Airbnb: Innovation and Its Externalities

By Erich Eiselt, IMLA Assistant General Counsel



Chapter Two—The Online Lodging Revolution. *Municipal Lawyer* recently discussed the "ridesharing" revolution led by Uber and its ilk. The mobile app upstart and other "Transportation Network Companies" are inciting showdowns at local governments across the country as an indigenous taxi industry battles to preserve its turf against a nimble swarm of web-enabled ninja-cabbies.[1]

An analogous upheaval has emerged in the housing arena. Airbnb, a San Francisco startup, was founded in 2008 by two roommates who offered space on air mattresses to help pay their rent. It is in some ways a second cousin to Uber and the TNC's--from a technology perspective, they may well share analogous genetic material. Just as Uber transforms everyday auto owners into self-employed taxi drivers, Airbnb enables the ordinary homeowner or apartment dweller to generate dollars (or euros, pounds, rupees, or yen) by renting out a home, room or even a couch. The company now numbers some 600,000 "hosts" across 192 countries around the globe.

Along with other web-based lodging sites including Austin based HomeAway.com (Nasdaq-"AWAY") and its subsidiary VRBO.com, Airbnb has revolutionized the world of short-term rentals, bringing landlords and tenants together in cyberspace, often avoiding taxes and regulations. These "disruptive" lodging websites allow armchair travelers to preview accommodations, room by room, whether a loft overlooking the Seine, a Mont Tremblant ski chalet or a second bedroom in Boston. Prior visitors' comments are scrutinized, features compared, and deals signed—with rents generally paid in advance. But unlike the other short-stay companies, which focus substantially on vacation locales, Airbnb has also become especially proficient in the alchemy of urban lodging, converting downtown residential condos and apartments into goldmines. And whereas its competitors make their money largely by collecting listing fees,[2] Airbnb positions itself in the middle of the rental transaction, charging the renter a commission of between 6% to 12% above the lodging price (while still exacting a 3% listing fee from the host).[3] The company's web site describes the merits:

> Our convenient payment system supports many currencies and several types of payment and payout methods. Airbnb collects guest payments from the moment they make a reservation and waits until 24 hours after arrival before releasing funds to the host. This way, guests and hosts can feel confident knowing that Airbnb will process and deliver payments when a reservation is honored.[4]

As with Uber, the middleman role can be highly profitable—Airbnb is reputed to have pocketed some $250 million last year,[5] with nothing but growth on the horizon. Like Uber, Airbnb is already valued in the billions (some sources refer to a four-fold jump in valuation just since last July, vaulting the company's presumptive worth to an amazing $13 billion today).[6] Not surprisingly, like Uber, Airbnb is considering a public offering. And it has displayed similar political savvy—whereas Uber recently hired David Plough, formerly strategist to Barack Obama, in July Airbnb added Bill Hyers, New York Mayor Bill De Blasio's campaign manager.

Not a Boxing Match—A Riot. The similarities do not end there. In terms of diverse interests and market implications, the "lodging wars" are at least as complex as the "taxi wars" described in a companion article in this issue.[6] Disputes over housing involve an even broader array of litigants jostling to protect their interests--more of a riot than a boxing match--creating significant

challenges for municipalities.

On one front, the traditional hoteliers are battling the new entrants.[7] Municipalities with large hotel constituencies are supportive. In New York City, home to the largest aggregation of hotel rooms in the nation, the lodging industry has gotten the attention of Attorney General Eric Schneiderman and Mayor De Blasio, who have joined forces to pressure Airbnb. And with good reason—New York City hoteliers are estimated to generate a staggering $1.4 billion yearly in real estate and hotel occupancy taxes, as well as hundreds of millions of dollars in annual payroll taxes. In addition, New York hotels employ some 400,000 union members, giving them significant power at the ballot box.[8] Not surprisingly, the industry's primary trade group, the Hotel Association of New York City,[9] has been threatening class action warfare directed at Airbnb. It alleges unfair competition, pointing to the fact that Airbnb hosts do not pay lodging taxes or comply with safely and zoning standards.[10]

Another group of stakeholders are landlords—individual or corporate-- who find that their supposed long-term tenants are secretly reaping handsome rewards by offering nightly or weekly stays to strangers. A small-time version of this battle unfolded in June, as a New Yorker began eviction proceedings and sought recovery on unjust enrichment grounds where her tenant was re-renting her $1,463 a month, rent-stabilized two bedroom Tribeca apartment for $250 per night.[11] And a Manhattan building owner recently brought suit after discovering that one tenant had long ago remodeled her unit to add a washing machine and baseboard heating—both in violation of building rules and safety ordinances—so that she could rent out her apartment via Airbnb. She allegedly pocketed more than $500,000 over a multi-year period. Despite losing her counsel after misrepresenting that an occupant in her unit was a "stepbrother" visiting from out of town," the miscreant nevertheless wrangled a $12,500 settlement payment in exchange for vacating the space.[12]

