sup> while also setting minimum standards for vacation rentals.<sup>184</sup> It does not directly address many of the issues that STRs, especially those connected with online platforms like Airbnb, have sparked in recent years.

An additional concern that could arise when assessing the preemption question is whether the legislature intended to create "a complete and integrated regulatory scheme."<sup>185</sup> Finding an answer to this question requires a court to wade into the murky waters of legislative history to discern relevant legislative intent. This is a critical question because "[c]ities may not 'regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.'"<sup>186</sup> In determining whether the General Assembly aimed to enact "a complete and integrated regulatory scheme,"<sup>187</sup> the Supreme Court of North Carolina looks at whether an activity "has generally been the prerogative of the State, not counties and cities."<sup>188</sup> Applying this viewpoint to STRs, there could be a question of whether the NCVRA expresses such intent. The purpose and scope of the NCVRA states that:

[t]he General Assembly finds that the growth of the tourism industry in North Carolina has led to a greatly expanded market of privately owned residences that are rented to tourists for vacation, leisure, and recreational purposes. Rental

181. N.C. GEN. STAT. § 160A-174(a) (2017).

182. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 428, 298 S.E.2d 686, 690 (1983).

183. See N.C. GEN. STAT. §§ 42A-15 to -30 (2017).

184. *Id.*

185. *King v. Town of Chapel Hill*, 367 N.C. 400, 411, 758 S.E.2d 364, 373 (2014).

186. *Id.* (quoting N.C. GEN. STAT. § 160A-174(b)(5) (2017)).

187. *Id.*

188. *Id.* at 400-11, 758 S.E.2d at 373-74 (discussing the State's historic legislative control over regulating highway travel).

transactions conducted by the owners of these residences or licensed real estate brokers acting on their behalf present unique situations not normally found in the rental of primary residences for long terms, and therefore make it necessary for the General Assembly to enact laws regulating the competing interests of landlords, real estate brokers, and tenants.<sup>189</sup>

This section may suggest that the General Assembly *did*, in fact, intend to regulate STRs, as they are often considered a subset of vacation rentals. Conversely, zoning ordinances, which are part of a comprehensive plan, are typically understood to fall within a municipality's police power.<sup>190</sup>

Even if courts find that there is not a comprehensive “regulatory scheme,” “[l]ocal ordinances must . . . be in harmony with State law; whenever the two come into conflict, the former must bow to the latter.”<sup>191</sup> Accordingly, if any city's STR ordinance, or a part of the ordinance, were found to impose upon the NCVRA, the city's ordinance might be preempted. Due to the Act's sparse language, the area most likely to clash with any local ordinance is the definition of STR.

Beyond the NCVRA, counties are prohibited from:

adopt[ing] or enforc[ing] any ordinance that would require any owner or manager of rental property to obtain any permit or permission from the county to lease or rent residential real property or to register rental property with the county, except for those individual rental units that have either more than four verified violations of housing ordinances or codes in a rolling 12-month period or two or more verified violations in a rolling 30-day period.<sup>192</sup>

This statute deals with counties, so it does not appear to prohibit registration at the city level. But if a county were to establish ordinances requiring permitting, then the county's action could run headlong into the statute. This might be more of an issue in rural areas where the county government is more robust than the local town's government.

189. N.C. GEN. STAT. § 42A-2 (2017).

190. See *Grace Baptist Church of Oxford v. City of Oxford*, 320 N.C. 439, 442–43, 358 S.E.2d 372, 374–75 (1987) (finding that a parking ordinance is a valid exercise of the police power).

191. *King*, 367 N.C. at 411, 758 S.E.2d at 373.

192. N.C. GEN. STAT. § 153A-364(c) (2017).

Lastly, it is worth noting that “there are other state [real estate laws] that do not strip zoning authority from local laws (e.g., the Planned Community Act and the Condominium Act).”<sup>193</sup> Therefore, “it seems unlikely that the Vacation Rental Act preempts local regulation, particularly because it makes no mention of municipal regulation” and the NCVRA’s “primary purpose is simply to regulate the competing interests of landlords, tenants, and real estate brokers.”<sup>194</sup> Overall, it seems that if the General Assembly wanted to preempt STR ordinances, it would have clearly expressed its intent to do so in the relevant statutes.

#### IV. ASSESSING APPROACHES & PROPOSAL

As discussed, a variety of North Carolina laws touch on STRs, but none offer a completely comprehensive regulatory structure applicable to STRs. In response, some featured North Carolina cities created or proposed differing municipal ordinances. The result is a confusing patchwork for property owners and their guests. The status of STR laws in North Carolina may be best characterized as experimental. While municipalities cobble together ordinances that attempt to meet the needs of multiple stakeholders, their attempts will continue to highlight the gaps in state law. Regarding ordinances, the “NewReg” regulatory tool may be the most long lasting. Notably, the authors of the article that introduced the four regulatory tools consider the “NewReg” approach the best approach for situations in which the innovation “raises new concerns not contemplated by existing legal rules” and the “policy concerns significantly outweigh neutral default.”<sup>195</sup>

