International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

Monday, October 5, 2015

Work Session V: The Sharing Economy: Uber and Airbnb – Can They Exist in a Regulated World? Will They Save or Destroy Your Community?

Shifting Landscapes: Regulatory Challenges Stemming from Emerging Technologies

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In the modern era, the world moves fast — aided by technology that is constantly evolving and changing our relationships with each other and with the world around us. Technological developments challenge us in many ways, including how we balance use of these new tools against regulating them to ensure they do not create new problems that outweigh their benefits.

Emerging technologies in all their forms, from those that create the sharing marketplace to those that enhance law enforcement, generate dynamic and ever-shifting issues for localities hoping to implement and integrate them. The focus of the conversation now for local governments must be on clarifying the issues these technologies present, and finding solutions for their appropriate regulation and implantation consistent with the public good.

Transportation Network Companies

Transportation Network Companies (TNCs) are ridesharing companies that connect users and drivers through smartphone apps. They allow prospective passengers to view and select from nearby available drivers, who are guided to the passengers using the smartphone's GPS. The apps also allow passengers to track the location of their rides and manage payments, in addition to permitting reviews of both drivers and customers.

Several TNCs currently operate in the United States. The most ubiquitous of these is Uber, which is now available in more than 45 countries and in more than 200 cities or regions[1]. Other commonly known TNCs include Lyft[2], where drivers affix pink moustaches to their cars when they are available, and Sidecar[3], which allows drivers to set their own prices.

TNCs present themselves as a viable alternative to the existing taxi industry, often offering lower prices by avoiding many of the regulations that apply to taxis. These companies claim to be able to offer faster, cheaper service that allows customers to track their driver and review them after they leave, and also provide them information about the number of potential drivers in the area at any given time.

The services present two issues for local governments: They compete with the existing highly regulated taxicab business and they may present safety concerns because TNC drivers and their vehicles are predominantly unregulated. TNCs largely claim that ridesharing services are not analogous to taxi companies, and so should not be subject to the same regulations. Yet their unregulated nature has led to problems, from deaths, injuries and crimes by drivers who passed background checks conducted by the companies that are less onerous than those required of taxi drivers,[4] to dissension as drivers claim they are not earning what they were promised by the company.[5]

The responses from local governments are as varied as the cities themselves, ranging from legalization of TNCs (seen in cities like Austin[6], Houston[7] and Washington, D.C.[8]) to complete bans (in November, Nevada effectively barred the service entirely[9], and cities like Portland, Ore. and Little Rock, Ark. similarly do not allow ride-sharing services).[10] Most regulations that allow

the service require some concessions. In California, for example, a new state law requires drivers of the services to maintain primary liability insurance throughout the period they use the apps, as opposed to only requiring coverage whenever drivers accept a fare.[11]

Earlier this year, the City Council for Spokane, Wash. adopted new ordinances regulating both the taxi industry and the private ridesharing businesses.[12] With the new regulations in Spokane, private ridesharing companies will be required to pay the city 10 cents on every ride its drivers make, up to an annual cap of $10,000, in addition to other requirements.[13]

Though the regulatory and policy problems presented by TNCs may be similar everywhere, individual cities may prioritize their concerns differently, and wish to fashion their own unique approaches to solving them. There is much that can be learned from the cities that are already regulating Uber, Lyft and other rideshare companies, and these cities' choices will lay out paths for future regulators to adhere to, or diverge from, based on their success.

Online Property Rental Marketplaces

Online property rental marketplaces are websites that enable property owners, tenants and occupants to rent their living space to travelers, whether it is an entire home or just a couch or spare bedroom. Typically, these are short-term rentals consisting of several days or weeks. The leading online marketplaces are Airbnb[14] and Homeaway[15], though other websites provide similar services.

The largest of these, Airbnb, claims more than 800,000 listings in 190 countries worldwide, and boasts more than 25 million guests.[16] Each property is associated with a "host" (the person renting the space) who may be viewed by the website's registered users. Airbnb and sites like it frequently claim they are not providing hotel services, but rather acting as facilitators between hosts who want to rent out space, and guests who want a place to stay. These websites operate on a "broker's" model, taking a percentage cut from both the host and guest. Because the host and guest usually are not professional businesses, this often leads to little or no compliance with local laws.

