

# **Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community**

## *Abstract*

*Peer-to-peer services offer participants considerable advantages whether they are a provider of such services or a user of them. The Airbnb phenomenon is an example of how technological advancement has transformed the rental industry and has signaled a societal acceptance of a sharing economy. However, the question now is to what extent cities should regulate this influx of short-term rentals while still preserving the property rights of homeowners.*

*Much of the answer to this question depends on each city's individual interpretation of specific areas of the law. Some legal issues raised by regulation and explored by this article include the property rights of homeowners, zoning restrictions on short-term rentals, and taxation responsibilities.*

*Thus far, there have been several city-specific approaches to regulating Airbnb. This Comment contrasts San Francisco's use of a permitting system with New York's adherence to its Multiple Dwelling Law and analyzes the benefits and ramifications of each. Then, it turns to Portland's Shared City initiative, which provides a more-balanced approach by combining the benefits of the permitting system with an enforcement mechanism to allow the city to realize the full benefits of the law. It concludes by urging more cities to follow Portland's lead because it provides an ideal middle ground between preserving an owner's right to engage in short-term rentals and protecting the nature of the city for all residents and visitors alike.*

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## I. INTRODUCTION

Consider this scenario: you are about to book a trip to a city you have always wanted to visit, and a friend recommends a great place to stay. They rave about the accommodations—it is close to restaurants, parks, entertainment, and best of all, it is less expensive than the Hilton you were looking into. You think there has to be some kind of catch. Then they tell you the “hotel” is not a hotel at all—it is someone else’s house! After hearing this, you probably have many questions, including whether this is the type of experience you are looking for. However, what you may not immediately ask is: is this legal?

Many are familiar with peer-to-peer rental providers, such as Airbnb, Uber, and Lyft, that offer a twist on traditional rental services.<sup>1</sup> Participants can earn a dollar on the side by renting out their underused assets to strangers.<sup>2</sup> In exchange, the renters receive considerable savings compared to traditional service providers like hotels or car rentals.<sup>3</sup> Technological advancement has facilitated the success of these companies by making communication instantaneous and effortless through the use of apps and online platforms.<sup>4</sup> Interested parties can easily search for services offered in their neighborhoods or in a specific destination they intend to visit, compare costs, and determine the trustworthiness of the provider through others’ reviews.<sup>5</sup> Although the concept of sharing is not new, the increasing willingness to share deviates markedly from the long-embraced consumer culture to which Americans ascribe.<sup>6</sup> Some attribute this change to the continuing economic recession, which has forced people to spend less, while

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1. Steve Henn, *What’s Mine Is Yours (for a Price) in the Sharing Economy*, NPR (Nov. 13, 2013, 3:16 AM), <http://www.npr.org/sections/alltechconsidered/2013/11/13/244860511/whats-mine-is-yours-for-a-price-in-the-sharing-economy>.

2. See *All Eyes on the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items> (characterizing companies like Airbnb and RelayRides as “matchmakers”).

3. *Id.*; see also Cait Poyner Lamberton & Randall L. Rose, *When Is Ours Better than Mine? A Framework for Understanding and Altering Participation in Commercial Sharing Systems*, 76 J. MARKETING 109, 111 (2012).

4. See Henn, *supra* note 1.

5. See *All Eyes on the Sharing Economy*, *supra* note 2.

6. Rita, *Capitalism, Threatened by the Sharing Economy Trend?*, MEGAFOUNDER (Mar. 7, 2014), <http://blog.megafounder.com/blog/sharing-economy/>.

others believe emotional benefits are the driving force.<sup>7</sup> Whatever the motivation, society has signaled its approval of peer-to-peer services and state and local governments have begun to respond.<sup>8</sup> The question now is to what extent should cities regulate sharing-economy activities, and the answer may vary depending on the characteristics of the city itself.<sup>9</sup> Focusing specifically on regulating short-term rentals, cities that plan to regulate must keep the positive effects in mind.<sup>10</sup> Regulations that allow society to take advantage of these services not only encourage innovation but also preserve traditional rights of ownership.<sup>11</sup> Cities across the globe should consider Portland's approach to regulating short-term rentals as a model that preserves the property rights of homeowners while still protecting society from illegal hotels and the other concerns associated with short-term rentals.<sup>12</sup>

Part II of this Comment provides a concise background of home sharing and explains Airbnb and its increasing impact on the Sharing Economy.<sup>13</sup> Part III details three areas of the law that present issues for Airbnb: real property, zoning, and taxation.<sup>14</sup> Each city's unique interpretation of these legal concepts dictates the way that city regulates Airbnb and other sharing companies, and consequently, either promotes or restricts sharing.<sup>15</sup> Finally, Part IV outlines the paths that San Francisco, New York City, and Portland have taken to regulate short-term rentals and explains how Portland's model is the best compromise between preserving an owner's right to engage in short-term rentals and protecting the character of the city for residents and visitors alike.<sup>16</sup>

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7. See Campbell Mithun, *National Study Quantifies the "Sharing Economy" Movement*, PRNEWswire (Feb. 8, 2012), <http://www.prnewswire.com/news-releases/national-study-quantifies-the-sharing-economy-movement-138949069.html>.

8. See *infra* Part IV.

9. See *infra* Part IV.

10. See *Airbnb Economic Impact*, AIRBNB, <http://blog.airbnb.com/economic-impact-airbnb/> (last visited Dec. 23, 2016) [hereinafter *Airbnb Economic Impact Report*] (reporting that many studies show that guests want to "live like a local").

11. See *infra* Section III.A; see also *infra* Part IV.

12. See *infra* Section IV.C.

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part IV.

## II. BACKGROUND: MODERN SHARING AND ITS HISTORICAL COUNTERPARTS

A. *What is Airbnb?*

Airbnb and similar companies provide hosts—people willing to share a room in their home—with a way to engage with an interested short-term guest.<sup>17</sup> Travelers simply go to Airbnb’s website, enter their desired destination and dates, and Airbnb provides a list of available options based on hosts’ listings.<sup>18</sup> Even those who have never used Airbnb’s services can recognize this model, because it shares many similarities with booking a room in a traditional hotel.<sup>19</sup> The main difference is that when a traveler books a space using Airbnb, the space they are renting is not a standard room with two double beds, but a room that, for the most part, is owned and occupied by someone else.<sup>20</sup> Hosts can list “anything from a spare bed to an entire mansion,” which broadens Airbnb’s appeal to a wide range of travelers.<sup>21</sup> Admittedly, staying in a stranger’s home raises many questions, but the system of ratings and reviews that Airbnb provides eases some of these concerns.<sup>22</sup> The system is “double-blind,” meaning that neither host nor guest sees the other’s review until both have been submitted, limiting the chances that the first review will influence the second and encouraging honest reviews.<sup>23</sup> This system builds trust between hosts and guests, and “creates incentives for hosts to go the extra mile, and for guests to . . . leave

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17. Aaron George, *Is Airbnb Legal?*, LAWKICK, <http://blog.lawkick.com/airbnb-legal/> (last visited Dec. 21, 2016).

18. AIRBNB, <https://www.airbnb.com/> (last visited Dec. 23, 2016).

19. See HOTELS, <http://www.hotels.com> (last visited Dec. 23, 2016). This website allows viewers to search for hotel rooms by date and location, and then generates a list of all possible bookings that are available for the specific date and location requested. *Id.*

20. See Clare Hutchison, *What Is Airbnb and Why Is It So Controversial?*, EVENINGSTANDARD (Aug. 20, 2015), <http://www.standard.co.uk/business/what-is-airbnb-and-why-is-it-so-controversial-a2918061.html> (noting that for Airbnb “the properties on offer are not professionally run hotels or apartments, they tend to be flats and houses of ordinary people looking to make some extra money”).

21. *All Eyes on the Sharing Economy*, *supra* note 2.

22. See Josh Krauss, *The Sharing Economy: How State and Local Governments Are Failing and Why We Need Congress to Get Involved*, 44 SW. L. REV. 365, 378 (2014) (noting that Airbnb hosts will only attract renters if they are “well reviewed”).

23. Seth Porges, *The Strange Game Theory of Airbnb Reviews*, FORBES (Oct. 17, 2014, 2:21 PM), <http://www.forbes.com/sites/sethporges/2014/10/17/the-strange-game-theory-of-airbnb-reviews/> (comparing Airbnb’s original system of publishing reviews immediately to the double-blind system).

the room in as good a shape as they found it.”<sup>24</sup> For their services in connecting hosts with travelers, Airbnb collects a “guest service fee” from travelers ranging between 6–12%, and another 3% service fee from hosts for each reservation.<sup>25</sup> Even with these small additional fees, Airbnb users still pay less than they would to rent a room in a traditional hotel.<sup>26</sup>

### B. *History of Home Sharing*

According to some commentators, home sharing is an old phenomenon that has simply been reinvigorated by the use of the Internet as a means to connect.<sup>27</sup> Renting a room in a home as a short-term boarder was typical, if not the norm, in urban areas during the nineteenth century.<sup>28</sup> Renting out extra space was a necessity for many who struggled to make ends meet, and the scarcity of housing options made boarding a realistic option for those who needed a short-term stay.<sup>29</sup> Most boarding and rooming houses were concentrated in downtown, urban areas, where the costs of living were lower and the options for work closer.<sup>30</sup> Often, workers only intended to stay for short periods of time, desiring to move once they could find more permanent work or higher pay.<sup>31</sup> These types of living arrangements have virtually

24. *Id.* (“It’s no exaggeration to say that reviews are the glue that keep the sharing economy together.”).

25. Jean Folger, *The Pros and Cons of Using Airbnb*, INVESTOPEDIA, <http://www.investopedia.com/articles/personal-finance/032814/pros-and-cons-using-airbnb.asp?performanceout=true> (last updated Jan. 20, 2015). Additional fees may apply to guests renting in certain European countries. *Id.*

26. Laura Kusisto, *Airbnb Cites Its Role in City*, WALL ST. J. (Oct. 21, 2013), <http://www.wsj.com/articles/SB10001424052702303448104579149844259343658>.

27. See Molly Cohen & Corey Zehngebot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J. 6 (2014) (describing the sharing economy as “[a]n old concept made new through internet-based sharing”).

28. Ruth Graham, *Boardinghouses: Where the City Was Born*, BOS. GLOBE (Jan. 13, 2013), <https://www.bostonglobe.com/ideas/2013/01/13/boardinghouses-where-city-was-born/Hpstvjt0kj52ZMpjUOM5RJ/story.html> (noting that some social historians estimate that up to one-half of all urbanities either rented space to boarders or were boarders themselves).

29. Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern “Sharing Economy”*: *Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557, 561 (2015) (arguing that local government regulations that restrict the use of real property for short-term rentals may constitute a taking under the Fifth and Fourteenth Amendments).

30. PAUL GROTH, *LIVING DOWNTOWN: THE HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES* 109 (1994).

31. *Id.* at 122–23.

disappeared in modern America due to a combination of rising wealth and changes in the law.<sup>32</sup> As people earned more money, they sought more space and privacy, and laws evolved to shield the expanding suburban developments from the poorer urban areas.<sup>33</sup> Many of the laws arose out of reform efforts to ensure decent housing by imposing occupancy limits, ventilation and plumbing requirements, and bath-to-room ratios.<sup>34</sup> Despite the initial good intentions, increased zoning and health regulations resulted in the elimination of boarding houses by making them either illegal or too expensive to operate.<sup>35</sup> Short-term rentals today may face a similar demise as cities push back against them by increasing regulation or more readily enforcing current regulations.<sup>36</sup>

Today, many Airbnb hosts list their space on Airbnb for the same reasons that motivated boarding house operators to open their doors to boarders.<sup>37</sup> The cost of renting has steadily risen in large and small cities alike, and today, many renters spend more than fifty percent of their income on rent.<sup>38</sup> Thus, it is relatively unsurprising that many hosts need the additional income from renting through Airbnb to help them stay in their homes.<sup>39</sup> Likewise, the lower prices of Airbnb rentals compared to traditional hotels allow guests to travel when they otherwise would not.<sup>40</sup> Airbnb's appeal is evidenced by its dramatic growth: Since its inception in 2008, the company now boasts more than two million listings in over 191 countries around the world.<sup>41</sup> Some proponents believe that removing restrictions on room rentals and shared housing "could be the fastest, least-

32. Alan Durning, *Rooming Houses: History's Affordable Quarters*, SIGHTLINE INST. (Nov. 14, 2012, 11:30 AM), <http://www.sightline.org/2012/11/14/rooming-houses-historys-affordable-quarters/>.

33. *Id.*

34. GROTH, *supra* note 30, at 241–53.

35. *See* Durning, *supra* note 32.

