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Work Session V: The Sharing Economy: Uber and Airbnb – Can they exist in a regulated world? Will they save or destroy your community?

An Overview of "Homesharing" Issues and Examples of Solutions So Far

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I. INTRODUCTION

The expanding use of technology and social media as part of our daily lives has created an opportunity for the emergence of new types of businesses. One of these new business models has been deemed the "sharing economy." Sharing economy businesses are characterized by practices such as carsharing, ridesharing, cooperatives, shared housing, and shared workspaces. These businesses directly connect people offering excess supply of goods or services with users who seek to utilize those goods or services.

"Homesharing," highlighted by the multibillion-dollar Airbnb, as well as VRBO (Vacation Rentals by Owner), among many smaller sites, has rapidly expanded in popularity. Along with that popularity, there has been increased scrutiny with the impact of these businesses on the quality of life within municipalities.

Typically, there are two types of homesharing: those where the owner remains in the home while renting out a room or rooms to visitors; and those where the owner is absent and the entire home or apartment is rented. The second category is also sometimes referred to as a short-term rental or a vacation rental and is the type most frequently regulated by city ordinance.

II. MUNICIPAL CHALLENGES

As the popularity of the homesharing economy surges, it becomes apparent that many cities do not have regulations that specifically address this relatively new use, and as a result, municipalities struggle to fit these new business models into existing regulations. For example, critics of homesharing have stated that the proliferation of this type of use results in homes becoming de facto hotel spaces, and cities are thus confronted with overlapping, and potentially conflicting, commercial and residential uses.

The emergence of homesharing has resulted in issues primarily arising in three main areas: (1) taxation and revenue, (2) housing and zoning, and (3) public safety and welfare.

A. Taxation and Revenue

Many cities derive significant revenue from taxes on businesses and the occupancy at hotels and other forms of lodging, the latter sometimes being levied as a sales tax. Those revenues go into cities' general funds to pay for services, including public safety and enforcement of zoning codes, and in some cases to fund enforcement of regulations of the guest lodging industry. Because the hotel, traditional bed and breakfast, and other lodging industries have been stable for some time, the application of occupancy taxes has been relatively straightforward and the law well settled. The tax applies to the act of renting lodging, is paid by the applicant, is collected by the operator of the lodging, and is remitted to the taxing agency. The application of business taxes has similarly been

straightforward, since hotels and bed and breakfasts inarguably fell within the definition of a business subject to the tax.[1]

The introduction of online reservations was the first instance of the internet unsettling the application of occupancy taxes. As is now fairly well understood, the tax collected on hotel reservations made online might not be based on the amount that the occupant ultimately pays for the lodging. The discrepancy arises from the difference that an online travel company pays to reserve blocks of rooms and the amount that the occupant pays to the online travel company. That is a matter of ongoing dispute between cities and online travel companies.

Airbnb and similar services have further unsettled the application of existing occupancy taxes to lodging. The websites and mobile apps offered by those companies also act as an intermediary between the owners and renters of houses and apartments and people seeking short-term lodging. In addition, unlike with online travel companies, Airbnb has no claim on the properties offered through its services. It therefore has a stronger argument that it is not an operator of a hotel or other form of lodging and has no obligation to collect occupancy tax at the time that payment is made for the lodging. Enforcement of the existing occupancy tax system is made even more difficult by the Airbnb service hiding the exact location of the property until the time that the host accepts the request from a guest to stay at the property. Cities and other taxing agencies have experienced difficulty identifying the people who would be required to pay occupancy and business taxes as a result.

In its earliest days, Airbnb and similar services frequently took the position that a short-term rental, particularly in a house or apartment occupied by the owner or tenant, was not the type of occupancy subject to local taxation or a business at all. Airbnb in particular presented its service as connecting travelers with local residents to provide an experience different from the one normally associated with staying in a hotel. That idea—still presented in their current ads at the time that this paper was written[2]—is part of its romantic concept of "disrupting" the existing lodging market by making it possible for travelers to experience their destinations as locals. The reality, as discussed in other parts of this paper, is often different. Many houses and apartments have become dedicated short-term rental properties with the owner or tenant making the entire property available to travelers rather than acting as a traditionally understood host.