Proponents of such websites emphasize that they allow property owners and tenants to make some needed extra money in difficult economic times while providing travelers with cheaper options than local hotels. In some cases, hosts claim they can only afford their homes by renting them out on these sites.[17] Guests, meanwhile, enjoy both cheaper rates and a more "authentic" experience, living in a residential area of the city and being surrounded with locals.

Yet problems associated with residential short-term rentals abound. Large numbers of temporary occupants can be linked with excessive noise complaints, parking problems, trash and degradation of a neighborhood's residential character. In severe cases, residential neighborhoods in popular tourist destinations can become de facto "hotel rows."

Beyond the negative impacts these marketplaces can have on the local hotel industry, most local governments tax hotel stays (usually called a "transient occupancy tax"). Traditionally, hotels are responsible for collecting and remitting these taxes to the local government, but Airbnb leaves

the obligation to pay on the host and the guest. These people may be unaware of how to comply with such obligations, or incapable of navigating complex reporting requirements. Typically, hotels must register with the local government so room rentals and taxes due can be tracked. By contrast, many local governments are unaware of which properties are being rented in their communities through sharing websites, so they are unable to track taxes due from these arrangements. In many cases, they are forced to search these websites themselves and then send letters informing hosts about taxes due. This has obvious inefficiencies and many hosts fall through the cracks — with lost tax revenue as the result.

There are some potential solutions, however. Airbnb has made deals with several local governments (including Multnomah County, Ore.[18]; San Francisco[19] and San Jose, Calif.[20]) to collect and remit transient occupancy taxes on their behalf. Putting the onus of collection and payment on a sophisticated business like Airbnb better ensures that proper transient occupancy taxes are paid on these rentals.

For some cities, dealing with Airbnb and its ilk is less appealing than attempting to limit the service in their jurisdictions by banning short-term rentals in certain zones. New York City has lead the charge in terms of banning homesharing, enforcing its law that makes it illegal for property owners to rent out homes for fewer than 30 days.[21] Other cities have taken different regulatory approaches, like Rancho Mirage, Calif., which recently passed an ordinance requiring every short-term rental agreement be signed by someone older than 30.[22] A lawsuit challenging that ordinance has since been dismissed.[23]

Local governments that permit residential short-term vacation rentals have found a code enforcement approach effective. This approach focuses on the nuisance conditions associated with short-term rentals, such as excessive noise, parking and trash.

Mealsharing

Though focus is directed more at larger services like Uber, Lyft, Airbnb and Homeaway, the sharing economy continues to expand into new areas. At least four websites (EatWith[24], CookApp[25], Feastly[26] and Meal Sharing[27]) are taking the sharing economy into the realm of dining, offering users the opportunity to engage in "meal-sharing" — paying to enjoy a home-cooked meal in the form of a dinner party arranged by the sites.

The companies allow people to purchase a home-cooked meal and a dinner-party setting. Yet, as in other sharing economy markets, they largely ignore conventional regulatory frameworks in their efforts to carve out a market share.

Multiple regulatory issues could face individual hosts or the websites that facilitate these transactions. These sites invite the creation of de facto pop-up restaurants that will likely violate local zoning ordinances in many instances, creating quasi-commercial activity in residential zones. Beyond that, operating a pop-up restaurant likely requires individual hosts to obtain a business license, and may also subject the hosts to Health Department regulations.

While both Airbnb and Uber have had success lobbying at the local level to change unfavorable laws, many health and safety laws are enacted at the state level, which will make efforts to change them more difficult to get off the ground. To date, most cities have had no reaction whatsoever to mealsharing apps, but a few possibilities spring to mind. On the one hand, zoning codes and health and safety laws would likely support a city's efforts to shut down these services, though there are obvious difficulties of enforcement. On the other hand, a city looking to encourage mealsharing services might alter its zoning to be more supportive of these companies by changing the code to allow for this sort of "mixed-use" in increased areas. This would not solve potential health and safety issues, but it might provide more room for individuals looking to offer meal-sharing out of their homes.

Body Worn Cameras

Body Worn Cameras (BWCs) are video camera equipment that is increasingly used by law enforcement officers to record their interactions with the public, gather evidence at crime scenes, and increase both citizen and officer accountability. While BWCs have been in use in the United States since the late 2000s, the shooting of Michael Brown in Ferguson, Mo. has turned a white hot light on the issue of equipping all police officers on patrol with the cameras.