36. *See infra* Part IV.

37. *See generally* Durning, *supra* note 32.

38. Jonnelle Marte, *The Cities Where Americans Are Most Likely to Spend More than Half of Their Paycheck on Rent*, WASH. POST (July 15, 2015), <http://www.washingtonpost.com/news/get-there/wp/2015/07/15/the-cities-where-americans-are-most-likely-to-spend-more-than-half-of-their-paycheck-on-rent/>.

39. *Shared Opportunities: How Airbnb Benefits Communities*, AIRBNB, [https://www.ftc.gov/system/files/documents/public\\_comments/2015/05/01740-96152.pdf](https://www.ftc.gov/system/files/documents/public_comments/2015/05/01740-96152.pdf) (last visited Dec. 20, 2016).

40. Kevin Boyd, *Airbnb Isn't Killing Hotels, After All*, R ST. (Oct. 7, 2015), <http://www.rstreet.org/2015/10/07/airbnb-isnt-killing-hotels-after-all/>.

41. *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Dec. 20, 2016).

expensive, and most sustainable way to make housing more affordable.”<sup>42</sup> But critics argue that allowing short-term rentals raises the costs of housing because it reduces the stock of long-term units.<sup>43</sup> This new debate raises issues of legality for Airbnb as many hosts find themselves in violation of local zoning ordinances.<sup>44</sup> It also raises concerns regarding the health and safety of guests and neighbors, infringement on traditional notions of property ownership, and taxation.<sup>45</sup>

### III. LEGAL ISSUES FACING AIRBNB

#### A. *Property Rights of Homeowners*

##### 1. Historical Background

Real property ownership is a concept with deep and complicated roots.<sup>46</sup> John Locke famously argued that property owners had a right to rebel against a government that infringed on their property rights earned through occupancy.<sup>47</sup> Blackstone posited that “property is the ‘sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’”<sup>48</sup> Although this axiom is widely accepted as a reflection of the

42. Durning, *supra* note 32.

43. See Tim Logan, Emily Alpert Reyes, & Ben Poston, *Airbnb and Other Short-Term Rentals Worsen Housing Shortage, Critics Say*, L.A. TIMES (Mar. 11, 2015), <http://www.latimes.com/business/realstate/la-fi-airbnb-housing-market-20150311-story.html>.

44. Will Coldwell, *Airbnb's Legal Troubles: What Are the Issues?*, GUARDIAN (July 8, 2014, 8:38 AM), <http://www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues>.

45. *Id.*; see also Jeff Bercovici, *Airbnb's Massive, Looming Safety Problem, and How to Solve It*, INC. (Nov. 9, 2015) <http://www.inc.com/jeff-bercovici/airbnb-safety-problem.html> (discussing Airbnb's response to various safety issues).

46. See generally Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 606 (1998) (detailing the legal conception of property with an emphasis on Blackstone's contribution).

47. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 144 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690); see also Rose, *supra* note 46, at 606 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*3) (explaining how occupancy was achieved: “First they took temporary use of natural products like plants for foodstuffs and fibers; then later, as they ‘increased in number, craft, and ambition’ and as resources became correspondingly scarce, they began to claim more permanent rights in chattels and ultimately in land”).

48. Andrew A. Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 BUFF. ENVTL. L.J. 101, 114 n.37 (2004) (quoting BLACKSTONE, *supra* note 47, at \*2).

historical underpinnings of property ownership, it actually does not align with earlier tradition.<sup>49</sup> In the feudal era, property ownership was burdened by many obligations, such as tenant to lord and lord to Crown, and thus a notion of “exclusive” ownership was absent.<sup>50</sup> Furthermore, Blackstone’s definition failed to account for well-established limitations on an owner’s use, such as the law of nuisance and restrictive covenants.<sup>51</sup> Early American lawyers viewed Blackstone’s words of exclusivity as too ideal when compared to the reality of property rights in the eighteenth century, yet even this has done little to dampen the influence of his celebrated definition.<sup>52</sup> The appeal of exclusivity is that it endows owners with “a small domain of complete mastery, complete self-direction, and complete protection from the whims of others.”<sup>53</sup>

## 2. What Is Included in the Ownership “Bundle of Rights”?

In Hohfeldian<sup>54</sup> terms, property owners hold the entire “bundle of rights” with respect to their property, meaning they can occupy, sell, lease, license, or burden the property according to their individual needs.<sup>55</sup> The main difference between these options is in the rights relinquished and kept after the conveyance is effectuated.<sup>56</sup> When an owner leases his property, he transfers his “right to use and occupy the property [to another] in exchange for consideration.”<sup>57</sup> The original owner gives the lessee “full and ‘exclusive legal possession of the premises and is responsible for its care and condition.’”<sup>58</sup> In contrast, “[a] license is an authority to do a particular act,

49. Rose, *supra* note 46, at 603 (“When Blackstone described property as exclusive dominion, he may have had little idea of the resonance his words would have for later writers on property. Indeed, the notion of property as exclusive dominion . . . is far from self-evident, and it was even less self-evident when Blackstone wrote these lines.”).

50. Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 290–91 (1998).

51. Rose, *supra* note 46, at 603.

52. *Id.* at 603–04.

53. *Id.* at 604.

54. Wesley Hohfeld was a Harvard Law professor who developed a framework for understanding property interests. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913).

55. Williams, *supra* note 50, at 283–84.

56. See *supra* notes 45, 47, and accompanying text.

57. BLACK’S LAW DICTIONARY 1024 (10th ed. 2014).

58. Rachael Ann Neal Harrington, *Vacation Rentals: Commercial Activity Butting Heads with CC&Rs*, 51 CAL. W. L. REV. 187, 192–93 (2015) (explaining that vacation rentals may violate the

or series of acts, upon another's land, without possessing any estate therein."<sup>59</sup> Thus, an owner does not relinquish his right to use and occupy to a licensee, but merely allows him to also use the property, typically for a specific purpose.<sup>60</sup> The agreement between a landlord and a tenant is a common example of a lease, whereas the relationship between a hotel guest and hotel owner is a license.<sup>61</sup> The term "rental" is often used to describe lease and license agreements, leading to confusion between the two legal concepts and which rights are actually being conveyed.<sup>62</sup> Thus, it is preferable to analyze the relationship between the parties to determine which rights have truly been conveyed, instead of focusing merely on the terms used to describe the conveyance.<sup>63</sup>

### 3. The Distinction Between Leasing and Licensing in Relation to Airbnb

The difference between leasing and licensing is relevant to properly classify the services provided by Airbnb.<sup>64</sup> Vacation rentals, for example, are an Airbnb-like service that gained popularity prior to the rise of Airbnb.<sup>65</sup> Unlike some Airbnb offerings, a typical vacation rental is for the entire home while the owner is not present.<sup>66</sup> Vacation rentals are properly classified as license agreements, because the owner of the property retains legal, possessory, and access rights, and simply allows the renter to use the

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covenants, conditions and restrictions (CC&Rs) of homeowners' associations, and increasing attempts to enforce the restrictions "will require the courts . . . to address the matter of vacation rentals as business activity").

59. BLACK'S LAW DICTIONARY 1060 (10th ed. 2014) (quoting 2 JAMES KENT, COMMENTARIES \*452–53).

60. Harrington, *supra* note 58, at 193–94.

61. *See* Stowe v. Fritzie Hotels, 282 P.2d 890, 893 (Cal. 1955) (en banc) (explaining that the duty of care owed to a tenant differs from that owed to a hotel guest).

62. *See* Harrington, *supra* note 58, at 199.

63. *Id.* at 195 ("Therefore, when considering what specific type or form of agreement has been created between [a] property owner and occupant, the substance of the agreement and relationship between the parties thereto must be analyzed rather than the terms used to classify the agreement, property, and people.").

64. *See id.* at 193–97.

65. *See id.* at 195 ("Vacation rentals are generally classified as short-term rentals of real property for terms less than 30 days.").

66. *Id.* at 211 (explaining that the main difference between a bed and breakfast and a vacation rental is that with a vacation rental, the renter gets "the whole home and possibly an arrival gift" instead of just a bedroom within the house).

property for a specified period of time.<sup>67</sup> Other similarities can be drawn between vacation rentals and the quintessential license agreement of hotels and hotel guests.<sup>68</sup> Like hotels, owners of vacation rentals often provide maid services before and after each occupant, and some even provide welcome baskets for guests to enjoy during their stay.<sup>69</sup> This is distinguishable from the landlord-tenant relationship where the tenant does his or her own cleaning and maintenance of the property and the landlord does not retain rights to access or use the property during the tenant's lease.<sup>70</sup> When an Airbnb host rents out one of his bedrooms and occupies another, he maintains possessory and access rights to the property.<sup>71</sup> Thus, Airbnb rentals are also properly classified as license agreements.<sup>72</sup> The other option Airbnb offers is entire-home rentals, which are similar to vacation rentals in that the owner does not occupy the property during the renter's stay.<sup>73</sup> Nonetheless, entire-home rentals are still licenses because the owner's intention is to allow temporary use by the guests without transferring any property rights therein.<sup>74</sup>

By imposing restrictions on short-term rentals, states and cities are severely limiting two very important "sticks" within the property owner's bundle of rights: the right to lease and the right to license.<sup>75</sup> Some statutes may prohibit leases, licenses, or both as a way to combat some of the negative externalities that accompany short-term rentals.<sup>76</sup> Cities must consider the impact such restrictions have on property owners, the reduction in value that may accompany such restrictions, and the potential issues that

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67. *Id.* at 195.

68. *Id.* at 196.

69. *Id.* at 196–97 nn.39–40 (examining reviews from vacation rental sites like VRBO and Homeaway, where guests comment on the cleanliness of the home and rave about welcome baskets and stocked kitchens).

70. *Id.* at 193.

71. *Id.* at 193–94 (discussing the rights associated with vacation rentals for the landlord and the licensee).

72. *Id.*

73. *What Does the Room Type of a Listing Mean?*, AIRBNB, <https://www.airbnb.com/help/article/5/what-does-the-room-type-of-a-listing-mean> (last visited Dec. 20, 2016).

74. *See* Harrington, *supra* note 58, at 197.

75. *See supra* notes 53–57 and accompanying text.

76. *See* ERIC. T. SCHNEIDERMAN, AIRBNB IN THE CITY 2, 4 (Oct. 2014), <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> (explaining that New York's Multiple Dwelling Law seeks to prevent fire and safety risks associated with transient accommodations and that Airbnb poses risks to housing affordability and the residential nature of neighborhoods).

surface when short-term renting is allowed.<sup>77</sup> Although the right to private property is not considered absolute, courts will often construe limitations, like restrictive covenants, narrowly to preserve property rights.<sup>78</sup> Many homeowners' associations impose covenants requiring property use to be "single-family" and "residential," which apply to the physical structure as well as the activities that occur on the property.<sup>79</sup> In attempting to preserve the property owner's bundle of rights, many courts have held that short-term rentals do not violate the residential-purpose requirement, thus protecting the right to lease and license.<sup>80</sup>

When it comes to preserving a property owner's alienability rights, the best option is to impose no limits on their ability to engage in short-term rentals.<sup>81</sup> This may be an option in some cities where the fear of nuisance and displacing long-term rentals is low due to the intermittent nature of visitors.<sup>82</sup> However, a lack of restrictions on short-term rentals would undoubtedly cause problems for densely populated and high-tourism cities.<sup>83</sup> In these cities, unregulated short-term rentals could result in long-term units being taken off the market, which would in turn cause rent prices to increase.<sup>84</sup> Thus, these cities must develop appropriate regulations that

77. *See infra* Part IV.

78. 1733 Estates Ass'n v. Randolph, 485 N.W.2d 339, 340 (Neb. Ct. App. 1992) (noting that restrictive covenants are not favored in law and if ambiguous, will be construed to allow maximum unrestricted use).

79. *Id.* at 339.

80. *See, e.g.*, Slaby v. Mountain River Estates Residential Ass'n, 100 So. 3d 569, 582 (Ala. Civ. App. 2012) (restriction on commercial use of property does not prohibit short-term rentals); Pinehaven Planning Bd. v. Brooks, 70 P.3d 664, 668 (Idaho 2003) ("[R]enting [the] dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood."); Lowden v. Bosley, 909 A.2d 261, 267 (Md. 2006) (finding that receipt of rental income does not detract from the use of the property as residences by tenants).

81. *See* Jefferson-Jones, *supra* note 29, at 569–70.

82. *See* Neil Michel, *Regulate Airbnb? It's Unnecessary*, DAVIS ENTERPRISE (July 23, 2015), <http://www.davisenterprise.com/forum/letters/regulate-airbnb-its-unnecessary/> ("In Davis, we have 71 Airbnb hosts, averaging a few thousand dollars a year at most . . . . The total potential upside from taxing Airbnb in Davis is less than my kids make selling lemonade on Picnic Day.")

