

2019

## Long Term Solutions to the Short-Term Problem: An Analysis of the Current Legal Issues Related to Airbnb and Similar Short-Term Rental Companies with a Proposed Model Ordinance

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### Recommended Citation

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Available at: <https://repository.belmont.edu/lawreview/vol6/iss1/8>

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LONG TERM SOLUTIONS TO THE SHORT-  
TERM PROBLEM:  
AN ANALYSIS OF THE CURRENT LEGAL  
ISSUES RELATED TO AIRBNB AND SIMILAR  
SHORT-TERM RENTAL COMPANIES WITH A  
PROPOSED MODEL ORDINANCE

BY: RICHARD W. F. SWOR\*

**ABSTRACT**

Airbnb and the short-term rental market have revolutionized the way that we travel and book accommodations, and now they are beginning to require cities to revolutionize their laws. This note argues that cities should adopt an ordinance that addresses health and safety, zoning, permitting, and taxation in an enforceable way by drawing on ideas already implemented in other cities such as Chicago, San Francisco, Nashville, and Portland.

In support of this conclusion, this note begins in Section I by discussing the history of vacation rentals and the sharing economy as a whole, before discussing Airbnb more specifically. Section II then provides an overview of some existing problems such as zoning, registration of properties, and taxation that cities are facing with the rise of short-term rentals. This is followed by Section III, which analyzes some existing short-term rental ordinances and how cities are dealing with these specific problems. Section IV delves into some of the limited case law that involves this short-term rental market in order to demonstrate additional legal

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\* Belmont University College of Law (2019). Thank you to Professor Jeffrey Usman for his help throughout the writing and editing process of this note. Additional thanks to Professor Elizabeth Usman for teaching me how to write, Professor Amy Moore for continually frightening me into becoming a better writer, Professor Travis Brandon for encouraging my interest in property law, and Professor Lynn Zehrt for your continual mentorship. Thank you to Margaret Darby, Emily Lamb, and Cate Pham for inspiring my interest in this topic. Thank you to the staff members who worked diligently on this note, particularly Sarah Martin, Sara Diehl, Marisa Garcia, and Grace Cooley. Sallie and Sammy Swor, Lauren LeStourgeon, and Joseph Kiley all deserve extra thanks for their continual support and for listening to me talk about short-term rentals endlessly for months. Dedicated to Daniel Wiseman Rochester.

considerations. Then Section V will provide a Model Ordinance for the regulation of the short-term rental market that Section VI will further advocate for specifically.

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## I: AN INTRODUCTION TO SHORT-TERM RENTAL PROPERTIES

While it has changed greatly with the advent of the Internet and mobile apps, short-term rentals have existed to some degree for centuries.<sup>1</sup> The first part of this section focuses on important historical developments to the vacation rental market. The second part of this section then looks at the general sharing economy, while the third part gives some history and background information about Airbnb and other online, short-term rental, property-specific websites.

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1. See Christine Dayao, *The Rise of the Vacation Home: From a Single Lodge to a \$85 Billion Industry*, SHERMANS TRAVEL (Mar. 30, 2015), <https://perma.cc/UZG8-7SJK> (discussing the early history of vacation homes back to the 1600s).

### A. A History of Vacation Rentals and the Sharing Economy

Short-term rental properties and home sharing apps are better understood by looking at the history of boardinghouses and the development of the vacation rental market. Before vacation rentals were commonplace in American society, boardinghouses were an important part of American history.<sup>2</sup> Boardinghouses were places to stay where a large variety of people would rent rooms and eat together.<sup>3</sup> With people moving into bigger cities in the 19th and 20th centuries, “boarding houses . . . served as places for new residents to get their city sea legs without immediately wading into the melee of the apartment-hunting game.”<sup>4</sup> Not surprisingly then, these boardinghouses were usually concentrated near downtowns.<sup>5</sup> Social historians estimate that in the 19th century, between one-third and one-half of urban residents either took in boarders or were boarders themselves.<sup>6</sup>

Boardinghouses served as a great alternative to long-term rentals or buying.<sup>7</sup> More importantly, beyond being a place to stay cheaply when travelling somewhere in which you did not have family or friends, boardinghouses were an early form of affordable housing.<sup>8</sup> However, “[a] tightening net of ordinances and codes have helped squeeze [boardinghouses], and related housing choices nearly to extinction.”<sup>9</sup> Despite this, while the screening process is much more extensive, boardinghouses still exist to some degree in large cities like New York City.<sup>10</sup>

In addition to boardinghouses, there is a market that is perhaps more comparable to short-term rentals that has developed recently: the home rental market. The home rental market is functionally and economically similar to the online short-term rental market.<sup>11</sup> This industry has grown with technological advances, from the telegraph to the telephone to where it is now with the Internet.<sup>12</sup> Whether it be renting a home to stay in on a yearly basis or booking and renting an online vacation lodging, the basic economic

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2. Ruth Graham, *Boardinghouses: where the city was born*, BOSTON GLOBE (Jan. 13, 2013), <https://perma.cc/2JV5-FJA6>.

3. *Id.*

4. Jessica Leigh Hester, *A Brief History of Co-Living Spaces*, CITYLAB (Feb. 22, 2016), <https://perma.cc/A7GY-EMZA> (further noting that these buildings also were historically considered “brick-and-mortar chastity belts, cast in the role of protecting women’s virtue against the city’s vices”).

5. Alan Durning, *Rooming Houses: History’s Affordable Quarters*, SIGHTLINE INSTITUTE (Nov. 14, 2012), <https://perma.cc/7B74-5SVG>.

6. WENDY GAMBER, *THE BOARDING HOUSE IN NINETEENTH-CENTURY AMERICA* 3 (The Johns Hopkins University Press, 2007).

7. *Id.*

8. Durning, *supra* note 5.

9. *Id.* (referencing restrictions on room rentals, bed rentals, shared housing, building-by-building mandates, and off-street parking).

10. Hilary Stout, *Where the Boys Aren’t*, N.Y. TIMES, Nov. 5, 2009, at E1.

11. See Priceonomics Data Studio, *The Rise of the Professional Airbnb Investor*, PRICEONOMICS (Feb. 2, 2016), <https://perma.cc/G5D4-86W6>.

12. Dayao, *supra* note 1.

model is paying a set periodic amount to be able to stay in the home or apartment.<sup>13</sup> Even though Airbnb is contemplating expansion into longer term rentals, these short-term rental websites are still used almost entirely for booking vacations.<sup>14</sup>

The concept of a vacation home traces back to the mid-1600s with King Louis XIII's "hunting lodge," also known as the Palace of Versailles.<sup>15</sup> Vacation homes developed from only the wealthiest enjoying vacation travel to the 1800s, when vacationing in friends' homes became much more popular.<sup>16</sup> It was custom during this time in Europe to ask friends to use their vacation homes using letters delivered by horse-and-carriage.<sup>17</sup> However, it was not until the invention of the telegraph in 1837 that vacation rental bookings really expanded, allowing faster communication between potential renters and homeowners.<sup>18</sup> The industry, which was previously primarily European, took off in the United States in the mid-1900s, with rentals being advertised in newspapers and by telephone through real estate agents.<sup>19</sup>

With the vacation rental industry growing in the second half of the twentieth century, the Vacation Rental Managers Association ("VRMA") was founded in 1985.<sup>20</sup> VRMA exists to "advance professionally-managed vacation rentals as a safe, reliable option for consumers" by providing education, information, research, and more to its members.<sup>21</sup> As technology has advanced, it is only natural that the vacation rental industry has prospered with the Internet, like so many other industries.<sup>22</sup> In 1995, a single condo in Colorado was available for rent as the Internet's first Vacation Rental by Owner.<sup>23</sup> This market was expanded in 1996 when a small division within Microsoft launched online travel booking site Expedia.com.<sup>24</sup>

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13. See generally F.T.C., *Renting an Apartment or House*, <https://perma.cc/K4SU-W2CU> (last visited Aug. 17, 2018).

14. See Olivia Zaleski, *Airbnb Explores Expansion in Long-Term Home Rentals*, BLOOMBERG TECH. (Mar. 8, 2017), <https://perma.cc/ZA29-YVHN>.

15. Dayao, *supra* note 1; see also Kristen Martinelli, *Everything You Need to Know About the Vacation Rental Industry Part 1*, FUTURESTAY, <https://perma.cc/V88N-9WEM> (last visited July 12, 2018).

16. Dayao, *supra* note 1.

17. *Id.*

18. *Id.*

19. *Id.*; see also Martinelli, *supra* note 15.

20. See *VRMA History*, VACATION RENTAL MANAGEMENT ASSOCIATION, <https://perma.cc/QPT2-CLWU> (last visited Jan. 28, 2018).

21. See *About the Vacation Rental Management Association*, VACATION RENTAL MANAGEMENT ASSOCIATION, <https://perma.cc/42W3-5GJK> (last visited Jan. 28, 2018).

22. Martinelli, *supra* note 15.

23. *Id.*

24. See *History of the Online Travel Industry Pioneer*, EXPEDIA INC., <https://perma.cc/4WUS-B8RH> (last visited Jan. 28, 2018).

## B. Sharing Economy Generally

It was only natural that the growing popularity in online vacation rentals would come to a head with the rapid development of the sharing economy.<sup>25</sup> While many economic models are based on ownership, this economic model instead focuses on access to resources such as a car or a home.<sup>26</sup> The basics of this model are “early instances of a future in which peer-to-peer exchange becomes increasingly prevalent, and the ‘crowd’ replaces the corporation at the center of capitalism.”<sup>27</sup> Two big examples of this sharing economy are Uber and Airbnb.<sup>28</sup> However, this economic model is not really new.<sup>29</sup> In fact, “prior to the industrial revolution, a significant percentage of economic exchange was peer-to-peer.”<sup>30</sup>

While Airbnb, which is the focus of this note, will be discussed in detail below, it is helpful to look at Uber, another industry giant. Uber, which launched in 2009 as a means for hailing premium black cars in a select few cities, has since evolved to provide car service similar to taxis in many cities across the globe.<sup>31</sup> In fact, as a driving service, Uber has become so popular that its impact has been “absolutely detrimental” to the traditional taxi industry.<sup>32</sup> However, the mere existence of Uber is dependent upon people being willing to share their automobiles and drive strangers around, yet whether these drivers are employees of Uber is a question without a definitive answer.<sup>33</sup>

That question of whether the people providing the actual service are employees or independent contractors is common across the sharing industry.<sup>34</sup> Using Uber as an example, the economic model is dependent on the companies themselves providing people a means to find someone to drive them, but the company is in turn dependent on the drivers.<sup>35</sup> While Uber

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25. See generally PIA A. ALBINSSON & B. YASANTHI PERERA, *THE RISE OF THE SHARING ECONOMY: EXPLORING THE CHALLENGES AND OPPORTUNITIES OF COLLABORATIVE CONSUMPTION* ix-x (Praeger 2018).

26. See Anastasia, *An Introduction to Sharing Economy*, CLEVERISM (Mar. 5, 2015), <https://perma.cc/J8UX-6APN>.

27. ARUN SUNDARAJAN, *THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 2* (The MIT Press 2016).

28. See Sonya Mann, *These Companies Are Winning the Sharing Economy, and Investors Want In*, INC. (Mar. 15, 2017), <https://perma.cc/F2EC-US4S>.

29. Sundarajan, *supra* note 27, at 4.

30. *Id.* (“The trust needed to make economic exchange possible came primarily from social ties of different kinds.”)

31. *Our story*, UBER, <https://perma.cc/WP3Z-UZJ4> (last visited Jan. 28, 2017).

32. Georgios Petropoulos, *Uber and the Economic Impact of Sharing Economy Platforms*, BRUEGEL (Feb. 22, 2016), <https://perma.cc/NDK3-5UBX>.