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[1] Which isn't to say that the owners of houses or condos offered as traditional vacation rentals never escaped either business or occupancy tax. Hotels and B&B's were, however, well known within their communities, making enforcement easier. Moreover, arranging to rent a home or condo for a vacation was more difficult before the rise of the internet.

[2] Airbnb, *Is Mankind?* <https://www.youtube.com/watch?v=2xegsh1CmPU> (as of August 27, 2015).

Consistent with its view of the service that it was providing, Airbnb initially took the position either that occupancy taxes did not apply to lodging arranged through its website and mobile app, or that it was the responsibility of each host to determine whether tax applied and to collect and remit it to the local taxing authority. The latter remains its position with regard to most locations where it has not reached agreement with the local taxing authority about how occupancy tax should apply.[3] Under that framework, in the absence of an agreement to the contrary, Airbnb's position remains that it has no obligation to collect occupancy tax and or to identify for local taxing authorities the people offering properties through its services.

With the rise in use of Airbnb, the increased dedication of properties solely to short-term lodging, and the change in the business in the direction of straightforward rental and away from shared accommodation, cities have become more interested in the issue of whether their existing occupancy taxes apply. Early resistance by Airbnb has given way to a willingness to negotiate agreements for collection of occupancy tax through its website and mobile app, usually in return for the taxing entity recognizing the use of property for short-term rentals as a legitimate use—although subject to other requirements.

The agreements that Airbnb has entered into with cities and states for the collection of occupancy tax vary in their details. Generally, Airbnb agrees "voluntarily" to act as a hotel operator for the purpose of lodging arranged using its website or mobile app, to collect the applicable occupancy tax, and to remit it to the taxing authority. Issues that typically vary as a result of negotiations include:

- Whether Airbnb identifies the people offering accommodations or the person paying for lodging, or provides only a numerical identifier.
- What information Airbnb provides about people offering accommodations and people paying for lodging during an audit.
- Whether individuals offering accommodations are still required to register as hotel operators, and if so, under what circumstances.
- The scope of the taxing authority's auditing power under the agreement and auditing procedures, including a reservation of rights to audit for payment of other taxes, like business taxes.
- Recordkeeping by Airbnb and individuals offering accommodations through Airbnb.
- Notification to individuals offering accommodations and people paying for lodging regarding the occupancy tax.

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[3] Airbnb, *What is occupancy tax? Do I need to collect or pay it?* <https://www.airbnb.com/help/article/654?topic=264> (as of August 27, 2015).

- Reservation of the power to audit or otherwise investigate individuals offering accommodations in response to a complaint.
- Liability of individuals offering accommodations and paying for lodging other than for payment of occupancy tax, such as compliance with noise regulations, zoning violations, and other potential nuisances.
- The effect of the agreement on the liability of individuals offering accommodations to have collected and remitted tax prior to the agreement's effective date.

A typical agreement with Airbnb might resolve the issue of collection of occupancy tax prospectively for short-term accommodations arranged through Airbnb, but it might not result in a taxing authority gaining information about the identity of the individuals offering the accommodations or the location of the accommodations. Thus, it might not assist with ensuring that business taxes are being collected or with the land use and public safety issues addressed in other parts of this paper.

Furthermore, the agreement itself implies that the use of residences for temporary accommodations is a legitimate use of the property. Airbnb might expect a local taxing authority to adopt legislation legitimizing the use. Cities should therefore consider whether it is prepared to treat the use as permissible as a tradeoff for ensuring that a significant portion of occupancy tax is collected. Operators of traditional hotels might object to legitimizing Airbnb-type short-term rentals.[4] On the other hand, entering into an agreement with Airbnb, as part of a more comprehensive overhaul of a city's regulations applicable to such rentals, makes the collection of occupancy tax easier, allowing cities to focus on other aspects of the ways in which these rentals are affecting their communities.