83. *See infra* Part IV.

84. *See* Rachel Monroe, *More Guests, Empty Houses*, SLATE (Feb. 13, 2014), [http://www.slate.com/articles/business/moneybox/2014/02/airbnb\\_gentrification\\_how\\_the\\_sharing\\_economy\\_drives\\_up\\_housing\\_prices.html](http://www.slate.com/articles/business/moneybox/2014/02/airbnb_gentrification_how_the_sharing_economy_drives_up_housing_prices.html) ("In a tight housing market, the results can be dire: fewer places on the rental market, increased evictions, and rising rents for everyone.")

preserve both property rights and the quality of neighborhoods.<sup>85</sup> Although a few cities have begun regulating short-term rentals, those that have not should look to Portland's system for guidance.<sup>86</sup>

#### 4. Explicit Prohibitions Legally Restricting Ownership Rights

Lease agreements between a landlord and tenant may specifically prohibit the tenant from exercising the right to sublease without owner permission or eliminate the right altogether.<sup>87</sup> These restrictions are permissible to protect the interest of the lessor, who has a "reversionary interest" in the property.<sup>88</sup> In *Gold Street Properties v. Freeman*, Freeman's lease prohibited subleasing without landlord consent.<sup>89</sup> Freeman's landlord objected to her renting the property through Airbnb and brought an action against her alleging that she incurably breached the lease agreement.<sup>90</sup> The court explained that even though Freeman did violate the terms of her lease by subletting through Airbnb without permission, illegal subletting is normally curable.<sup>91</sup> Thus, the court held that Freeman cured the breach by ceasing the objectionable conduct.<sup>92</sup> Although contractual limitations in leases are permissible, courts will construe them narrowly, like they do for restrictive covenants.<sup>93</sup> Thus, where a lease does not specifically prohibit subleasing, courts may determine there is no limitation in an effort to protect the property rights of the tenant.<sup>94</sup>

Another issue arises with provisions that require landlord consent prior

85. See *infra* Section IV.C.

86. See *infra* Section IV.C.

87. *Gold Street Properties, L.P. v. Freeman*, No. 90185/2013, N.Y.L.J. 1202661511936, at \*2 (N.Y. Civ. Ct. June 16, 2014).

88. *Kendall v. Ernest Pestana Inc.*, 40 Cal. 3d 488, 494 (1985). A property owner maintains a reversionary interest when he does not part with his entire interest in the property, for example, in a lease: when the lease expires, ownership reverts to the lessor. *Reversion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

89. See *Gold Street Properties, L.P.*, N.Y.L.J. 1202661511936, at \*2.

90. See *id.* at 1, 3.

91. See *id.* at 3 (citing *Thompson v. 490 W. End Apts. Corp.*, 252 A.D.2d 430, 436–37 (N.Y. Ct. App. 1998)).

92. See *id.* at 6.

93. See *Kendall*, 40 Cal. 3d at 494.

94. *Id.* at 494–95, 495 n.7 (noting that the law favors alienability of property, and that the lease stating property could not be "assigned" without permission did not restrict tenant's ability to sublease).

to subleasing.<sup>95</sup> Traditionally, a landlord of residential property could withhold consent arbitrarily.<sup>96</sup> However, the modern trend among courts is that landlords must have reasonable grounds for withholding consent, even when a lease is silent as to whether reasonableness is required.<sup>97</sup> In addition, some states have adopted statutes requiring a landlord's refusal of consent to be reasonable.<sup>98</sup> Tenants who want to be Airbnb hosts must look closely at their respective leases to ascertain whether the lease permits them to "sublease" to an Airbnb tenant.<sup>99</sup> If the lease contains a consent clause, then asking the landlord is necessary, and a landlord may be required to provide a reasonable basis for refusal, depending on the jurisdiction.<sup>100</sup> In some locations, tenants with leases prohibiting any form of alienation may be unable to host through Airbnb.<sup>101</sup> All things lease-related considered, tenants cannot stop here; even if the lease contains no restrictions on alienability, local ordinances and zoning measures may still prohibit short-term rentals.<sup>102</sup>

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95. See generally *Kendall*, 40 Cal. 3d at 494–98 (noting that the majority of jurisdictions have upheld a landlord's right to arbitrarily refuse assignment where an approval clause is present in the lease).

96. JESSE DUKEMINIER ET AL., PROPERTY 443 (8th ed. 2014).

97. See *Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. Dist. Ct. App. 2012) (holding that when a boilerplate clause in a lease requires the landlord's approval to sublease, a landlord's blanket refusal to consent to any sublease was unreasonable and thus a violation of good faith); *Basnett v. Vista Vill. Mobile Home Park*, 699 P.2d 1343, 1346–47 (Colo. App. 1984) (quoting RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.2(2) (AM. LAW INST. 1977)) (adopting the Restatement approach which holds "a restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent"), *rev'd on other grounds*, 731 P.2d 700, 704 (Colo. 1987).

98. ALASKA STAT. § 34.03.060 (2016); DEL. CODE ANN. tit. 25, § 5508 (2016); see also CAL. CIV. CODE §§ 1995.230–250 (Deering 2016) (requiring express standards be stated when a consent clause is used, and if no standard is listed, the landlord's consent may not be unreasonably withheld).

99. See *George*, *supra* note 17.

100. William G. Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 LOY. L.A. L. REV. 405, 505 (1989).

101. See *Carma Developers, Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 359–60 (1992) ("[E]ven the minority view adopted by the Restatement recognizes the validity of a freely negotiated disabling restraint in a lease."); see also Alex Lipton, *How to Sublet Without Breaking the Law*, SHAKE (July 7, 2014), <http://www.shakelaw.com/blog/sublet-without-breaking-law/> (noting that in California, leases may include complete restrictions on alienability).

102. See Lipton, *supra* note 101; see also *George*, *supra* note 99.

*B. Zoning Restrictions on Short-Term Rentals*

State and city governments are endowed with police powers, which they may exercise to protect public health, safety, and welfare.<sup>103</sup> Zoning ordinances are a relatively modern application of police power, arising out of “the great increase and concentration of population”<sup>104</sup> and enacted “to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development.”<sup>105</sup> Before this change, zoning was viewed as an impermissible infringement on the right of property owners to use their “private property for all lawful purposes provided a nuisance did not result.”<sup>106</sup> Relying on nuisance law to protect a person’s interests forced parties to bring lawsuits and endure the misconduct until relief was granted.<sup>107</sup> These issues spurred attempts at preventative nuisance avoidance and ultimately led to the introduction of municipal regulations like zoning.<sup>108</sup>

The court in *Village of Euclid v. Ambler Realty Co.* explained that although zoning regulations may have been considered arbitrary and unreasonable in the past, such regulations are now a proper exercise of police power due to changing urban conditions, so long as they “find their justification in some aspect of the police power, asserted for the public welfare.”<sup>109</sup> Initially, many zoning restrictions were implemented to preserve and insulate residential uses from other uses, such as commercial and industrial activities.<sup>110</sup> While this is still generally the case today, there is a trend toward authorizing mixed-use development, even within residential zones.<sup>111</sup>

Many zoning ordinances were implemented to protect single-family residences by limiting “transient” and high-density occupancy.<sup>112</sup> Many

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103. U.S. CONST. art. X; *see also* *Commonwealth v. Alger*, 61 Mass. 53, 85–86 (1851).

104. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926).

105. *Id.* at 392–93.

106. Gerald A. Fisher, *The Comprehensive Plan Is an Indispensable Compass for Navigating Mixed-Use Zoning Decisions Through the Precepts of the Due Process, Takings, and Equal Protection Clauses*, 40 URB. L. 831, 839 (2008).

107. *Id.* at 840.

108. *Id.*

109. *Vill. of Euclid*, 272 U.S. at 387.

110. *Id.* at 394–95; *see also* Fisher, *supra* note 106, at 834.

111. Fisher, *supra* note 106, at 836.

112. *See* N.Y. MULT. DWELL. LAW §§ 2, 4 (McKinney 2016).

ordinances define transient stay as anything less than a month—thus, individuals who reside at a location for a month or longer are considered permanent, not short-term.<sup>113</sup> Many ordinances similar to the restrictive covenants mentioned above require that the use of the property be “residential.”<sup>114</sup> Courts define “residential” as “a place where people reside, dwell, or make their homes,” as opposed to business or commercial uses.<sup>115</sup> In ordinances and covenants that merely contain residential-use requirements and do not explicitly reference transience limitations, cities may still limit short-term rentals by classifying them as commercial.<sup>116</sup>

In *Siwinski v. Town of Ogden Dunes*, the Supreme Court of Indiana concluded that short-term rentals were commercial activity where commercial activity was defined by the ordinance as “[a]ny activity conducted for profit or gain.”<sup>117</sup> Not all courts have reached the same verdict; indeed, many have found that short-term rentals constitute residential use under these ordinances.<sup>118</sup> Courts following this approach explain that although the power to zone is broadly construed in favor of the city, “[z]oning ordinances are in derogation of the common law and, hence, are to be construed in favor of the free use of private property.”<sup>119</sup> Thus, to be upheld, zoning ordinances must unambiguously restrict short-term rentals.<sup>120</sup> Further complicating the question is the “blurring of the

113. *Id.* § 4; see also Stephen Fishman, *Legal Restrictions to Renting Your Home on Airbnb or Other Rental Services*, NOLO, <http://www.nolo.com/legal-encyclopedia/legal-restrictions-renting-your-home-airbnb-other-rental-services.html> (last visited Dec. 21, 2016).

114. See *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1587 (1991) (upholding the validity of an ordinance requiring property to be used only for permanent, residential uses).

115. 1733 Estates Ass’n v. Randolph, 485 N.W.2d 339, 340 (Neb. Ct. App. 1992).

116. Susan L. Ruby, *The Vacation Rental Housing Dilemma in Coastal California*, 44 REAL EST. REV. J. 3 (2015); see also *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 830 (Ind. 2011) (interpreting “single-family, residential use” as requiring use by a *single family* and thus finding that short-term rentals violated the city ordinance).

117. *Siwinski*, 949 N.E.2d at 830 (quoting TOWN CODE OF THE TOWN OF OGDEN DUNES § 152.002).

118. See, e.g., *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 212 (Utah Ct. App. 1998) (holding that a zoning ordinance that required single-family residential use did not preclude short-term rentals); *Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals*, 861 N.W.2d 797, 802 (Wis. Ct. App. 2015) (holding that mere temporary use does not preclude use from being residential because there is “nothing inherent in the concept of residence or dwelling that includes time”).

119. *Heef Realty & Invs.*, 861 N.W.2d at 799 (quoting *Cohen v. Dane Cty. Bd. of Adjustment*, 246 N.W.2d 112, 114 (1976)).

120. *Id.*

traditional lines separating residential and commercial land uses.”<sup>121</sup> Many uses that were once considered commercial are now frequently taking place in homes, such as home-based businesses and offices.<sup>122</sup> Arguably, running a business from home can have many of the negative effects that zoning ordinances seek to prevent: increased traffic, parking shortages, and noise.<sup>123</sup> Even though these uses are comparatively more in line with commercial or business activity than short-term rentals are, they have received more leniency and flexibility with respect to zoning ordinances.<sup>124</sup> A report by the American Planning Association notes that as “telecommuting and home offices . . . becom[e] a way of life, local zoning codes should reflect, rather than deny, that reality.”<sup>125</sup>

Such an argument may also support the adoption of a flexible approach to zoning with respect to short-term rentals.<sup>126</sup> Cities have begun to address this issue by modifying their zoning ordinances or by standing more firmly behind ordinances currently in place.<sup>127</sup> The ranging solutions are revealed by comparing the approaches taken by San Francisco, Portland, and New York City.<sup>128</sup> As noted, Portland’s model offers an appropriate balance between preserving property owners’ rights and protecting long-term residents.<sup>129</sup> Portland has modified its zoning code to allow for short-term rentals with certain restrictions.<sup>130</sup> As many cities’ zoning codes currently restrict short-term rentals, changes like those implemented by Portland will be necessary to accommodate residents who are Airbnb hosts as well as protect other residents from nuisance and rising rents.<sup>131</sup> In locations where

121. Ruby, *supra* note 116, at 3.

122. *Id.*

123. *Id.* at 4.

124. *Id.* (noting that the strict standards once applicable to home businesses are being replaced by “performance standards or other flexible zoning techniques”).

125. Patricia E. Salkin, *Zoning for Home Occupations: Modernizing Zoning Codes to Accommodate Growth in Home-Based Businesses*, 35 REAL EST. L.J. 181, 183 (2006).