33. See Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017), <https://perma.cc/BN8U-KGPA>.

34. *Id.*

35. See generally *id.*; John Patrick Pullen, *Everything You Need to Know About Uber*, TIME (Nov. 4, 2014), <https://perma.cc/3ZFW-68NK> (“[t]o drivers, [Uber is] basically a referral services”).

settled a case in 2016 that allowed drivers to stay freelancers, this is an important debate that may be settled in the very near future and change much of this sharing economy.<sup>36</sup>

On one side of the debate, this allows Uber to continue to “sidestep the costs of full-time employees,” including benefits such as a guaranteed minimum wage, insurance, share of Social Security, and other worker protections.<sup>37</sup> However, on the other side of the argument, some drivers “value their independence” in selecting when to work, as well as the ability to drive for multiple companies simultaneously.<sup>38</sup> With all of the concerns facing these revolutionary technologies, it is only natural that some cities have embraced these economic models while others have attempted to stifle them with regulations.<sup>39</sup>

### C. Airbnb and Other Short-term Rental Companies

Airbnb began in 2008 when a couple of roommates who needed some extra cash rented out some air mattresses in their loft and provided breakfast to their guests.<sup>40</sup> As of 2017, Airbnb has since turned into a \$31 billion company, the second most valuable start-up company in the United States behind Uber, and the biggest of the home sharing apps.<sup>41</sup>

Airbnb provides a website for hosts to share their spaces with guests, allowing individuals to book destinations in 190 countries and more than 34,000 cities.<sup>42</sup> This model is similar to the traditional hotel model, except that there is no more a dedicated staff to check customers in, clean their rooms, or provide them with room service.<sup>43</sup> Instead, Airbnb is a house, condo, apartment, or other lodging that an individual owns and rents out to

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36. Mike Isaac & Noam Scheiber, *Uber Settles Cases With Concessions, but Drivers Stay Freelancers*, N.Y. TIMES, Apr. 22, 2016, at B1. See generally Tad Devlin & Stacey Chiu, *Is Your Uber Driver or Lyft Driver an Employee or Independent Contractor and Why Does It Matter?*, KAUFMAN DOLOWICH & VOLUCK (June 2017), <https://perma.cc/9MAK-4E56>.

37. Isaac and Scheiber, *supra* note 36. But see *Insurance: How you're covered*, UBER, <https://perma.cc/Y7Z7-3N7K> (last visited Apr. 29, 2018) (explaining that drivers are covered by Uber's insurance policy in certain situations while driving, but not when driving for personal use).

38. Isaac & Scheiber, *supra* note 36.

39. Joanna Penn & John Wihbey, *Uber, Airbnb and consequences of the sharing economy: Research roundup*, JOURNALIST'S RESOURCE (June 3, 2016), <https://perma.cc/V4CE-FC6Z>.

40. Biz Carson, *How 3 guys turned renting an air mattress in their apartment into a \$25 billion company*, BUS. INSIDER (Feb. 23, 2016), <https://perma.cc/UP2R-UHJK>.

41. Rani Molla, *Uber is the most valuable U.S. startup, with Airbnb and WeWork following far behind it*, RECODE (Aug. 8, 2017), <https://perma.cc/VN9P-RQX4>.

42. See generally *How to travel*, AIRBNB, <https://perma.cc/3J9C-H6M4> (last visited Jan. 28, 2018) (discussing the basics of Airbnb booking for potential customers).

43. See Elaine Glusac, *Hotels vs. Airbnb: Let the Battle Begin*, N.Y. TIMES, July 20, 2016, at TR3.

interested guests.<sup>44</sup> The hotel manager is now simply the owner and operator of his or her own dwelling.<sup>45</sup> While this model may at first seem like simply a young vacationer's dream, recently it was reported that 31% of people who use Airbnb have actually used it for business.<sup>46</sup>

Airbnb in its terms and services specifies that the company “does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any Listings or Host Services.”<sup>47</sup> Therefore, hosts are responsible for their own listings.<sup>48</sup> Instead of hosts sending the renters a contract and waiting to receive a signed copy, “[w]hen members make or accept a booking, they are entering into a contract directly with each other.”<sup>49</sup> Airbnb specifies that it is not an agent, but that it “may” help facilitate dispute resolution.<sup>50</sup> Additionally, Airbnb does not guarantee “the existence, quality, safety, suitability, or legality of any listing,” nor the “truth or accuracy of any Listing descriptions.”<sup>51</sup>

There are a variety of distinctions between the different models of short-term rental properties, but one important distinction is “owner-occupied” property versus “non-owner-occupied” property.<sup>52</sup> Owner-occupied involves a residence associated with the principal resident on the same lot.<sup>53</sup> Airbnb itself goes further in options, providing the distinctions of “shared rooms,” “private rooms,” and “entire homes/apartments.”<sup>54</sup> “Shared rooms” and “private rooms” are usually part of the owner-occupied model, in which the rental is not of the entire house or apartment, but rather a single room of the resident's dwelling.<sup>55</sup>

It is worth noting that there are still hundreds of different listing sites for short-term rentals.<sup>56</sup> While Airbnb has arguably become the most well-known, Booking.com, HomeAway, and TripAdvisor are considered major

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44. *See generally* *How to be an Airbnb host*, AIRBNB, <https://perma.cc/UN8G-WLER> (last visited Jan. 28 2018) (giving hosts a broad overview of how to begin using their residence as a short-term rental property with Airbnb).

45. *See generally id.*; *Local destinations for a global community*, AIRBNB, <https://perma.cc/F7KH-Z3EP> (last visited Jan. 28, 2018) (both discussing general host and guest features of using Airbnb).

46. Glusac, *supra* note 43, at TR3.

47. *Terms of Service*, AIRBNB, <https://perma.cc/8GL8-YMJS> (last visited Jan. 28, 2018).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See* NASHVILLE, TENN., SUB. ORDINANCE NO. BL2016-492 (Feb. 22, 2017), <https://perma.cc/NS37-WXH6>.

53. *Id.*

54. *What does the room type of a listing mean?*, AIRBNB, <https://perma.cc/D7C9-QX26> (last visited Jan. 28, 2018).

55. *Id.*

56. *Third Party Distribution Channels: The Changing Landscape of Third Party Booking Channels*, VRM INTEL (Jan. 29, 2016), <https://perma.cc/6TFK-QREM>.



competitors.<sup>57</sup> Booking.com allows people to book “everything from apartments, vacation homes, and family-run B&Bs, to 5-star luxury resorts, tree houses, and even igloos.”<sup>58</sup> In 2006, HomeAway purchased Vacation Rentals by Owner (VRBO), another short-term rental website, and thus commands a large share of the market.<sup>59</sup> However, according to HomeAway’s CEO, the company does not consider Airbnb direct competition because HomeAway focuses on renting houses “based on an annual homeowner subscription model,” which requires renters to pay a yearly fee to keep their property listed, while Airbnb is a “platform for people looking to scrape together a few extra bucks from renting a room[.]”<sup>60</sup> TripAdvisor, which used to be part of Expedia.com before, includes much more than just home rentals, such as restaurant reviews, ability to book flights or rental cars, and more.<sup>61</sup> TripAdvisor purchased FlipKey in 2008, which performs similar services to Airbnb.<sup>62</sup>

Yet, with the rapid growth of short-term rentals, some cities are facing novel issues unique to the industry, and there has thus been much more reason to suddenly regulate this market.<sup>63</sup> Additionally, some places that have had restrictions on short-term rental properties for much longer have suddenly started seeing more enforcement.<sup>64</sup> For example, the vacation rental market has existed in Venice, California “since there was a Venice,” but actual enforcement of restrictions really started with complaints over Airbnb.<sup>65</sup> Similarly, areas like Tampa Bay that have historically had a lot of tourism before the smart phone era are now seeing changing regulations to deal with the new problems that Airbnb and similar companies are bringing.<sup>66</sup>

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57. *Id.*

58. *About Booking.com*, BOOKING.COM, <https://perma.cc/ED6H-GUMR> (last visited Jan. 28, 2018).

59. Peter Lane Taylor, *Watch Out, HomeAway and Airbnb: Here’s Why TripAdvisor May Be Your Biggest Competition*, FORBES (Dec. 7, 2016), <https://perma.cc/5HWG-DTFP>.

60. *Id.*; see also *How much does a subscription cost?*, VRBO, <https://perma.cc/EZ52-EGDD> (describing both the costs and the benefits of a VRBO subscription).

61. Will Ashworth, *Trip Advisor Continues Its Buying Binge*, INVESTOPEDIA (May 10, 2013), <https://perma.cc/5MN4-NAQD>; see also *FlipKey vs. Airbnb*, TRIPPING, <https://perma.cc/G6GB-RL6W> (last visited Jan. 28, 2018).

62. *Id.*

63. *Vacation Rental Market Growth: Eye-Watering Projections*, SMARTHOSTS, <https://perma.cc/E76Y-RUWB> (last visited Jan. 28, 2018) (“[Y]ear-on-year growth in the vacation rental market has averaged 3.6% between 2011 and 2016.”).

64. See Nancy Scola, *How 60 Years of Progressive Organizing History is Shaping the Short-Term Rental Market*, NEXTCITY (Dec. 2, 2013), <https://perma.cc/G2T2-3GPZ>.

65. *Id.* (“The vacation rental business has been part of Venice since there was a Venice . . . but it has only been with the rise of airbnb.com and related websites that complaints have risen to the point where [the L.A. Department of Building and Safety] has started enforcement.”).

66. See generally Sarah Hollenbeck, *Battle brewing over short-term vacation rentals*, ABC ACTION NEWS, WFTS TAMPA BAY (Mar. 15, 2017), <https://perma.cc/9C43-NUKM> (discussing concerns over proposed regulations in beach cities that have historically been tourist destinations).

Regardless of the individual cities' previous experience or lack thereof in vacation and short-term rentals, there are numerous problems potentially worth addressing.

## II: EXISTING PROBLEMS

While there are many different aspects of short-term rentals which require regulation, there are five main problems which are the most pertinent for cities to address, some of these actually acknowledged by Airbnb.<sup>67</sup>

The first problem is health and safety. The sharing-economy startups do not have the same level of regulation as their industry counterparts (i.e., taxi-services compared with Uber, or hotel industry compared with Airbnb).<sup>68</sup> This can result in a lack of strictly enforced health and safety standards.<sup>69</sup> Health and safety is a broad category but includes topics such as cleanliness, parking, fire prevention, and other aspects that would likely be present if one were to rent with a hotel as opposed to a short-term rental property.<sup>70</sup> There is a concern with short-term rental properties not being inspected or maintained for cleanliness as a hotel would be regularly.<sup>71</sup> One of the primary benefits of being in a hotel is having a contact person there at all times, and certain cities have addressed the local contact aspect that is missing with short-term rental properties.<sup>72</sup> Even though Airbnb has suggestions to keep the home safer, as well as general safety requirements, some cities have passed more extensive regulations directly targeting health

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67. See *What regulations apply to my city?*, AIRBNB, <https://perma.cc/R8QG-UZJ7> (last visited Jan. 28, 2018); see also *5 Key Arguments in Tennessee's Debate Over Short-Term Rentals*, NASHVILLE PUB. RADIO (Sept. 16, 2016), <https://perma.cc/2K36-6M2L>.

68. See Jeff John Roberts, *Airbnb Faces Scrutiny Over Secret Tax Deals With Cities*, FORTUNE (Mar. 7, 2017), <https://perma.cc/HEU2-3DEG> (quoting a report on city's concessions to Airbnbs about how "[s]ecrecy allows lodging operators to run hotels that violate zoning laws, avoid public health and safety standards, and reduce the current housing supply for long-term residents"). See generally David Kemp, *Don't Regulate Uber, Deregulate Regular Taxis*, NEWSWEEK (Sep. 28, 2017), <https://perma.cc/7GDH-UUA6>; Maya Kosoff, *The story of a man who died in a freak accident during an Airbnb stay reveals a huge safety problem the startup still needs to solve*, BUS. INSIDER (Nov. 9, 2015), <https://perma.cc/2XYV-2UAC>.

69. See generally Kosoff, *supra* note 68. But see *Your safety is our priority*, AIRBNB, <https://perma.cc/A3XM-A7LQ> (last visited Apr. 29, 2018) (giving generalized safety requirements that Airbnb is "always working to make sure [are] enforced," such as "require[ing] that [hosts] refrain from endangering or threatening anyone" and "ask[ing] hosts] to respect others' property, information, and personal belongings").

70. See *Responsible hosting in the United States*, AIRBNB, <https://perma.cc/KP4C-P73J> (last visited Jan. 28, 2018); see also *I'm a host. What are some safety tips I can follow?*, AIRBNB, <https://perma.cc/WL3J-CPAS> (last visited Jan. 28, 2018).