B. Housing and Zoning

Historically, municipalities throughout the United States have spent considerable effort in the precise planning of the growth of their cities, resulting in the adoption of zoning plans and ordinances that seek to protect the amount, type, and placement of housing in relation to businesses and other commercial spaces. When faced with a changing neighborhood, it is common for cities to slowly update their zoning regulations in response. However, with the homesharing boom, the demand to react to current conditions has tested even the most flexible urban planner.

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[4] Griswold, *Why Airbnb Desperately Wants to Pay Hotel Taxes* (February 13, 2015) Slate <http://www.slate.com/articles/business/moneybox/2015/02/airbnb_hotel_taxes_why_does_the_sharing_economy_startup_want_to_pay_them.single.html> (as of August 27, 2015).

As a house or apartment fluctuates from single family occupancy one day to a hostel-style vacation rental for transient visitors the next, and then back to a single family occupancy, all within the space of a week, traditional zoning regulations struggle to accurately define and regulate these new types of uses.

1. Housing

Cities like San Francisco and New York, as well as many others throughout the country, are constantly trying to balance the influx of new or visiting residents with the particular municipality's demand for additional office space and commercial ventures. In many of these cities, long-term housing is being removed from the housing stock in favor of short-term rentals, which, although profitable, remain unoccupied many days each year. This can lead to a significant drop in the number of available units on the long-term residential housing market.[5]

This past June, the City of Santa Monica, California passed a "Home-Sharing Ordinance" citing the fact that "[i]n some cities, entire apartment buildings have begun to only offer vacation rentals, essentially turning an apartment building into a hotel in a residential neighborhood."[6] Santa Monica declared registered home-sharing, where a resident hosts visitors in their home, to be a valid use but upheld the city's long-standing prohibition against vacation rentals, or use of a dwelling without a resident physically present. The City promises to begin proactive enforcement of this ordinance this September.

Santa Monica is not alone. Cities ranging from Miami Beach, Florida to Manhattan Beach, California have outright banned short-term vacation rentals. Other cities, like Laguna Beach, California, have put a moratorium on short-term rentals as they scramble to determine the best course of regulatory action for their city. Atlantic City attempted a de facto ban on short-term rentals by regulating the minimum length of a permissible rental to ninety days, only to be challenged in court and forced to agree to repeal the ordinance and promise not to pass another based on rental length in the future.[7] And finally, New York City simply declared war on "private short-term rentals" (where the owner is not present during the

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[5] Speri, *Airbnb Will Probably Get You Evicted and Priced Out of the City* (April 24, 2014) Vice News <https://news.vice.com/article/airbnb-will-probably-get-you-evicted-and-priced-out-of-the-city> (as of August 27, 2015).

[6] City of Santa Monica Planning & Community Development, *Overview of the Home-Sharing Ordinance* <http://www.smgov.net/Departments/PCD/Permits/Short-Term-Rental-Home-Share-Ordinance/#1._Why> (as of August 27, 2015).

[7] STRAC Editor, *New Jersey Illustrates Why Short-Term Rentals Aren't a Commercial Use* (November 12, 2013) <http://www.stradvocacy.org/new-jersey-illustrates-why-short-term-rentals-arent-a-commercial-use> (as of August 27, 2015).

stay) by stating that most of them violate state and local laws, owe millions in back taxes, and many operate as illegal hostels.[8]

In a recent San Francisco Chronicle article, an advisor to Mayor Ed Lee summed up the dilemma confronting many cities by saying: "We want to crack down on people taking housing off the market and hurting San Francisco. But we also want law-abiding people to be able to do occasional (short-term rentals) because it helps many people afford to live in our city."[9]

2. Zoning

Related to the loss of permanent housing are zoning and planning issues. Historically, municipalities have developed zoning schemes and passed ordinances restricting property use in order to balance the commercial and residential spheres within growing cities. This tradition goes back to the turn of the 20th century and allowed for an alternative preventive measure to the common law remedies for nuisance and trespass.