126. See Jamila Jefferson-Jones, *Can Short-Term Rental Arrangements Increase Home Values? A Case for AirBNB and Other Home Sharing Arrangements*, 13 CORNELL REAL EST. REV. 5, 18 (2015) (discussing *Ewing v. Carmel-by-the-Sea*, 234 Cal. App. 3d, 1579, 1592–93 (1991), and finding that the “court’s definition of ‘community-strengthening’ activities is too limited”).

127. Compare S.F., ADMIN. CODE, § 41A (2014), with N.Y., ADMIN. CODE § 27-265 (1968).

128. See *infra* Part IV.

129. See *infra* Section IV.C.

130. See *infra* Section IV.C.

131. See *infra* Part V.

short-term rentals are allowed, however restricted, the issue of what taxes renters and landlords must pay further complicates the matter.<sup>132</sup>

### C. Taxation Responsibilities

The Constitution grants Congress the power to “lay and collect [t]axes.”<sup>133</sup> Likewise, state legislatures have the power to implement and collect taxes—a power that is subject to limitations imposed by state constitutions’ parallel structures.<sup>134</sup> A well-known tax in many states is the property tax, which is paid by owners of real property based on the property’s value.<sup>135</sup> Income taxes, which are taxes based on the amount of income generated, are also common.<sup>136</sup> Although the duty to pay taxes is generally understood, “it seems as if almost no one involved in the sharing economy knows exactly what taxes they’re supposed to pay, nor when or how to pay them.”<sup>137</sup>

#### 1. The Hotel Tax

A common argument made by hotels is that Airbnb users should pay the “transient occupancy tax” or “hotel tax” that hotels are required to pay.<sup>138</sup> Transient occupancy taxes are separate from income taxes and typically apply to rentals of thirty days or less, but may vary depending on the state or

132. Brad Tuttle, *The Other Complication for Airbnb and the Sharing Economy: Taxes*, TIME (June 15, 2013), <http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes/>.

133. U.S. CONST. art. I, § 8.

134. *Delaney v. Lowery*, 154 P.2d 674, 678 (Cal. 1944) (noting that “[g]enerally the Legislature is supreme in the field of taxation, and the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it”).

135. Chris Seabury, *Property Taxes: How They Are Calculated*, INVESTOPEDIA, [http://www.investopedia.com/articles/tax/09/calculate-property-tax.asp?header\\_alt=c](http://www.investopedia.com/articles/tax/09/calculate-property-tax.asp?header_alt=c) (last updated Dec. 8, 2015).

136. Ken Clark, *Personal Income Tax Guide: Basic Concepts*, INVESTOPEDIA, [http://www.investopedia.com/university/personal-income-tax-guide/tax-guide1.asp?header\\_alt=c](http://www.investopedia.com/university/personal-income-tax-guide/tax-guide1.asp?header_alt=c) (last visited Dec. 21, 2016) (explaining the basics of the progressive tax system and tax “brackets”).

137. See Tuttle, *supra* note 132.

138. Alby Gallun & Ally Marotti, *Hotels to Airbnb Hosts: Pay Up*, CRAIN’S CHI. BUS. (Feb. 14, 2015), <http://www.chicagobusiness.com/article/20150214/ISSUE01/302149989/hotels-to-airbnb-hosts-pay-up> (noting that the Chicago hotel industry views Airbnb collecting hotel taxes as a “step in the right direction but not enough”).

city.<sup>139</sup> Most ordinances define “hotel” broadly for the purpose of the tax, such as “any structure . . . which is occupied or intended or designed for occupancy by transients.”<sup>140</sup> Airbnb has not collected nor paid hotel taxes until recently, even though the taxes arguably apply to Airbnb in all cities that have adopted an expansive definition of hotel.<sup>141</sup> Initially, Airbnb argued that they were not responsible for collecting occupancy taxes because they did not own the rooms being rented and acted merely as an intermediary between host and guest.<sup>142</sup> In response to the increasing backlash from hoteliers and city governments, Airbnb has offered to pay transient occupancy taxes in some locations and has included information on its website for hosts who may be required to pay the taxes based on their city’s code.<sup>143</sup>

Airbnb hosts are undoubtedly subject to income tax—rental income must generally be reported in addition to income earned from other sources.<sup>144</sup> While this obligation is relatively straightforward and easily accomplished through familiar tax forms, paying transient occupancy taxes is not so simple.<sup>145</sup> Although Airbnb now directly collects and remits transient occupancy taxes upon booking in some cities, such as San Francisco and Chicago, hosts in other locations are still expected to collect

139. Ann Carrns, *Lodging Taxes and Airbnb Hosts: Who Pays, and How*, N.Y. TIMES (June 16, 2015), [http://www.nytimes.com/2015/06/17/your-money/lodging-taxes-and-airbnb-hosts-who-pays-and-how.html?\\_r=0](http://www.nytimes.com/2015/06/17/your-money/lodging-taxes-and-airbnb-hosts-who-pays-and-how.html?_r=0) (explaining that some cities allow Airbnb to collect hotel taxes directly, whereas “hosts in other locations are supposed to collect and pay the tax themselves”).

140. L.A., MUNI. CODE § 4.72.020 (2012) (including within the definition of hotel “any hotel, inn, tourist home or house, motel, studio hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, mobilehome or house trailer at a fixed location, or other similar structure or portion thereof”).

141. See Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 1020, 1039 (2016); see also Verne Kopytoff, *Airbnb’s Woes Show How Far the Sharing Economy Has Come*, TIME (Oct. 7, 2013), <http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come/> (explaining Airbnb’s initial response to collecting hotel taxes as “[y]our laws are outdated and don’t apply to innovative businesses like ours”).

142. See Shu-Yi Oei, *supra* note 141, at 1045.

143. See Carrns, *supra* note 139; *What Is Occupancy Tax? Do I Need to Collect or Pay It?*, AIRBNB, <https://www.airbnb.com/help/article/654/what-is-occupancy-tax--do-i-need-to-collect-or-pay-it> (last visited Dec. 21, 2016).

144. See Tuttle, *supra* note 132 (noting that Airbnb provides 1099-Misc forms to hosts responsible for rental income taxes); see also Shu-Yi Oei, *supra* note 141, at 1014 (“Home sharing hosts must include rents received in gross income and may deduct qualified deductions in computing net taxable income.”).

145. See Shu-Yi Oei, *supra* note 141, at 1014.

and pay the taxes themselves.<sup>146</sup> Most hosts are unfamiliar with this type of tax, and they are unlikely to collect it even if alerted of the requirement by Airbnb.<sup>147</sup> The phrase “hotel tax,” which the transient occupancy tax is often called, may also give hosts the wrong impression, because most hosts do not see themselves as running hotels and thus believe they should not have to pay the tax.<sup>148</sup> The policy and legislative manager for the San Francisco Office of the Treasurer and Tax Collector has clarified that the hotel tax is “a tax on the transient occupant, not on the hotel or person hosting a short-term rental.”<sup>149</sup> Technically, hosts are responsible for paying the hotel tax even if they do not collect it from their renters—a fact that may motivate hosts in cities like New York to consider taking steps to collect hotel taxes or else run the risk of paying out of pocket.<sup>150</sup>

Further, many cities have yet to clarify whether Airbnb hosts are responsible for the taxes for fear of implying that the rentals are legal.<sup>151</sup> Even in cities that have determined what taxes must be paid, the question of how to pay them remains.<sup>152</sup> In San Francisco, for example, hosts must register with the city as a business and pay the application fee to obtain a certificate of authority that allows them to collect the tax.<sup>153</sup> One commentator notes that registering as a business with the city is unappealing to many hosts who simply want to rent out a spare room in their home, and

146. *See id.* For a full list of where Airbnb currently collects and remits occupancy taxes, see *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, <https://www.help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available> (last visited Dec. 21, 2016) [hereinafter *Occupancy Tax Availability*]. Guests visiting Airbnb rentals in the cities listed will be charged the tax upon booking. *Id.* Airbnb’s website also lists the amount of occupancy tax that must be paid in each location. *How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, AIRBNB <https://www.airbnb.com/help/article/1036/how-does-occupancy-tax-collection-and-remittance-by-airbnb-work> (last visited Dec. 21, 2016).

147. *See Tuttle, supra* note 132 (explaining the issues surrounding individual hosts paying hotel taxes).

148. *See id.*

149. *See id.*

150. *Occupancy Tax Rates Every Airbnb Host Should Know*, SHARED ECON. CPA (Sept. 21, 2015), <http://www.sharedeconomycpa.com/blog/occupancy-tax-rates-every-airbnb-host-should-know>; *see also infra* Section IV.B.

151. *See Tuttle, supra* note 132.

152. *See id.* According to San Francisco’s Policy and Legislative Manager, Greg Kato, “there is indeed a process for an Airbnb host to collect and pay TOTs. First, the host must register as a business with the treasurer and get a certificate of authority to collect the tax. There are some application fees involved . . . and quarterly filings of taxes with the city.” *Id.*

153. *See id.*

who may fear that registering will expose other issues with their rental plan.<sup>154</sup> Due to these factors, very few hosts collect and remit occupancy taxes, which has in turn led cities to claim large estimated losses in tax revenue.<sup>155</sup>

## 2. Ramifications of Requiring Payment of Hotel Taxes

Airbnb's failure to collect transient occupancy taxes give Airbnb a commercial advantage over other forms of lodging that do collect the taxes.<sup>156</sup> Without the taxes, Airbnb listings are generally less expensive than traditional accommodations.<sup>157</sup> However, some argue that even if Airbnb were to collect occupancy taxes from all hosts based on their city's unique rate, Airbnb would still continue to thrive.<sup>158</sup>

Airbnb guests already pay a rate that is much lower than that of any nearby hotel; an additional percentage is not likely to affect their decision to stay in a particular place. In fact, increased options for cheaper lodging might bring more tourists to the city, increasing revenue for local businesses.<sup>159</sup>

Cities that allow Airbnb to collect taxes from guests upon booking are essentially condoning short-term rentals, and individuals who feared that renting their space was illegal may then be motivated to become hosts, creating more options for renters in "local" areas.<sup>160</sup> Airbnb has noted that, in many cities, the majority of Airbnb listings are located outside of central hotel districts, and visitors end up spending a majority of their money in the

154. *See id.*

155. *See id.* San Francisco's *Bay Guardian* has estimated that the transient occupancy taxes that should be collected from guests amounts to at least 1.8 million dollars per year. *Id.* As of 2014, another source has estimated that the number could be as high as 11 million per year in San Francisco alone. Carolyn Said, *S.F. Could Get \$11 Million a Year When Airbnb Collects Hotel Tax*, SFGATE (Sept. 18, 2014), <http://www.sfgate.com/business/article/S-F-could-get-11-million-a-year-when-Airbnb-5762838.php>.

156. *See* Shu-Yi Oei, *supra* note 141, at 1045–46.

157. Michael Giaquinto, *Why New York Should Listen to Airbnb's Appeal for Taxation*, TAXANALYSTS (Apr. 3, 2015), <http://www.taxanalysts.org/content/why-new-york-should-listen-airbnbs-appeal-taxation>.

158. *Id.*

159. *Id.*

160. *Id.*

host's neighborhood.<sup>161</sup>

On the other hand, economists argue that the benefits gained from visitors using Airbnb far outweigh the supposed tax losses.<sup>162</sup> A recent study noted that in San Francisco alone, Airbnb guests spent 338 million dollars during the past year, of which 105 million dollars went to hosts.<sup>163</sup> Further, this spending has generated 5.5 million dollars in sales tax revenue over a year-long period. When considered overall, these expenditures dwarf the 11 million dollars of hotel taxes the city claims Airbnb is depriving it of.<sup>164</sup> Many hosts believe that the benefits they receive from renting their space will be minimized if they are required to pay the high hotel taxes some cities impose.<sup>165</sup> One resident explained that paying the additional taxes "puts a wet blanket on the whole idea of short term rentals."<sup>166</sup>

Despite many hosts' general aversion to paying hotel taxes, eight cities in California have reached agreements with Airbnb that require the company to collect and remit taxes from visiting guests.<sup>167</sup> One argument in favor of this type of arrangement is that tax agreements benefit Airbnb by legitimizing the service.<sup>168</sup> Cities argue that because the tax is to be paid by the transient visitor, it should be paid whether the person stays in a traditional hotel or an Airbnb's host's home, because the underlying purpose of the tax is to fund services that maintain the city's functionality and appeal

161. See *Airbnb Economic Impact Report*, *supra* note 10 (highlighting that an Airbnb visitor to New York spends approximately 880 dollars at New York businesses, of which 740 is spent in the neighborhood where the rental is located).

