## Adam Zack

**From:** Linda Bannerman <lindaj@teleport.com>
**Sent:** Wednesday, September 15, 2021 9:36 PM
**To:** Vacation Rental Comments
**Subject:** Letter for public comment regarding vacation rentals
**Attachments:** Letter to PC and SJCC regarding legal research litigation pdf.pdf



Please read and post for public viewing the following letter to the Planning Commission to be read prior to action on their proposed ordinance scheduled for the September 17 meeting: (I include a pdf version at the end of this email in case that makes posting it easier.)

September 17, 2021

Members of the San Juan County Planning Commission
PO Box 947
Friday Harbor, WA 98250

**Re: Proposed Use of "Caps" for Regulation of Vacation Rentals in San Juan County**

Dear Members of the San Juan County Planning Commission,

I am writing to urge you to reverse your own decision to recommend an ordinance to the San Juan County Council implementing both a county cap and island-by-island cap on the issuance of new permits for vacation rentals. I am opposed to this proposed ordinance.

Much misinformation has been offered you around the issues of affordable housing, neighborhood feel, degradation of the environment, rising real estates prices and so on. But little has been offered you about the high risk of costly litigation and emerging legislation pursuant to implementing caps and other restrictions on short term rentals. The commission and, eventually the county council, would do well, if they have not yet done so, to educate themselves about the rising number of legislative actions and court rulings against such proposals. Further, I assert it would be their duty to inform the public about such rulings. My aim is to bring some of that data into the discussion.

I have humbly undertaken initial research around such litigation and am in communication with attorneys involved in successful suits against city and county efforts to impose bans, caps, lotteries, over-regulations that have the effect of bans, zoning issues and much more. These attorneys point out that, though push back against regulations is younger than the regulations themselves, it is growing, it is divisive, it is successful and it is costly. I present a summary of it here for your consideration.

This is lengthy, I know. I urge you to read this carefully, none the less.

Consider, for example, the recent **Texas Supreme Court decision out of Austin N0.03-17-00812**. This decision revoked Austin's attempt to limit vacation rentals on both state and federal constitutional grounds and provides property owners in San Juan County powerful precedent to launch similar suits here. Parallels in the Austin case to unfounded claims and fears from some in our community is uncanny. I provide you a link to the entire decision here: https://cases.justia.com/texas/third-court-of-appeals/2019-03-17-00812-cv.pdf?ts=1574860549 but, for your immediate consumption, I directly quote the judge here, especially the most relevant language from his decision:

- Nothing in the record supports a conclusion that a ban on type- 2 rentals would resolve or prevent the stated concerns. In fact, many of the concerns cited by the City are the types of problems that can be and already are prohibited by state law or by City ordinances banning such practices.
- To the contrary, the record shows that, in the four years preceding the adoption of the ordinance, the City did not issue a single citation to a licensed short-term rental owner or guest for violating the City's noise, trash, or parking ordinances. And during this same four-year period, the City issued notices of violations—not citations—to licensed short-term rentals only ten times: seven for alleged over occupancy, two for failure to remove trash receptacles from the curb in a timely manner, one for debris in the yard, and none for noise or parking issues. And the City has not initiated a single proceeding to remove a property owner's short-term rental license in response to complaints about parties. Further, the record shows that short-term rentals do not receive a disproportionate number of complaints from neighbors. In fact, as the City acknowledges, "short-term rental properties have significantly fewer 311 calls and significantly fewer 911 calls than other single-family properties."
- Nothing in the record before us suggests that the City's reasons for banning type-2 rentals address concerns that are particular to type-2 rentals or that the ban itself would actually resolve any purported concerns.
- But even if we were to determine that the City's ban on type-2 rentals advances a compelling interest …would still require us to conclude that the ban is unconstitutionally retroactive.
- The ability to lease property is a fundamental privilege of property ownership. The ownership of land, . . carries with it the right to . . lease it to others, and therefore derive profit. The City's ban on type-2 short-term rentals will result in a loss of income for the property owners.
- Accordingly, based on the record before us and the nature of real property rights, we conclude that owners of type-2 rental properties have a settled interest in their right to lease their property short term.
- Because the record before us shows that the ordinance serves a minimal, if any, public interest while having a significant impact on property owners' substantial interest in a well-recognized property right, we hold that section 25-2-950's elimination of type-2 short-term rentals is unconstitutionally retroactive.

Another important action occurred in 2006, in Arizona. Prop 207 or the **Private Property Rights Protection Act** requires government to reimburse land owners when regulations cause a decrease in property value. It states that government shall not be allowed to over- regulate in ways that ban, a direction current proposals here in San Juan County appear to be heading. It further stipulates that regulations passed must apply equally to all types of rentals. In other words, if short term rentals must apply for a permit, so must long term rentals. If short term rentals have occupancy limits, septic inspections, 24/7 response from land owners, and so on, so must long term rentals as both are constitutionally protected rights to rent property for profit, the only difference being duration.

