

# Taxing Affordable Rental Housing

**Virginia Association of Assessing Officers**

69<sup>th</sup> Education Seminar – July 24, 2024

Charlottesville, Virginia

**Andrew McRoberts, Esquire**  
amcroberts@sandsanderson.com  
(804) 783-7211

**M. Tolley Gwinn, Esquire**  
tgwinn@sandsanderson.com  
(804) 783-7244



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# What is Affordable Rental Housing?

- “real property operated in whole or in part as affordable rental housing, in accordance with the provisions of (i) 26 U.S.C. § 42, 26 U.S.C. § 142(d), 24 C.F.R. § 983, 24 C.F.R. § 236, 24 C.F.R. § 241(f), 24 C.F.R. § 221(d)(3), the federal Rental Assistance Demonstration program established under the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55), or any successors thereto; (ii) applicable state law; or (iii) local ordinances adopted by the locality wherein such real property is located”
  - Va. Code § 58.1-3295(A)
- In plain English? Properties that receive a federal low-income housing tax credit (“LIHTC”).

# How do you know you have it?

- a. Tension in § 58.1-3295 over how a property is designated as affordable rental housing.
  - i. *(B) implies that it is up to the owner to apply for the designation (at least for local affordable rental housing programs)*
    - i. “The owner of real property that is operated in whole or in part as affordable rental housing in accordance with the definition of affordable rental housing established by ordinance or resolution of the locality in which the real property is located may make an application to the locality to have the real property assessed pursuant to this section.”
  - ii. *(A) and (D) and (E) imply that affordable rental housing must be assessed in this manner.*
    - i. “Notwithstanding any other provision of law, in determining the fair market value of real property operated in whole or in part as affordable rental housing...the duly authorized real estate assessor **shall consider...**”
    - ii. “For property where only a portion of the units are operated as affordable housing, as defined in § 42 of the Internal Revenue Code or as required by state law or applicable local ordinance, only the portion determined to be affordable housing **shall be subject to this section.**”
    - iii. “Notwithstanding any other provision in this section or other law, the real property governed by this section that is generating income as affordable housing **shall be assessed using the income approach...**”
- b. Statute does not specifically state an assessor has a duty to determine whether a property is affordable rental housing.

# How does a property owner apply?

- a. If locality establishes an affordable rental housing ordinance separate from federal or state programs, the owner can apply to the locality.
  - a. *Va. Code § 58.1-3295 does not establish an application process.*
- b. The application **shall** be granted by the locality if
  - a. *The owner charges rents at level that meet the locality's definition of affordable housing*
  - b. *The real property does not have any pending building code violations at the time of the application*

# How do you assess affordable rental property?

- a. Va. Code § 58.1-3295(A): “Notwithstanding any other provision of law, in determining the fair market value of real property operated in whole or in part as affordable rental housing...the duly authorized real estate assessor shall consider:
  - a. *1. The contract rent and the impact of applicable rent restrictions;*
  - b. *2. Restrictions on the transfer of title or other restraints on alienation of the real property; and*
  - c. *3. The actual operating expenses and expenditures and the impact of any such additional expenses or expenditures.”*
- b. Va. Code § 58.1-3295(E): “Notwithstanding any other provision in this section or other law, the real property governed by this section that is generating income as affordable housing shall be assessed using the income approach based on:
  - a. *the property's current use, [and]*
  - b. *income restrictions, [and]*
  - c. *provisions of any arm's-length contract including but not limited to restrictions on the transfer of title or other restraints on alienation of the real property, [and]*
  - d. *the requirements of subsection B, and*
  - e. *all other provisions of this section.”*
- c. Va. OAG op. 22-063: assessments must comply with GAAP
- d. Va. OAG op. 22-063: token consideration is insufficient
- e. Va. Code § 58.1-3295(B) requires the property owner to provide necessary documents at the assessor’s request.

# How do you defend a challenge to an assessment?

- a. Attend the defending assessment presentation by Sands Anderson!
- b. Determine the stakes of the challenge.
  - a. *How much would locality refund based on the taxpayer's request?*
- c. Confirm the history of the assessment.
  - a. *Did locality request documents from the taxpayer?*
  - b. *Did taxpayer provide the documents?*
  - c. *Did taxpayer apply to be assessed as an affordable rental property?*
  - d. *How did assessor conduct the assessment?*
  - e. *What was the outcome of the assessment?*
- d. Confirm the property's FMV.
- e. Given this information, consider litigation versus settlement alternatives.