162. *Id.*; see also David Owen, *Supporting Local Neighborhood Spending in San Francisco*, AIRBNB (Aug. 31, 2015), <http://publicpolicy.airbnb.com/supporting-local-neighborhood-spending-san-francisco/>.

163. See Owen, *supra* note 162.

164. *Id.*; see also Raz Godelnik, *Airbnb Claims \$56M Contribution to San Francisco's Economy*, TRIPLE PUNDIT (Nov. 5, 2012), <http://www.triplepundit.com/special/rise-of-the-sharing-economy/new-study-shows-airbnb-contributes-56-million-san-franciscos-economy-real-figure/>.

165. Andrea Gardner, *Airbnb in Negotiations with Los Angeles over Collecting Occupancy Taxes*, 89.3 KPCC (Feb. 11, 2015), <http://www.scpr.org/news/2015/02/11/49756/airbnb-in-negotiations-with-los-angeles-over-colle/>.

166. *Id.*

167. Guy Marzorati, *On Airbnb Rentals, Some California Cities Tax First and Regulate Later*, KQED NEWS (Nov. 6, 2015), <http://ww2.kqed.org/news/2015/11/04/california-cities-tax-airbnb-regulation>; see also *supra* note 146 and accompanying text.

168. See also *supra* note 146. Even though the belief is flawed, it is commonly believed that taxes cannot be collected on illegal activities; thus, residents may believe their city allows Airbnb rentals if Airbnb collects and remits the hotel tax. See Giaquinto, *supra* note 157.

for residents and nonresidents alike.<sup>169</sup> Even though hosts who collect the tax will have to increase the amount they collect from guests to account for their city's occupancy tax rate, the cost will likely still be lower than traditional hotels.<sup>170</sup> Even though many cities across the globe have concluded that the tax must be paid by hosts, few have stated that Airbnb is required to collect and remit the tax itself.<sup>171</sup> Cities without a tax-collecting agreement with Airbnb are likely to find that the tax will go uncollected by hosts until stricter enforcement measures are taken.<sup>172</sup>

Although one commentator has argued that Airbnb hosts should pay a specialized, lesser rate than the city's hotel tax, it appears that Airbnb is amenable to paying the current hotel tax.<sup>173</sup> Indeed, Airbnb has not argued that a lesser rate should apply to its rentals, but instead has consented to paying the current hotel rates in many cities.<sup>174</sup> The next section details the approaches of three cities with respect to Airbnb regulation generally, including taxation, which appears to be a strong motivator for cities that have embraced Airbnb.<sup>175</sup> Although San Francisco was one of the first cities to amend its laws to legalize certain short-term rentals, there are several problems with its model.<sup>176</sup> Cities contemplating similar changes to their short-term rental bans should instead look to Portland's model for

169. Cory Briggs, *Who Runs San Diego: The Use and Abuse of the Transient Occupancy Tax*, SAN DIEGO FREE PRESS (Sept. 3, 2014), <http://sandiegofreepress.org/2014/09/who-runs-san-diego-the-use-and-abuse-of-the-transient-occupancy-tax/>.

170. See Giaquinto, *supra* note 157 (proposing a plan for collecting hotel taxes from Airbnb in New York City).

171. See Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 109 (2015); *San Francisco, CA*, AIRBNB, <https://www.airbnb.com/help/article/871/san-francisco--ca> (last updated Apr. 5, 2016) (explaining San Francisco's policy requiring Airbnb to collect and remit a 14 percent Transient Occupancy Tax).

172. Ben Trefny, *Airbnb to Start Charging Hotel Taxes in a Handful of Cities*, NPR (Apr. 18, 2014), <http://www.npr.org/sections/alltechconsidered/2014/04/18/304564169/airbnb-to-start-charging-hotel-taxes-in-a-handful-of-cities>.

173. See Giaquinto, *supra* note 157 (arguing that "Airbnb is not a hotel service" and cities should create a separate tax rate for Airbnb); see also Marcus Wohlsen, *Airbnb: Our Rooms Should Be Taxed Like Hotels*, WIRED (Oct. 13, 2013), <http://www.wired.com/2013/10/airbnb-taxes/>.

174. See *Occupancy Tax Availability*, *supra* note 146; see also Marzorati, *supra* note 167; Alison Griswold, *Why Airbnb Desperately Wants to Pay Hotel Taxes and Why Some Cities Won't Let It*, SLATE (Feb. 13, 2015), [http://www.slate.com/articles/business/moneybox/2015/02/airbnb\\_hotel\\_taxes\\_why\\_does\\_the\\_sharing\\_economy\\_startup\\_want\\_to\\_pay\\_them.html](http://www.slate.com/articles/business/moneybox/2015/02/airbnb_hotel_taxes_why_does_the_sharing_economy_startup_want_to_pay_them.html).

175. See *infra* Part IV.

176. See Kerr, *infra* note 189; see also *infra* Sections IV.A.3–4.

guidance.<sup>177</sup> Through continuous updates and revisions, Portland has achieved a system that protects an individual's ability to engage in short-term rentals, with appropriate limitations.<sup>178</sup> Portland is also ahead of other cities in enforcing its new laws, which ensures that the intended protections imbedded in the system are realized.<sup>179</sup>

#### IV. REGULATING AIRBNB: A CITY-BASED APPROACH

##### A. *San Francisco*

###### 1. San Francisco's Historical Battle Against Short-Term Rentals

San Francisco is Airbnb's home city.<sup>180</sup> As a major tourist destination and home to over 850,000 residents, it is no surprise that San Francisco has been at the forefront of analyzing Airbnb's impact.<sup>181</sup> San Francisco's historically limited number of rentable units and high rent prices has contributed to the city's fears regarding Airbnb and the potential for the creation of illegal hotels.<sup>182</sup>

The term "illegal hotel" is often used to describe a residential apartment or other unit that is being rented out for short periods of time.<sup>183</sup> Notably, the short-term rental of residential units was a concern for densely populated cities like San Francisco even before Airbnb and other home-sharing platforms arose, and until recently, San Francisco's administrative code prohibited short-term rentals of less than thirty days.<sup>184</sup> This restriction

177. *See infra* Section IV.C.

178. *See infra* Section IV.C.

179. *See infra* Section IV.C.2; *see also* Dan Peltier, *Airbnb Faces Big Fines in Portland if Hosts Don't Get City Permits*, SKIFT (Feb. 23, 2015), <http://skift.com/2015/02/23/airbnb-faces-big-fines-in-portland-if-hosts-dont-get-city-permits/> (explaining that the city will begin fining Airbnb and similar companies for listing units from hosts without permits).

180. *About Us*, *supra* note 41.

181. *Quickfacts: San Francisco County, California*, U.S. CENSUS BUREAU, (Dec. 2, 2015), <http://www.census.gov/quickfacts/table/AGE115210/06075> (reporting San Francisco's population estimates as of July 1, 2016).

182. Carolyn Said, *The Airbnb Effect*, S.F. CHRON. (July 12, 2015), <http://www.sfchronicle.com/airbnb-impact-san-francisco-2015/#1>.

183. *See* Colin Moynihan, *A Bill to Stop Illegal Hotels, and a Protest*, N.Y. TIMES (July 18, 2010), <http://www.nytimes.com/2010/07/19/nyregion/19hotel.html>.

184. S.F., CAL., ADMIN. CODE § 41A.4(c) (2013); *see also* Dana Palombo, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U.

prevented landlords of residential units from turning units or entire building into an illegal hotel by forcing out long-term tenants and renting the units for only short-term stays instead.<sup>185</sup> The intended result of prohibiting short-term rentals was to keep long-term residents in their homes, preserve the character of neighborhoods, and control the affordability of rental units by avoiding cost increases associated with shortage.<sup>186</sup> Concerns for safety are also behind regulations that prohibit illegal hotels, as short-term rentals subject neighbors to the presence of strangers who may not have been subject to background checks, and subject guests to homes that may not have been properly maintained.<sup>187</sup> Additionally, many insurance policies held by landlords may not cover hotel-like operations.<sup>188</sup>

## 2. Modernizing the Code to Allow for Short-Term Rentals

San Francisco was one of the first cities to contemplate amending its code to allow for short-term rentals.<sup>189</sup> In October 2014, Mayor Ed Lee

BUS. L. REV. 287, 309 (2015) (noting that short-term rentals violated San Francisco's administrative code).

185. *SF Landlords Sued by City Pay \$276,000 Fine for Short-Term Renting: Are NYC Landlords Next?*, BRICKUNDERGROUND (May 8, 2015), [http://www.brickunderground.com/blog/2015/05/sf\\_landlords\\_hit\\_with\\_penalties\\_for\\_short\\_term\\_renting\\_are\\_nyc\\_landlords\\_next](http://www.brickunderground.com/blog/2015/05/sf_landlords_hit_with_penalties_for_short_term_renting_are_nyc_landlords_next); see also Gerry Shih, *San Francisco Sues Landlords Who Evicted Tenants for Airbnb*, REUTERS (Apr. 23, 2014), <http://www.reuters.com/article/airbnb-lawsuit-idUSL2N0NF1UO20140423>. Landlords, alternatively, argue that they can also be the victim of illegal hotels when their tenants rent the unit for profit on a short-term basis. See Palombo, *supra* note 184, at 310 (“Many landlords dislike when tenants profit off of their property.”).

186. See Jefferson-Jones, *supra* note 126, at 12.

187. Sofia Ranchordas, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413, 459–60 (2015) (“Sharing economy practices can raise multiple safety concerns regarding the background checks of drivers and house hosts, safety of vehicles and facilities, location of houses and the position of neighbors, driving or other skills required for the task, and sufficient insurance.”); see also Tom Newcombe, *Airbnb Given Safety Standards Warning*, BBT (July 17, 2014), <http://buyingbusinessstravel.com/news/1722814-airbnb-issued-safety-standards-warning>.

188. Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html> (noting that “[m]ost homeowner’s and renter’s insurance policies do not cover regular commercial activity in the home”). Therefore, if a guest was hurt in a unit, the landlord may be personally liable to the guest without help from insurance. *Id.*

189. Dara Kerr, *San Francisco Mayor Signs Landmark Law Making Airbnb Legal*, CNET (Oct. 28, 2014), <http://www.cnet.com/news/san-francisco-mayor-makes-airbnb-law-official/> (noting that over the past two years, the bill has been subject to countless changes and modifications as numerous groups of dissenters have attempted to keep short-term rentals illegal).

signed a bill—colloquially referred to as the “Airbnb Ordinance”—legalizing short-term rentals albeit in a “highly regulated manner.”<sup>190</sup> First, the exception to the ban against short-term rentals only applies to permanent residents of San Francisco who reside in the unit for at least 275 days per year.<sup>191</sup> Furthermore, permanent residents may only rent their dwellings to transient visitors for a maximum of ninety days per year—unless they are also residing in the dwelling during the visitor’s stay, in which case there is no limitation of the number of rental days allowed.<sup>192</sup> Further, permanent residents may only rent out their primary residences, which prevents landlords from evicting tenants to create illegal hotels.<sup>193</sup>

The Airbnb Ordinance also requires that hosts undergo a permitting process, which includes: (1) registering with the Office of Short-Term Rentals; (2) obtaining a business license from the Treasurer and Tax Collector’s office; (3) declaring qualified website company and small operator status with the Treasurer and Tax Collector’s office; and (4) obtaining a certificate of authority from the Treasurer and Tax Collector’s office.<sup>194</sup> The city has created a “Short-Term Residential Rental Starter Kit,” available online, which consists of a guide, permits, and other related documents, to help interested parties understand the law along with eligibility and permitting requirements.<sup>195</sup> The Starter Kit explains that hosts who list their space solely under the “Qualified Website Company” category are not required to collect transient occupancy taxes from their guests because the website company collects the tax upon booking; as of now,

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190. See Palombo, *supra* note 184, at 315. The legislation was drafted by San Francisco Board of Supervisors President David Chiu, a supporter of peer-to-peer lending. See Joshua Sabatini, *Chiu Introduces Legislation Seeking to Restrict Use of Short-Term Housing Rental Services Such as Airbnb*, S.F. EXAMINER (Apr. 16, 2014), <http://archives.sfexaminer.com/PoliticsBlog/archives/2014/04/16/chiu-introduces-legislation-seeking-to-restrict-use-of-short-term-housing-rental-services-such-as-airbnb>.

191. S.F., CAL., ADMIN. CODE § 41A.5(g) (2015). According to the ordinance, a permanent resident is “[a] person who occupies a Residential Unit for at least 60 consecutive days with intent to establish that unit as his or her primary residence. A Permanent Resident may be an owner or a lessee.” *Id.* § 41A.4; see also *Short-Term Residential Rental Starter Kit*, S.F. BUS. PORTAL (Sept. 25, 2015), <http://businessportal.sfgov.org/start/starter-kits/short-term-rental>.