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Larger landlords have taken a more proactive approach. The Airbnb-enabled illegal sublet movement has led at least one large New York City property owner, the Ideal Companies, to "deputize" resident managers as "Airbnb marshals." Their mission? To identify renters who have become short-term landlords and are skirting rent stabilization laws.[13]

Still other fights are instigated on a more granular level, by individual Airbnb lessors who discover that their dwellings have been trashed or used for illicit activities. In July 2011, renters savaged an apartment owned by a San Francisco-based executive. The company responded by issuing a $1,000,000 retroactive insurance guarantee to protect hosts from property damage caused by Airbnb guests. In March of this year, a New York-based comedian rented out his apartment via Airbnb to a man who then used it to host an advertised "XXX Freak Fest." Not surprisingly, the prostitution trade finds that high-end urban apartments, rented from unknowing owners in short increments via Airbnb, can provide far better profits and greater privacy than costly hotels with nosy front desk clerks. As one sex-trade worker told the New York Post "It's more discreet and much cheaper than The Waldorf").[14]

Beyond Lost Tax Revenues: Municipalities themselves are also becoming combatants against Airbnb, for a variety of reasons. Obviously, they seek lost tax revenues from *sub rosa* commercial activities thriving within their jurisdictions—in some cases they would collect 20% or more as hotel taxes. They also require better knowledge about how and where short-term rentals are springing up so that they can ensure safety and enforce zoning standards. They respond to residents' complaints that neighborhoods are being overrun by weekly cycles of short-term vacationers, bringing with them noise, trash, traffic and a shortage of respect.

And some cities and towns have concerns about a more subtle Airbnb externality: unlike the Uber revolution, which arguably increases the supply of publicly-available transportation, drives down taxi fares, improves quality and expands service to remote areas, the Airbnb movement can reduce a city's housing and drive prices up. As owners triple or quadruple their incomes by converting long-term leases into weekly or daily lodging, the supply of long-term housing—places that will provide a stable home for permanent residents who are employed within the city, who form family units, who vote, who volunteer, who care for others, or who simply have no other place to live within city limits—is diminished. The laws of economics intercede, and prices for the remaining stock of long-term rentals are driven further out of reach. Against a flood of transients paying sky-high prices for overnight stays, cities struggle to preserve the shrinking stock of long-term housing that is still within the budgets of working-class residents.

New York on the Attack: States and municipalities have a variety of mechanisms to combat the short-term rental siege: zoning that restricts or prohibits commercial activity, occupancy codes limiting the number of guests, durational maximums (or minimums) for short stays, parking restrictions, requirements for notifying neighbors,

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safety inspections, tax filings, business licenses, fees and the like. These can be buttressed with individual building rules and condo or homeowner association by-laws. The appropriate vehicle(s) will vary with the objective—from eliminating short stays altogether, to complete *laissez-faire*, with many gradations in between.

In New York, home to vigorous litigation on the subject, the State's Multiple Dwelling Law (the "MDL"), was amended in 2010 to implement a virtual prohibition against rentals of less than 30 days in a "Class A" multiple dwelling:

> A Class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit. The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with the occupancy of such dwelling unit for permanent residence purposes: (1) (A) occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons **living within the household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers**; or (B) incidental and occasional occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment, **provided that there is no monetary compensation paid to the permanent occupants for such occupancy**.[15]

In other words, under New York law, it is unlawful to rent out an apartment in a "Class A" multiple dwelling (one occupied by three or more separate tenants) for fewer than 30 days unless a "permanent resident" is present during the rental period. If the "permanent resident" is absent, the temporary occupancy must be uncompensated.

The purpose of this prohibition is to protect permanent residents who "must endure the inconvenience of hotel occupancy in their buildings" and ensure that proper fire and safety codes are being enforced.[16] (Because transient, short-term residents are not as likely to be familiar with fire escape routes as long-term tenants, New York buildings used for short term tenancy are required to comply with a host of Fire Department safety-oriented provisions that are not required of long-term rental facilities. These include sprinkler systems, fire extinguishers, illuminated escape path lighting and so on. When ordinary apartment buildings become hostels and do not adopt these greater safety measures, they subject unknowing transient visitors to heightened risks—and building owners to fines and other penalties).