In the future, it is likely that more North Carolina cities, and possibly the state as a whole, will have to address the issue of STRs due to their increasing impact on the local economy, tourism, and the livability of cities. If, and when, other cities in North Carolina begin to look at how to govern STRs, they will have the opportunity to examine the responses of cities like Asheville, Charlotte, Raleigh, and Wilmington. They will also have the responsibility of choosing the right path for their own city. At this point, a city considering regulation of STRs has a variety of options across the spectrum of regulation. Should the city choose not to regulate and follow Charlotte’s current model of “Free Pass,” it must rely on its existing

193. Badgett, *supra* note 6; see also N.C. GEN. STAT. §§ 47C-1-106, 47F-1-106 (2017).

194. Badgett, *supra* note 6.

195. Biber et al., *supra* note 12, at 1618.

ordinances and consider ramping up its enforcement of its laws, assuming its pre-existing laws are robust enough to accommodate unforeseen issues.<sup>196</sup> Alternatively, a North Carolina city could take an approach similar to Raleigh or Wilmington and promulgate new ordinances that require STRs registration and restrict them to certain areas. At the far end of the spectrum, a North Carolina city may attempt to simply ban all STRs, although that likely raises constitutional and property rights arguments.<sup>197</sup> Banning STRs likely does nothing more than push the activity underground and exacerbate the issues that citizens are most concerned about, such as not knowing who is in their neighborhood.<sup>198</sup>

Perhaps the cleanest option is one where the General Assembly creates comprehensive legislation that governs STRs. The benefit is a standardized law across the state. It is likely easily administrable, at least from the state level. But a statewide rule could ignore many local issues for which statewide legislation simply cannot account. Furthermore, an act by the General Assembly to fully preempt local ordinances will surely meet resistance.<sup>199</sup> The General Assembly could also modify the NCVRA or the RRAA to accommodate STRs, especially rentals connected with an online platform.

Ultimately, a blend of statewide legislation and local ordinances may be the most effective way to manage STRs. Introducing a new section or definition to the NCVRA could update the Act to encompass and address STRs. Providing standardized language in a specific definition of an STR could help municipalities as they draft ordinances and clear up any confusion about viewing STRs as hotels or other forms of lodging. A specific definition could also force cities with existing ordinances to modify their definitions to match the statewide standard.

Even if the General Assembly chooses not to create a statutory definition for a “short-term rental,” the General Assembly could take smaller actions to add more clarity to the current situation. For example, the General Assembly could fix the durational gap in the

196. *Id.*

197. Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern “Sharing Economy”*: *Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L. Q. 557, 568 (2015) (highlighting that some state restrictions may be “unduly cumbersome” and, therefore, unconstitutional). This issue touches upon an entirely different discussion and is beyond the scope of this Comment.

198. Miller, *supra* note 15, at 153.

199. See NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 15–16 (2018), <http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [https://perma.cc/WF7R-GKAB].



NCVRA created by the definition of “vacation rental” that excludes vacation rentals for more than ninety days.<sup>200</sup> The General Assembly could do this by extending the length of time to more than ninety days or removing the durational limit altogether. Other proposed changes to the NCVRA could include specific references to web-based STR services and could outline minimum standards of consumer protection for STRs. These minimum standards could include both the physical sense, like minimum safety standards, and the financial sense, like online payment protection. Regarding the NCVRA’s requirement that a guest rent the property for vacation or recreational purposes, the General Assembly could carve out an exception for STRs that disregards the recreational intent of the guest. This carve-out would increase the scope of the Act and would cover guests traveling for business reasons.

The updated NCVRA could also expressly direct cities and towns to handle the more specific aspects of regulating STRs. An express delegation by the North Carolina legislature would also prevent questions of preemption and legislative intent. Municipalities could continue to legislate on zoning districts and their comprehensive zoning plans without interruption by the General Assembly.

Beyond the NCVRA, the General Assembly could address STRs in the RRAA or pass an entirely separate act. That said, the RRAA would not be the intuitive statute to address the problem. Legislators could, however, make updates to the RRAA to explicitly exclude STRs or to address STRs that are not used for vacation purposes. The General Assembly could also pass a separate section addressing STRs. Yet, similar to the challenges of passing a local citywide STR ordinance, passing a separate statewide STR law could be extremely challenging.

Ultimately, updating the NCVRA may be the most feasible statewide solution. If the General Assembly decides to update the NCVRA to address the current issues surrounding STRs, the General Assembly should make a few definitional changes and set minimum statewide standards and, then, should step aside and let local governments handle the local issues.

#### CONCLUSION

Sticking with the status quo is not a lasting strategy. STRs are likely to remain an issue that affects communities across the state.

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200. N.C. GEN. STAT. § 42A-4 (2017).

While no solution will create perfect outcomes for all parties involved, the General Assembly and local municipalities can take active steps to responsibly address STRs. Some cities have already started working on this issue, and their solutions will likely serve as the starting points for future legislation. Moving forward, both the General Assembly and local governments are in a position to make changes that can create a more cohesive regulatory system and a blend of state and local laws may be the most advisable solution.

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