71. Kosoff, *supra* note 68.

72. See CHI., ILL., MUN. CODE § 4-14-040 (2018), <https://perma.cc/959V-TT33>; DOUGLAS CTY., NEV., CODE § 5.4.100 (2018), <https://perma.cc/T72N-2N36>.

and safety concerns, such as Chicago's requirements of sanitizing and cleaning dishes after rentals.<sup>73</sup>

The next problem is how to zone short-term rental properties. While some cities allow for short-term rental properties practically everywhere, other cities restrict these properties to certain zones.<sup>74</sup> Some only allow owner-occupied in certain zones.<sup>75</sup> Some cities do not allow short-term rental properties altogether.<sup>76</sup> While zoning law has developed over the years and become engrained as part of United States property law, zoning law was originally justified in part by looking at the concept of nuisances.<sup>77</sup> Therefore, when considering potential nuisances, without any kind of zoning restrictions on short-term rental properties, quiet neighborhoods suddenly have short-term rental properties popping up next door with strangers coming and going.<sup>78</sup>

A third problem is putting proper permitting systems in place to restrict the number, and potentially location, of short-term rental properties. While this is somewhat tied to the second issue, many of the owner's requirements to get a permit to rent their home as a short-term rental are distinct from just zoning.<sup>79</sup> This section will also focus on the owner-occupied versus non-owner-occupied distinction certain cities have raised, which has led to litigation.<sup>80</sup> Furthermore, the section also touches on the notice requirement, with some cities requiring a short-term rental property owner notify the neighbors when applying for a permit.<sup>81</sup>

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73. See CHI., ILL., MUN. CODE § 4-14-040 (2018), <https://perma.cc/6ZJX-XED5>; *Helping Hosts Make Their Homes Safer*, AIRBNB, <https://perma.cc/XTL6-MPYJ> (last visited Jan. 28, 2017); *Your safety*, *supra* note 79.

74. See Steven Leigh Morris, *Airbnb is Infuriating the Neighbors. Is it Time for New Rules?*, LA WEEKLY (Jan. 22, 2015), <https://perma.cc/2VYF-RLRT>.

75. NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/A9E6-E3TE>.

76. See generally Lori Weisberg, *Short-term rentals not allowed in San Diego, city attorney says*, THE SAN DIEGO UNION-TRI. (Mar. 16, 2017), <https://perma.cc/PWF3-N6GT>.

77. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (“A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”).

78. See Joel Grover, Matthew Glasser & Cole Sullivan, *Short-Term Rentals Turn Into Nightmares Next Door*, NBC L.A. (Mar. 1, 2017), <https://perma.cc/5WL5-J33V> (quoting neighbors lamenting that “[they]’ve lived here for several years now and the last three weeks, [they]’re suddenly living next to a hotel”).

79. CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6.2 (2018), <https://perma.cc/53R8-F99S>.

80. See *Anderson v. Metro. Gov’t of Nashville & Davidson Cty. TN*, No. M2017-00190-COA-R3-CV (Tenn. Ct. App. Jan. 23, 2018).

81. CITY OF PORTLAND, OR., PLANNING AND ZONING CODE § 33.207 (2017), <https://perma.cc/Y68W-4HDE>.

Permitting prevents what the hotel industry refers to as “illegal hotels.”<sup>82</sup> Nearly 30% of Airbnb revenue is collected from full-time hosts.<sup>83</sup> According to one study, there are 2,675 full-time operators who have properties available to rent more than 360 days a year.<sup>84</sup> Additionally, hosts who have two or more units available to rent account for nearly 40% of the revenue on Airbnb.<sup>85</sup> Requiring permits is one potential way to attempt to limit this problem.<sup>86</sup>

The fourth problem is taxation of short-term rental properties and hosts. This issue really comes down to cities’ relationship with Airbnb.<sup>87</sup> Airbnb is willing to collect hotel taxes in certain instances, but some cities require more information about the guests than Airbnb is willing to provide, leading to some cities completely forgoing the hotel tax except for self-reporting citizens.<sup>88</sup> However, foregoing this tax opportunity is hard for cities, because Airbnb already collects over \$40 million in tax revenue for cities that are willing to partner with the company.<sup>89</sup>

A final problem that also serves to tie all of these together is enforceability. While all of these areas may not individually seem overly difficult to regulate, cities must create restrictions that are actually enforceable.<sup>90</sup> This also means that these restrictions must pass legal scrutiny and not be deemed unconstitutional or against state law, which will primarily be addressed in Section IV.<sup>91</sup> Additionally, these restrictions must not be overly complex or overly burdensome on agency officials, allowing them the ability to actually monitor and enforce these restrictions.<sup>92</sup>

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82. Christopher Elliott, *Airbnb Runs ‘Illegal Hotels,’ Hotel Industry Study Claims*, FORTUNE (Jan. 20, 2016), <https://perma.cc/5A3L-597Q>.

83. Dr. John W. O’Neill & Yuxia Ouyang, *From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb*, P.A. STATE UNIV. 2 (2016), <https://perma.cc/E85M-Q9M8> (“A growing number of hosts are using the Airbnb platform to operate an unregulated, full-time business”).

84. *Id.* at 3.

85. *Id.*

86. *See* Elliott, *supra* note 82.

87. Kai Kokalitcheva, *Airbnb to Cities: Cooperate and We’ll Get You Tax Revenue*, FORTUNE (Jan. 22, 2016), <https://perma.cc/M9A7-GLB4>.

88. *Id.*

89. Cecilia Kang, *Airbnb Takes Its Case to U.S. Mayors Conference*, N.Y. TIMES, Jan. 21, 2016, at B1.

90. *See generally* BRIAN BGUYEN ET AL., DESIGNING ENFORCEABLE REGULATIONS FOR THE ONLINE SHORT-TERM RENTAL MARKET IN LOS ANGELES, UCLA LUSKIN SCHOOL OF PUBLIC AFFAIRS (2016).

91. *See* La Park La Brea A LLC v. Airbnb, Inc., 285 F. Supp. 3d 1097 (C.D. Cal. 2017); Airbnb, Inc. v. City & Cty. of S.F., 217 F. Supp. 3d 1066 (N.D. Cal. 2016).

92. *See generally* Tim Logan, *Can Santa Monica—or anyplace else—enforce a ban on short-term rentals?*, L.A. TIMES (May 13, 2015), <https://perma.cc/9A9L-KBZJ>.

### III: EXAMPLES OF EXISTING CITY ORDINANCES

Cities have addressed these problems in many different ways. While some cities' regulations have somewhat matched each other, some regulations are vastly different city to city.

#### A. Health and Safety

One of the main differences between a short-term rental unit and a hotel is the amount of time spent by a staff focusing on health and safety. However, some cities have addressed this extensively in their regulations.<sup>93</sup> Chicago, Illinois is one of the best examples of a city having in-depth requirements for its operators.<sup>94</sup>

Chicago Municipal Code section 4-14-040 discusses the legal duties of operators, many of which relate to health and safety.<sup>95</sup> First, each shared housing unit must provide its guests with soap, clean individual bath cloths and towels, and clean linen.<sup>96</sup> All of these must be kept in good repair and must be changed between guests.<sup>97</sup> Additionally, the host is required to clean and sanitize all dishes, utensils, pots, pans, and other cooking utensils between guests.<sup>98</sup> Any leftover food, beverages, and alcohol left by the previous guests must also be disposed of.<sup>99</sup> If the host provides food to any guests, the host is required to comply with all applicable food handling and licensing requirements of the Chicago Municipal Code and the Board of Health regulations.<sup>100</sup>

Additionally, Chicago requires that each host ensure that the shared housing unit is in compliance with applicable laws regarding the installation and the maintenance of functioning smoke and carbon monoxide detectors.<sup>101</sup> An evacuation diagram identifying all means of egress from the shared housing unit and the building is required to be posted in a conspicuous place near the entrance of the shared housing unit.<sup>102</sup>

Another important aspect of health and safety is the listing itself. Chicago requires descriptive information on the listing.<sup>103</sup> First, the listing must state the short-term residential rental provider's cancellation and check-in and check-out policies.<sup>104</sup> Second, it must provide a statement on whether

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93. See CHI., ILL., MUN. CODE § 4-14-040 (2018), <https://perma.cc/9GFX-BRMF>.

94. § 4-14-040.

95. § 4-14-040.

96. § 4-14-040(a)(1).

97. § 4-14-040(b)(1).

98. § 4-14-040(b)(2).

99. § 4-14-040(b)(2).

100. § 4-14-040(b)(7).

101. § 4-14-040(b)(5).

102. § 4-14-040(b)(6).

103. § 4-14-040(a).

104. § 4-14-040(a)(1).

or not the rental is wheelchair or ADA accessible.<sup>105</sup> In addition to this, it must state whether there is any parking and what restrictions there are, as well as the availability of any recreational facilities or other amenities.<sup>106</sup> Third, there must be a description of the unit, specifying the number of sleeping rooms, the number of bathrooms, and what portion of the house is available to rent.<sup>107</sup> Finally, it must provide the short-term residential rental provider's city license or registration number.<sup>108</sup> This registration process will be discussed more in depth in the third part of this section related to permitting.

Hotels additionally have the added benefit of having a contact person or manager within the building. In Chicago, each shared housing host is required to post in a conspicuous place near the entrance the name and telephone number of a local contact person.<sup>109</sup> This "local contact person" is defined as "a person authorized as an agent of the shared housing host who: (1) is designated for service of process; (2) is authorized by the shared housing host to take remedial action and to respond to any violation of this Code; and (3) maintains a residence or office located in the city."<sup>110</sup>

Boulder, Colorado increases this local contact requirement and requires the name and telephone number of two local contacts on the application form.<sup>111</sup> These local contacts must be "capable of responding to the property within sixty minutes."<sup>112</sup> However, the other safety restrictions are much more relaxed, only requiring a "certification that the dwelling unit is equipped with operational smoke detectors, carbon monoxide detectors and other life safety equipment as may be required by the city manager."<sup>113</sup>

San Francisco, California's requirements are less specific than Chicago's.<sup>114</sup> The only specific requirement in the code in terms of health and safety is just that the residence needs to demonstrate the property is not "subject to any outstanding Building, Electrical, Plumbing, Mechanical, Fire, Health, Housing, Police, or Planning Code enforcement."<sup>115</sup> However, similar to Chicago, the owner must post a "clearly printed sign" providing information regarding the "location of all fire extinguishers in the unit and building, gas shut off valves, fire exits, and pull fire alarms."<sup>116</sup>

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105. § 4-14-040(a)(2)(i).

106. § 4-14-040(a)(2)(ii-iii).

107. § 4-14-040(a)(3).

108. § 4-14-040(a)(4).

109. § 4-14-040(b)(6).

110. § 4-14-010.

111. BOULDER, COLO., MUN. CODE § 10-3-19(c)(5) (2018), <https://perma.cc/4P9F-X66Q>.

112. § 10-3-19(c)(5).

113. § 10-3-19(c)(4).

114. S.F., CAL., ADMIN. CODE § 41A.5(H) (2018), <https://perma.cc/QV98-NAWG>.

115. § 41A.5(H)

116. § 41A.5(2)(D).

While the codes in Chicago and San Francisco are directly in response to the rise in short-term rentals, some other spots such as Douglas County, Nevada, home of Lake Tahoe, have had ordinances related to vacation rentals for a longer time.<sup>117</sup> However, it is easy to see many of the similarities in the codes. In Douglas County, the vacation home rental must have a clearly visible and legible notice posted within the unit on or adjacent to the front door which contains health and safety information.<sup>118</sup>

This notice first has to contain the name of the agent, local contact person, or owner of the unit with a telephone number at which that party may be reached on a 24-hour basis.<sup>119</sup> The definition of local contact person is similar to Chicago.<sup>120</sup> However, it is worth noting that while Chicago requires this local contact person's information to be available, Douglas County lists three different options with the only stipulation being that any of those parties must be reachable on a 24-hour basis.<sup>121</sup>

Furthermore, this notice must list the maximum number of occupants permitted to stay in the unit, the maximum number of vehicles allowed to be parked on the property, and the location of on-site and assigned parking spaces.<sup>122</sup> Something that Douglas County requires that Chicago does not is information regarding the trash pick-up day and notification that the trash may not be stored on the exterior of the property except for certain times.<sup>123</sup>

Some cities, such as San Francisco, require the hosts to carry some kind of liability insurance.<sup>124</sup> While this issue is somewhat alleviated for Airbnb hosts by the company's Host Protection Insurance program, which can cover up to \$1 million per occurrence of third party claims of bodily injury or property, Airbnb's insurance program does not cover intentional acts, loss of earnings, fungi or bacteria, as well as other exclusions.<sup>125</sup> However, it is worth noting that not all short-term hosting platforms provide liability insurance coverage, so the issue is still relevant in drafting an ordinance to the extent that some owners may still need to get coverage.<sup>126</sup>

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117. See generally Amy Alonzo, *Douglas County vacation rental ordinance to see updates*, THE RECORD-COURIER (Mar. 23, 2017), <https://perma.cc/4T8Z-BKDH> (pointing out that the last update to the code occurred in 2005).

118. DOUGLAS CTY, NEV. CODE § 5.40.090 (2018), <https://perma.cc/3TGV-SK98>.

119. § 5.40.090.