The traditional devices of segregating housing from business uses are still the default planning methods throughout the country but are being challenged by a surge in the short-term home rental market.

Many cities have been forced to revisit their short term rental zoning restrictions in the wake of the tremendous growth of Airbnb, VRBO.com, and other sites which allow a residential dwelling to be used as a rental space for short periods, in essence turning it into a de facto hotel space or hybrid of home and commercial rental vehicle.

C. Public Safety and Welfare

Finally, homesharing generates concerns about safety and the welfare of homesharing guests and neighbors alike. With a conversion from home to something more resembling a hotel comes fears of property destruction, noise-related nuisances, and basic trespass by "strangers" visiting a city for a short period. Houses used as exclusively for homesharing can remain vacant for long periods, becoming the targets of homeless looking for a place to live or criminals looking for a place to do business.

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[8] New York State Office of the Attorney General, *Airbnb in the City* (October 2014) <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> (as of August 27, 2015) p. 2-3.

[9] Said, *Airbnb's Impact in San Francisco: Hosts or Hoteliers?* (July 12, 2015) <http://www.sfchronicle.com/airbnb-impact-san-francisco-2015/#3> (as of August 27, 2015).

These fears were starkly reflected in the findings of a 2007[10] ordinance from Isle of Palms, South Carolina:

> "That, in general, it has been the experience of the City that short-term renters generate more waste, litter, traffic, and over-crowding, keep later hours and create a greater disruption with light and noise than long-term tenants or owners. Such use must be balanced against the desirability of peace, tranquility and quality of lifestyle for long-term tenants and owners in the City."[11]

To protect health and safety, most cities attempt to regulate industries that have an impact on the welfare of its residents and visitors. Through inspections, insurance requirements, and safety device installation mandates, municipalities have regulated the hotel and bed & breakfast industry for decades, passing the costs associated with regulations through to the lodgers with transient occupancy taxes, as discussed above.

But, in the case of homesharing, because many of the homes that are being used as quasi-hotels or quasi-B&Bs are zoned and designated as single-family homes and residences, they are not subject to the piercing scrutiny of those buildings zoned for transient occupancy. As the Chief of Fire Prevention for New York explained, the buildings for transient occupancy are "required to be designed, constructed and operated in accordance with more stringent fire protection requirements than those applicable to apartment buildings" and other homes.[12] The hotels and other transient occupancy buildings require portable fire extinguishers, sprinklers, exit lights and markers, and evacuation plans, among other safety features. There are no such requirements for personal residences. This distinction is likely present in most cities' codes but the safety issues engendered by visitors in an unfamiliar location exist whether they are in a formal hotel or a non-owner occupied homeshare.

III. HOW CITIES ARE ADDRESSING THESE ISSUES

In response to homesharing, many cities have either amended their existing short-term rental ordinances or passed completely novel ones. As far back as 2010, the City of Chicago recognized that "cities in Arizona, California, Florida, Hawaii, Maine, New York, New Mexico, North Carolina, Oregon, and Pennsylvania . . .

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[10] Airbnb was founded in San Francisco the same year.
[11] Isle of Palms Ordinance 2007-2, section 1.A. <http://www.iop.net/client_resources/short-term%20rental%20ordinances.pdf> (as of August 27, 2015).
[12] New York State Office of the Attorney General, *Airbnb in the City* (October 2014) <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> (as of August 27, 2015) p. 23.

are working to impose restrictions on the booming business of daily and weekly rentals by individual owners."[13]

Recently, the primary focus seems to be on registration of these homeshares and tax collection, but some cities have taken unique approaches to further address the issues outlined above. Below are just a few specific examples.