# Short Term Rentals

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# SHORT-TERM RENTALS

## Overview

- A short-term rental is generally considered the transient occupancy of a dwelling unit for a period of 30 days or less. See Va. Code sec. 15.2-983. Your local code may vary where permitted.
- Airbnb, VRBO, and other companies are platforms that connect property owners with guests making short stays, usually a number of days or a week
- These platforms are notoriously difficult for local governments to regulate, which can lead to lost revenue and unwelcome changes to the community's character

# Transient Occupancy Tax

# Transient Occupancy Tax Overview

- Title 58.1, Chapter 38, Article 6
- § 58.1-3840 permits cities and towns to levy “certain excise taxes” on “transient room rentals.”
  - -3843 permits TOT “for the occupancy of any room or space that is suitable or intended for occupancy by transients for dwelling, lodging or sleeping purposes”  
See also local charter for potential authority.
- § 58.1-3819 authorizes counties to levy TOT

# Transient Occupancy Tax Issues with Enforcement and Collection

- TOT was originally meant to tax inns, hotels, and other traditional temporary lodging
- Very difficult to tell if a property is listed on AirBnB or other platform from the outside; new world for assessment and enforcement.
- Very easy for hosts to list on AirBnB and ignore or avoid TOT or other regulation

# Transient Occupancy Tax

## § 58.1-3826

- § 58.1-3826(C) requires the “accommodations intermediary” to collect and remit TOT
- § 58.1-3826(F) requires the intermediary to submit a list of the properties and gross receipts to the locality on a monthly basis
  - Level of compliance is unclear
  - Info has been less than desired or needed

# Transient Occupancy Tax Ongoing Issues

- Accommodations intermediaries do not like dealing with local governments
  - It increases their transaction costs.
  - Facilitators are lobbying Commonwealth to local TOT and centralize it in the state.
  - SB651 commission recommended local ordinances be as uniform as possible to mitigate transaction costs.
  - TOT tax rates should be up to date with the Department of Taxation
- Some localities have entered into Voluntary Collections Agreements with Airbnb.
  - A single check with no supporting documentation arrives each month.
  - No real ability to audit.

# STR Registration



# STR Registration

## State Statute - § 15.2-983

- Defines “short-term rental” as “the provisions of a room or space that is suitable or intended for dwelling, sleeping, or lodging purposes, for a period of fewer than 30 consecutive days, in exchange for a charge for the occupancy.”
- Annual registration administered by locality staff.
- Locality can assess a reasonable fee and levy a \$500 penalty per violation for failure to register.
- Locality can prohibit rental of unit that is not registered.
- Locality can prohibit rentals where multiple violations have occurred.
- Does not apply to real estate agents, properties represented by real estate agents, registered time-shares, or licensed lodging establishments such as hotels – may lessen effectiveness of registry.
- 2024 Update:
  - 2024 Virginia Laws Ch. 700 (H.B. 1461) allows lessees and sublessees to operate an STR on the property with the owner’s permission.
  - 2024 Virginia Laws Ch. 792 (S.B. 544): “No local ordinance enacted after December 31, 2023, or any subsequent amendment, shall require that a special exception, special use, or conditional use permit be obtained for the use of a residential dwelling as a short-term rental where the dwelling unit is also legally occupied by the property owner as his primary residence.”

# BPOL – Another Option for STR Registration

- § 58.1-3700 et seq
- “Whenever a license is required by ordinance adopted pursuant to this chapter and whenever the local governing body shall impose a license fee or levy a license tax on any business, employment or profession, it shall be unlawful to engage in such business, employment or profession without first obtaining the required license.”
- Note “fee” or “tax.” BPOL tax alternative to merchants’ capital taxes. 58.1-3704
- Business license process a traditional way for a locality to gather info about a business to regulate or tax it.

# Regulating STRs Through Zoning

- *Manors LLC v. Bd. of Supervisors of Albemarle Cnty.*, 76 Va. App. 737 (2023) (potentially abrogated in part by S.B. 544)
  - Albemarle County denied landowner's request for a homestay exception under the zoning ordinance.
  - The BZA affirmed Albemarle's Decision.
  - The Circuit Court affirmed Albemarle's Decision.
  - The Court of Appeals of Virginia affirmed, finding the ordinance to be constitutional and enforceable.