120. § 5.40.100.

121. § 5.40.090.

122. § 5.40.090.

123. § 5.40.090.

124. S.F., Cal., Admin. Code § 41A.5(g)(1)(D) (2018), <https://perma.cc/4DM6-BTRD>.

125. *What is Host Protection Insurance?*, AIRBNB, <https://perma.cc/TL4E-C59U> (last visited Jan. 28, 2018).

126. Stephen Fishman, *Understand insurance and liability issues when you rent out your home on Airbnb*, NOLO, <https://perma.cc/SD54-7Y3N> (last visited Jan. 28, 2018) (“Instead, HomeAway recommends that hosts obtain their own short-term rental coverage from the insurer[.]”).

## B. Zoning

Another issue that is prominent in short-term rental regulation is which zones permit these short-term rentals. It is valuable in the case of zoning to start with broader zoning regulations and move to progressively more narrow zoning regulations. Portland, Oregon has one of the broadest.<sup>127</sup> Portland allows short-term rentals in all zones.<sup>128</sup> However, in zones where Retail Sales and Service uses are allowed, these short-term rentals may be regulated as either Retail Sales and Service uses or as short-term rentals.<sup>129</sup> “This decision is up to the applicant.”<sup>130</sup>

Chicago adds the idea of “restricted residential zones.”<sup>131</sup> A restricted residential zone is defined as:

a precinct within which, in any combination: (1) all new or additional shared housing units or vacation rentals, or both, have been ordained as ineligible for licensing or registration under Chapter 4-14 [“Shared Housing Units”] or Section 4-6-300 [“Vacation Rentals”] of this Code; or (2) all new or additional shared housing units or vacation rentals, or both, that are not their owner’s primary residence have been ordained as ineligible for licensing or registration under Chapter 4-14 or Section 4-6-300 of this Code.<sup>132</sup>

The legal voters of any precincts that contain residentially zoned property may petition their local alderman to introduce an ordinance to prohibit all new or additional shared housing units, vacation rentals, or both.<sup>133</sup> The ordinance can be a general ban, or it can ban only those units that are not their owner’s primary residence.<sup>134</sup>

This petition requires the signatures of at least 25% of the registered voters of the precinct.<sup>135</sup> The alderman must assess relevant factors, which include the precinct’s geography, density and character, the prevalence of residentially-zoned property, current shared housing units and vacation rentals in the precinct, and the prevailing viewpoint with regard to the issue raised in the petition.<sup>136</sup> Once these factors have been assessed, the alderman

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127. CITY OF PORTLAND, OR., PLANNING AND ZONING CODE § 33.207.030 (2018), <https://perma.cc/RZP6-6LU7>.

128. § 33.207.030.

129. § 33.207.030.

130. § 33.207.030.

131. CHI., ILL., MUN. CODE § 4-17-010 (2018), <https://perma.cc/LRP2-QUZ5>.

132. § 4-17-010.

133. § 4-17-020.

134. § 4-17-020.

135. § 4-17-020.

136. § 4-17-020.



may introduce an ordinance which creates a restricted residential zone in that precinct.<sup>137</sup>

Charleston, South Carolina allows for short-term rentals in various zones and provides an overlay map to help potential owners know whether or not they live in an area that allows for short-term rentals.<sup>138</sup> While Charleston is in the process of conducting an evaluation of potential changes in regard to their short-term rental property ordinance, as it stands, the City of Charleston Department of Planning, Preservation & Sustainability provides a Short-term Rental Overlay map that shows which properties are eligible for short-term rentals.<sup>139</sup> The Short-term Overlay Zone in the ordinance allows for short-term rentals as conditional uses in certain zone districts as long as the “use satisfies” various conditions.<sup>140</sup> These include not being an affordable housing unit, a prohibition on exterior signs, and compliance with all business license and revenue collection laws of the City of Charleston.<sup>141</sup>

One interesting aspect of Charleston’s zoning ordinance as it relates to short-term rentals is the number of units permitted on one lot.<sup>142</sup> Whereas some ordinances such as St. Helena, California only allow for one short-term rental unit per lot,<sup>143</sup> Charleston allows for “[n]o more than nine (9) short-term rental units . . . on one (1) lot.”<sup>144</sup> Additionally, the ordinance provides that for ten or more accommodations use is possible.<sup>145</sup> This accommodation makes it so renters in apartment buildings could potentially rent out their apartments as short-term rental units.

Finally, Miami, Florida has a much stricter zoning definition. In a memorandum from the City of Miami Planning & Zoning Department Office of Zoning, the definitions of residential areas in the zoning code are interpreted.<sup>146</sup> Under this interpretation, “using a Single Family residence or Two Family-Housing (a duplex) within a T3 [residentially zoned area] to provide rental accommodations per night, week or anything less than one

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137. § 4-17-020.

138. CHARLESTON, S.C., ZONING CODE § 54-227(a) (2018), <https://perma.cc/UQ4C-XGYZ>.

139. *Short Term Rental Task Force*, CITY OF CHARLESTON, S.C., <https://perma.cc/A4EV-YBZ7> (last visited Jan. 28, 2018); *Short Term Rental, ST Overlay*, CITY OF CHARLESTON, S.C., <https://perma.cc/JM7V-DH7K> (last visited Jan. 28, 2018).

140. § 54-227(a) (“Short term rentals may be permitted in the CT, LB, GB, UC, MU-1, MU-1/WH, MU-2, and the MU-2/WH zone districts within the Short Term Rental, ST Overlay Zone as a conditional use if the use satisfies, as evidenced by an application, a site plan and floor plans of the property. . . .”).

141. § 54-227(a).

142. § 54-227(a).

143. ST. HELENA, Cal., MUN. CODES § 17.134.040(A) (2018), <https://perma.cc/H4JP-JQL2>.

144. § 54-227(a) (2018), <https://perma.cc/4768-H43Z>.

145. § 54-227(a).

146. Chabeli Herrera, *Miami puts plan for strict short-term rental rules on hold – for now*, MIAMI HERALD (Feb. 28, 2017), <https://perma.cc/3XTQ-BCU6>.

month would constitute an activity in violation of Miami Ordinance 21.”<sup>147</sup> This interpretation essentially outlaws short-term rentals in suburban areas.<sup>148</sup>

### C. Permitting

The majority of cities regulating short-term rental properties now require that the host acquire some sort of license or permit in order to operate.<sup>149</sup> This helps the cities monitor who is renting the properties, where they are renting, and whether or not hosts are keeping up with the health and safety regulations.<sup>150</sup> However, monitoring these permits is a difficult task, which will be addressed below in Section III(E), regarding problems with enforceability.<sup>151</sup> Some cities, such as Philadelphia, Pennsylvania require no permit as long as the residence is rented 90 days or less in a calendar year.<sup>152</sup>

However, many cities that have sought to regulate short-term rental properties do require permitting.<sup>153</sup> Santa Fe, New Mexico shows some of the standard requirements cities utilize in applications for short-term rental permits.<sup>154</sup> First, an application to get a permit for a residential unit requires proof of ownership of the unit.<sup>155</sup> This can be shown with a deed or the latest property tax record.<sup>156</sup> Additionally, an owner must submit a site plan with a scale showing of all buildings and parking.<sup>157</sup> The owner must have a floor plan to scale showing all bedrooms.<sup>158</sup> Furthermore, the owner must have

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147. Letter from Irene S. Hegedus, Zoning Administrator, City of Miami Planning & Zoning Department, to Francisco J. Garcia, Dir. of Planning and Zoning, City of Miami (Aug. 11, 2015), <https://perma.cc/P8CN-VTV2>.

148. Herrera, *supra* note 146.

149. See CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2(A)(5)(b)(ii) (2018), <https://perma.cc/7XTZ-5GWM>; NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/65PB-9225>.

150. See generally *Short Term Rental Property*, METRO. GOV'T OF NASHVILLE & DAVIDSON CTY., TENN., <https://perma.cc/5RFL-DU2Y> (last visited Jan. 28, 2018) (discussing the permitting requirements and process in Nashville).

151. See generally *HOST COMPLIANCE*, <https://perma.cc/XM9J-DYXH> (last visited Jan. 28, 2018) (discussing the difficulty cities face regulating short-term rentals).

152. *Short Term Home Rental*, LICENSES + INSPECTIONS, CITY OF PHILA., <https://perma.cc/87JK-QT6L> (last visited Jan. 28, 2018).

153. See generally *Short-Term Rentals Regulation in 10 US Cities*, BNB SHIELD, <https://perma.cc/QR9H-XRP3> (last visited Aug. 17, 2018) (showing multiple major cities require permitting).

154. CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2 (2018), <https://perma.cc/VE6S-N32P>.

155. § 14-6-2.

156. *Short Term Rental Permit Application*, CITY OF SANTA FE, <https://perma.cc/3M29-Q4SB> (last visited Jan. 28, 2018).

157. *Id.*

158. *Id.*

proof of property insurance.<sup>159</sup> There must also be proof that the short-term rental unit has had all required inspections.<sup>160</sup>

This application also must have the name and number of the owner or operator where he or she is available twenty-four hours a day, seven days a week in order to respond to any complaints.<sup>161</sup> The application must be signed by the owner, indicating that he or she will operate the short-term rental unit in compliance with any applicable laws.<sup>162</sup> This application is submitted with a \$100 nonrefundable fee.<sup>163</sup> Once all the required inspections have been approved, an owner will be notified that the unit is eligible for a short-term rental permit.<sup>164</sup>

While different cities have different renewal procedures, Santa Fe requires a yearly renewal.<sup>165</sup> This renewal process starts with a notification in December that renewal is required.<sup>166</sup> The permit holder then has until March 15 to submit a renewal application and payment.<sup>167</sup> Under this method, the owner makes yearly payments to keep the permit active and continue operating a short-term rental.<sup>168</sup>

Some cities have different permitting requirements depending on whether a property is owner-occupied or non-owner-occupied.<sup>169</sup> Owner-occupied requires that “the owner of the property permanently resides in the [short-term rental property] or in the principal residential unit with which the [short-term rental property] is associated on the same lot.”<sup>170</sup> Nashville, Tennessee originally allowed non-owner-occupied short-term rental properties but would only grant permits in three percent of the single-family or two-family residential units within each census tract.<sup>171</sup> However, Nashville subsequently passed a new ordinance that seeks to phase out all non-owner-occupied short-term rental properties by June of 2020.<sup>172</sup>

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159. *Id.*

160. CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2(A)(5)(d)(iii) (2018), <https://perma.cc/59WU-9DRZ>.

161. § 14-6-2(A)(5)(d)(i).

162. § 14-6-2(A)(5)(d)(ii).

163. § 14-6-2(A)(5)(d)(vii).

164. *Short Term Rental Permit Application*, *supra* note 156.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/XBY5-VALH>; METRO. GOV'T OF NASHVILLE, *Short Term Rental Property Permit Information*, NASHVILLE.GOV (last visited Aug. 19, 2018), <https://perma.cc/WUR8-DU53>.

170. *Id.*

171. *Id.*

172. Joey Garrison, *Nashville's short-term rental vote: What it does, doesn't do, and why it's a big deal*, TENNESSEAN (Jan. 25, 2018), <https://perma.cc/Z5SF-M7TK>.

This is similar to what New York City already required, prohibiting short-term rentals unless they are in an owner-occupied unit.<sup>173</sup> Under New York's Multiple Dwelling Law, there are two types of dwellings.<sup>174</sup> Class A dwellings are residential buildings that are occupied for 30 days or more, and Class B dwellings are buildings that are occupied for less than 30 days.<sup>175</sup> This law was amended to provide that Class A dwellings must have the same person or family rent for at least 30 consecutive days.<sup>176</sup> The amendment prevents landlords from taking advantage of the price disparity between people renting long-term and the amount of money that can be generated by a short-term vacation rental.<sup>177</sup>

Under this law, a person can only rent to a guest if the owner also occupies the dwelling.<sup>178</sup> While this law was not specifically targeting online short-term rentals, this law as applied to short-term rentals makes it illegal in New York to rent non-owner occupied short-term rental properties.<sup>179</sup> Moreover, not only must the host be on the premises, but the guest must also have access to the entire unit.<sup>180</sup>

Another issue in permitting, besides just the application for the different types of permits, is the requirement of notice. Portland, Oregon requires the owner of the short-term rental to notify the neighborhood association and the District Coalition of Neighborhoods.<sup>181</sup> Additionally, the owner must notify all property owners with properties abutting and directly and diagonally across from their residence.<sup>182</sup> This is a simple notice requirement, and the neighbors are not required to sign or send back anything specifying that they have received this notice.<sup>183</sup> Portland provides a sample letter that can be filled out and sent to neighbors.<sup>184</sup>

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173. David Pfeffer, *The Conundrum With Short-Term Rentals in NYC*, LAW 360 (Feb. 6, 2017), <https://perma.cc/Z7Q8-KGHG>.

