Factors Residential Homeowners and Real Estate Investors Should Consider When Leasing in Shared Economies

By Christina Jenkins and D. Joshua Crowfoot

Travelers and homeowners everywhere have enjoyed the options and opportunities of shared economy leasing. A "sharing economy" is economic activity that involves individuals buying or selling usually temporary access to goods or services, especially as arranged through an online company or organization such as Airbnb, HomeAway, TripAdvisor, VRBO, and Stay Alfred. Although shared economy companies came onto the scene over a decade ago, it has taken that long for state and local jurisdictions to determine the best way to curb the unintended consequences of shared economy arrangements. As the industry evolves, so do industry players that weren't previously contemplated, leaving state and local governments perpetually behind the curve.

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Home sharing is currently regulated at the state and local level rather than the federal level. Major cities and popular destinations have had to address the phenomenon of home sharing much more so than rural areas. And each locale has developed its own method of regulating home sharing based on feedback from their respective communities. As a result, some communities have very little regulation in place, yet others all but ban the practice.

This article surveys state and local efforts to regulate shared economies involving the short-term rental of residential property (also referred to herein as home sharing), identifies common legal and public policy issues across the jurisdictions, and offers advice to industry participants.

Case Law Interpretation of Shared Economy Leasing

Litigation involving shared economy leasing takes several forms when it comes to the parties and the issues. Typical plaintiffs include: homeowners (challenging a local ordinance or property owner association prohibition of short-term leasing), property owner associations (suing a homeowner or seeking a declaration concerning deed restrictions and covenants, conditions, and restrictions), shared economy companies (suing a jurisdiction for an improper ban on short-term rentals, up to and including financially supporting homeowners with standing to sue their local jurisdiction), and governmental bodies (using local authority or agency action to enforce zoning, licensing, and tax laws).

Almost all reported case law involving shared economy leasing is at the trial and court of appeals levels. Although it appears that state supreme courts have deliberately left it to the jurisdictions to hash out the details, the highest courts in Pennsylvania, Texas, and Wisconsin have provided some instruction on the law as it applies to short-term rentals in those states, albeit on narrow, well-defined issues as detailed below.

Pennsylvania

A case in Pennsylvania provides valuable guidance with respect to how short-term rentals should be treated under zoning law. The case involves Slice of Life, LLC, which was created by Val Kleyman, its sole member, for the purposes of using a single-family dwelling as part of a transient lodging business. *Slice of Life, LLC V. Hamilton Twp. Zoning Hearing Bd.*, 164 A.3d 633, 635 (Pa. Comm. Ct. 2017).

In May 2014, Hamilton Township sent an enforcement notice to Slice alleging that it had violated a zoning ordinance prohibiting the "[u]se of [the Property] as Hotel and/or other types of transient lodging, Rental of Single-Family Residential Dwelling for

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transient tenancies," and requested that Slice cease activity by May 31, 2014. Id. Slice's appeal to the Hamilton Township Zoning Hearing Board (Board) was denied. Its subsequent appeal to the trial court resulted in a finding for Hamilton Township (the court found the Board did not abuse its discretion in upholding the enforcement notice because the purpose of Slice was to make a profit operating as a short-term, transient lodging business). See id. at 636. On Slice's appeal, the Commonwealth Court of Pennsylvania reversed the lower court decision, finding that: (i) there was not sufficient evidence in the record that Slice's use of the property as a short-term rental was violative of the health, safety, and welfare of the public, and (ii) absent specific language in the zoning ordinance prohibiting the use of the property as a rental, the language of the ordinance must be interpreted in favor of the property owner and against any implied extension of the restriction where there is doubt as to the intended meaning of the language in the ordinance. Id. at 645-46, citing 53 P.S. § 10603.1 ("In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction."). Hamilton Township appealed to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court reversed the Commonwealth Court of Pennsylvania decision and upheld the enforcement notice. *Slice of Life, LLC V. Hamilton Twp. Zoning Hearing Bd.*, No. 7 MAP 2018, 2019 WL 1870562 (Pa. Apr. 26, 2019). The decision is based on the language of the zoning ordinance, which permits "dwellings" and defines a "dwelling" as "[a] building or structure designed, arranged, intended, or used as the living quarters for one or more families living independently of each other upon the premises . . . not be construed to include hotel, motel, rooming houses, or other tourist home." Id. at *4. "Family" is defined in the ordinance as "[o]ne or more persons, occupying a dwelling unit, related by blood, marriage, or adoption, living together as a single housekeeping unit and using cooking facilities and certain rooms in common." The court examined how the

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phrase “single housekeeping unit” has been used by courts throughout the country and found it to be understood to exclude purely transient uses of property. Id. at *11. The decision adopts an “excluded-unless-expressly-included standard,” combined with “functional analysis.” Id.