Armed with the MDL and other tools, New York has begun a frontal assault on Airbnb's activities. In May, Attorney General Eric Schneiderman served a subpoena on the company, seeking records about the number and nature of Airbnb leases in the state. After a series of legal maneuvers to avoid the subpoena, the company complied, at the same time removing some 2,000 New York City listings from its site. (Predictably, the provision by Airbnb of this data gave rise to its own lawsuit. Calling themselves "New Yorkers Making Ends Meet in the Sharing Economy," a group of property lessors filed a lawsuit in September against Airbnb in state supreme court to prevent the firm from sharing their private information with the the Attorney General).[17]

In mid-October, AG Schneiderman released his report.[18] Among other things, it found that the vast majority of Airbnb's New York City leases violate State and City laws including the aforementioned MDL. It also determined that, despite Airbnb's image as a collection of small-time mom and pop landlords picking up occasional income on the side, a substantial number of big commercial players have worked their way into the mix.

Among Schneiderman's findings were:

- **Up to 72% of New York Airbnb listings are illegal:** Of 35,354 private, short-term listings, more than 25,000 violated either the MDL and/or New York City's Administrative Code (zoning laws).
- **Commercial users run multi-million-dollar businesses on Airbnb:** Over 100 landlords controlled 10 or more apartments rented on Airbnb. These big-time players booked 47,000 reservations and earned $60 million in revenue. The most prolific landlord administered 272 unique listings, booked 3,024 reservations and made $6.8 million.
- **Numerous units appear to serve as illegal "hostels:"** In 2013, approximately 200 units were booked through Airbnb for more than 365 nights during the year, indicating that multiple, unrelated guests shared the same unit on the same night, as they would in a hostel (or other use). The ten most-rented units were booked for an average of 1,900 nights in 2013, with one top listing averaging thirteen reservations per unit per night.[19]

The Big Apple has already begun taking action. In October it obtained preliminary injunctions against two building owners who were using their lower Fifth Avenue properties for Airbnb-fueled short term rentals.[20]

The California Offensive: In California, the fight over Airbnb's short term housing bloom is part of a larger conversation, veering into Fifth Amendment territory. The Golden State's Ellis Act has long been a focal point of landlord-tenant hostilities. Passed by the California legislature in 1985, the Ellis Act was adopted in response to local measures which were making it increasingly difficult for owners to leave the rental housing business. One decision in particular, *Nash v. City of Santa Monica*, 37 Cal.3d 97, 688 P.2d 894 (Cal. 1984) engendered Ellis. In *Nash*, the owner wished to evict the one remaining tenant in his six-unit property and raze the structure, leaving the empty lot available for redevelopment. The Santa Monica City Charter had been amended to prohibit landlords from demolishing a

building without obtaining a permit. This required a showing that: (1) the building was not occupied by persons of low or moderate income, (2) it could not be afforded by persons of low or moderate income, (3) removal would not adversely affect the housing supply, and (4) the owner could not make a reasonable return on his investment.

The trial court agreed with Nash's contention that he would not be able to fulfill the criteria for the demolition permit, and it found that the challenged provision operated to deprive Nash of property without due process of law and without just compensation. It ordered that the City and the Santa Monica Rent Control Board grant Nash a removal permit for his property.

The California Supreme Court reversed, upholding the Santa Monica permit requirement and its application to Nash. Operating in a pre-*Nollan*, *Dolan* and *Koontz* context, it reasoned that *Penn Central* standards had been satisfied because the owner could still make a profit from his leasing activities and his investment-backed expectations had been preserved: "It is undisputed that both prongs of the Penn Central test are met here. We are aware of no authority which would impose different requirements under the California Constitution."[21] (The court did state in passing that Nash was protected by Thirteenth Amendment proscriptions against involuntary servitude, and could not be compelled to be a landlord).

The California legislature rapidly stepped into the breach with the Ellis Act of 1986, Cal. Gov't Code §§ 7060-7060.7. The Act explicitly states that the legislative intent was "to supersede any holding or portion of any holding in Nash v. City of Santa Monica, 37 Cal.3d 97 to the extent that the holding or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business." Under the Act, governmental entities cannot require a residential owner to remain in the rental business:

> No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease, except for guestrooms or efficiency units within a residential hotel . . . [22]

"Airbnb is committed to making cities stronger and more affordable, and the vast majority of our hosts do just that," the company stated. "If a small number of predatory landlords are abusing platforms like ours to illegally evict tenants in search of a quick buck, we wholeheartedly support efforts to bring those landlords to justice and applaud the City Attorney for his actions."