174. N.Y. STATE, MULTIPLE DWELLING LAW § 194 (McKinney 2018).

175. N.Y. STATE, MULTIPLE DWELLING LAW §§ 4(8)(a)(1)(A), 4(9).

176. § 4(8)(a)(1)(A).

177. Pfeffer, *supra* note 173.

178. *Id.*

179. *Id.*

180. *To Airbnb or not to Airbnb: New York's Restrictions on Short-term Rentals*, ROSEN LAW LLC (Oct. 10, 2017), <https://perma.cc/JHM6-3HHP>.

181. CITY OF PORTLAND, OR., PLANNING AND ZONING CODE § 33.207(C) (2018), <https://perma.cc/F3BB-AFA6>; see CITY OF PORTLAND OR., *Neighborhood Notice Accessory Short-Term Rental Permit – 1&2 Dwelling Structure*, BUREAU OF DEV. SERVS. (last visited Aug. 19, 2018), <https://perma.cc/RQ5C-PRHT>.

182. § 33.207(C).

183. § 33.207(C).

184. *Neighborhood Notice*, CITY OF PORTLAND, <https://perma.cc/RQ5C-PRHT> (last visited Jan. 28, 2018).

#### D. Taxation

Hotels are generally required to pay transient occupancy taxes, which are charged to travelers when they stay in accommodations for fewer than thirty days.<sup>185</sup> But what about people who instead stay in short-term rental properties? Airbnb provides on its website information about occupancy taxes for travelers.<sup>186</sup> According to the help page, Airbnb “expect[s] all hosts to familiarize themselves with and follow their local laws and regulations.”<sup>187</sup> At the bottom of the page, Airbnb states that “[it will] let you know if an occupancy tax related feature becomes available for your listing.”<sup>188</sup>

While allowing Airbnb to collect and remit taxes to cities may seem like a win-win for both hosts and cities, there is more to this issue than meets the eye.<sup>189</sup> Many cities are worried about allowing Airbnb to collect and remit the taxes without certain concessions to the city, such as the addresses of where the taxes are being remitted from.<sup>190</sup> However, a recent report which was prepared with support from the American Hotel and Lodging Association says that some cities are willing to make these concessions.<sup>191</sup> Even though the hotel industry is an obvious critic of Airbnb because of Airbnb’s growing share of the market, the report does point out some unusual concessions on the part of tax agencies.<sup>192</sup>

One of the biggest concessions is that these agreements do not “guarantee accountability for the proper payment of lodging taxes because tax agencies cede a substantial control of the payment and audit processes to Airbnb.”<sup>193</sup> Airbnb does not share direct data about either hosts or listings, making it more difficult for city officials to police residents breaking short-term rental local laws.<sup>194</sup> Why might a city be willing to concede such an important aspect of tax collection?

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185. See NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/DTU8-CM5R>.

186. *What is occupancy tax? Do I need to collect or pay it?*, AIRBNB, <https://perma.cc/XC2F-HRAD> (last visited Jan. 28, 2018).

187. *Id.*

188. *Id.*

189. See Alison Griswold, *Why Airbnb Desperately Wants to Pay Hotel Taxes*, SLATE (Feb. 13, 2015), <https://perma.cc/C5BP-MYJT>; Roberts, *supra* note 68.

190. Griswold, *supra* note 189 (“[I]t would effectively sanction an operation that local regulations make largely unlawful”); Kokalitcheva, *supra* note 87 (“[m]any municipalities across the U.S. have criticized Airbnb for the opacity of its hosts’ activities through the service, often violating local regulations on short-term rentals”).

191. DAN R. BUCKS, AIRBNB AGREEMENTS WITH STATE AND LOCAL TAX AGENCIES 2-3 (2017), <https://perma.cc/293F-JVRE>.

192. Roberts, *supra* note 68 (“[f]or instance, the deals do not permit the cities to audit Airbnb’s books or identify the addresses of the hosts”).

193. Bucks, *supra* note 191, at 2.

194. Kokalitcheva, *supra* note 87.

For example, in Lexington, Kentucky, 2016 data showed that tourism officials could get an additional estimated \$150,000 in revenue from Airbnb each year.<sup>195</sup> The company itself estimated that through partnering with the fifty largest American cities, the company could have provided \$200 million in tax revenue in 2015.<sup>196</sup> However, according to the author of the report, these cities should be cautious not to undermine the democratic process and “provide special treatment to Airbnb.”<sup>197</sup>

There are other taxes, such as sales tax, that can be collected in regard to short-term rentals but, according to a 2017 Survey of State Tax Departments, there is a split on who should be responsible for these taxes.<sup>198</sup> Fifteen states impose tax collection obligations on Airbnb.<sup>199</sup> Twenty-five states put the responsibility of collecting sales tax on the property owner.<sup>200</sup> Some states make the property owner and the company jointly liable.<sup>201</sup> Some states take an entirely different approach, such as New Jersey, which requires no remittance of taxes.<sup>202</sup> A bill was recently vetoed by the governor that would have imposed taxes on Airbnb rentals, despite having support from both the hotel industry and Airbnb itself.<sup>203</sup>

### E. Enforceability

Despite a great deal of passed and proposed regulations in cities and municipalities, these regulations mean nothing if they are not enforceable.<sup>204</sup> The difficulty of enforcing any regulations, along with previous lengthy battles with other sharing economy companies such as Uber, have led some cities to not even attempt to regulate short-term rentals.<sup>205</sup>

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195. Beth Musgrave, *Lexington Airbnb hosts made \$1.8 million in 2016. Now the city will get its cut.*, LEXINGTON HERALD LEADER (Dec. 5, 2017), <https://perma.cc/L4CH-7GSR>.

196. Kokalitcheva, *supra* note 87.

197. Roberts, *supra* note 68 (“Bucks said cash-strapped cities often agree to concessions because Airbnb offers a carrot in the form of a big check, and because they lack the resources to conduct long-running investigations into the company and its software”).

198. Gerald B. Silverman, *Airbnb Free of New Jersey Sales, Hotel Tax*, BLOOMBERG BNA (Jul. 21, 2017), <https://perma.cc/Z6RJ-2WUG>. See also *2017 Survey of State Tax Department*, BLOOMBERG BNA (2017), <https://perma.cc/6CYK-UNEE>.

199. *2017 Survey of State Tax Department*, BLOOMBERG BNA S-6 (2017), <https://perma.cc/ZP8T-ZZAT>.

200. *Id.*

201. *Id.* (“Several states, including Colorado, Iowa and North Carolina, noted that the owner and third party are jointly liable for the collection of sales tax.”).

202. Silverman, *supra* note 198.

203. *Id.* (“We are extremely disappointed the governor decided to veto a bill that would have generated millions of dollars for Garden State residents without raising taxes,” Airbnb said in a statement.”)

204. See Christine Van Geyn, *Slapping new regulations on Airbnb won’t cure cities’ housing woes*, CBC NEWS (July 10, 2017), <https://perma.cc/XA4H-63PW>.

205. See Mark Reagan, *No Rules: Will San Antonio Regulate Airbnb and Homeaway?*, SAN ANTONIO CURRENT (Feb. 18, 2015), <https://perma.cc/9T7Y-X8U5> (“San Antonio is still smarting over the city’s bitter fight against popular ride-sharing services Uber and Lyft.”).

Some cities attempt to make violating the law frightening to a homeowner by levying fines for non-compliance that would deter most homeowners from violating the law.<sup>206</sup> Miami takes this idea to the extreme, imposing fines for short-term rental violations that are up to twenty times higher than the maximum fine for a first-time drunk driving conviction.<sup>207</sup> The city's \$20,000 fine only increases with multiple violations, reaching a total of \$100,000 for a fifth violation.<sup>208</sup>

Miami has the most extreme penalties for short-term rental violations in the United States.<sup>209</sup> However, some cities with lower fines, such as Portland, Oregon, are increasing their fines to make renting without a permit less appealing.<sup>210</sup> Nashville, Tennessee imposes a fifty dollar fine per day for each day of operation without a permit.<sup>211</sup> These fines add up, resulting in a \$10,500 fine for a Nashville resident who continued to operate a short-term rental after the Board of Zoning Appeals had suspended his permit.<sup>212</sup>

Another perhaps more pressing issue is who is going to enforce these restrictions. San Francisco has created an entire Office of Short-Term Rentals.<sup>213</sup> But other cities, such as Asheville, North Carolina, have only hired a single employee.<sup>214</sup> This employee is responsible for processing applications, issuing permits, and issuing notices of violations and citations.<sup>215</sup> Santa Monica, California falls in between, hiring two code enforcement officers and a data analyst.<sup>216</sup> These analysts are hired from revenue collected from home-sharing tax.<sup>217</sup>

This difficulty in monitoring and enforcing short-term rental properties has even led to start-up companies forming to take over these

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206. See John Kartch, *\$20,000: Miami Beach Short-Term Rental Fines Are USA's Highest*, FORBES (Oct. 26, 2017), <https://perma.cc/P9EL-HKXW>.

207. *Id.* ("Violations of this city's restrictive short-term rental law can result in fines of \$20,000 or more . . . In Florida the maximum fine for a first-time drunk driving conviction is \$1,000.")

208. *Id.*

209. *Id.*

210. *Portland to raise fines for operating Airbnb rental without permit*, KGW8 NEWS (FEB. 16, 2017), <https://perma.cc/H8WQ-NDMH> ("Currently, fines for operating without a permit . . . range from roughly \$700 to \$1,400. [L]ate next month, the city will raise fines to between \$1,000 and \$5,000.")

211. NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/98DZ-5Q5P>.

212. Kevin Trager, *Judge issues \$10,500 fine for Airbnb host, man rents home anyway*, WSMV (Nov. 16, 2017), <https://perma.cc/UR4K-6VHP>.

213. S.F. OFFICE OF SHORT-TERM RENTALS, <https://perma.cc/DGU8-TAW3> (last visited Jan. 28, 2018).

214. *Asheville's homestay and short-term rental regulation program progressing*, ASHEVILLE CITY SOURCE (July 13, 2016), <https://perma.cc/6K73-62VN>.

215. *Id.*

216. Logan, *supra* note 92.

217. *Id.*

responsibilities.<sup>218</sup> On their homepage, Host Compliance announces that the company “makes it easy for municipalities to implement and enforce fair and effective short-term rental rules.”<sup>219</sup> Around 110 cities are listed as using the services of Host Compliance.<sup>220</sup> The fact that other start-up companies are emerging to help regulate Airbnb, a start-up company itself, shows how difficult to regulate some of these problems have become.

#### IV: LEGAL ISSUES

Regulating these short-term rental properties without violating existing law is difficult, and some of these regulations are already being challenged in court.<sup>221</sup> In various courts across the United States, short-term rental property challenges have been raised on grounds such as anti-monopoly concerns, contractual issues, freedom of speech violations, ambiguity, and vagueness.<sup>222</sup>

##### A. Anti-Monopoly

Nashville, Tennessee passed an ordinance providing that no more than three percent of non-owner occupied single-family or two-family residential units would be granted short-term rental permits in each census tract.<sup>223</sup> The Anderson family challenged this for, among other things, violating the anti-monopoly clause of the Tennessee State Constitution.<sup>224</sup> Article I, Section 22 states that “perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.”<sup>225</sup> This provision is similar to other states’ constitutions related to monopolies.<sup>226</sup>

In *Anderson v. Metropolitan Government of Nashville & Davidson County*, the Andersons moved from Chicago to Nashville and obtained an owner-occupied permit.<sup>227</sup> Upon receiving a promotion that required moving,

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218. Heather Kelly, *Meet the Airbnb police*, CNN TECH (Oct. 1, 2016), <https://perma.cc/E95F-YFVW>.

219. HOST COMPLIANCE, <https://perma.cc/S6WQ-VFL5> (last visited Jan. 28, 2018).

220. *Id.*

221. *See* *Dunn v. Aamodt*, 695 F.3d 797 (8th Cir. 2012); *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097 (C.D. Cal. 2017); *Airbnb, Inc. v. City & Cty. of S.F.*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016); *Vera Lee Angel Revocable Tr. v. Jim O’Bryant & Kay O’Bryant Joint Revocable Tr.*, 537 S.W.3d 254 (Ark. 2018); *Anderson v. Metro. Gov’t of Nashville & Davidson Cty.*, No. M201700190COAR3CV, 2018 WL 527104 (Tenn. Ct. App. Jan. 23, 2018).