Texas

Tarr v. Timberwood Park Owners Association involved homeowner Kenneth Tarr’s rental of his single-family residence by advertising on shared economy sites, one of which was Vacation Rentals by Owner. *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 276 (Tex. 2018). To manage the home, he formed an LLC, Linda’s Hill Country Home LLC. During the summer of 2014, Tarr obtained 31 rentals of up to seven days each for a total of 102 days. Tarr rented the entire house (and not individual rooms) and there were no common services for groups of renters like housekeeping or cooked meals. Although he did not provide hotel-type services, he paid both state and city hotel/occupancy taxes to Texas and San Antonio/Bexar County. There was no business activity conducted on the premises because it was leased only to individuals (families with children and groups of adults) for residential stays.

In July and September 2014, the Timberwood Park Owners Association advised Tarr that he was in violation of two deed restrictions: the residential-purpose and the single-family residence covenants. After several months of fines and disagreement, Tarr filed a suit for declaratory judgment. The trial court, in finding for Timberwood Park, held that residential use of a home requires that an occupant have “an existing intent to physically remain there for a sufficient duration.” Tarr was enjoined from “operating a business on his residential lot” and from engaging in short-term rentals to “multi-family parties.” He was ordered to pay the association’s attorney fees. Id. at 278. The Fourth Court of Appeals affirmed.

The issue in the case was whether short-term vacation rentals violated the Timberwood Park restrictive covenants that limit the use of tracts to residential purposes and single-family residences. In overruling both the trial and appellate courts, the court found that the covenants unambiguously failed to address the “property use complained of in this case.” Although the property was restricted to “residential purposes,” the court concluded that the short-term rentals were residential in nature. “[S]o long as the occupants to whom Tarr rents his single-family residence use the home for a ‘residential purpose,’ no matter how short-lived, neither their on-property use nor Tarr’s off-property use violates the restrictive covenants.” Id. at 291.

Wisconsin

In *Forshee v. Lee Neuschwander*, 914 N.W.2d 643 (Wis. 2018), Lee and Mary Jo Neuschwander purchased property on Hayward Lake in Hayward, Wisconsin. After renovating the large house, they began renting it to vacationers on both short-term and long-term bases. Several neighboring property owners objected to the use of the property as a vacation rental. They sued in Sawyer County Circuit Court, claiming that short-term rentals were precluded under a restrictive covenant that encumbers all lots in the subdivision. The Sawyer County Circuit Court found for the neighbors. The Court of Appeals reversed, and the Wisconsin Supreme Court granted the neighbors’ petition for review.

The issue in the case was whether operating a home as a vacation rental is: (1) a single-family use of real property, permitted by residential zoning ordinances and protected by the public policy preference for the free and unrestricted use of property; or (2) a business enterprise, a form of “commercial activity” appropriately prohibited by residential zoning ordinances. The court concluded that the term “commercial activity,” which is undefined in the covenant, is ambiguous. The court narrowly interpreted the covenant, concluding that it does not preclude either short-term or long-term rentals of Neuschwanders’ property. In support of its interpretation, the court noted that the first homeowner in the subdivision was Louisiana Pacific, which had permitted its house to be used by individuals who were not the owners for both long- and short-term stays. Accordingly, the court affirmed the decision of the court of appeals.

Lessons Learned from the State Supreme Court Cases

Existing state supreme court cases involving short-term rentals involve the following issues:

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- Whether an ordinance, covenant, or restriction was interpreted correctly by the lower courts and in line with established precedent, irrespective of whether there is precedent on point addressing short-term rentals;
- Whether the property use complained of is addressed specifically in an ordinance, covenant, or restriction at issue, and, if not, whether there is existing precedent to exclude such property use when interpreted in the light most favorable to the property owner; and
- Whether a short-term rental falls under the definition of "transient" use of a property and what existing precedent or language in the ordinance, covenant, or restriction can lead to a conclusion of whether the use of a short-term rental is permissible.