The Ellis Act allows the eviction of tenants where the owner has decided to take a property off the market. It is limited in its application and by no means a free ride for landlords. Under the Act and local regulations promulgated in its wake, owners must give up to one year's notice of eviction and pay upwards of $5000 per-person relocation costs. They are required to pay damages to a displaced tenant if they attempt to re-lease the property within two years—and must offer it first to that tenant, at rent-controlled rates. If they demolish a building to construct a replacement residential structure, they are prohibited from leasing the property for five years at anything above rent-controlled rates.[23]

Despite these ostensible protections against abuse, profit-oriented owners and builders hungry for redevelopment opportunities have predictably found ways to skirt California's Ellis Act barriers. Tens of thousands of moderately-priced units across the state have disappeared. In San Francisco, the birthplace of Airbnb, affordable housing has become an endangered species. City Attorney Dennis Herrera describes the shortage, and the brewing war against lawbreakers, in no uncertain terms:

> "In the midst of a housing crisis of historic proportions, illegal short-term rental conversions of our scarce residential housing stock risks becoming a major contributing factor. We intend to crack down hard on unlawful conduct that's exacerbating – and in many cases profiting from – San Francisco's alarming lack of affordable housing."[24]

Herrera has invoked the full power of available laws. The city brought suit against defendants Darren and Valerie Lee, who had invoked the Ellis Act when they ceased leasing three Pacific Heights dwellings in 2005. One of the displaced tenants was disabled. He had been living in the unit for ten years and was paying $1,087 a month. The city's suit alleges that in 2009, the Lees began short-term rentals of the three properties via VRBO.com and HomeAway.com for up to $595 per night—rates that would generate nearly $18,000 per month if all units were leased every night.[25]

Another San Francisco lawsuit cited defendants Lev, Tamara and Tatyana Yurovsky for similar violations – one of which also involved a disabled resident – at two Fisherman's Wharf properties they began renting through Airbnb and GreatSFVacation.com for as much as $320 a night.[26]

In a public statement, Airbnb expressed its support for Herrera's offensive, saying that it did not condone the use of its platform to violate regulations.

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The Ellis Act had always left open the possibility of additional mitigation in favor of tenants. Sections 7060.1-7060.1(c) go on to explain that "[n]otwithstanding Section 7060, nothing in this chapter" . . . "[d]iminishes or enhances any power in any public entity to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations."[28]

In June 2014, San Francisco took additional–and detractors would say extreme–legislative steps to protect incumbent tenants from being displaced. The new measure significantly increased the cost to landlords for displacing renters above the then-existing levels (which allowed a maximum of $13,500 per unit, plus an additional $3,000 for elderly or disabled tenants).

San Francisco's new ordinance applies to all tenants who had not actually moved out as of June 1, 2014—even if they had received notice under the prior ordinance. Under the 2014 Ordinance, the landlord must pay the greater of the payout required by the prior ordinance, or an amount equal to twenty-four times the difference between the unit's current monthly rate and the fair market value of a comparable unit in San Francisco, as calculated by a schedule developed by the Controller's Office.[29]

The law was imediately challenged. Plaintiffs Daniel and Maria Levin own a two-unit house on San Francisco's renowned and picturesque Lombard Street. Earlier this year, they notified the occupant of one unit that they were taking it off the market. Under the new city ordinance, they would be required to pay nearly $118,000 to that single tenant, according to court documents. The Levins and other property owners filed suit against the city in late July.[30]

In October, the ordinance was found to be constitutionally deficient.[31] Northern District of California Judge Charles R. Breyer said in his decision that while the city was well-intentioned in attempting to solve its housing shortage, the recent ordinance did not survive Fifth Amendment scrutiny.

"San Francisco's housing shortage and the high market rates that result are significant problems of public concern, and the city legislature's attempts to ameliorate them are laudable," Judge Breyer wrote. "The ordinance apparently is unprecedented in requiring a massive lump-sum payout from one private party to another in exchange for regaining possession of property. But that trail had not been blazed before for good reason."[32]

The decision concluded that "the city has crossed the constitutional line between permissible government regulation of land and an impermissible monetary exaction that lacks an essential nexus and rough proportionality to the impact of an Ellis Act withdrawal." [33] In essence, the imposition of such a high barrier to taking one's leasehold off the rental market amounted to a virtual taking of the property—or a significant portion of the property's value—by the city. While requiring an owner to compensate a displaced tenant for moving and moving costs, as required under the Ellis Act, was constitutionally acceptable, holding the landlord responsible for skyrocketing rental rates was not.