222. *Id.*

223. *Anderson*, 2018 WL 527104, at \*2.

224. *Id.* at \*2-3

225. *Id.* at \*17 (citing TENN. CONST. art I, § 22).

226. N.C. CONST. art. I, § 34 (“Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.”); TEX. CONST. art. 1, § 26 (“Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. . . .”).

227. *Anderson*, 2018 WL 527104, at \*2.



the Andersons kept the Nashville residence and applied for a non-owner-occupied permit.<sup>228</sup> This application was denied because the three percent cap had already been reached in the Andersons' census tract.<sup>229</sup>

The Andersons challenged the Nashville ordinance, claiming among other things that it provided an unlawful monopoly to those existing three percent of owners.<sup>230</sup> The Andersons further contended that the cap had "no legitimate relation to any valid public purpose."<sup>231</sup> The trial court found that the three percent cap did not constitute granting of a monopoly, and even if it did the cap would still be permissible.<sup>232</sup> In deciding this, the trial court emphasized that the granting of a monopoly is not prohibited if such a monopoly "has a reasonable tendency to aid in the promotion of the health, safety, morals and well-being of the people."<sup>233</sup>

The Tennessee Court of Appeals decided that the three percent cap was a granting of a monopoly, but that this determination was not dispositive in answering whether the cap was invalid under the Tennessee Constitution.<sup>234</sup> The court believed that the protection of residential character implicated the public's well-being, even to the extent that such protection might be considered to partially promote aesthetic considerations.<sup>235</sup> The court recognized the residential concerns of allowing unlimited non-owner-occupied short-term rentals in any particular neighborhood.<sup>236</sup> Apparently, in the neighborhood in question, 20% of the homes were non-owner occupied short-term rentals.<sup>237</sup> Nashville passed a new ordinance on the same day the *Anderson* opinion was issued by the Tennessee Court of Appeals, which plans to phase out non-owner-occupied short-term rental properties by 2020.<sup>238</sup>

## B. Contractual Issues

Many homeowners' associations ("HOAs") and lease agreements have provisions that restrict the renters or home owners from renting out their homes on Airbnb, but that raises the question of whether Airbnb has any

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228. *Id.* at \*3.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at \*8.

233. *Id.* at \*6 (citing *Checker Cab Co. v. City of Johnson City*, 216 S.W.2d 335, 337 (Tenn. 1948)).

234. *Id.* at \*8.

235. *Id.* at \*10.

236. *Id.* at \*9 ("The reason we want limits on the non-owner-occupied houses on our street is the same reason you don't want to live in a hotel. There is an increased number [of] transient strangers, and there is [a] decreased sense of community. [M]y children's friends have been replaced by bachelorette parties.").

237. *Id.*

238. *Id.* at \*1; Garrison, *supra* note 172.

responsibility to monitor or report users that do.<sup>239</sup> Airbnb has created a “Friendly Buildings Program” as a way for landlords, property managers, and HOAs to let people in their building host short-term rentals.<sup>240</sup> By participating, landlords, residents, and HOAs share portions of the reservation income, and Airbnb helps create specific hosting rules.<sup>241</sup> Despite this, Airbnb has still been sued multiple times by groups alleging that, by publishing the properties available for rent, Airbnb is responsible for monitoring and policing these agreements and, consequently, would fall outside of the Section 230 immunity of the Communication Decency Act (“CDA”).<sup>242</sup>

Section 230 of the CDA states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>243</sup> An “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through Internet or any other interactive computer service.”<sup>244</sup>

This issue came up in *Airbnb v. San Francisco*, where Airbnb challenged San Francisco’s then existing ordinance, which made it a misdemeanor to collect a fee for providing booking services for the rental of an unregistered unit within the city.<sup>245</sup> Airbnb argued that the ordinance was preempted by Section 230 of the CDA, and that the ordinance would require it to monitor and police listings by third parties.<sup>246</sup>

The district court rejected this argument, stating that the ordinance did not create any obligation on Airbnb to monitor, edit, withdraw, or block the content supplied by hosts.<sup>247</sup> San Francisco apparently even emphasized in its briefs and at oral argument that “[Airbnb is] perfectly free to publish any listing [it gets] from a host and to collect fees for doing so—whether the unit is lawfully registered or not—without threat of prosecution or penalty under the Ordinance.”<sup>248</sup>

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239. See Edvard Pettersson, *Airbnb Defeats Aimco Lawsuit Over Unauthorized Subleases*, BLOOMBERG TECHNOLOGY (Jan. 2, 2018), <https://perma.cc/FZN7-U9QX>.

240. *What’s the Airbnb Friendly Buildings Program?*, AIRBNB, <https://perma.cc/8JHQ-FQME> (last visited Jan. 28, 2018).

241. *Id.*

242. *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1102-04 (C.D. Cal. 2017); *Donaher v. Vannini*, No. CV-16-0213, 2017 WL 4518378, at \*3 (Me. Super. Ct. Aug. 18, 2017).

243. 47 U.S.C. § 230(c)(1) (2017).

244. 47 U.S.C. § 230(f)(3) (2017).

245. *Airbnb, Inc. v. City and Cty. of S.F.*, 217 F. Supp. 3d 1066, 1071 (N.D. Cal. 2016).

246. *Id.* at 1072.

247. *Id.*

248. *Id.* at 1073.

This came up again more recently in *La Park La Brea v. Airbnb*.<sup>249</sup> Here, the plaintiffs, Aimco, were owners and operators of apartment buildings in Los Angeles, California.<sup>250</sup> The lease agreements contained an anti-subleasing clause, providing that the “[r]esident shall not sublet the Apartment or assign this Lease for any length of time, including . . . renting out the Apartment using a short-term rental service such as [Airbnb].”<sup>251</sup> Aimco contacted Airbnb to obtain information about how it could prevent unlawful subleasing, received information about the Friendly Buildings Program, and provided Airbnb the lease agreements.<sup>252</sup> Airbnb then advised Aimco that it does not review lease agreements or mediate disputes between hosts and property owners regarding leases.<sup>253</sup>

Aimco argued that Airbnb was an information content provider as opposed to being immune under the CDA Section 230.<sup>254</sup> However, the district court rejected this argument.<sup>255</sup> Despite requiring hosts to include specific information about the property and themselves, collecting payments and commissions, and offering ancillary services, the court determined that Airbnb was not an information content provider.<sup>256</sup> As the court stated, “Airbnb hosts—not Airbnb—are responsible for providing the actual listing information[,]” and Airbnb is merely providing a framework which can be utilized both properly and improperly.<sup>257</sup> This case cited at length *Donaher v. Vinnini*, a Maine state court case, which held that merely processing payments does not strip a provider of immunity under the CDA.<sup>258</sup>

While this decision once again holds that a suit against Airbnb for violation of lease agreements is unlikely to be successful based on CDA Section 230, Aimco has appealed this case to the Ninth Circuit Court of Appeals.<sup>259</sup> However, as the court pointed out, the Ninth Circuit analyzes whether or not a content provider is the creator of challenged content by determining if the provider merely encouraged the creation of the content or if it instead actually required another to create the content.<sup>260</sup> As discussed in

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249. *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1099-1100 (C.D. Cal. 2017).

250. *Id.* at 1100.

251. *Id.*

252. *Id.* at 1101.

253. *Id.*

254. *Id.* at 1103.

255. *Id.* at 1104.

256. *Id.*

257. *Id.* at 1105.

258. *Id.* at 1104 (citing *Donaher v. Vannini*, No. CV-16-0213, 2017 WL 4518378, at\* 3-4 (Me. Super. Ct. Aug. 18, 2017) (“The Maine state court held that ‘the processing or receipt of payments associated with posts does not strip a provider or user of an interactive computer service of immunity under the CDA’ and granted Airbnb’s motion to dismiss”).

259. Dennis Lych, *Aimco appeals court case against Airbnb over LA apartment rentals*, THE REAL DEAL (Jan. 26, 2018), <https://perma.cc/573A-H5VD>.

260. *See Fair Hou. Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008).

Section I, the evolving model of the sharing economy might provide an interesting analysis of this issue, but that is a lengthy discussion beyond the scope of this note.<sup>261</sup>

### C. Freedom of Speech

Between the *Anderson* trial court opinion and the *Anderson* decision being released by the Court of Appeals, Nashville amended the zoning code as it related to free speech and signage.<sup>262</sup> However, when the case was at the trial level, Nashville's zoning code still prevented homeowners from advertising their property as a short-term rental without first obtaining a permit.<sup>263</sup> Additionally, even once a permit was obtained, homeowners were not allowed to display signs or other advertising on the property that indicated the unit was being utilized as a short-term rental property.<sup>264</sup> The Andersons argued that this abridged their free speech rights.<sup>265</sup>

As previously mentioned, between the trial court decision and the court of appeals decision, Nashville amended the ordinance.<sup>266</sup> This amendment altered the advertising ban to provide that "[a]ny sign . . . on a property used as a short-term rental property shall be governed by the provisions of [Metro Code] Sign Regulations."<sup>267</sup> The trial court, upon motion from the City of Nashville, entered an agreed order dismissing the Andersons' free speech claim as moot.<sup>268</sup> While this issue was therefore not addressed at the appellate court level, the court of appeals did note that the trial court believed there was a substantial likelihood of success with respect to the free speech claim.<sup>269</sup>

Furthermore, based on the Supreme Court's decision in *Reed v. Town of Gilbert*, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."<sup>270</sup> The Court went on to state that a content based law is subject to strict scrutiny "regardless of the government's benign motive,

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261. See generally Sundarajan, *supra* note 27 (discussing the sharing economy at length).

262. *Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, No. M201700190COAR3CV, 2018 WL 527104, at \*5 (Tenn. Ct. App. Jan. 23, 2018).

263. *Id.* at \*1.

264. *Id.*

265. *Id.* (The parties cited both *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and *Los Angeles v. Patel*, 135 S. Ct. 2443 (2015)).

266. *Id.* ("In 2016, however, Metro took steps to amend the ordinances related to the Andersons' free speech . . . claim [], citing both *Reed* and *Patel* as a basis for its action.")

267. *Id.* at \*3.

268. *Id.*

269. *Id.* at \*14.

270. *Reed*, 135 S. Ct. at 2226 (quoting *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) ("This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys.")).

content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”<sup>271</sup> Based on this, a code that restricts short-term rental advertisement to only those that have received permits would likely have to survive the gauntlet of strict scrutiny, and therefore, freedom of speech is a legal issue worth keeping in mind.<sup>272</sup>

#### D. Unconstitutional Vagueness and Ambiguity

While this was another issue deemed moot in the *Anderson* case, it is worth quickly noting.<sup>273</sup> Prior to passage of a new ordinance, the definition for short-term rental property in Nashville was “a residential dwelling unit containing not more than four (4) sleeping rooms that is used and advertised for rent for transient occupancy by guests. . . .”<sup>274</sup> The definition went on to exclude hotels, motels, and other similar establishments, which the Andersons argued would overlap and render the ordinance unconstitutionally vague.<sup>275</sup> The trial court agreed.<sup>276</sup> However, Nashville passed a new ordinance to alter this definition that the trial court declared unconstitutionally vague.<sup>277</sup> The ordinance does not exempt the other establishments but rather defines them separately.<sup>278</sup> The court of appeals decided that this issue was moot as well.<sup>279</sup>

However, the Eighth Circuit Court of Appeals and Arkansas Supreme Court have recently had an opportunity to address definitions of residential property in terms of ambiguity.<sup>280</sup> In *Dunn v. Aamodt*, a restrictive covenant restricted sites for “residential purposes,” yet the Aamodts rented their property to friends and others as a vacation home.<sup>281</sup> The Eighth Circuit agreed with the Aamodts that the phrase “residential purposes” in the

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271. *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

272. *See generally id.*

273. *Anderson v. Metro. Gov’t of Nashville & Davidson Cty.*, No. M201700190COAR3CV, 2018 WL 527104, at \*3 (Tenn. Ct. App. Jan. 23, 2018).

274. *Id.* at \*5.

275. *Id.* (“[For example,] the Andersons’ home fits the definition of a hotel. Their home is a structure. They furnish accommodations to transients for a consideration. Their home is occupied and intended for occupancy by transients for dwelling, lodging or sleeping purposes. While their home is a residential dwelling unit, an element of [a short-term rental property], the hotel definition does not exclude residences from the definition. There is no clear line of demarcation between the terms.”).

276. *Id.* at \*4.

277. *Id.* at \*5.