In other actions across the country, trial and appellate courts are addressing a host of additional issues that local governments are called upon to address, including: (i) public health and safety, (ii) overreach of local governmental authority, (iii) neighborhood integrity, and (iv) curbing investor and landlord violations of, or attempts to sidetrack, existing laws. In New York, for example, the Office of Special Enforcement files enforcement actions in the lower courts to ensure short-term rental owners are in compliance with local law, including, but not limited to, local zoning and building codes. The subject matter of the lower state courts could not be found more clearly than in the various state and local initiatives to regulate short-term rentals.

State and Local Perspective on Shared Economy Rentals

A handful of states and hundreds of local cities and towns have taken action to implement and enforce short-term rental regulations. Savannah Gilmore, *More States Taking Action on Short-term Rentals*, Vol 26, No. 35 NCSL LegisBrief (Sept. 10, 2018). These actions take a variety of forms (state-level legislation, zoning ordinances, taxation, agency business licensing, city or local ordinances), but there are a couple of emerging themes.

Preemptive Legislation

Some states have enacted laws to protect short-term rentals under very limited circumstances. Many of them are hotly contested and attempt to strike a balance between the economic certainty of preemption, the role of local governments in stabilizing neighborhoods, and the rights of individual property owners. Others go a step further in regulating short-term rental uses, with one state offering a legal framework for local property owners to contest local government action that attempts to ban short-term rentals.

The common elements of state short-term rental legislation are:

- a general prohibition against local government bans of short-term rentals,
- the preemption of existing and future local government laws that ban short-term rentals,
- the reservation of local government authority to limit short-term rentals based on public health and safety, use and enjoyment, and integrity of residential neighborhoods, and
- the granting of local government authority to tax or require permits for short-term rentals.

Arizona

In 2016, Arizona enacted legislation that provided, "a city or town may not prohibit vacation rentals or short-term rentals." A.R.S. § 9-500.39(A). But cities and towns may regulate such rentals for the purposes of: (i) protecting the public's health and safety, (ii) adopting and enforcing residential use and zoning ordinances, and (iii) limiting or prohibiting use of vacation or short-term rentals for certain purposes (e.g., housing sex offenders and selling illegal drugs). See id. § 9-500.39(B). "Vacation rental" or "short-term rental" means "any individually or collectively owned single-family or one-to-four-family house or dwelling unit or any unit or group of units in a condominium, cooperative, or timeshare, that is also a transient public lodging establishment or owner-occupied residential home offered for transient use if the accommodations are not classified for property taxation under section 42-12001." Id. § 9-500.39(D)(2). "Transient" means "any person who either at the person's own expense or at the expense of another obtains lodging space or the use of lodging space on a daily or weekly basis, or on any other basis for less than thirty consecutive days." Id. § 9-500.39(D)(1).

Florida

In 2011, Florida enacted legislation prohibiting a local law, ordinance, or regulation from banning vacation rentals. Fla. Stat § 509.032(7). The law defined a vacation rental as "any unit or group of units in a condominium or cooperative or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment but that is not a timeshare project." Id. § 509.242(1)(c).

In 2014, the legislature amended the statute to provide that a local law, ordinance, or regulation may regulate "the duration or frequency of rental of" vacation rentals. Although the amendment broadened the authority of local bodies, the general prohibition still stands.

This year, the Florida legislature has two proposed bills in an effort to strike an appropriate balance in regulating short-term rentals.

Idaho

On January 1, 2018, the "Short-term Rental and Vacation Rental Act" took effect, which prohibits local governments from levying taxes or fees on businesses operating a short-term rental marketplace (a platform through which a lodging operator, or the authorized agent of the lodging operator, offers a short-term rental or vacation rental to an occupant). Idaho Code § 63-1804. It further bans any county

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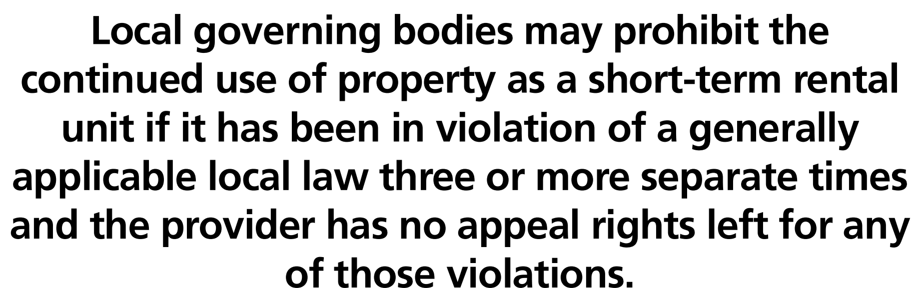

Local governing bodies may prohibit the continued use of property as a short-term rental unit if it has been in violation of a generally applicable local law three or more separate times and the provider has no appeal rights left for any of those violations.

or city from enacting or enforcing any ordinance that prohibits short-term or vacation rentals. Id. § 67-6539(1). Like Arizona, however, the law permits regulations necessary to "safeguard the public health, safety and general welfare in order to protect the integrity of residential neighborhoods in which short-term rentals or vacation rentals operate." Id.