BWCs are traditionally placed on the front of an officer's shirt, providing a first-person perspective, and arguably an objective, unalterable account of what occurred in the field. The hope is that the technology will protect citizens and officers alike from false accusations, create a better chain of evidence by recording every interaction of an investigating officer, and make incidents of violence — both by and against police officers — easier to investigate and satisfactorily resolve.

There are still significant privacy and policy concerns, however. BWC technology will acquire and store huge amounts of data, some of which might intrude on the privacy of those being recorded, both intentionally and incidentally. An officer walking through a neighborhood might film private moments unintentionally, and an officer conducting an interview with one person might incidentally record another individual's conduct in the background. Beyond that, a BWC is indiscriminate in what it records, which means it is likely to capture victims who might be injured or otherwise traumatized, as well. Further, when an officer enters a home or other private place, even legitimately, the "intrusion" is made more pronounced by the fact that it is being recorded, not to mention the potential implications of the technology on the plain view doctrine. There are also concerns for officer privacy, both on duty and on break, and how BWCs may affect internal affairs inquiries, discipline and officer safety.

Apart from the resource and logistic commitment for the equipment, and for storage and retrieval of the data, there are issues of policy development, training and administration of the technology and data. Further, there is always the possibility of the footage becoming public — whether or not the officers and agencies involved intend it to be. While the Public Records Act[28] exempts investigatory records from disclosure, this does not mean that information captured by officers wearing BWCs will not become public. For example, the City of Del Mar, Calif. recently discontinued use of body-worn cameras following a Public Records Act request that lead to the

release of a video taken by a park ranger wearing a BWC of an off duty reserve sheriff's deputy making abusive remarks.[29]

While a federal mandate is far from definite, local governments across the nation are beginning to research the use of BWCs, adopting policies for their use, including Ferguson and Los Angeles[30], while numerous other cities, including Houston[31] and Rochester, New York[32], are conducting ongoing testing in hopes of implementing BWCs. Some others, like San Jose, are debating an effort to develop policies that please both citizens and officers.[33] At the state level in California, AB 66 was recently introduced, which would create a task force to study the effectiveness of BWCs and make policy recommendations for implementation by agencies in the state.[34] Most of these policies are still being rolled out to allow the departments time to develop best practices so that the program they implement will minimize the potential issues.

Automated License Plate Readers

Automated License Plate Reader (ALPR) technology uses fixed and mobile platform (often vehicle mounted) high-speed cameras to take digital photographs of vehicle license plates. The system is automatic and has the ability to recognize and capture thousands of vehicle license plates per day. The captured license plates are downloaded automatically to a secure database for further processing/enforcement on a routine basis.

Law enforcement use typically entails comparing captured license plate information against a database of prior captures on a "hot list" with some connection to a prior crime or criminal investigation. If an ALPR camera picks up the license plate number of a flagged vehicle, an alert goes out allowing officers to contact the vehicle for further follow up. Law enforcement agencies that employ ALPR systems almost universally report a significant increase in crime interdiction and reduction as a direct result of the technology.

ALPRs can serve as a significant resource multiplier, both in the law enforcement and non-law enforcement contexts, by automating the collection and comparison process for license plates against the designated database. The technology allows for the collection of thousands of license plates every day with effectively unlimited storage and almost instantaneous identification.

However, the technology has drawn criticism from privacy advocates concerned with the location of ALPR cameras, whether deployment is targeted at certain communities, whether the technology allows for active surveillance of the public, and the length of time the captured information is stored. When combined with the use of drones, BWCs and Stingray technology that allows the police to track specific cell-phone signals, ALPR technology creates serious concerns about how pervasive we want our public safety surveillance to be, and how robustly we desire to protect citizens' privacy interests.

Cities and states across the country are adopting or moving to adopt the technology for everything from recovering stolen vehicles[35] to enforcing parking laws.[36] In early 2014, the federal government released an RFP for a national ALPR "fusion" database that would ostensibly allow for information sharing and hot list development on a national scale. Policies

must be put in place with regard to how the data will be collected, for how long it will be stored, who may be allowed access to it, and under what circumstances access should be allowed.

The landscape is shifting incredibly quickly on all of these technologies, and cities should think carefully about how they want to respond. Each of these emerging technologies presents its own opportunities for local governments, but each comes with its own attendant challenges. These issues are constantly developing and changing, and local governments should be prepared to adapt to dynamic situations to ensure they are providing the response that best serves their citizens, minimizing the potential problems these technologies cause and maximizing their upsides.

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