278. *Id.*

279. *Id.*

280. *See Dunn v. Aamodt*, 695 F.3d 797 (8th Cir. 2012); *Vera Lee Angel Revocable Tr. v. Jim O’Bryant & Kay O’Bryant Joint Revocable Tr.*, 537 S.W.3d 254 (Ark. 2018).

281. *Dunn*, 695 F.3d at 798-99.

restrictive covenant was ambiguous and did not prohibit short-term rental of the property.<sup>282</sup>

This opinion was cited in another Arkansas case, *Vera Lee Angel Revocable Trust v. Jim O'Bryant and Kay O'Bryant Joint Revocable Trust*.<sup>283</sup> There, a restrictive covenant prohibited a house in a subdivision from being used for "any commercial purpose," including purposes such as "motels" and "hotels."<sup>284</sup> The Arkansas Supreme Court found that even with the specific uses listed, it was not "clearly apparent" that short-term rentals were prohibited.<sup>285</sup> Therefore, based on these two cases together, leaving as little ambiguity as possible in the ordinances is important.<sup>286</sup>

## V: PROPOSED MODEL ORDINANCE

Listed below is a proposed model ordinance based on the concerns raised in Section II. The model ordinance incorporates various approaches that cities have used in response to these problems as demonstrated in Section III, while also taking into account various legal concerns discussed in Section IV. Unfortunately, many of the actual ordinances are more recent, and it is thus difficult to determine the long-term effect of all these restrictions. However, in reviewing the problems faced in regulating short-term rental properties and looking at the ways that cities are already seeking to address these problems, it is possible to combine some of the ideas into a potentially effective model ordinance. While some cities are already addressing these problems, the proposition below could potentially be implanted in harmony with any already existing strategies. The model ordinance below seeks to take some of the best ideas and combine them into a generalized, cohesive proposal.

**(1) Definitions.** The following definitions apply through this section.

**(a) "Short-term rental property"** is any residential dwelling unit that is used and advertised for rent for transient occupancy by guests for less than 30-days. This definition is specific to this section and other

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282. *Id.* at 801 (citing *Scott v. Walker*, 645 S.E.2d 278, 283 (Vir. 2007) ("[T]he restrictive covenant does not by express terms prohibit the short-term rental of the [subject] lot,' and that '[i]n the absence of language expressly or by necessary implication prohibiting nightly or weekly rentals, we find that the [defendants'] short-term rental of their property did not run afoul of the restrictive covenant at issue.'")).

283. *Vera Lee Angel*, 537 S.W.3d at 256.

284. *Id.* at 255.

285. *Id.* at 258-59 ("Certainly, if the drafters of the bill of assurance intended to prohibit renting of property in the subdivision, they could have done so with an express provision.").

286. See generally *Dunn*, 695 F.3d at 797; *Vera Lee Angel*, 537 S.W.3d 254.

entities, such as “hotels,” “motels,” and “bed and breakfasts,” are defined elsewhere in this code.<sup>287</sup>

**(b) “Local Contact”** is an individual available for guests to communicate with in the city. This individual needs to be able to respond to the property within 30 minutes.<sup>288</sup>

**(c) “Owner-occupied”** requires that the homeowner reside in the residence at least 260 days in a calendar year.

**(d) “Non-owner-occupied”** is a residence that the homeowner does not reside in the residence 260 days in a calendar year.

**(e) “Homeowner”** is the individual who owns legal title to the residence.

**(2) Zoning.** Short-term rental properties will only be available in certain commercial and residential zones. A zoning map with the available areas for short-term rentals overlaid will be posted on the city’s website.<sup>289</sup> There can be no more than one short-term rental property per lot without specifically appealing to the zoning board.<sup>290</sup>

**(3) Permit.** Before operating a short-term rental property, the homeowner must apply to the city for a permit. This application will include:<sup>291</sup>

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287. This is an attempt to avoid the vagueness problem presented in *Anderson v. Metro. Gov’t of Nashville & Davidson Cty.*, No. M201700190COAR3CV, 2018 WL 527104 (Tenn. Ct. App. Jan. 23, 2018).

288. This is an alteration of multiple cities’ requirement that there be a local contact. Unlike BOULDER, COLO., MUN. CODE § 10-3-19(c)(5), there needs to be only one contact instead of two, but they need to be within 30 minutes travel time as opposed to 60. This is more specific than the requirement in CHI., ILL., MUN. CODE § 4-14-010 that the contact maintain a residence or office located in the city, but it does similarly require that the contact information be placed in a conspicuous place.

289. This is based on CHARLESTON, S.C., ZONING CODE § 54-227(a). The ambiguity in the “certain” commercial and residential zones is purposeful and will be addressed in the explanation section.

290. This is an alteration of CHARLESTON, S.C., ZONING CODE § 54-227(a), meant to address the concerns raised in Elliott, *supra* note 82.

291. This section is very similar to the application process in CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2.

- (a) proof of ownership of the unit
- (b) a site plan showing all buildings and parking
- (c) floor plan showing all bedrooms and bathrooms
- (d) proof of property insurance
- (e) proof that short-term rental unit has had all required inspections as required by the city code
- (f) contact information, including but not limited to full name, address, phone number, and email address for both the local contact and the owner, as well as signatures from both
- (g) whether the property is to be used as an owner-occupied or non-owner-occupied short-term rental property

**(4) Permit Fee.** For owner-occupied short-term rental properties, a one-time nonrefundable permit fee of \$100 will be assessed. For non-owner-occupied short-term rental properties, a one-time nonrefundable permit fee of \$150 will be assessed.<sup>292</sup>

**(5) Permit Renewal for owner-occupied.** Once a homeowner has been approved for an owner-occupied short-term rental property, he or she must renew the short-term rental permit every 3 years.<sup>293</sup> This fee will be \$50.

**(6) Permit Renewal for non-owner-occupied.** Once a homeowner has been approved for a non-owner-occupied short-term rental property, he or she must renew the short-term rental permit every 2 years. This fee will be \$75.

**(7) Notification.** An owner must notify all property owners with properties abutting and directly and diagonally across from his or her residence. This can be done by a letter form,

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292. This is also similar to CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2 but differentiates between owner-occupied properties and non-owner-occupied properties similar to NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951.

293. This is less frequent than required in CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2.



which is provided on the city's website. There is no requirement for notified property owners to respond.<sup>294</sup>

**(8) Penalty.** The penalty for operating a short-term rental property without a license will be a fine of \$50 per day of operation and an injunction from continuing operation. Subject to judicial discretion, the subsequent issuance of a permit to the rental owner can potentially eliminate all or part of the daily fines and/or lift the injunction.<sup>295</sup>

**(9) Basic Health and Safety Concerns.** The owner of the property shall certify that the residence is not subject to any outstanding Building, Electrical, Plumbing, Mechanical, Fire, Health, Housing, Police, or Planning Code enforcement or violation.<sup>296</sup>

**(10) Fire.** The short-term rental property must be equipped with smoke detectors, carbon monoxide detectors, and a fire extinguisher. The location of the fire extinguisher must be obvious.

**(11) Insurance.** Hosts must obtain liability insurance either through a provider or, if applicable, through the short-term hosting platform, of at least \$500,000. This insurance policy does not have to cover intentional acts.<sup>297</sup>

**(12) Posting.** There shall be posted in a conspicuous place near the entrance of the dwelling a diagram identifying all means of egress from the dwelling and building (if an apartment), as well as the location of the fire extinguisher(s) and the contact information of the local contact.<sup>298</sup> This sign should also have information related to the nearest medical center and the address of the short-term rental property.

**(13) Sanitization.** The host must clean and sanitize all dishes, utensils, pots, pans, and other cooking utensils

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294. Similar to the requirements in CITY OF PORTLAND, OR., PLANNING AND ZONING CODE § 33.207.

295. This is an alteration to the punishment in NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (seeking to give judges more flexibility to allow for remedial action by the offender to possibly lessen the length of injunction).

296. This language is incredibly similar to S.F., CAL., ADMIN. CODE § 41A.5(g).

297. Cf. S.F., CAL., ADMIN. CODE § 41A.5 (2018), <https://perma.cc/2Q2R-BWAA> (requiring hosts to carry liability insurance).

298. Cf. CHI., ILL., MUN. CODE § 4-14-040 (2018), <https://perma.cc/E95A-WKXG> (requiring hosts to post a diagram identifying all means of egress).

between guests. Additionally, any leftover food, beverages, and alcohol left by a guest must be disposed of before a new guest stays in the residence.<sup>299</sup>

**(14) Linens.** Housing units must provide guests with clean individual bath cloths and towels and clean linens. These must be kept in good repair between guests.<sup>300</sup>

**(15) Description of Unit.** The listing for the unit must include the following information:<sup>301</sup>

(a) cancellation and check-in and check-out policies

(b) a statement on whether or not the rental is wheelchair or ADA accessible

(c) parking and any related restrictions

(d) the number of sleeping rooms, the number of bathrooms, and the size/portion of the home that is available to rent

**(16) Advertising.** A homeowner may not advertise on any short-term rental listing site without first obtaining a permit. Any physical signage present on the property itself must follow all standard restrictions on sign regulation according to the city code.<sup>302</sup>

**(17) Taxation.** Homeowners are required to collect and remit Transient Occupancy Tax.<sup>303</sup>

**(18) Short-Term Rental Office.** The permitting fees, permit renewal fees, and fines collected for operating a short-term rental property shall be used to fund the Short-

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299. See *supra* text accompanying note 98–99.

300. See *supra* text accompanying note 96–97.

301. Cf. § 4-14-040 (requiring similar specific listing requirements).

302. This is in response to the free speech challenge in *Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, No. M201700190COAR3CV, 2018 WL 527104 (Tenn. Ct. App. Jan. 23, 2018).

303. Since a city has the choice whether or not to contract with Airbnb to collect taxes, this Model Ordinance does not attempt to definitively sway that decision one way or the other. The benefits and concerns are listed in Section II.

Term Rental Office. This office is charged with processing applications and enforcing these restrictions.<sup>304</sup>

## VI: REASONING FOR PROPOSED MODEL ORDINANCE

While some of the pieces of the above proposed Model Ordinance (“M.O.”) are not directly related to any of the above issues presented, as a whole this proposal is designed to address these various problems that have arisen.

### A. Health and Safety

An important aspect of the health and safety issue is addressed in the definitions, and that is the local contact.<sup>305</sup> While there were different requirements in different cities for the local contact, M.O. section 1(b) requires the local contact be only 30 minutes away instead of 60 minutes, which would be beneficial and a particularly wise tradeoff with allowance of non-owner-occupied rentals.<sup>306</sup> It is likely that any life threatening emergencies will be called in to 9-1-1, which has an average emergency response time nationwide of 15 minutes, 19 seconds.<sup>307</sup> Other emergencies and concerns that would require calling the local contact person should reasonably be able to be addressed in double that time, making 30 minutes a good standard for local contact distance.<sup>308</sup>

In addition to just being available, the local contact individual is required to sign the application along with the homeowner. This is to ensure that the person submitting the application makes sure that the local contact is aware of the responsibilities they will have as the local contact.<sup>309</sup> Additionally, the contact information for this local contact person must be on a sheet placed in a conspicuous place close to the entryway of the home.<sup>310</sup> This is a good safety policy from the Chicago ordinance, because in a situation where an individual needs to get in touch with the local contact, it is easier for the guest to access contact information if it is printed and available in a set location where it will be accessible.<sup>311</sup>

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304. Cf. S.F., CAL., ADMIN. CODE § 41A.5 (2018), <https://perma.cc/V42B-9JK9> (discussing an Office for Short-Term Rentals and its duties).

305. See, e.g., BOULDER, COLO., MUN. CODE § 10-3-19(c)(5) (2018), <https://perma.cc/2KL9-QXJT>.

306. See CHI., ILL., MUN. CODE § 4-14-040 (2018), <https://perma.cc/FKT5-SYW2>; BOULDER, COLO., MUN. CODE § 10-3-19(c)(5).

307. *Emergency Response Times Across the U.S.*, AUTOINSURANCE CENTER, <https://perma.cc/DR2N-XRQ3> (last visited Jan. 28, 2018).

308. Note that the restriction requires the individual only needs to “be able” to respond to the property within 30 minutes, not that the person has to.

309. See § 4-14-040.

310. § 4-14-040.

311. § 4-14-040.