Indiana

On July 1, 2018, Indiana's short-term rental law became effective and provided that no zoning ordinance may prohibit the short-term rental of owner-occupied short-term rental property. Ind. Code § 36-1-24-9(b). Short-term rental under the act is a rental of certain property for less than 30 days at a time through a short-term rental platform (e.g., a shared economy company). Id. § 36-1-24-6. In the case of non-owner-occupied property, local governments may require a special exception, use, or zoning variance but still may not use them in a manner that is intended to, or results in, the prohibition or unreasonable restriction of all short-term rentals of the property. Id. § 36-1-24-9(b). Local governments have the authority to enforce laws or plans for the purposes of public health and safety, noise, property maintenance, nuisance, and other similar purposes. Id. § 36-1-24-10. They may prohibit short-term rentals from housing sex offenders, being used to sell drugs, or other similar behavior and may limit or prohibit short-term rentals located within a conservancy district. Id. Local units are also allowed to require that an owner obtain and pay a fee for an initial permit. Id. § 36-1-24-11.

Tennessee

The Short-Term Rental Unit Act became effective May 17, 2018, and prohibits bans on short-term rental units, defined as residential dwellings rented wholly or partially for a fee for a period of less than 30 continuous days. However, such bans "shall not apply to property if the property was being used as a short-term rental unit by the owner of the property prior to the enactment" of the ordinance or rule. See Tenn. Code Ann. § 13-7-603(a). Such units can become subject to a prohibition if they are sold, transferred or cease to be used as a short-term rental for more than 30 months. Local governing bodies may prohibit the continued use of property as a short-term rental unit if it has been in violation of a generally applicable local law three or more separate times and the provider has no appeal rights left for any of those violations. Id. § 13-7-604. The act further gives short-term rental providers the ability to challenge local governing body violators through a civil action or appeal and specifically grants jurisdiction of the appeal (with *de novo* standard of review) to the circuit or chancery court. Id.

Wisconsin

On September 23, 2017, Wisconsin's short-term rental law became effective. It provides that a city, village, town, or county may not enact or enforce an ordinance that prohibits the rental of a residential dwelling for seven consecutive days or longer. Wis. Stat. § 66.1014(2)(a). Within certain limits, local governing bodies may limit the number of days (no less than 180 days) that a residential dwelling can be rented within a 365-day calendar year. Id. § 66.1014(d)(1). Separately, the law provided for the registration and taxation of short-term rental providers (see id. § 66.1014(d)(2)), defining a short-term rental as a residential dwelling that is offered for rent for a fee and for fewer than 29 consecutive days. Id. § 66.0615(1)(dk).

Nebraska

On March 1, 2019, the Nebraska Legislature unanimously approved, and the governor approved, Legislative Bill 57, a new short-term rental law that prohibits municipalities from banning short-term rentals. 2019 Nebraska Laws L.B. 57. The law applies to municipalities (cities or villages) and bars ordinances or other regulations that prohibit the use of a property as a short-term rental. Id. § 1(2). A municipality may adopt or enforce ordinances that affect short-term rentals if the primary purpose is to protect the public's health and safety. Id. § 1(3). The Tax Commissioner may enter into an agreement with an online hosting platform to collect and pay applicable sales taxes. Id. § 4. This law does not apply to regulations of a private entity, including a homeowner's association. Id. § 1(7).

Licensing and Taxation: Big Business

Aside from legal disputes between operators of short-term rentals and local governments, much of the litigation in the area of residential real estate is between the home sharing platforms, such as Airbnb, and local governments. The three big flashpoints are collection of tax revenue for the local or state government, licensing and registration of short-term rental owners, and data sharing between the home sharing platform and local or state government.

From the inception of home sharing platforms, a big concern of local and state governments has been the ability to collect the proper amount of tax revenue from individuals renting out

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their homes on a short-term basis. Litigation has ensued over whether it is the responsibility of local government or the home sharing platform to collect such tax revenue.