In every community that undertakes to address any or all of the areas of concern addressed in this paper, an additional issue will be the availability of resources to enforce new regulations adopted.

A. Taxes and Revenue[14] – Savannah, Georgia

At the end of last year, Savannah, Georgia passed an ordinance updating the city's zoning districts to allow for short-term vacation rentals.[15] Beyond legitimizing the use of residential homes as vacation rentals, a clear aim was to generate revenue and collect taxes that were not due before the adoption of the ordinance.

The new law requires all short-term vacation renters to apply for and obtain a business certificate. The initial application fee is $150 per property, and a $50 renewal fee each year thereafter. The certificate is non-transferable so the $150 fee has to be paid by each subsequent owner that wishes to share his or her home as a vacation rental. If an owner is discovered renting their property for less than 30 days without a certificate, they are subject to a $500 fine for the first violation, $750 for the second, and $1000 for the third within any twelve-month period.[16]

Finally, all short-term vacation rental owners are required to pay six percent of his or her lodging charges to the City of Savannah each month under the title of

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[13] City of Chicago Ordinance No. 011311, adding Chapter 4-207 to Chicago Mun. Code. <http://www.cityofchicago.org/content/dam/city/depts/bacp/general/vacationrentalordinance011311.pdf> (as of August 27, 2015).

[14] Other cities that have mandated that short-term rentals pay specific transient taxes include Washington, D.C.; Malibu, CA; Oakland, CA; Philadelphia, PA; Phoenix, AZ; Amsterdam, The Netherlands; and throughout the country of India. Details and links can be found here: Airbnb, *In what areas is Occupancy Tax Collection and Remittance by Airbnb available?* <https://www.airbnb.com/help/article/653?topic=264> (as of August 27, 2015).

[15] City of Savannah, *Short-Term Vacation Rentals and B&B Guest Units* <http://www.savannahga.gov/stvr> (as of August 27, 2015).

[16] City of Savannah City Code section 8-10009 et seq. <http://www.savannahga.gov/DocumentCenter/View/4303> (as of August 27, 2015).

hotel/motel taxes. Additionally, to be in compliance, short-term renters must pay an additional seven percent monthly in state use and sales taxes.[17]

The Savannah ordinance has little reference to the actual operation of these short-term rentals and clearly is focused on regulation and increasing revenue for the city and state.

B. Housing[18] – San Francisco, California

After several years and many heated debates, San Francisco decided to legalize short-term rentals within the city with several very specific regulations meant to protect long-term housing in the city. In the ordinance's general findings, the Board of Supervisors made it clear that they were only making an exception to the prohibition on short-term rentals for "permanent residents [who] are present for a significant majority of the calendar year."[19] A significant majority of the year equates to no less than 275 days that a resident must remain in their home, thus capping the number of possible nights that a resident might rent their home at ninety in a given year. This approach is meant to prevent homes from being rented out for the bulk of the year and thus keep them in the ever-tightening long-term residential market.

San Francisco also requires those who would like to participate in short-term rentals to register with the city and pay taxes but the residency timeframe requirement was the final concession that allowed the city to come to an agreement with the proponents of homesharing and short-term rentals in the city that is the birthplace of Airbnb.

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[17] City of Savannah, *Short-Term Vacation Rentals and B&B Guest Units* <http://www.savannahga.gov/stvr> (as of August 27, 2015).

[18] Estes Park, Colorado is following San Francisco's footsteps in conducting a detailed analysis into the impact of short-term rentals on the housing market: Town of Estes Park Community Development, *Review of Draft Recommendation for Vacation Rentals Report* (August 25, 2015) <https://www.colorado.gov/pacific/sites/default/files/atoms/files/Binder.pdf> (as of August 27, 2015).

[19] San Francisco Ordinance No. 218-14, section (c)(2) <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf> (as of August 27, 2015).