"I think [Judge Breyer] got it right. This is an unprecedented law that forced a few property owners to solve a larger societal problem by paying a king's ransom to stop being landlords," said Pacific Legal Foundation pro bono attorney J. David Breemer on behalf of his clients. "There may be a broader crisis, but that doesn't justify forcing the burden of solving the crisis on the backs of a few property owners."[34]

Dennis Herrera announced an appeal in short order. "There should be no doubt that when a landlord evicts a rent-controlled tenant, the immense rent increase the tenant faces is the direct result of the landlord's decision to evict. . . .San Francisco is facing a housing affordability crisis that's historically unprecedented, and our tenant relocation law serves a legitimate and lawful public purpose in helping tenants to adjust to the loss of rent control and mitigating the harms of displacement."[35]

Levin and other landlord-tenant cases lay bare many of the complex—and often conflicting-best intentions of state and municipal governments as they try to reconcile free enterprise with societal goals. In San Francisco, New York City and other metropolises, one major reason for the huge disparity between existing rents and fair market value is obvious – the artificial ceiling on annual rent increases for occupied units. San Francisco's rent control plan, for example, covers nearly all rental property in buildings constructed before June 1979, thereby affecting a large proportion of the city's leasehold inventory. Rent increases are strictly limited to a rate lower than inflation under the guidelines published by the San Francisco Rent Control Board-specifically, to sixty percent of the Bay Area Cost of Living Index. Under this rubric, rent increases generally hover between one and two percent per year, resulting in an ever-diminishing return on investment for property owners.[36]

An Attempt at Compromise

Even as San Francisco has continued to fight the loss of long-term affordable housing, it recognizes the syllogism that by allowing permanent residents to rent out their properties on occasion, their prospects for staying in the city may actually increase. In October, the City Board of Supervisors passed an ordinance explicitly *authorizing* short -term rentals—within reason. In explaining its about-face, the Board cited a fuller appreciation of the role that Airbnb and its cohorts play in the city's housing market:

> The widespread conversion of residential housing to short-term rentals, commonly referred to as hotelization, was prohibited by this Board because, when taken to extremes, these conversions could result in the loss of housing for permanent residents. But, with the advent of new technology, the rise of the sharing economy, and the economic and social benefits to residents of sharing resources, short-term rental activity continued to proliferate. This has not only led the City to strengthen enforcement of short-term rental laws, but also prompted an examination of parameters to regulate short-term rentals and create a pathway to legalize this activity. The goal of regulation is to ensure compliance with all requirements of the Municipal Code, including but not limited to the Business and Tax Regulations Code

and the Residential Rent Stabilization and Arbitration Ordinance, and accountability for neighborhood quality of life.

(1) Notwithstanding the restrictions set forth in this Section 41A.5, a Permanent Resident may offer his or her Primary Residence as a Short-Term Residential Rental if:

(A) The Residential Unit is occupied by the Permanent Resident *for no less than 275 days* out of any given the *calendar year* in which the Residential Unit is rented as a Short-Term Residential Rental or, proportional share thereof if he or she if the Permanent Resident has not rented or owned the Residential Unit for the full preceding calendar year, for no less than 75% of the days he or she has owned or rented the Residential Unit.[37]

This measure seems to be a creative and forward-thinking solution. Whether it will actually help curb San Francisco's runaway rental rates and protect long-term housing is unclear. Enforcement will become more complex if greater numbers of owners get into the short-term act. Some detractors will no doubt carp that, if apartments come with a legalized sublease profit opportunity, owners will boost rents even more to participate in the potential upside.

In fact, a challenge has already been launched against the new law--but from a most unexpected source: HomeAway.com. The Airbnb competitor brought suit against the city in November, raising unfair competition and even Commerce Clause challenges because Airbnb is a California-based company.[38] HomeAway objects to the 90-day annual limitation on short term leasing, given that it specializes in second homes rented out to vacationers for most, if not all, of the year. Although Airbnb will lose some San Francisco listings under the new law, the majority of Airbnb landlords rent out primary residences and do not vacate them for extended periods.[39] HomeAway may also be threatened by provisions requiring the payment of lodging tax—unlike Airbnb's system, which puts the company in the middle of the payment process from the outset, making collection of taxes relatively easy, HomeAway is only a listing service. It cannot ensure that its clients are complying with tax laws.

Economic Infusion or Code Violation?: The competing considerations behind San Francisco's give and take are evident across the country. Many jurisdictions are only now beginning to grapple with the right balance. Local governments continue to seek the right balance between residential stability and free market entrepreneurialism. In vacation areas that are not fighting the loss of long-term housing and want to accommodate the proprietors of short-term rentals, whose transient tenants are a vital part of the locality's economy, the focus is on registration, notice, safety–and fees.