There are more than 1,000 licensing and taxation laws across the United States impacting short-term rentals. Almost all of them are at the local government level, but there are also state level licensing and tax registration requirements. The Short-Term Rental Jurisdictions Matrix, available in the digital version of this article, sets forth various requirements by state. With the fast pace of enactment at the local level, it is not an exhaustive list but provides an idea of how state and local governments can generate millions of dollars of revenue from the taxation of short-term rental income.

Although each jurisdiction is unique, common components of state licensing and taxation laws are:

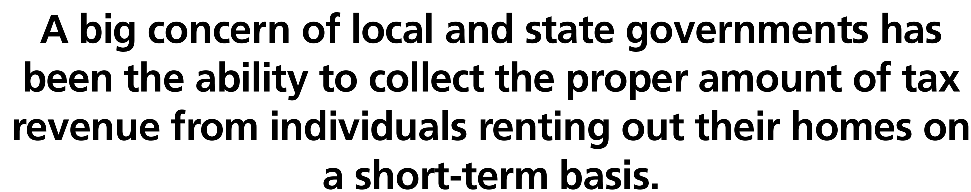
Short-Term Rental Defined. Short-term rental definitions average stays of 30 days or less across jurisdictions.

Owner-Occupier Requirement. In many cities and communities, local governments primarily regulate home sharing by requiring that the operators of a short-term rental also live in the home they are renting to guests. Cities that have a "One Home, One Host" policy include Denver, Miami, New Orleans, and New York City. Los Angeles, Baton Rouge, and Big Island, Hawaii, are proposing similar measures. This decision is based on a few different determinations. The first is that many municipalities recognize that the "problem" homes for home sharing are not owned by owner-occupiers. Those who live in the unit they are renting are quick to discern whether their guests are using their room for what they intended (quiet business trip as opposed to crazy bachelor party), and they are quick to respond to complaints by neighbors, police, or those in the community. If there is a complaint about noise, trash, or parking, the owners are in a position to quickly remedy the problem. In addition, elected officials understand that the idea behind home sharing—that regular people can earn supplemental income by sharing their homes—is a good one. Any councilperson or representative that would suggest an outright ban would likely lose votes in the next election. There is a large contingent of individuals who responsibly rent their homes. Not all operators adhere to this policy, however. In New York City, for example, three real estate brokers ran an illegal network of rentals that grossed about $21 million dollars. The brokers rented more than 100 apartments in 35 buildings and then relisted them on Airbnb to cover their costs. Their operation included a 15-person professional cleaning crew and interior designer to style the apartments. The brokers created multiple host accounts using different names and e-mail addresses. As many know, New York City lacks available affordable housing, so the city understandably sued the brokers, and the lawsuit is currently underway. Erin Hudson, *How It Worked: Inside Three Ex-brokers' $21M Airbnb Scheme*, The Real Deal, New York City Real Estate News (Feb. 24, 2019), https://bit.ly/2MbVyhk.

Permits & Registration Requirements. Many local governments are beginning to require operators to obtain a license to rent their home on a short-term basis. In addition to the tax revenue generated by such rentals, the municipalities earn revenue from selling licenses. In cities like Denver, where only an owner-occupier can rent his home as a short-term rental, if an operator is found by the local government to have listed an investment property on a home sharing platform, he can have his short-term rental license revoked. Cities like Las Vegas limit the number of legal home-sharing units by limiting the number of new permits that are available to owner-occupied homes. Other places require operators to register their home as a home sharing dwelling and pay an applicable fee.

State Business Licenses. In some jurisdictions, owners are responsible for obtaining a business license or registering with the state tax agency before collecting taxes on short-term rentals. In other jurisdictions, owners are not required to obtain a license but are responsible for self-reporting and remitting taxes to state taxing authority.

Mandatory Insurance. Cities like Denver have started requiring that operators of short-term rentals carry commercial liability insurance with a minimum of $1 million in coverage. An operator cannot have a guest stay in his home until he obtains commercial liability insurance for his home. Unlike hotels or other lodging businesses, short-term rentals are not subject to regular safety and fire inspections. This increases the likelihood of accidents. As an example, Airbnb has recently started requiring some of its operators who provide luxury rentals to install smoke alarms and carbon monoxide detectors. Such measures are a response to a recent lawsuit against the home sharing platform stemming from recent deaths of guests to fire and carbon monoxide. Associated Press, *Airbnb Making New Push for Smoke Alarms, Carbon Monoxide Detectors After Recent Deaths*, USA Today (Dec. 19, 2018), https://bit.ly/2JMS8zT.