The Goldwater Institute has provided the means to draft such legislation in Washington. They have already in place the **Property Ownership Fairness Act** which, they unequivocally state, "can be used to protect citizens in the other 49 states." In addition to the protections established in the Texas Court of Appeals and Prop 207, this legislation would prevent government from "redesigning neighborhoods to serve the interests of politically powerful developers at the expense of home and small business owners." While the wording mentions developers, one can reasonably assert it equally applies to other politically powerful entities such as ones here in San Juan County.

Further, in May of 2016, Arizona passed **Senate Bill 1350**. In addition to allowing Airbnb and VRBO to collect taxes and keep properties residential for tax purposes, it requires cities to allow short term rentals.

Consider next in Wilmington, North Carolina, the case of **Schroeder v Wilmington**. In this instance, the use of a lottery to issue permits in areas where caps had been implemented was challenged. The ruling favored landowners, citing both state and US Constitutional protections from "changing rules in the middle of the game" and from governments "picking winners and losers in private industry." "A raffle system," the ruling states, "is unconstitutional. Property rights cannot be simply raffled off for the benefit of one small class of people at the expense of everyone else." Attorney Ari Bargil, who represented the Schroeders, tells us, "Virtually every state in the country requires that a city compensate property

owners if it takes their property or infringes on their property rights - including the right to rent," and points out that lotteries are, "inherently arbitrary."

Consider next, the Maryland Court of Appeals decision in 2006, in **Lowden v Bosley**. The court determined that, "STRs are no more commercial that LTRs." Many states have ruled STRs are "residential use" because people live there, duration not changing the residential status. "No commercial enterprise is taking place on the property."

Florida, too, has passed legislation pushing back against regulations restricting property rights to rent. **FL-HB 219** goes so far as to prohibit licenses and inspections. Regulations are allowed only if said regulations apply to ALL residential properties. Government may not single out vacation rentals. The language also points out that regulations regarding noise, trash, parking and the like are already addressed through ordinances against those things.

**Tennessee** has recently joined the ranks of states ruling in favor of constitutional protections. To read an entire article about what transpired there, see https://www.hendersonvillestandard.com/news/judge-finds-city-s-short-term-rental-policy-unconstitutional/article_9aa68054-faac-11eb-814a-374ff34c3a92.html However, in summary, a 2016 amendment to the city's zoning ordinance eliminated short-term or vacation rentals as a permitted use in residential neighborhoods. After the new law passed, two homeowners in particular were cited in city court multiple times for violating it. But the homeowners appealed the city court rulings and challenged the constitutionality of the city's ordinance, arguing that the ruling violated the equal protection clause under the 14th amendment by treating citizens differently depending on the type of property they own. "The city's ordinance tramples on the constitutional rights of its citizens in an effort to accomplish interests that can be accomplished by less restrictive means," wrote Moore, attorney for the property owners. "As stated, there are already laws and ordinances to protect citizens and property owners alike from nuisances such as noise restrictions, public drunkenness laws, ordinances regarding maintenance of properties, etc." Judge Davies went on to say, "Here, the ordinance does not promote the public interest as a whole. Instead, it promotes some private owners' interest over other private owners' interest." The city's restriction acts as an "unconstitutional infringement upon a property owner's fundamental right to own, lease, and dispose of property in a lawful manner because it destroys the homeowner's right to lease his property on a short-term basis," the judge concluded.

Consider our own very local case, ruling that limiting STRs may not be done on the basis of *fears* of what *might* happen absent proof that it *has* happened. Because our own Karen Kay Speck can speak far more eloquently and completely than I on this ruling, I refer you to her and to the documents involved in that case. You'll find it all quite relevant.

I am not proposing that, should such litigation be sparked here in San Juan County, property owners are guaranteed to win. I could not make such an argument. But I am noting that such litigation would be expensive, time consuming and arduous. I am further suggesting that, in my humble opinion, the right side is with the property owners. The arguments are just and persuasive.

I hope you will see it that way as well. I hope you will choose to recommend that our community work together to meet the very real challenges of creating affordable housing, enforcing laws that control noise, nuisance, neighbor disputes and the like, and preserving our resources by encouraging the efforts of all of us together rather than pursuing futile policies and vilifying law abiding property owners who are only using their properties in constitutionally protected ways in order to eek out a way to live in our community.

Please vote no on this ordinance.

Respectfully,

Linda J. Bannerman, Orcas Island

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The greatest perk, among countless others, that comes from loving someone right now, just exactly as they are, instead of waiting for them to change, is that you get to love someone right now.

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