San Bernardino's mountains, to the east of Los Angeles, are such a locale. There the San Bernardino County Development Code provides that: "A short-term private home rental, within the Mountain Region, shall be allowed, provided that a Special Use Permit is first obtained and all of the standards and conditions contained in this Chapter are fulfilled." The San Bernardino Code further specifies that a short term rental is 30 days or less, that fire and safety standards must be met, that the number of occupants cannot exceed available "raised sleeping beds" (furniture on which to sleep, elevated at least two feet above the floor) and that sufficient parking must be available at each house. In addition, owners of contiguous properties must be notified.[40]

The 5-page San Bernardino Special Permit application requires payment of a $671 fee (renewal is biennial) and includes a "Uniform Transient Occupancy Tax" form, to be filed directly with the County Tax Collector.[41]

In Fort Meyers Beach, the rules are a bit less generous to landlords. Owners are permitted to rent out their residential properties, but only once in any calendar month, and for not less than one week at a time.[42]

In sunny Gilbert, Arizona the policies are stricter still. There, big-time profits have led homeowners to open their residences to winter-weary Northerners. The city has no intention of seeing established neighborhoods overrun with short-term out of towners. The Gilbert Code prohibits any leases of less than 30 days, period. Violators are charged $255 for the first offense with more costly disincentives thereafter. Some Gilbert homeowners associations have gone further, requiring minimum stays of 90 days or more. [43]

And in Ashland, Oregon, an R-1 zoning designation means that the owner cannot legally offer any short term rental whatsoever, with or without Airbnb—there is no process for registering and no standards or fees that will enable compliance.[44]

The response to regulation varies around the country. There appears to be little patience for a recent legislative solution in Austin, Texas. There, the city is more interested in safety and tax revenues than preserving affordable housing. The Lone Star State mecca for leading-edge music and laid-back lifestyles ("Keep Austin Weird" is a local bumper sticker and tee-shirt theme) is home to a number of heavily attended festivals during the year. Many residents have built a healthy income by offering up their properties—on a temporary basis or as year-round vacation rentals. Operating through Airbnb, HomeAway.com, VRBO.com and others, owners have been skirting safety requirements and ignoring lodging taxes (recall that Texas has no state income tax).

In August 2012, the Austin City Council determined that the situation required action. It voted overwhelmingly to pass Ordinance No. 20130926-144, which imposed new requirements on Short Term Rentals (STR's). The definition of "STR" was expanded to virtually anyone in city limits who made accommodations available for less than 30 days at a time, if they charged $2 or more per day. The number of "secondary" STR's—those where the rented property was not the owner's principal residence—was limited to no more than 3% of each census tract in the City. STR operators were required obtain licenses, be inspected, obtain at least $500,000 in liability insurance and file reports of lodging activities. Finally, made STR income became taxable under "Hotel Occupancy Tax" and other laws—resulting in a 7% hotel impost to Austin, an additional special 2% Austin assessment, plus a 6% Texas state sales tax. Application fees were set at $235, with a further $241 charge to cover the municipality's cost of notifying all neighbors within 100 feet of the short-term rental property. Penalties for non-compliance could reach $2,000 per night.[45]

According to press accounts, the new rules were met with non-compliance and anger. Although they went into effect in October 2012—shortly before the Austin City Limits music festival and the City's first ever Formula 1 race (preparations for that event were evident to IMLA

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2012 Annual Conference attendees in Austin) only four landlords had fully registered as the ACL began. The City estimated that over 1,000 had not.[46]

The City Council has recently softened one of the most objectionable portions of the short-term tax package—it reduced the charge for notifying neighbors to $50, resulting in a $285 annual license application cost. [47]

But the bigger disagreement continues. In a convergence reminiscent of the legalized marijuana movement, conservatives and liberals have joined to decry the intrusion of government into Austin's way of life. Further massaging of the city's hotel occupancy tax ordinance will be needed, it seems.

More Work to be Done: As with the ride sharing wars, enforcement of short-term lodging rules is a challenge. It is difficult to catch scofflaws in the act, expensive to deploy already-busy code enforcement officers, and time-consuming to litigate when Airbnb and its free-market disciples take to the courts. The impact of Airbnb and its web-lodging relatives on municipal governments is certain to increase—whether they bolster local economies or undermine safety and tax laws and threaten long-term housing. Despite their broader spectrum of litigants and potential constitutional implications, the short-term lodging wars do share one significant characteristic with the battle over ride sharing. Both involve leading edge (for the moment) technologies, which are embraced by the younger cohort in our society and worldwide--with older converts joining every day. Airbnb and HomeAway are not going to disappear anytime soon, any more than are Uber or Lyft. The challenge for local lawmakers is to fashion rules that allow the benefits of entrepreneurship and new technology, while comporting with Constitutional parameters, protecting the public and meeting fiscal responsibilities. Municipal decision makers—and IMLA members as their counselors—need to devise effective and responsible regulations that protect the best parts of the status quo but allow innovation to take root and flourish.