# Regulating STRs Through Zoning Regulations on What

- Albemarle
  - Requires building official, fire official, and Virginia Department of Health approval
  - Requires a safety inspection and notice to neighbors
  - Parking must be off street
- Virginia Beach
  - Must provide 1 parking space per bedroom
  - Draws distinction between STRs (where homeowner is not present) and “home sharing” (where homeowner is present); Home sharing is subject to fewer regulations
- Fairfax
  - “Short term lodging” is permitted in all zoning districts that permit residential uses and in all types of dwellings; Short term lodging is NOT permitted in detached accessory structures, accessory dwelling units, temporary health care structures, affordable dwelling units, or workforce dwelling units
  - No inspection necessary for the permit, but “short term lodging” unit must be open to inspection upon reasonable request

# Regulating STRs Through Zoning Regulations on Where

- Albemarle
  - Permits “Homestays” in Residential Districts and Rural Area Districts with zoning approval
  - Only allows two rooms in Residential Districts and Rural Area District Properties smaller than 5 acres
- Blacksburg
  - Allows “Homestays” in residential dwelling units
- Virginia Beach
  - Limits short term rentals to overlay districts and requires a conditional use permit

# Regulating STRs Through Zoning Regulations on When

- Albemarle
  - Only allows whole house rentals for a maximum of seven days in a month and a total of 45 days in a year
- Blacksburg
  - Homestay rentals only permitted for a total of 90 nights
  - Only 30 of those nights can be “Type B” rentals, which are rentals of more than 2 rooms or when the owner is not present during the rental period
- Virginia Beach
  - No more than 2 contracts within a 7-day period

# Regulating STRs Through Zoning Regulations on How

- Virginia Beach
  - Provide the name and phone number of a responsible party to address any problem within 30 minutes of being reported
  - Maintain \$1,000,000 in liability insurance
  - Must have a special use permit for events with more than 50 people, with no more than three such events per year
  - No more than three persons per bedroom
- Fairfax
  - Owners and tenants can do “short term lodging” of their primary residence. A primary residence requires living at the residence for a minimum of 185 days; tenants must get approval from the owner before hosting “short term lodging.”
  - “Short term lodging” permits are issued—and can be revoked—by the Zoning Administrator
  - STL operator must have an exit plan posted on inside of door at the STL permit number must be included in advertisements.

# Regulating STRs Through Zoning

## Summary of Common Methods

- Only allow STRs at primary residences
- Limit frequency of rentals
- Parking Requirements
- Require Conditional Use Permit
- Limit number of guests per unit
- Safety requirements



# Regulating STRs Through Zoning Enforcement Tools

- Civil penalties under § 15.2-2209
- Criminal penalties under § 15.2-2286(A)(5)
- Injunction under § 15.2-2208
- Denial of Permits under § 15.2-2299
- Overlapping regulations (zoning, business license, STR registry, TOT)
- Big question: Who enforces and when?

# Regulating STRs Through Zoning

## Common Defenses

- “Non-conforming but legal” under § 15.2-2307 for newer zoning regulations
- Delayed Enforcement
- Selective Enforcement
  - “Mere enforcement of law against one person and not against others does not amount to denial of equal protection of the law.” Dick Kelly Enterprises, Virginia P'ship, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992)

# Regulating STRs Through Zoning Nonconforming v. Grandfathering

- Nonconforming: a previously permitted and existing lawful use that conflicts with a new zoning regulation
- Grandfathering: a specific permission within an ordinance or regulation for a property to continue in a use or design

# Regulating STRs Through Zoning Nonconforming Uses

- To be nonconforming but legal:
  - It must have been the primary use of the property before the change in zoning
    - *An accessory use cannot become the primary use*
  - The use must be continuous from before the zoning change
    - *No break longer than two years*
  - The use and the property cannot expand beyond their pre-zoning change use and size.
- Damaged nonconforming properties can be repaired to their nonconforming state

# Regulating STRs: Case Study Town of Irvington

- Northern Neck of Virginia
- Small town (about 350 population, 2020 census)
- Major tourist location, due to Tides Inn and Carter's Creek, off of Rappahannock River
- Stock of housing – 1930s – 1970s



## Irvington

Home to the Tides Inn, Irvington has been attracting visitors for years. Explore by bicycle and enjoy coffee or a great meal in town and discover the farmer's market with over 100 vendors. You can also visit the Dog & Oyster Vineyard with your dog and taste local wine and seafood.



# Regulating STRs: Case Study Town of Irvington

Traditionally, no real regulation other than TOT  
Just a few short term rentals  
Enforcement reliant on voluntary compliance  
In fact, prohibited and illegal under zoning  
ordinance adopted, but never enforced (no  
nonconforming uses)

# Regulating STRs: Case Study Town of Irvington

- Exploded in number with AirB&B, VRBOs
- Mixed reception in small town
- Impacts on neighborhoods
- Financial benefits to owners, operators and tourism-related businesses



# Regulating STRs: Case Study Town of Irvington

- Town Council response – create STR Committee with PC, TC and community members
- STR Committee met, produced report and extensive recommendations
- Town Attorney tasked with achieving recommendations in ordinance and policy form

# Regulating STRs: Case Study Town of Irvington

- Some of STR Committee recommendations were tax-related, others were zoning and land use-related, others were “other”
- One of most controversial aspects was “cap” of 35 STRs in Irvington
- Density discussed and latter addressed by “one neighbor rule” (STR on both sides of home prohibited). You get at least one neighbor.