192. See *Short-Term Residential Rental Starter Kit*, *supra* note 191; see also *San Francisco, CA*, *supra* note 171.

193. Stephen Fishman, *Overview of Airbnb Law in San Francisco*, NOLO, <http://www.nolo.com/legal-encyclopedia/overview-airbnb-law-san-francisco.html> (last visited Dec. 22, 2016).

194. See *Short-Term Residential Rental Starter Kit*, *supra* note 191.

195. See *id.*

Airbnb is the only Qualified Website Company.<sup>196</sup> Hosts who do not list solely through Airbnb are still responsible for collecting the taxes and must remit them either yearly or monthly depending on the amount of money the host earns from renting the dwelling.<sup>197</sup>

### 3. Is the Permitting System All It Is Cracked up to Be?

Although the passage of the initial Airbnb Ordinance was considered a success for Airbnb, the company continues to face pushback from those who want the regulations to be more stringent.<sup>198</sup> Recently, Airbnb spent approximately eight million dollars fighting Proposition F, a ballot measure that would have imposed further restrictions on San Francisco residents' ability to rent out their spaces for short lengths of time.<sup>199</sup> The proposition was defeated by a large margin, which shows that a majority of residents believe the benefits of short-term rentals outweigh the possible negative effects.<sup>200</sup>

196. *See id.*

197. *See id.* If a host makes less than 40,000 dollars per year from short-term rentals, the host can choose to register as a "small operator," which allows the host to pay the required transient occupancy taxes on a yearly basis, instead of monthly. *Id.*

198. *See* Kerr, *supra* note 189; *see also* Noah Kulwin, *2016 Will Be a Good Year—and a Hard Year—for Airbnb*, RECODE (Dec. 31, 2015), <http://recode.net/2015/12/31/like-2015-next-year-will-probably-be-pretty-good-for-airbnb-but-it-wont-come-easily/> (noting the challenge posed by Proposition F).

199. Kulwin, *supra* note 198; *see also* *City of San Francisco Initiative to Restrict Short-Term Rentals, Proposition F (November 2015)*, BALLOTPEdia, [https://ballotpedia.org/City\\_of\\_San\\_Francisco\\_Initiative\\_to\\_Restrict\\_Short-Term\\_Rentals,\\_Proposition\\_F\\_\(November\\_2015\)](https://ballotpedia.org/City_of_San_Francisco_Initiative_to_Restrict_Short-Term_Rentals,_Proposition_F_(November_2015)) (last visited Dec. 22, 2016). Among other restrictions, the measure sought to limit the number of short-term rentals to seventy-five nights per year per unit, and eliminate short-term renting of "in-law" units. *Id.*

200. Carolyn Said, *Prop. F: S.F. Voters Reject Measure to Restrict Airbnb Rentals*, SFGATE, <http://www.sfgate.com/bayarea/article/Prop-F-Measure-to-restrict-Airbnb-rentals-6609176.php> (noting that "Airbnb had a potent weapon besides its massive campaign war chest. A jaw-dropping 138,000 city residents stayed in Airbnb rentals or hosted guests themselves in the past year") (last updated Nov. 4, 2015). Voters struck down Proposition F even in light of Airbnb's billboard campaign, which was highly criticized as "passive-aggressive and tone-deaf," which tends to show that residents opposed the measure based on their desire to share spaces, not necessarily because they support Airbnb as a company. *See* BALLOTPEdia, *supra* note 165. For example, one of Airbnb's billboards stated: "Dear Public Library System, We hope you use some of the \$12 million in hotel taxes to keep the library open later." *See* Julia Carrie Wong, *Airbnb Apologizes for Passive Aggressive Ads on Minu Shelters (UPDATED)*, SF WKLY. (Oct. 21, 2015), <http://archives.sfweekly.com/thesnitch/2015/10/21/passive-aggressive-pro-airbnb-ads-appear-on-muni-shelters>. Airbnb issued a public apology in response. *See* BALLOTPEdia, *supra* note 165.

The Airbnb Ordinance benefits San Francisco by providing an initial means of regulation for short-term rentals.<sup>201</sup> Airbnb and other similar platforms will remain and likely continue to grow in popularity, whether they are endorsed by the city or not.<sup>202</sup> “By regulating these companies, users have the opportunity to comply with the law, whereas if these services are available but illegal, users are pigeonholed into breaking the law.”<sup>203</sup> Under the Airbnb Ordinance, cities will not only continue to gain revenue from visiting tourists who spend money at local attractions, but will also receive income from hosts’ filing fees and the hotel taxes collected and remitted by Airbnb.<sup>204</sup> Moreover, hosts are able to offset a portion of their living expenses and provide a unique local experience to guests.<sup>205</sup> Although there are clear benefits from the Airbnb Ordinance, some question whether the law will really change anything.<sup>206</sup>

#### 4. Continuing Problems with Enforcement

One criticism of the permissive regulation system, and other systems like it, is that enforcement continues to present a problem.<sup>207</sup> Lack of

201. See Palombo, *supra* note 184, at 314–19.

202. See *id.* at 318.

203. *Id.*

204. See *Short-Term Residential Rental Starter Kit*, *supra* note 191, at 5 (noting that the initial filing fee is fifty dollars).

205. See AIRBNB, AIRBNB SUMMER TRAVEL REPORT: 2015 2, 8 (2015), <http://blog.airbnb.com/wp-content/uploads/2015/09/Airbnb-Summer-Travel-Report-1.pdf> (noting that “the majority of Airbnb hosts are sharing their space to make ends meet” and give guests “the chance to have a unique, local travel experience”).

206. See Roberto Roldan, *Other Cities Warn of Airbnb Regulation Pitfalls*, COURIER J. (Aug. 2, 2015), <http://www.courier-journal.com/story/money/2015/07/30/cities-warn-airbnb-regulation-pitfalls/30896135/> (“Officials from San Francisco also say regulations are ‘unenforceable’ without more cooperation from the largest short-term rental sites.”).

207. See Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1089–91 (2015) (noting that “[p]olicing sharing platforms often proves more difficult than enacting legislation”); see also Jefferson-Jones, *supra* note 126, at 13–15 (arguing that “current short-term rental restriction can be divided into six types: (1) full prohibitions; (2) geographically-based restrictions; (3) quantitative restrictions; (4) proximity restrictions; (5) operational restrictions; and (6) licensing requirements”); CITY OF SANTA FE, N.M., CODE § 14-6.2(A)(6)(a)(i) (2011) (limiting the number of short-term rental permits to 350, unless the unit in question qualifies as an accessory dwelling unit, owner-occupied unit, or unit located within a development containing resort facilities); MENDOCINO CTY., CAL., CODE § 20.748.020(A) (1995) (requiring that a ratio of thirteen long-term to one short-term dwelling units be maintained in the county); SAN LUIS OBISPO CTY., CAL., CODE § 23.08.165(c) (2012) (prohibiting residential vacation rentals from being established

enforcement is not a new issue—before the Airbnb Ordinance, the city responded to complaints of violations, but did not actively seek out individuals who were in violation of the then-existing ban on short-term renting.<sup>208</sup> San Francisco has responded to fears about enforcing the Airbnb Ordinance by creating a new Office of Short-Term Rental Administration and Enforcement.<sup>209</sup> Furthermore, the city “has started a new wave of enforcement, sending violation letters to 15 hosts for allegedly turning 73 residential units into full-time hotels.”<sup>210</sup> The Airbnb Ordinance makes the requirements clear, allowing hosts to more readily comply with the law, even though they may find the permitting process “cumbersome.”<sup>211</sup> The city admits that finding violators will continue to depend “heavily on complaints,” but it intends to focus on “outreach to encourage compliance.”<sup>212</sup> Enforcing pro-sharing regulations is more complicated than enforcing a total ban, which is the approach that New York City—the U.S. city with the most Airbnb listings—is attempting to take.<sup>213</sup>

## B. New York City

### 1. New York City’s Steadfast Attempt to Adhere to the Multiple Dwelling Law

New York City boasts the most Airbnb listings in the United States, and the second most on an international scale.<sup>214</sup> According to one study, 400

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within two hundred feet of an existing residential vacation rental on the same block); ISLE OF PALMS CITY, S.C., CODE § 5-4-202(1) (2007) (limiting overnight occupancy to two persons per bedroom, plus an additional two persons).

208. See Palombo, *supra* note 184, at 314 (noting that “[t]he Department of Building Inspection (‘DBI’) enforces these provisions, but often does not take action unless neighbors or landlords complain”).

209. See Carolyn Said, *S.F. to Create City Office to Enforce Airbnb Law*, SFGATE (July 2, 2015), <http://www.sfgate.com/business/article/S-F-to-create-city-office-to-enforce-Airbnb-law-6361832.php>.

210. *Id.*

211. *Id.*

212. *Id.*

213. Will Coldwell, *Paris Becomes Airbnb’s Top Home-Sharing City Destination*, GUARDIAN (Feb. 27, 2015), <http://www.theguardian.com/travel/2015/feb/27/paris-becomes-airbnbs-top-home-sharing-city-destination> (noting that New York City is the second most popular city with 34,000 listings).

214. *Id.* With more than 40,000 listings, Paris boasts the most Airbnb listings. *Id.*

thousand Airbnb guests visited New York City between 2012 and 2013, and spent 632 million dollars.<sup>215</sup> Like San Francisco before the Airbnb Ordinance, New York City's Multiple Dwelling Law (MDL) restricts short-term rentals by requiring certain types of dwellings to be used for "permanent residence purposes" only.<sup>216</sup> But unlike San Francisco, New York City's response to the growing popularity of short-term rentals is to crack down on enforcement of the MDL.<sup>217</sup> According to the MDL's primary sponsor, New York State Senator Liz Krueger, the purpose behind the legislation was to eliminate illegal hotels in New York's notably scarce housing market.<sup>218</sup> Regardless of its intended purpose, the law poses a problem for many Airbnb hosts.<sup>219</sup> In an October 2014 report, New York State Attorney General, Eric Schneiderman, claimed "72% of unique units used as private short-term rentals on Airbnb" were illegal.<sup>220</sup> The report spurred considerable debate as many New Yorkers struggled to understand how their infrequent Airbnb activity could land them the title of "hotelier."<sup>221</sup>

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215. See *Airbnb Economic Impact Report*, *supra* note 10. As of 2014, 760,000 visitors stayed in New York City via Airbnb. *The Tremendous Impact of Airbnb in New York*, AIRBNB ACTION (May 12, 2015) [hereinafter *Airbnb in New York*], <http://publicpolicy.airbnb.com/tremendous-impact-new-york> ("Last year alone, more than 760,000 visitors to New York stayed in Airbnb properties, up 84 percent from August 2012 to July 2013.").

216. N.Y. MULT. DWELL. LAW § 4(8)(a) (McKinney 2011).

217. See, e.g., Shawn Hessinger, *New York Cracks Down on Short Term Rentals and Airbnb*, SMALL BUS. TRENDS (Dec. 22, 2015), <http://smallbiztrends.com/2015/12/new-york-cracks-down-short-term-rentals-airbnb.html>; Jennifer Fermino, *New York City Will Spend \$10M to Crack Down on Illegal Hotels*, DAILY NEWS (Nov. 16, 2015), <http://www.nydailynews.com/new-york/nyc-spend-10m-crack-illegal-hotels-article-1.2436047>.

218. See Kaplan, *supra* note 171, at 111 (noting that the law was "responsive to an issue that predated Airbnb's existence" and was not meant to target people "renting out [their] apartment[s] for a couple of days"). San Francisco's pre-Airbnb Ordinance law was aimed at prohibiting the same activity. See *supra* Section V.A.1.

219. See *infra* notes 220–21 and accompanying text.

220. Schneiderman, *supra* note 76, at 8 (arguing that seventy-two percent is even possibly an understatement).

221. See Hari Sreenivasan, *Why Is New York City Cracking Down on Airbnb?*, PBS (Aug. 1, 2015), <http://www.pbs.org/newshour/bb/will-new-york-city-shut-airbnb-2/> (interviewing an Airbnb host who lamented, "It's really hard for me to feel like my home is a hotel").