Notes

1. The TNC uprising continues to undermine traditional taxis. A recent New York Times article describes the precipitous decline in the value of taxi medallions across the US. Medallions, which are often a bigger investment than a home mortgage, have dropped 20 percent or more in the past 2 years in New York (to an average of $872,000), Boston and Chicago. Philadelphia recently scrapped a new medallion auction altogether. N.Y. Times, Friday November 27, 2014, page a-1.
2. Homeaway's 10Q dated November 5, 2014 indicates that, for the 9 months ended September 30, 2014, roughly $290 million of the company's $350 million in revenues came from listings. http://files.shareholder.com/downloads/ABEA-6A2WZS/3667792059x0xS1193125-14-398235/1366684/filing.pdf
3. http://www.nbcnewyork.com/news/local/Airbnb-NYC/-Data-Battle-227773671.html
4. https://www.airbnb.com/help (see "getting paid").
5. "An Airbnb Rival Challenges San Francisco's Airbnb Law," Businessweek, Nov. 3, 2014. http://www.businessweek.com/articles/2014-11-03/san-francisco-faces-a-lawsuit-over-its-airbnb-law
6. *Id.*
7. http://rochester.twcnews.com/content/lifestyles/780202/hotel-industry-weighs-impact-of-airbnb/
8. http://betabeat.com/2014/04/schneiderman-smacks-airbnb-at-crains-breakfast/#ixzz3JLYf25bn
9. http://www.hanyc.org
10. http://therealdeal.com/blog/2013/08/19/hotels-seek-to-file-class-action-lawsuit-against-airbnb
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14. http://nypost.com/2014/04/14/hookers-using-airbnb-to-use-apartments-for-sex-sessions/
15. Laws of New York, Chapter 225 (emphasis added) http://www.nyc.gov/ html/dob/downloads/pdf/NYS_chapter_225.pdf
16. *See* New York State Assembly Memorandum in Support of Legislation (S. 6873-B, 233rd Leg. (N.Y. 2010 (Sponsor's Memo) Bill No. A10008).
17. http://time.com/3260313/airbnb-sued-by-group-of-users-in-new-york-city-for-breach-of-privacy/
18. http://www.ag.ny.gov/press-release/ag-schneiderman-releases-report-documenting-widespread-illegality-across-airbnbs-nyc
19. http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf
20. http://www.nydailynews.com/new-york/de-blasio-administration-files-lawsuit-apartments-operating-hotels-sites-liairbnb-article-1.1977461
21. Nash v. City of Santa Monica, 37 Cal.3d 97, at 102 (Cal. 1984).
22. Cal. Gov't Code § 7060(a).
23. Cal. Govt Code §7060.2 (d).
24. http://www.sfexaminer.com/sanfrancisco/city-attorney-files-lawsuits-against-landlords-renting-property-as-illegal-hotels/Content?oid=2778976
25. *Id.*
26. *Id.*
27. *Id.*
28. Cal. Govt Code §7060.1-7060.1(c).
29. Ordinance No. 54-14, S.F. Admin. Code. § 37.9A(e)(3)(E).
30. http://www.sfaa.org/pdf/levin-complaint-july-2014.pdf
31. Daniel Levin et al. v. City and County of San Francisco, no. 3:14 cv 03352 (Oct. 22, 2014).
32. *Id.*
33. *Id.*
34. http://www.sfexaminer.com/sanfrancisco/city-attorney-to-appeal-federal-judges-ruling-against-tenant-relocation-law/Content?oid=2909951
35. *Id.*
36. *see generally* S.F., Cal., Admin. Code §§ 37.2(r)(5), 37.3(a), and 37.9.
37. https://sfgov.legistar.com/View.ashx?M=F&ID=3292337&GUID=67C37394-6A63-49DC-A886-675E294384C1
38. Businessweek, *supra*, footnote 5.
39. Airbnb claims that 87% of its San Francisco rentals are primary residences. The San Francisco Chronicle disputes that number, finding that 30% of Airbnb landlords in the city are offering two or more locations. Carolyn Said, "Window Into Airbnb's Hidden Impact on S.F.," S.F. Chronicle http://www.sfchronicle.com/business/item/airbnb-san-francisco-30110.php
40. http://cms.sbcounty.gov/Portals/5/CodeEnforcement/Short%20Term%20Rental%20ORD%2084. 28%202014.pdf
41. *Id.*

Airbnb *Cont'd from page 32*

42. Fort Meyers Beach Development Code Ch. 34 sec. 622k. http://www.fortmyersbeachfl.gov/DocumentCenter/Home/View/320
43. http://www.azcentral.com/community/gilbert/articles/2010/05/14/20100514gilbert-vacation-homes-0515.html
44. http://www.kdrv.com/short-term-rentals-against-city-code/
45. http://austintexas.gov/str
46. http://www.statesman.com/news/news/local/as-austin-short-term-rental-rules-take-effect-hund/nSZbj
47. http://austintexas.gov/sites/default/files/files/Code_Compliance/STRs/S ML

Day in the Life *Cont'd from page 20*

the mayor's office, and even a state senator. Because of the community's demands for immediate action, several governmental entities felt compelled to join an already complicated situation.

