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To Regulate Or Not To Regulate? Short-Term Rentals and the Hard Questions Municipalities Are Starting To Ask

by Karla Chaffee, Esq.

Karla Chaffee is a member of Robinson + Cole, LLP's LandLaw Section. Her practice includes reviewing and commenting on municipal regulations, as well as litigating land use and environmental matters. She also is a co-author of the blog, www.rluipa-defense.com. Karla moderated the panel discussion "Who's Renting Next Door? Airbnb, Similar Services and How Municipalities Are Choosing to Respond" at the APA's Northeast Planning Conference, held June 25-26, 2015, in Saratoga Springs, New York. Panelists were Cathy Lizotte, Senior Assistant Corporation Counsel for the City of Boston; George Proakis, AICP, Director of Planning for Somerville, Massachusetts; and Erich Eiselt, Assistant General Counsel of the International Municipal Lawyers Association.

Although I did not know it until recently, I am a Millennial. According to Neil Howe and William Strauss, authors of the 1991 book Generations: The History of America's Future, 1584 to 2069, Millennials are the generation of individuals born between 1982 and 2004. Born in 1984, I am right on the tip of the wave of individuals who apparently love social networking, had a Facebook account in college, stopped using Facebook when their mother joined Facebook, and are entrenched members of the "sharing economy." Yes, I love Zipcar and I have rented through Airbnb and HomeAway. My internet-enabled rental experiences have been positive (except for one "artist cottage" that was really a shack with a dirty bathroom), but as a land use and zoning attorney, I recognize that short-term rental platforms like Airbnb raise a host of concerns for some municipalities.

Companies like Airbnb, HomeAway, VRBO, and FlipKey provide a web-based platform that allows anyone from the owner of a five-bedroom Victorian home to a tenant in a two-room city apartment to rent their space for as little as one night. While HomeAway (which now owns VRBO) allows those listing units to either pay a flat membership fee or pay a "commission" on each rental, FlipKey and Airbnb work only on the commission-based model (charging approximately 3% of each booking fee).

It is certainly unquestionable that the short-term rental market has and will continue to rise at an incredible rate. Some estimates show Airbnb's revenue growing by 250% over the next five years, valuing the company, which remains privately owned, at $20 to $25 billion. Of course, the concept of renting your home or apartment for short periods of time, especially in "touristy" or seaside communities, is not new. However, the explosion of the online rental market has caused many community planners to question whether and how such uses can and should be regulated.

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Potential Short-term Rental Externalities

There are plenty of horror stories about renters who view an Airbnb rental as an instant party venue. A favorite recent headline, "Airbnb guests trash Calgary house in 'drug-induced orgy'" succinctly explains the risks to hosts. Often, less publicized impacts are felt community-wide. As the percentage of homes or apartments rented on a short-term basis in neighborhoods rises, so too do the externalities associated with transient populations; potential increases in traffic, noise, and trash– not to mention numerous strangers with suitcases–may quickly start to impact the fabric of a neighborhood.

One less obvious impact of the increase in short-term rental prevalence is the displacement of housing stock available for long-term tenancy. Reductions in available housing, especially in metropolitan areas where residential space may already be tight, have already started to push rental and purchase prices up. According to members of the San Francisco Planning Department, who presented at the 2015 American Planning Association (APA) National Conference in Seattle, the impact of short-term rentals on the affordability of housing is one, if not the largest, concern with the boom of short-term rental use in their city.

In May of last year, San Francisco's Budget and Legislative Analyst's Office issued a report on how short-term rentals affect the City's housing market. Until February of last year, short-term rentals (defined as thirty days or less) were illegal in San Francisco, but the City estimates between 5,249 and 6,113 units were rented on Airbnb, despite the restriction. By calculating the number of "commercial" hosts, those renting an entire housing unit on a short-term basis, the City "estimates that between 925 and 1,960 units citywide have been removed from the housing market from just Airbnb listings." Such units account for between 11% to 23% of the City's total available rental units.