## 2. Nigel Warren's Case

The statistics Mr. Schneiderman reported were not just a scare tactic—consider the highly publicized case of Nigel Warren.<sup>222</sup> After receiving permission from his roommate, Mr. Warren used Airbnb to rent out his room in their shared apartment during a three-night trip.<sup>223</sup> When he returned, his landlord notified him that a city inspector had issued violations for the short-term rentals taking place in the building, with fines potentially reaching a staggering forty-thousand dollars.<sup>224</sup> An administrative judge found that Mr. Warren had violated the MDL, but the decision was reversed on appeal.<sup>225</sup> Mr. Warren, with the help of a team from Airbnb, successfully argued that the MDL allows short-term rentals as long as a permanent occupant of the unit is present during the stay.<sup>226</sup>

Although Mr. Warren's case proved that the MDL's reach is limited, it also made it clear that many hosts violate the MDL by listing their space on Airbnb as available when they are not present.<sup>227</sup> In a grand effort to root out violators, Attorney General Schneiderman subpoenaed user data from Airbnb, which was eventually provided after steps were taken to protect hosts' privacy.<sup>228</sup> Ultimately, Schneiderman requested identifying information for 125 hosts identified as potential bad actors—those renting out a large amount of rooms or units—the “majority of whom were no

222. See Tomio Geron, *Airbnb Wins New York City Appeal on Short-Term Rentals*, FORBES (Sept. 27, 2013), <http://www.forbes.com/sites/tomiogeron/2013/09/27/airbnb-wins-new-york-city-appeal-on-short-term-rentals/#f581e2319464>.

223. Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html>.

224. *Id.*

225. See Geron, *supra* note 222.

226. See David Hantman, *Huge Victory in New York for Nigel Warren and Our Host Community*, AIRBNB (Sept. 27, 2013), <http://publicpolicy.airbnb.com/huge-victory-new-york-nigel-warren-host-community/>; see also *City of New York v. Carrey*, App. Nos. 1300602, 1300736, at \*5–6 (N.Y. Evtl. Control Bd., Sept. 26, 2013) (finding that “the occupancy of the cited Class ‘A’ apartment by a tourist for less than thirty consecutive days while a permanent occupant was present in the apartment is consistent with using such apartment for permanent residence purposes” under section 4 of the MDL). In *Carrey*, the board explained that Mr. Warren's roommate was a permanent resident of the apartment, and thus the MDL “expressly allows a paying, lawful boarder, roomer, or lodger, such as the Russian tourist, to live a few days within the household of [Mr. Warren's roommate], the permanent occupant.” *Id.* at \*5.

227. See N.Y. MULT. DWELL. LAW § 4 (McKinney 2011).

228. See Kaplan, *supra* note 171, at 113–14.

longer active Airbnb hosts.”<sup>229</sup> Although it appears that the city is only targeting “commercial” style listings, that does not mean that individuals who only list their own apartments are off the hook.<sup>230</sup> As explained previously, these rentals are still illegal under the plain language of the MDL, despite reassurance that the law was not meant to target people “renting out [their] apartment[s] for a couple of days.”<sup>231</sup> Furthermore, landlords whose leases prohibit subleasing may still take action against tenants who host through Airbnb, even if the city does not take action against them.<sup>232</sup>

### 3. New York City Holds Hosts Responsible for Hotel Tax

Although New York considers many short-term rentals illegal, the city nonetheless deems hosts responsible for paying hotel taxes.<sup>233</sup> Initially, New York courts held that Airbnb was not responsible for collecting the hotel tax because Airbnb “is neither a hotel operator nor a room remarketer.”<sup>234</sup> In his report, however, Attorney General Schneiderman clarified that the city expects hosts to pay the hotel tax.<sup>235</sup> Even though Airbnb originally maintained that it was not required to collect the tax on behalf of hosts, the company now requests permission to do just that.<sup>236</sup> Interestingly, New York has not been amenable to this solution, but the hotel industry has

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229. See Kaplan, *supra* note 171, at 114; see also Palombo, *supra* note 184, at 303 (noting that “Airbnb contends that most of its hosts do not abuse the platform” and that Airbnb “removed about 2,000 listings that made NYC ‘worse, not better’”).

230. See Katz, *supra* note 207, at 111.

231. *Id.*

232. See *supra* Section III.A.4.

233. See Schneiderman, *supra* note 76, at 9.

234. Beth Goldman, *Request for Letter Ruling: New York City Hotel Room Occupancy Tax*, N.Y. CITY DEP’T OF FIN. 5 (Aug. 21, 2013), [http://www1.nyc.gov/assets/finance/downloads/pdf/redacted-letter-rulings/hotel/lr13\\_4939.pdf](http://www1.nyc.gov/assets/finance/downloads/pdf/redacted-letter-rulings/hotel/lr13_4939.pdf) (noting that “because [Airbnb] is not a party to the rental contract between the hotel and the Traveler, it has no obligation to collect and remit the [hotel tax]”).

235. Schneiderman, *supra* note 76, at 9; see also *Hotel Room Occupancy Tax*, NYC DEP’T FIN., <http://www1.nyc.gov/site/finance/taxes/business-hotel-room-occupancy-tax.page> (last visited Dec. 22, 2016) (explaining that hotel taxes must be paid by occupants of a room in a hotel, which includes apartments, unless the rooms are rented for less than fourteen days “or are only rented once or twice during any four consecutive tax quarters of a [twelve]-month filing period”).

236. Palombo, *supra* note 184, at 304. Airbnb now collects and remits taxes from cities across the globe. See Kaplan, *supra* note 162 and accompanying text.

argued that allowing Airbnb to collect taxes would legalize the operation.<sup>237</sup> But the argument that collecting taxes on “illegally” earned income would make the illegal actions legal does not hold water.<sup>238</sup> The Supreme Court has stated that it sees “no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.”<sup>239</sup> Thus, it appears that New York City could continue qualifying Airbnb listings as illegal, yet collect the hotel tax without issue.<sup>240</sup> Although New York City has yet to allow Airbnb to collect and remit taxes on behalf of hosts, it would behoove the city to decide soon, or else risk continued revenue loss from hosts who do not know how or refuse to pay the tax themselves.<sup>241</sup> Development in surrounding cities may also influence New York—for example, Jersey City has introduced legislation allowing Airbnb to collect a six percent hotel tax from renters.<sup>242</sup>

#### 4. Surprising Benefits of New York City’s Approach

If the MDL is applied consistently with the purported legislative intent advanced by Senator Krueger, New York City’s approach is actually relatively well-rounded.<sup>243</sup> The city must protect its residents from the escalating housing costs that will undoubtedly result if long-term residential buildings are entirely converted to short-term use.<sup>244</sup> Unsurprisingly, not

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237. See Palombo, *supra* note 184, at 304 (noting that the hotel industry has gone from demanding Airbnb pay taxes to claiming that allowing Airbnb to pay taxes would legalize an “illegitimate enterprise”).

238. See *United States v. Sullivan*, 274 U.S. 259, 263 (1927).

239. *Id.* (holding a bootlegger responsible for paying taxes on income received from illegal alcohol sales).

240. Indeed, some cities like Chicago and Washington D.C. have entered into tax agreements with Airbnb without officially legalizing short-term rentals. Griswold, *supra* note 174.

241. See generally Tuttle, *supra* note 132 (noting that “almost no one involved in the sharing economy knows exactly what taxes they’re supposed to pay, nor when or how to pay them. . . . How many Airbnb hosts actually hand over hotel taxes to the local tax collector? No one really knows, but it’s likely that the percentage is tiny—perhaps even zero.”).

242. Teresa Novellino, *Jersey City Plans to Bring in 11M via Airbnb Tax*, N.Y. BUS. J. (Oct. 13, 2015), <http://www.bizjournals.com/newyork/news/2015/10/13/jersey-city-reaches-hotel-tax-deal-with-airbnb.html> (noting that Jersey City will be the first city in the tri-state area to partner with Airbnb to collect hotel taxes). Assemblywoman Linda Rosenthal remarked that New York will not be looking “across the Hudson for a policy blueprint” and that “this development will have zero impact on the law in New York.” *Id.*

243. See *supra* Sections IV.B.1–3.

244. See Monroe, *supra* note 84 (noting that in a tight housing market, the effect of limiting long-

even Airbnb disputes the negative effects of allowing these illegal hotels to profit off of long-term residents' displacement.<sup>245</sup> However, as noted, most of New York City's Airbnb hosts are *not* running the type of operation the MDL seeks to eradicate.<sup>246</sup> Additionally, it appears that most New Yorkers support Airbnb and the right to list their space through the website.<sup>247</sup> If New York developed a guide—like San Francisco's Short Term Rental Guide—to educate residents on their tax responsibilities, the city may eliminate the need for Airbnb to collect the tax on behalf of hosts.<sup>248</sup> In the alternative, New York could allow Airbnb to collect the tax and thus ensure the city received the revenue it deems it is owed.<sup>249</sup>

Further, New York City's approach eliminates many of the negative externalities associated with the permit system.<sup>250</sup> Many hosts have complained that the permit system is “cumbersome” and that it is impossible to know whether residents hold the correct permits unless neighbors' complaints spur the city to inspect the host's credentials.<sup>251</sup> The MDL

term rental units can be “dire”); Anne Karni, *Exclusive: De Blasio Administration Files First Lawsuit Against Apartments Operating as Illegal Hotels Through Sites like Airbnb*, N.Y. DAILY NEWS (Oct. 17, 2014), <http://www.nydailynews.com/new-york/de-blasio-administration-files-lawsuit-apartments-operating-hotels-sites-liairbnb-article-1.1977461> (explaining that in its legal papers, the city “links the illegal rentals to the housing crunch”).

245. See Palombo, *supra* note 184, at 303; see also Ryan Lawler, *Airbnb Scrubs Thousands of Listings from ‘Bad Actor’ Hosts Ahead of NY Subpoena Hearing*, TECHCRUNCH (Apr. 21, 2014), <http://techcrunch.com/2014/04/21/ahead-of-ny-subpoena-hearing-airbnb-weeds-out-hosts-with-dozens-of-listings/> (quoting a notice sent by Airbnb where the company stated it has been removing hosts with a “large number of listings”).

246. See *Airbnb in New York*, *supra* note 215 (stating that 90 percent of hosts rent their primary residence, and 78 percent are low-to-middle income).

247. See Erik Engquist, *Legal or Not, New Yorkers Like Airbnb*, SURVEY SAYS, CRAIN'S N.Y. BUS. (Nov. 5, 2015), <http://www.crainnewyork.com/article/20151105/BLOGS04/151109935/legal-or-not-new-yorkers-like-airbnb-survey-says> (noting that 37 percent of voters viewed Airbnb positively, while “[s]ome 48 [percent] of the 400 voters surveyed over 11 days in October had no opinion of the controversial company”). Furthermore, some hosts are even amenable to paying their share of hotel taxes. See Sreenivasan, *supra* note 221.

248. See *Short-Term Residential Rental Starter Kit*, *supra* note 191.

249. See Memorandum for Bill No. A07848, N.Y. STATE ASSEMB., 2013–14 Reg. Sess. (N.Y. 2013), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07848&term=2013&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07848&term=2013&Memo=Y); see also Memorandum for Bill No. A07495, N.Y. STATE ASSEMB., 2013–14 Reg. Sess. (N.Y. 2013), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07495&term=2013&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07495&term=2013&Memo=Y).

250. See Dan Raile, *Unicorn v. Leviathan: The Battle Between Airbnb and San Francisco Rages On*, PANDO (Apr. 20, 2015), <https://pando.com/2015/04/20/unicorn-v-leviathan-the-battle-between-airbnb-and-san-francisco-rages-on/>.

251. See Said, *supra* note 208.

eliminates the need for permits by stating rather clearly what is and is not allowed.<sup>252</sup> Although Mr. Scheiderman’s report alerts all Airbnb hosts that they may be liable for violating the MDL, his actions in response to the Airbnb subpoena show that his bark may be bigger than his bite.<sup>253</sup> If this approach continues, responsible hosts who list their primary residence—the type of host Airbnb claims its platform is intended to support—may continue to operate without fearing that the city will stop them.<sup>254</sup>

Furthermore, the permit system does little to aid cities in enforcing the law.<sup>255</sup> San Francisco lawmakers admit that they still rely on complaints from neighbors to police the use of short-term rentals.<sup>256</sup> Without more efficient and reliable forms of enforcement, there is little motivation to change the law.<sup>257</sup> Generally speaking, New York should refrain from implementing additional legislation that curtails short-term rentals at this stage.<sup>258</sup> New York should first clarify the taxation issue to allow Airbnb to collect and remit hotel taxes on behalf of hosts,<sup>259</sup> and second, continue

252. See N.Y. MULT. DWELL. LAW § 4 (McKinney 2016). Upon inspection, the MDL is even further limited in its application. It does not apply to cities with a population of less than 325,000, or to “class B” dwellings. See N.Y. MULT. DWELL. LAW §§ 3–4; *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786 (N.Y. Sup. Ct. 2014). Additionally, the MDL may not be applicable to tenants. See *Gold Street Properties, L.P. v. Freeman*, No. 90185/2013, N.Y.L.J. 1202661511936 (N.Y. Civ. Ct., June 16, 2014) (noting that the MDL is “generally aimed at the conduct of owners of property, not tenants”).