On Sept. 5, the final show cause hearing for the tenant's eviction was held. The tenant failed to appear at the hearing, the order was issued, and the King County Sheriff posted notice the following day. Over the next week, I visited the home with officers and the home owner, verified that the tenants had not yet vacated, and developed a timeline with the sheriff's detective assigned to execute the eviction. Additionally, I was the point person to keep the increasing number of governmental agencies up to date on our progress and plans.

As eviction day grew closer it became evident that simply kicking the tenants out would not solve all the problems. Their mess still had to be cleaned up and it was clear that the tenants weren't going to do it. One of our office's land use attorneys, Tamera Van Ness, pushed DPD to issue a citation and expedite the abatement process. Once the citation was posted, the owner consented to a voluntary abatement. This cleared the City to have the property cleared immediately after the eviction.

In the weeks leading up to the eviction I worked closely with SPD to make sure all the pieces were in place. I maintained contact with the sheriff's office to make sure all parties would be present as required. The owner, with neighborhood cooperation, secured a contractor to board up the doors and windows of the home. The owner and neighborhood volunteers would clear out any "valuables" left behind by the tenant. CPT conferenced with the Conservation Corps to confirm they had the necessary tools, namely a large dumpster, standing by to clear the garbage off the property.

Finally, the day had arrived. On Sept. 18, we all headed out to the property for the 10 a.m. eviction. When we arrived, the Conservation Corps was ready to go with a large dumpster and a back hoe! This was important because as we quickly realized using a hand shovel to clear the garbage would have taken days. All we needed was the sheriff and the owner, who both arrived on schedule. The eviction went smoothly and the tenants left peacefully, despite the media's attempts at encouraging confrontation. Once the tenants had left, the cleanup frenzy began and, by 3:00 p.m., the place was unrecognizable. Almost everything proceeded according to plan. The only issue remaining was a need for a second dumpster that we were told we just couldn't have; that was easily remedied with calls from the North Precinct operations lieutenant and an assistant city attorney doing his best to sound intimidating. Overall, the day went smoothly, and the biggest reward was the neighbors' gratitude that the tenants were gone and the property was clean.

Since the property is still in the process of being listed as a short sale and technically abandoned, I worked with the owner to draft and sign a trespass agreement. That gives SPD authority similar to that in the retail trespass program (http://www.seattle.gov/law/precinct_liaisons/seattletrespass.htm). Between the neighbors' vigilance and SPD's ability to enforce trespassing with the owner's permission, the home should remain secure until it is sold and demolished. ML

Second Look *Cont'd from page 27*

5. Fed. R. Civ. P. 34(b)(2)(E)(i).
6. *Id.*
7. Although the magistrate judge makes light of this fact, the requesting party in *Venture Corp*. waited until shortly before the end of discovery to seek clarification about the produced ESI and documents, and may therefore have improperly sought to extend discovery. *See* 2014 WL 5305575 *2.
8. 2014 WL 5305575 *2.
9. 2014 WL 5305575 *3. ML

Code Enforcement *Cont'd from page 19*

ordinance. One of the orders the city may seek is closure of the building for a period of not less than 30 days. With the possibility of a closure order being put in place where the landlord would potentially lose rental income, we anticipate that landlords will be far more likely to address the problems at their property once they receive a notice from the city. In fact, we have used this tactic with successful results.

One peripheral issue that has arisen with respect to nuisance ordinances of this nature was framed in an e-mail from IMLA Executive Director Chuck Thompson. His note related that the ACLU is challenging these types of ordinances on the basis that they can have a negative impact on victims of crime. An example they cite is a woman who was being evicted from her residence—because the property had been found to violate nuisance ordinances due to her repeated calls to law enforcement about domestic violence against her, taking place in her rental. In essence, her complaining about intolerable (and likely criminal) actions occurring against her in her own apartment caused the property to be classed as a nuisance and taken off the rental rolls.

These are challenging problems. Like many issues in municipal law, there are valid concerns to be considered on both (or many) sides of the argument. I believe that nuisance ordinances can be drafted to accommodate the concerns raised by the ACLU. (I would encourage those of us who use these types of ordinances to send a copy to IMLA, along with any comments on your experience with the provision; as IMLA seeks to work with the ACLU on this issue, I am certain that any additional information would be useful).

To sum up, one element of a successful college town – whether home to a major university or a smaller community college—is adequate student housing. When a younger, transient student population lives within established, stable neighborhoods, conflicts are sure to arise. I am confident most of these issues can be resolved via some of the ideas I have referenced above, including carefully crafted housing ordinances. ML