Furthermore, this posted sign requires a diagram identifying all means of egress from the dwelling and building and the location of the fire extinguishers in the residence.<sup>312</sup> There were 1,345,500 house fires in 2015 resulting in over 3,000 deaths and 15,700 injuries.<sup>313</sup> Having information available related to various escape routes could potentially help reduce the number of fire deaths and injuries in short-term rental properties.<sup>314</sup> While the exits in most standard homes might be more obvious, this map of egress from the building would be particularly helpful with short-term rentals in apartment buildings, which also contribute to the number of deaths and injuries from fire.<sup>315</sup> Additionally, even though the requirement of having fire extinguishers was not present in Chicago's sweeping health and safety ordinance, based on the possibility of house fires, it would be a good addition to the Model Ordinance.<sup>316</sup>

Moreover, both the location of the nearest medical center and the address of the short-term rental property are required to be added to this posted sign. While neither of these were required in any of the listed ordinances, both could additionally help to prevent emergencies. Knowing the exact address of the location of an emergency is incredibly important when seeking emergency assistance.<sup>317</sup> Furthermore, since it is possible that in an emergency situation, individuals would forget the exact location of the short-term rental property, having this information easily viewable would be beneficial.<sup>318</sup>

Despite Airbnb providing liability insurance up to \$1,000,000, this is not true of all the short-term rental hosting companies.<sup>319</sup> Therefore, it is included in M.O. section 11 that hosts must obtain liability insurance, which is similar to what is required by San Francisco's ordinance.<sup>320</sup> This insurance requirement is admittedly vague as written, since cities might have very different homeowner's insurance requirements to rent out a building, and the insurance requirement is meant to be a general and adaptable rule without a specific set monetary amount.

In relation to the general health and safety guidelines, M.O. section 9 adopts almost the identical broad language of San Francisco's ordinance.<sup>321</sup>

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312. § 4-14-040.

313. *U.S. fire statistics*, U.S. FIRE ADMINISTRATION, <https://perma.cc/5MMC-XU9R> (last visited Jan. 28, 2018).

314. *See generally* § 4-14-040.

315. *See generally Apartment structure fires*, NAT'L FIRE PROT. ASSOC., <https://perma.cc/7QFA-RZKQ> (last visited Apr. 29, 2018).

316. *See* § 4-14-040; *see also* KNOXVILLE, TENN., ORDINANCE O-245-2017 (Nov. 21, 2017), <https://perma.cc/VXM4-CMBE> (an ordinance that was recently passed and will require fire extinguishers).

317. *See generally Top 10 Tips for Calling 9-1-1*, NENA, <https://perma.cc/QL22-MUHC> (last visited Jan. 28, 2018).

318. *Id.*

319. Fishman, *supra* note 126.

320. *See* S.F., CAL., ADMIN. CODE § 41A.5 (2018), <https://perma.cc/PGS4-2WD2>.

321. *Id.*

This is because many cities already govern parking, electrical, plumbing, and other requirements separately, so allowing the existing entities to do their jobs as opposed to imposing new additional specific requirements for short-term rental properties seems the best route for many general matters. However, certain home concerns such as smoke detectors and fire extinguishers are properly regulated more extensively for short-term rentals, as in Chicago and Knoxville.<sup>322</sup>

Also similar to Chicago's ordinance is the M.O. section 15's requirement of an accurate listing, including information related to parking, ADA accessibility, and number of rooms.<sup>323</sup> This helps to prevent inaccurate or deceptive listings on the site, which is a commonly occurring issue.<sup>324</sup>

Finally, Chicago's requirements related to sanitization and linens are recreated in M.O. sections 13 and 14 respectively.<sup>325</sup> These requirements, while perhaps seeming excessive for hosts, will help prevent issues and mitigate common cleanliness complaints of guests.<sup>326</sup> Even if a homeowner is renting a residence as a non-owner-occupied rental, there are cleaning services in most major cities that will take over the cleaning of short-term rental properties.<sup>327</sup> All of these health and safety requirements, while not perfect, help alleviate some of the concerns raised in Section II(A).

## B. Zoning

M.O. section 2 is purposefully vague here. Even though many cities still use some form of zoning, there are many different techniques implemented, and thus it would be difficult to make a model rule with regard to zoning.<sup>328</sup> However, finding out whether a certain property is eligible for a short-term rental property is potentially difficult, so utilizing the Charleston overlay-style map for users seemed like a great technique to encourage here.<sup>329</sup> While zoning maps are generally easily accessible, for a potential host who is perhaps not familiar with reading zoning maps and zoning code texts together, the overlay system makes an easy system to find whether or not a specific property is eligible to be rented.<sup>330</sup>

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322. See § 4-14-040 (2018), <https://perma.cc/3RVB-VYNC>; KNOXVILLE, TENN., ORDINANCE 16-612(2)(c) (July 30, 2017), <https://perma.cc/6G2X-SCLD>.

323. See CHI., ILL., MUN. CODE § 4-14-040.

324. See Sarah Schlichter, *7 Airbnb Problems and How to Solve Them*, SMARTERTRAVEL (June 19, 2017), <https://perma.cc/53H2-KTLP>.

325. See § 4-14-040.

326. See Ryan Holiday, *Airbnb Etiquette: A Wake-Up Call to Unprofessional Hosts*, OBSERVER (Mar. 19, 2014), <https://perma.cc/2VG6-3FZS>.

327. *5 Ways to Effectively Improve Your Airbnb Cleaning*, LEARN AIRBNB, <https://perma.cc/7QTH-ARUU> (last visited Jan. 28, 2018).

328. *Property Topics and Concepts*, THE AM. PLANNING ASSOC., <https://perma.cc/S4M5-BDSR> (last visited Jan. 28, 2018).

329. See CHARLESTON, S.C., ZONING CODE § 54-227 (2018), <https://perma.cc/ZRB5-WR4Z>.

330. See generally § 54-227.

One thing left off of M.O. section 2 is Chicago's neighborhood petition to local alderman to introduce an ordinance which creates a restricted residential zone.<sup>331</sup> While this could mitigate some potential neighborhood issues, having the city decide the zoning for itself seemed like a better idea since the city is the entity creating and maintaining an Office for enforcement of these rules.<sup>332</sup>

### C. Permitting

M.O. sections 3 through 7, which relate to permitting, are, for the most part, adaptations of the Santa Fe ordinance.<sup>333</sup> However, there are some differences. Almost all of the required items in M.O. sections 3(a) through (g) are the same as what is required in Santa Fe.<sup>334</sup> The first distinction is the requirement in M.O. section 3(f), which requires the contact information and the signatures for both the local contact and the owner. The reasoning for this was addressed in the Health and Safety section.

The next difference, which runs through a lot of this section, is in M.O. section 3(g), which requires the applicant to state whether the property is owner-occupied or non-owner-occupied.<sup>335</sup> Even though some cities, such as Nashville, are phasing out non-owner-occupied rentals in residentially-zoned neighborhoods, this Model Ordinance embraces them, but adds more requirements for homeowners wanting to run this type of short-term rental property.<sup>336</sup> The one-time permit fee is more expensive for a non-owner-occupied property. Additionally, the permit renewal for a non-owner-occupied property is both more frequent and more expensive than for an owner-occupied property. The increased expense is for two reasons. First, because it costs more to obtain a non-owner-occupied permit, this will make permits for non-owner-occupied rentals more difficult to obtain and potentially less appealing. Second, restrictions on non-owner-occupied rentals may be more difficult to enforce since the owner of the property will rarely if ever be on the property, so charging more for these permits will help support the office mentioned in M.O. section 18.

Finally, there is a similar notification method to Portland's ordinance in M.O. section 7.<sup>337</sup> While there is no requirement for the neighbors to

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331. See CHI., ILL., MUN. CODE § 4-17-040 (2018), <https://perma.cc/MAD9-RNWD>; see also *supra* text accompanying notes 131–37.

332. See § 4-17-040; S.F., CAL., ADMIN. CODE § 41A.5 (2018), <https://perma.cc/Y6ZZ-3D7V>.

333. See CITY OF SANTA FE, N.M., LAND USE DEVELOPMENT CODE § 14-6-2 (2018), <https://perma.cc/CC4E-D62G>.

334. § 14-6-2

335. See NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/NQ4U-ANH9>.

336. *Id.*; Garrison, *supra* note 172.

337. See CITY OF PORTLAND, OR., PLANNING AND ZONING CODE § 33.207 (2018), <https://perma.cc/6Y2F-BX8H>.

respond, at least informing the neighbors what is going to be occurring at the rental property will hopefully prevent some surprise when strangers are in the neighborhood.<sup>338</sup> This section seeks to unambiguously specify which neighbors must be informed to avoid any vagueness or ambiguity issues.<sup>339</sup>

Additionally, under M.O. section 16, advertising on the property is permitted to the extent that it would already be allowed in the city's sign code. Since this issue was deemed moot in *Anderson* based on changes in the code between the filing of the complaint and the court addressing the various challenges, this provision is likely enough.<sup>340</sup> Whether or not the sign code itself can pass freedom of speech strict scrutiny is outside of the scope of this note and would depend on the specifics of the city code, so this Model Ordinance only seeks to address problems with content differentiation between short-term rental signage and other signage.<sup>341</sup>

#### D. Taxation

The taxation section, similar to the zoning section, is relatively vague as it is written. A lot of the issue with taxation depends on a city's willingness to negotiate with Airbnb and other companies, and as mentioned in Section III, this potentially involves a lot of sacrifices.<sup>342</sup> Therefore, whether or not a city is willing to make these sacrifices for tax revenue is up to the city, and it is thus hard to make a Model Ordinance section about taxation that can be applied to any city. That being said, if a city is not willing to negotiate with Airbnb to receive tax remittance, requesting owners to remit and self-report related taxes would likely be in the cities' best interest.

#### E. Enforceability

One of the goals of the Model Ordinance was for it to be simple enough that not only do potential hosts know what is required of them, but that it is easy to tell when somebody is violating the short-term rental laws. In regard to definitions, after seeing the challenge of unconstitutional vagueness in Tennessee, terms such as "hotel" and the like are left to be defined elsewhere in the city code.<sup>343</sup>

Additionally, the amount of fines varies greatly. While Miami is going the extreme route, M.O. section 8 is more akin to what Nashville is doing and providing a daily fine for operating without a permit.<sup>344</sup> The

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338. § 33.207

339. *See generally* *Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, No. M201700190COAR3CV, 2018 WL 527104 (Tenn. Ct. App. Jan. 23, 2018).

340. *Id.*

341. *Id.* *See generally* *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

342. *See* Griswold, *supra* note 189.

343. *Anderson*, 2018 WL 527104.

344. *See* NASHVILLE, TENN., SUB. ORDINANCE NO. BL2014-951 (Feb. 26, 2015), <https://perma.cc/5ATB-7LPG>; Kartch, *supra* note 206.

additional phrase that “[s]ubject to judicial discretion, the subsequent issuance of a permit to the rental owner can potentially eliminate all or part of the daily fines and/or lift the injunction” is to prevent a situation where fines build up over time to reach Miami levels before going in to court.<sup>345</sup>

The idea of having a short-term rental office as opposed to a few employees is similar to San Francisco’s ordinance.<sup>346</sup> While this might be impractical in a smaller city, in a larger city this would be a good solution, so it would allow a group of people to specialize in short-term rental enforcement.

## VII: CONCLUSION

There are many issues going forward related to regulating short-term rental properties, and it is impossible to address them all in anything short of a textbook. However, the above proposed solutions to some of the problems presented show that cities are slowly making progress. While no one city has completely revolutionized the way that short-term rental properties are regulated, nor has any one city been entirely successful with regulating this market, almost all of the Model Ordinance provisions are based in some part on many of the listed cities’ ordinances.

Some of the presented issues are dependent on cities and Airbnb cooperating—in particular, taxation and enforcement. Both sides may have to concede things that neither are currently willing to concede. Other issues like zoning will be dependent on the city’s existing ordinances. However, some problems such as how to address health and safety concerns, as well as methods of providing permits, are more easily addressed broadly by the Model Ordinance.

Finally, there will continue to be legal issues presented with almost any regulation that is passed. Nashville, Los Angeles, and San Francisco have all recently been faced with Airbnb-related lawsuits that have brought up unique legal issues.<sup>347</sup> Going forward, it will be interesting to see what issues continue to arise in both the short-term rental industry and the sharing economy as a whole. As this market continues to grow and change, so must the ways cities approach regulating it. While there may not truly be any long-term solutions to this short-term rental problem, there has certainly been progress.

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345. See Kartch, *supra* note 206; Trager, *supra* note 212.

346. See S.F., CAL., ADMIN. CODE § 41A.5 (2018), <https://perma.cc/3VTU-9WX4>.

347. As of the date of publication of this article, Airbnb is currently suing New York City over a new law that requires sharing host information. See Glenn Fleishman, *Airbnb Sues New York Over Law That Demands Host Information*, FORTUNE (Aug. 24, 2018), <https://perma.cc/5XG8-PXAM>.