C. Zoning[20] – Portland, Oregon

In 2014, Portland passed an ordinance changing its zoning code and legalizing "accessory short-term rentals." The stated purpose of the change to the code was to "allow for a more efficient use of residential structures, without detracting from neighborhood character, and ensuring that the primary use remains residential."[21] Separating these rentals into types A and B, the primary distinguishing criteria were the number of bedrooms rented to overnight guests, two or less for type A, and three or more for type B. The ordinance goes on to state which type is valid in which city zone and the inspections that they may be subject to. Type A requires a permit while type B is subject to a conditional use review.

Although safety features are mentioned, the primary focus of the Portland ordinance is registration of these short-term rentals and analysis of their use within the greater scope of their surrounding neighborhood.

Portland did make these short-term rentals subject to transient occupancy taxes but the city was only willing to legalize it if they could analyze the registered rentals as part of the existing zoning scheme.

D. Safety and Welfare[22] – Chicago, Illinois

In January 2011, through enactment of its vacation rental ordinance, Chicago became the self-proclaimed "first large municipality to set the standard by regulating rentals on a daily and weekly basis by private entities."[23] Chicago's

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[20] Maui County, Hawaii also focused on zoning issues with their 2012 short-term rental ordinance: Maui County Ordinance No. 3941 <http://co.maui.hi.us/DocumentCenter/View/19568> (as of August 27, 2015), as did Sonoma County, California: Sonoma County Ordinance No. 5908 <http://www.sonoma-county.org/prmd/docs/vacrent/vacation-rentals-final-ordinance.pdf> (as of August 27, 2015).

[21] Portland City Code section 33.207 <http://www.portlandonline.com/auditor/index.cfm?c=28197&a=501886> (as of August 27, 2015).

[22] Additionally, Bal Harbour Village, Florida was especially concerned with the impact on health and welfare caused by short-term rentals, as reflected in its findings: Bal Harbour Village Ordinance No. 2011-549 <http://www.balharbourgov.com/static/sitefiles/events/BHV20120919075459.pdf> (as of August 27, 2015), and Pacific County, Washington is worried about the "large groups of strangers next door": Pacific County Department of Community Development, *Short Term Vacation Rentals* (revised February 11, 2013) <http://www.co.pacific.wa.us/dcd/images/apps-forms/vacation%20rental%20brochure.pdf> (as of August 27, 2015).

[23] City of Chicago Ordinance No. 011311, adding Chapter 4-207 to Chicago Mun. Code

ordinance is most focused on safety and welfare concerns, separating owner-occupied dwelling units from vacation rentals and requiring that each obtain a license to operate.

Along with the license, Chicago requires vacation rental licensees to provide contact details for a local contact person, proof of $1 million commercial liability insurance on top of standard homeowner's insurance, a posted evacuation diagram, and even such seemingly minor details as providing guests with soap, bath cloths/towels, and linens along with basic cleaning and sanitizing between each guest's stay.

Zoning issues are also addressed in the ordinance but the clear focus is on health and safety and making short-term rentals in Chicago as hospitable to guests as that of a hotel.

IV. CONCLUSION

As these wide-ranging laws attest, cities have been forced to quickly remake existing regulatory frameworks to address the desire to collect taxes, maintain the delicate balance of residential and commercial uses throughout the municipalities, and protect both the city's residents and visitors alike.

Airbnb, the largest of the homesharing platforms, has realized each city's new and unique ordinance regime can be difficult to navigate and comply with, and thus the company has put together a "Responsible Hosting" page that provides links to nearly fifty different city pages containing information about that city's regulations.[24] This information can be invaluable but whether the bulk of homeshare owners are actually making the effort to register and comply is an open question.

<http://www.cityofchicago.org/content/dam/city/depts/bacp/general/vacationrentalordinance011311.pdf> (as of August 27, 2015).

[24] Airbnb, *Responsible Hosting: Your City's Regulations* <https://www.airbnb.com/help/responsible-hosting> (as of August 27, 2015).