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Many local governments are beginning to require operators to obtain a license to rent their home on a short-term basis.

The home sharing company has been shipping such devices to owners for free since 2014.

Mandatory Disclosure to Homeowners Association. Certain cities, like Denver, require the operator of a short-term rental to notify the homeowners association, if any, of the homeowners intent to list his primary residence on a home sharing platform.

Cap on Length of Rental Period. Some local governments have begun placing occupancy limits for vacation and short-term rentals. Miami-Dade County passed an ordinance that limits operators to renting short-term rentals to 180 days per year. In Big Island, Hawaii, the county council is capping the number of days of any given short-term rental period to 30 days.

Cap on Number of Rooms. Some local governments place a cap on the number of rooms in a short-term rental. In Big Island, Hawaii, the county council is considering a five-room maximum in any home. This regulation addresses community concerns about the intensity of the use in a given home.

Zoning Limitations. Some communities have decided to not allow short-term rentals outside of commercial districts and hotel and resort zones. Big Island, Hawaii, is working on such a measure. South Lake Tahoe recently passed such an ordinance and, as a result, roughly 80 percent of the single-family residential homes in the area became de-listed on Airbnb. In Denver, the city has delegated the power to revoke or deny a short-term rental license for "good cause" to the director of the Department of Excise and Licenses, with such decision being subject to judicial review. "Good cause" is defined as either (1) any violation of the applicable regulations or terms and conditions placed on the short-term license or (2) evidence that the rental property has been, or will be, "operated in a manner that adversely affects the public health, safety, or welfare of the immediate neighborhood in which the property is located." The latter language is commonly used as a basis for zoning decisions by local governments.

Other Requirements. Other obligations being imposed on operators of short-term rentals include screening for sexual offenders and enforcing rental standards on guests, such as following garbage procedures and noise restrictions. In some locales, the operator must also be reachable within three hours of getting a call from authorities, a guest, or a neighbor.

To alleviate the burden of complying with taxation requirements, some shared economy companies, with Airbnb taking the lead, are entering into agreements with state taxing authorities to remit taxes on behalf of short-term rental owners. These agreements are very complex (and sometimes confidential) in nature but, in some cases, states have agreed to various protections, including audit and registration exemption. A list of states for which Airbnb collects occupancy taxes is included in the Short-Term Rental Jurisdictions Matrix in the digital version of this article, under the "Taxation" column.

Airbnb, the Tax Collector: How It Works and Arguments For and Against

Similar to most home sharing platforms, Airbnb will agree to collect taxes on behalf of a state or municipality from thousands of privately owned properties being operated as individual short-term rentals. They do so by entering into voluntary tax collection agreements (VCAs) with local or state governments. Currently, Airbnb has such arrangements with more than 40 counties and municipalities around the country. Other home sharing platforms have similar agreements. The types of taxes collected include sales tax, resort tax, and a "bed" tax. In Florida alone, Airbnb remitted $33 million to the state and $12.7 million to counties with which it has tax collection contracts.

Recently, certain VCAs have come under attack from hoteliers and lodging associations, which see home sharing platforms as competitors. In Florida, the Asian American Hotel Owners Association (AAHOA) recently sued the Florida Department of Revenue, arguing that such agreements are negotiated in secret outside of usual rule-making protocol, and the VCAs lack sufficient accountability. Groups like the AAHOA argue that VCAs allow companies like Airbnb to operate under their own honor system with no way to verify whether Airbnb is collecting and remitting all standard applicable taxes. Such groups want Airbnb and other home sharing platforms to be held to the same standards as hotels and other lodging businesses. With that criticism in mind, groups like AAHOA and other lodging associations prefer VCAs than no VCAs at all because it means that short-term rental operators are paying their fair share of taxes and not running their business at an advantage over hotels or other lodging businesses whose tax collection is rigorously monitored.

Certain cities like New York City and Boston have taken aggressive stances against home sharing platforms. As mentioned above, New York City has a "One-Home, One-Host" policy. Only

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owner-occupiers can participate in the home sharing platform, not real estate investors. It is also illegal for an individual to advertise rentals for less than 30 days in unoccupied homes. Much of New York City's legislation was passed in part due to heavy lobbying efforts by hotel groups and affordable housing advocates. New York City has had recent sting operations discovering entire buildings being rented out by Airbnb hosts, which the city believes are operating as illegal hotels in the city. In an attempt to crack down on unauthorized short-term rentals, New York City has issued a subpoena to Airbnb, demanding it hand over details of 20,000 apartment listings in the city. Airbnb has pressed back and may have defenses under federal statutes—the Communications Decency Act and Stored Communications Act, to name a few. Airbnb has pressed for data sharing agreements similar to its VCAs that it has with San Francisco and Philadelphia that report tax revenue.