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The Positive Side of Short-term Rentals

The affordability issue, however, is not one-dimensional. Several studies have concluded that short-term

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Short-Term Rentals

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rentals may increase tourism, especially in neighborhoods not usually on a tourist's map. Rental platforms like Airbnb also enable long-term residents to rent out a room or two in their owner-occupied home and earn additional income. In numerous high-priced areas, such income ultimately allows a temporary lessor to remain in their home and remain a valuable asset to the community. As George Proakis, AICP, Director of Planning of Somerville, Massachusetts, recently explained: "When the City of Somerville considers how or whether to regulate the short-term rental market, we're very conscious of the impact to the City's limited housing supply. On the other hand, however, we recognize that Airbnb allows some homeowners who are essential to the fabric of our neighborhoods to rent a bedroom or two and afford our already high-priced housing market."

In most circumstances, short-term rentals can further a fundamental principle of the sharing economy; when information is shared or underutilized assets are utilized, the entire economy benefits. Embracing the sharing economy and tools like Airbnb is a part of life for most Millennials, which is just the population that large and small cities wish to attract to its inner core.

To Regulate or Not To Regulate?

With the astonishing rate of growth for Airbnb and other short-term rental companies, municipalities are left picking their brains about how best to regulate these uses, or whether to even regulate them at all. So what are the best options for a community? In this case, nothing is more apt than the typical lawyer response—it depends. First, municipalities should consider whether existing code enforcement options are enough to address their concerns. Do existing zoning code or health and safety regulatory enforcement tools provide adequate remedies for permanent residents' concerns?

If a community decides to regulate, identifying desired goals is critical. At a presentation at the June 25-26, 2014 APA New England Conference in Saratoga Springs, New York, Catherine Lizotte, Senior Assistant Corporation Counsel of Boston, Massachusetts, discussed how Boston, which has not passed any legislation directed at short-term rentals, has started to contemplate the short-term rental issue. A key part of Boston's evaluation is to assess the goals of any potential regulatory program; how can a regulatory program encourage compliance, protect public safety, promote industry equity (for example, by collecting a hotel tax), and mitigate potential impacts to neighborhoods and housing costs?

Additionally, other communities have already started regulating the short-term rental market. In the same presentation, Erich Eiselt, Assistant General Counsel of the International Municipal Lawyers Association, provided insight on how some municipalities have responded. Just a few examples of these include: in parts of San Luis Obispo County, California, short-term rentals are not allowed within 200 linear feet of each other; in Austin, Texas, short-term rentals not within the host's primary residence cannot exceed 3% of each census tract; and in Fort Meyers Beach, Florida, individuals may only host one short-term rental per month, not less than one week in duration.

Unfortunately, this article cannot point its readers to best practices in regulating short-term rentals, because municipalities across the country are just beginning to decide whether and how short-term rentals should be regulated in the Age of Airbnb. The good news, however, is that innovations such as the upsurge in short-term rentals provides another opportunity for communities to evaluate whether to embrace, reject, or find some middle ground in regulating the sharing economy. ♦

Meet Our New Curtin Fellow

The Planning & Law Division welcomes Leonard Cohen as this year's recipient of the Daniel J. Curtin Fellowship. Lenny is a second year law student at Pace University School of Law in White Plains, New York. Prior to attending Pace, Lenny earned a B.A. in English and Creative Writing at the University of South Florida. Lenny developed an interest for land use and planning while taking an undergraduate architecture course that focused on sustainable cities. He is currently a Junior Associate on Pace's Environmental Law Review, part of Pace's 3rd ranked Environmental Law Program. Lenny served as a summer intern at the Land Use Law Center for Sustainable Development, where he worked on a variety of issues ranging from fair housing to economic development for New York municipalities. He hopes to further a career in planning and the law and believes his role as Curtin Fellow is the next step down that path. Lenny enjoys the adventurous side to life – bouldering, skiing, and rock climbing. His favorite hike was Yosemite last summer.

The purpose of the PLD Daniel J. Curtin, Jr. Fellowship is to foster increased interest in the study of land use planning and its interrelationship with the law at the graduate, and law school levels; increased participation in the planning profession; and ultimately, greater service to communities across the nation.

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