# Regulating STRs: Case Study Town of Irvington

- All of the above” approach to regulation:
  - TOT ordinance amendments to address STRs and current state law
  - Zoning, land use, safety regs in zoning ordinance
  - STR Registry and Business License Permit ordinance
  - These overlap and internally reference each other

# Regulating STRs: Case Study Town of Irvington

- Issues remaining:
  - TOT and “accommodations intermediaries” and obtaining enough information to audit
  - Density still an issue (one neighborhood largely overtaken by STRs)
  - CUP process and effective conditions
  - Effective enforcement

# STRs and Agritourism

# STRs and Agritourism

## What is Agritourism?

- § 3.2-6400: “[A]ny activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, wineries, ranching, historical, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity.

# What is agritourism?



# STRs and Agritourism

## The Right to Farm Act

- §3.2-301: “... no locality shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.... No locality shall enact zoning ordinances that would unreasonably restrict or regulate farm structures or farming and forestry practices in an agricultural district or classification unless such restrictions bear a relationship to the health, safety, and general welfare of its citizens.”
- Localities can:
  - adopt setback requirements
  - minimum area requirements
  - other requirements that apply to land on which agriculture and silviculture activity is occurring within the locality that is zoned as an agricultural district or classification



# STRs and Agritourism

## Agritourism Statutes

- § 15.2-2288 Localities may not require a special use permit for certain agricultural activities (Right to Farm Act)
  - “A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.”
- § 15.2-2288.6(A) (Agritourism Zoning Preemption)
  - No locality shall regulate the carrying out of any of the following activities at an agricultural operation, as defined in § 3.2-300, unless there is a substantial impact on the health, safety, or general welfare of the public:
    - *1. Agritourism activities as defined in § 3.2-6400*

# STRs and Agritourism

## OAG Opinion No. 22-036

- “I therefore conclude, based on the plain language of the applicable statutes, including § 3.2-6400, that offering short-term rental accommodations, in defined circumstances, falls within the protections against local regulation afforded certain activities under § 15.2-2288.6.”
- “Nevertheless, I caution that whether a particular instance of a property owner offering short-term rental accommodations is exempt from local zoning regulation depends on whether all attendant statutory conditions are met. For an activity to be exempt from local regulation under § 15.2-2288.6:”
  - The associated property must be zoned as a part of an agricultural district or classification or engaged in an “agricultural operation” as defined in § 3.2-300
  - The activity must occur on property meeting the definition of a “farm or ranch,” which in turn requires the land to be used in the creation of “agricultural products,” as further defined by statute.
  - “Rural activities” must be available for the general public to experience.

# STRs and Agritourism Avenues of Regulation

- Regulate light pollution under zoning authority
- Noise Regulation carve out under § 15.2-2288.6(C)
  - Must be general noise regulation, or no more stringent
  - No “reasonable person” test (Tanner v. Virginia Beach)
  - Decibel meter or “clearly audible” test
- VDOT and traffic enforcement generally applicable within agriculturally zoned areas
- ADA and building code – when triggered on farm?

# Issues on STR Assessment

- Are STRs a commercial use, or a residential use?
  - In what context? Zoning? HOAs/covenants? Tax assessment?
- Which of the three approaches to value to use?
  - Advantages and disadvantages
  - Some specialized applications to STRs

# Issues on STR Assessment

- Market / Sales Comparison Approach
  - Selecting highest and best use a first step (STR? Residence? Other commercial? Some combination?) What about parcels zoned for other uses OR STRs?
  - Selecting comparable sales with that highest and best use
  - Are they STRs? How do you know?
  - Sales of parcels that COULD be comparable sales
  - Owner-occupied “primary residence” STRs, ie 2024 Virginia Laws Ch. 792 (S.B. 544) STRs versus “business” STRs
  - Adjustments... based on success or not of STR? Location? Age? Condition?

# Issues on STR Assessment

- Cost Approach
  - Rule of substitution
  - Reconstruction (Cost to recreate same improvements on similar site) ...
  - Replacement (Cost to replace the same utility/use)
  - Depreciation (physical, functional, economic)
    - *Physical – time and condition*
    - *Functional – is it suitable for STR*
    - *Economic – is it even legal, are there outside actions that reduce market, seasonal impacts, etc.*

# Issues on STR Assessment

- Income Capitalization Approach
  - *Income less expenses before taxes*
  - *Even if you do know it is an STR, how do you get income and expense information? (Return, summons, public education)*
  - *Capitalization rate*
    - Derived from comparable sales
    - Derived from investment rate expectation – are there investors in STRs to determine a market return expectation?

Thank you for your time!



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