Public Policy Considerations: Benefits and Burdens of Short-Term Rentals

On all sides of the short-term rental home sharing debate are various homeowner, government official, advocate, and trade groups, all with vested interests in the outcome of the shared economy market. Their perspectives are what shape the public policy arguments outlined below.

Known Benefits of Home Sharing in a Residential Community

Local businesses enjoy increased revenue from tourism. Local municipalities collect vital tax revenue in the way of sales tax, bed tax, and other resort taxes. Individual homeowners who serve as operators of short-term rentals receive supplemental income to save for retirement, pay down debt, or make home repairs. Properties that are dilapidated or otherwise abandoned get renovated into income-producing properties that contribute to the local tax base and economy. The aesthetic of the community is enhanced.

Drawbacks of Home Sharing in a Residential Community

City and local governments see a need to regulate home sharing to mitigate or prevent a host of problems, which include the following:

When homes provide short-term rentals, their regular use becomes intensified. More individuals than usual may stay in a single-family residential home, so the number of people who need accommodations for parking, for example, will increase. Communities like the Spanish Town neighborhood in Baton Rouge, Louisiana, have experienced this firsthand. Spanish Town allocates one to two parking spaces per home via parking permits in its neighborhood. Residents will rent their homes to attendees during college football weekends (LSU), and the sheer volume of people concentrated in a small area can leave local residents without parking for three to four days at a time.

Another issue is noise pollution. Frequently, short-term listings will invite party-goers. In cities like Denver, Colorado, and Miami, Florida, neighborhoods complained that their communities changed overnight with loud crowds, raucous drinking, and smoking that can come from short-term rentals. The aftermath and the resulting trash are an issue, too. Residents often complain about having the quiet enjoyment of their neighborhoods being disrupted.

The purchase of homes that would otherwise be vacant or rundown that are converted into short-term rentals brings many benefits to the community. Typically, however, the individuals purchasing these homes are not owner-occupiers. They are often real estate investors. When investors scoop up groups of homes, as they have done in New Orleans, Louisiana, in recent years, the inventory of housing stock available for purchase as a primary residence goes down. The lower supply drives higher demand, which increases prices. In cities like San Francisco, California, and Portland, Oregon, which have well-known housing crises, the cities have crafted their ordinances to allow only owner-occupiers to provide short-term rental housing. Real estate investors who attempt to purchase multiple properties to rent them out as short-term rentals can find themselves on the other end of stiff fines. The city of San Francisco recently settled a civil lawsuit against a couple for $2.25 million because of their track record of evicting long-term tenants in their investment properties and then converting those dwelling units into short-term rentals. John Breslin, *Record $2.25 Million Settlement Reached for Violation of San Francisco Short-term Rent Law*, Northern California Record (Nov. 30, 2018), https://bit.ly/32LpPJK. This particular couple earned $700,000 from the

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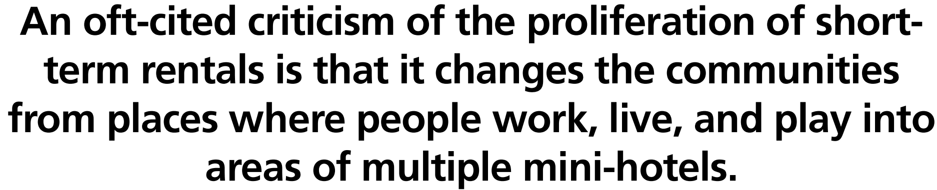

An oft-cited criticism of the proliferation of short-term rentals is that it changes the communities from places where people work, live, and play into areas of multiple mini-hotels.

rentals by engaging in what the city called an "illicit hotel chain."

Like the increase in home prices, when real estate investors acquire single family homes to rent as short-term rentals, the homes are typically converted into high-priced, high-end residences, especially in tourist destinations like Miami or New Orleans. As a result, there is less housing stock for affordable housing, which can create situations where essential workers like police officers, firefighters, nurses, and teachers cannot live in the cities where they work.

In Baton Rouge, many properties that needed repairs were acquired by investors and turned into short-term rentals. However, to maximize cash flow, many homes were remodeled to maximize occupancy beyond what the structures were meant to hold. Such practices make the buildings less safe for their occupants.

As single-family homes in neighborhoods are converted into short-term rentals, the conversion caters to tourists and leaves less room for long-term residents. As a result, long-time residents move out of the area or are displaced. The cumulative effect of displacing long-term residents causes an erosion of the authenticity and culture of a particular locale.

Municipalities often observe that when homes in a community become short-term rentals, there is an essential rip in the fabric of the community. When tourists abound, their presence is transient in nature. They do not contribute to the community in ways that owner-occupiers do. Those who are primary residents pay their civic dues and form neighborly bonds. They may bring meals to shut-ins, feed pets while an owner is away, and in some cases take care of a neighbor who is sick. There is a relationship that can be developed that is simply not present with a brief visitor. An oft-cited criticism of the proliferation of short-term rentals is that it changes the communities from places where people work, live, and play into areas of multiple mini-hotels. The character of the neighborhood irrevocably changes.

Altogether, the recurring theme is that state and local governments are attempting to strike a balance between much-needed revenue and protecting the integrity of local neighborhoods.

Advising Clients Who Want to Participate in the Shared Economy of Residential Short-Term Rentals

Shared economy leasing can be full of traps for the unwary. The following checklist can be instructive to practitioners advising business and individual clients. (This checklist is not intended to be a substitute for legal advice in your local jurisdiction.)

Advising Business Clients or In-House Clients

- Secure local counsel who practices residential real estate law. A good real estate attorney and tax advisor in the state in which a short-term rental is located would be a worthy investment for those entering the shared economy market. Attorneys fortunate enough to manage large scale shared economy projects would be well-served to develop a local counsel network to adequately cover the legal issues across the jurisdictions.
- Property Owners Association CC&Rs should be clearly and carefully drafted to leave no room for ambiguity when it comes to the use of short-term rentals. They should also make provision for amendments and be revisited regularly to keep current with legal developments.
- Governmental zoning ordinances should be clearly and carefully drafted to align within the legal framework of the state and to describe what constitutes violative use of short-term rentals.
- Engage at state and local government offices where your property is located to stay abreast of issues that may not be yet published or well know. It cannot be overstated how quickly things can change at the local level.
- Engage state level licensing and registration departments. Most agencies regulating short-term rentals are good sources of information and will gladly help you navigate the regulatory landscape. Keep in mind that the tax revenue is desirable.

Advising Individuals as Clients

- Determine if the local municipality or city allows short-term rentals and, if applicable, whether the homeowners association allows such rentals.
- For municipalities, contact local or state agencies that regulate hotels, resorts, and tourism. Ask whether real estate investors can provide short-term rentals or whether home sharing is limited to those who are owner-occupiers of their property.
- In addition, be sure to contact the state's department of revenue, so the individual short-term operator is paying the necessary taxes for his property.
- Review any applicable declaration, master deed, or governing documents for a unit that is part of a community association. Avoid the client being fined under local law or community association rules.

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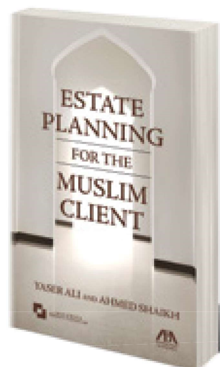
- Ensure that your clients are prepared for extra work and costs. Guests are expecting the comforts of a home but the conveniences of a hotel. That means the owner must provide furnishings and amenities, cable and internet, snow removal and lawn care, and utilities, which are expenses that can reduce the profit of a short-term rental.
- Ensure that the client can price the property competitively. The client should do a market analysis, so they can determine whether operating an Airbnb will be profitable for their particular property in their market.
- Ensure that the client can emotionally detach from the home. Many do not expect the emotional challenge of sharing one's home—whether it be the kitchen table or living room—with strangers.
- Homeowners must understand their target market. Who will be the typical guest staying in the rental? College students? Couples looking for a romantic getaway? Families? Sports fans? Professionals traveling for work? Help your clients know what the market bears, so they can decorate and market the home appropriately.
- Individuals who participate in short-term rentals are ultimately responsible for compliance with applicable licensing and tax laws. Hosts should not assume that agreements between shared economy providers and taxing authorities will operate to indemnify them against government action for violation of tax laws. ■



Graphic Design USA awarded *Probate & Property* a 2019 American Inhouse Design Award for its publication redesign. They also recognized the RPTE book, *Estate Planning for the Muslim Client* by Yaser Ali and Ahmed Shaikh, a winner in the book cover design category.

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