253. As noted, Mr. Schneiderman only requested identifying information for 124 Airbnb hosts out of approximately 20,000 listings. See Stephanie Burnett, *The New York Attorney General Is Seeking Those Who “Flagrantly” Misused the Online Platform*, TIME (Aug. 26, 2014), <http://time.com/3180103/airbnb-hands-over-data-on-124-hosts-in-new-york-city-to-the-authorities/>; see also Jason Clampet, *Airbnb in NY: The Real Numbers Behind the Sharing Story*, SKIFT (Feb. 13, 2014), <http://skift.com/2014/02/13/airbnb-in-nyc-the-real-numbers-behind-the-sharing-story/> (noting that as of January 31, 2014, there were 19,521 New York City listings on Airbnb).

254. See Kaplan *supra* note 171 and accompanying text.

255. See *infra* Section V.A.4.

256. See Said, *supra* note 209 (“You cannot enforce this law or any other law about short-term rentals unless you have two things: data on the number of nights a place is rented and the ability to go after hosting platforms that list illegal units.”).

257. Under current law, New York City employs the “respond to complaints” method of enforcing restrictions on short-term rentals. See Josh Dzieza, *Airbnb Comes Under Fire in New York City*, VERGE (Jan. 21, 2015), <http://www.theverge.com/2015/1/21/7865959/airbnb-under-fire-new-york-city-city-council> (noting that the Mayor’s Office of Enforcement received 1,150 “illegal-hotel complaints last year”).

258. See generally Giaquinto, *supra* note 157.

259. Josh Kraus, *The Sharing Economy: How State and Local Governments Are Failing and Why We Need to Get Involved*, 44 SW. L. REV. 365, 372 (2014).

focusing its efforts on the true illegal hotel operations that remove units from the full-time residential market.<sup>260</sup>

Another approach that begs consideration is that of Portland, Oregon. At first blush, one may be unable to discern differences between Portland's approach and San Francisco's.<sup>261</sup> In reality, there are a few major differences in Portland's legislation, as well as differences in the way Airbnb gained the city's acceptance.<sup>262</sup>

### C. Portland

In 2014, Portland became the first city to engage in Airbnb's Shared City initiative.<sup>263</sup> Airbnb CEO Brian Chesky explained that "Shared City is our initiative to help civic leaders and our community create more shareable, more livable cities through relevant, concrete actions and partnerships."<sup>264</sup> One of the major commitments of the Shared City initiative is the collection of hotel taxes by Airbnb on behalf of hosts.<sup>265</sup> Chesky also explained that the program will enable Airbnb hosts to easily donate money earned through Airbnb to local causes.<sup>266</sup> Airbnb noted it will also continue its disaster relief program, and plans to implement training programs "to help . . . hosts respond to crisis."<sup>267</sup> Additionally, in an attempt to increase safety, Airbnb's

260. See Dzieza, *supra* note 257 (explaining that Schneiderman's report found that "nearly 2,000 units were rented for more than half the year in 2013, taking them effectively off the market").

261. Steve Law, *City Legalizes Airbnb, Other Short-Term Home Rental Services*, PORTLAND TRIB. (July 30, 2014), <http://portlandtribune.com/pt/9-news/228670-92077-city-legalizes-airbnb-other-short-term-home-rental-services->.

262. See *infra* Section IV.C.

263. Brian Chesky, *Shared City*, MEDIUM (Mar. 26, 2014), <https://medium.com/@bchesky/shared-city-db9746750a3a#.y1tjc5ori>; see also Malia Spencer, *Airbnb Launches Shared City Initiative in Portland*, PORTLAND BUS. J. (Mar. 26, 2014), <http://www.bizjournals.com/portland/blog/2014/03/airbnb-launches-shared-city-initiative-in-portland.html>.

264. Chesky, *supra* note 263.

265. *Id.*; see also *supra* note 146 and accompanying text.

266. Chesky, *supra* note 263. Chesky also noted that Airbnb will match hosts' donations. *Id.*

267. *Id.* Airbnb explained that the idea for its disaster relief program came from hosts who wanted to help victims of Hurricane Sandy. See *Disaster Response Program*, AIRBNB, <https://www.airbnb.com/disaster-response> (last visited Dec. 22, 2016). Since 2013, hosts have been opening their doors "to displaced residents in response to emergencies around the world." *Airbnb Disaster Response by Airbnb*, U.S. CHAMBER COM. FOUND., <https://www.uschamberfoundation.org/airbnb-disaster-response> (last visited Dec. 22, 2016) (explaining that "[w]hen disasters strike, AirBnB activates its response tool for a designated geographic area," and when the tool is activated, hosts who are able to help "can host those in need for free").

Shared City initiative provides hosts with free smoke and carbon monoxide detectors.<sup>268</sup>

Through Shared City, “Airbnb has portrayed itself as a company that gives back, offering cities services and funding that other companies do not.”<sup>269</sup> Overall, Portland welcomed the idea and passed legislation legalizing certain short-term rentals in 2014.<sup>270</sup>

### 1. Portland’s Limited Legalization

Until 2014, Portland, like New York City under the MDL and San Francisco before the Airbnb Ordinance, did not allow rentals for less than thirty days.<sup>271</sup> Portland’s new legislation permits residents to rent out one or two rooms for a period of less than thirty days if they obtain a permit and allow the city’s Bureau of Development Services to perform safety inspections at the residence.<sup>272</sup> Additionally, the permanent resident must reside in the unit for at least 270 days per year and must be present during the short-term renter’s stay.<sup>273</sup> Portland’s original Accessory Short-Term Rental law also prohibited short-term rental of apartments or condos in larger complexes; however, there has been a push to amend the law to allow this, as well as “unhosted” rentals.<sup>274</sup> In fact, the zoning code available on Portland’s website, updated as of February 2015, appears to allow for rentals in “multi-dwelling buildings.”<sup>275</sup>

268. Chesky, *supra* note 263.

269. Palombo, *supra* note 184, at 317.

270. See Neal Gorenflo, *Airbnb Declares Portland a “Shared City,”* SHAREABLE (Mar. 28, 2014), <http://www.shareable.net/blog/airbnb-declares-portland-a-%E2%80%9Cshared-city%E2%80%9D> (“I think it’s great when cities full of sharers—like Portland—get the recognition and support they need to share more.”); Law, *supra* note 261.

271. Charity, *Portland’s Short-Term Rental (ASTR) Guidelines*, TURNKEYED (Dec. 10, 2014), <http://turnkeyed.com/portlands-astr-guidelines/> [hereinafter *ASTR Guidelines*].

272. PORTLAND ZONING CODE § 33.207.040(A)–(C) (2015).

273. *Id.* §§ 33.207.020(A), 33.207.040(A)(1). The city code section is referred to as “Accessory Short-Term Rentals.” *Id.* “An accessory short-term rental is where an individual or family resides in a dwelling unit and rents bedrooms to overnight guests for fewer than [thirty] consecutive days.” *Id.*

274. Law, *supra* note 261; see also Elliot Njus, *Portland May Soon Allow Airbnb-Style Rentals in Apartments, Condos*, OREGONLIVE (Oct. 8, 2014), [http://www.oregonlive.com/front-porch/index.ssf/2014/10/portland\\_may\\_soon\\_allow\\_airbnb.html](http://www.oregonlive.com/front-porch/index.ssf/2014/10/portland_may_soon_allow_airbnb.html) (noting that the city fears the effect of short-term renting on affordability of housing, but does not want “bureaucracy to get in the way of innovation”).

275. See PORTLAND ZONING CODE § 33.207.040(C)(2). This is a change from the original system

## 2. Portland Veers from “Complaint” Enforcement to Fining Airbnb Instead

Portland’s permit process costs around 180 dollars per host and requires hosts to notify neighbors of their intent to become permitted for short-term rentals.<sup>276</sup> As of February 2015, the city of Portland had received a measly 166 permit applications, despite the fact that at least 1600 short-term rentals were available on sites like Airbnb.<sup>277</sup> One Airbnb host without a permit explained, “Honestly, it’s been on my to-do list but I haven’t done it. It’s another barrier.”<sup>278</sup> This speaks to the same enforcement issue that accompanies other permit systems, like San Francisco’s.<sup>279</sup> But what differentiates Portland from San Francisco in this respect is the city’s response to the low permit application turnout. Portland attempted to work with Airbnb to get hosts to comply with the ordinance.<sup>280</sup> For example, the city suggested Airbnb “lock” hosts’ listings until they obtained a permit, but the company did not implement the idea.<sup>281</sup> Instead, the newly implemented enforcement remedy is to fine Airbnb and companies like it 500 dollars per violation for each host who has not complied with the permit requirements.<sup>282</sup> This enforcement mechanism goes beyond simply responding to complaints, giving the ordinance more weight.<sup>283</sup> Indeed, Airbnb may now be motivated to “freeze” hosts’ listings until they provide a permit number or otherwise prove compliance with Portland’s ordinance.<sup>284</sup>

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that prohibited short-term rentals in multi-dwelling units. See Elliot Njus, *Portland Legalizes Airbnb-Style Short-Term Rentals*, OREGONLIVE (July 30, 2014), [http://www.oregonlive.com/front-porch/index.ssf/2014/07/portland\\_legalizes\\_airbnb-styl.html](http://www.oregonlive.com/front-porch/index.ssf/2014/07/portland_legalizes_airbnb-styl.html) (noting that “[m]any of the short-term rental operations in the city remain illegal, including those in multifamily apartment and condo buildings”).

276. See Law, *supra* note 261; PORTLAND ZONING CODE § 33.207.040(C). Hosts are required to renew the permit every two years. *Id.*

277. Peltier, *supra* note 179.

278. *Id.*

279. See *supra* Section IV.A.4.

280. Peltier, *supra* note 179.

281. *Id.*

282. *Id.*

283. *Id.*

284. See Aaron Mesh, *Portland Says Deadline for Airbnb Hosts to Get City Permits Is Feb. 20*, WILLAMETTE WEEK (Jan. 27, 2015), <http://www.wweek.com/portland/blog-32752-portland-says-deadline-for-airbnb-hosts-to-get-city-permits-is-feb-20.html> (“City Council last week passed an ordinance that will fine online rental marketplaces \$500 each time a host advertises a rental without posting a city permit number.”).

Portland's approach grants all the benefits of the permit system, and its path of enforcement allows the law to function the way it was intended to. By legalizing certain short-term rentals, Portland allows residents to enjoy sharing while still ensuring that the number of long-term affordable housing units remains sufficient.<sup>285</sup> Unlike people in New York City, Portland residents who obtain a permit do not need to fear being fined by the city.<sup>286</sup> Like San Francisco, Portland allows Airbnb to collect and remit hotel taxes on behalf of hosts, the revenue from which benefits all residents by creating more affordable housing.<sup>287</sup> Although Portland's law is similar in form to San Francisco's Airbnb Ordinance, San Francisco has failed to enforce the permit requirements and thus is at a higher risk of continued illegal use by hosts.<sup>288</sup> In general, Portland is moving in the right direction when it comes to short-term rentals. If fining Airbnb for allowing unpermitted hosts results in increased compliance, the city will realize the full benefits of its law, which protects both long- and short-term residents.

## V. CONCLUSION

After comparing the approaches taken by San Francisco, New York City, and Portland, one approach reigns supreme. Portland's model preserves the rights of property owners by allowing them to rent—or license—their space to visitors for short periods of time.<sup>289</sup> Even still, Portland protects neighbors, hosts, and visitors through its notification and permit process, and required safety inspections.<sup>290</sup> Even though some residents lament that the permit process is just another hassle, it is an

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285. PORTLAND ZONING CODE § 33.207 (2015); *see also* Anna Walters, *Hotel California*, WILLAMETTE WEEK (Feb. 17, 2015), <http://www.wweek.com/portland/article-23993-hotel-california.html> (“It’s illegal in Portland to rent out your place with Airbnb or other home-sharing services unless you reside there at least nine months out of the year.”).

286. *See ASTR Guidelines*, *supra* note 271. Even though New York City officials claim they will not target certain hosts, the law allows them to if they have a change of heart. *See supra* note 252 and accompanying text.

287. Heidi Groover, *Should Airbnb Help Pay for Affordable Housing?*, STRANGER (Dec. 22, 2015), <http://www.thestranger.com/blogs/slog/2015/12/22/23292826/should-airbnb-help-pay-for-affordable-housing>.

288. *See supra* Section IV.A.4.

289. *See supra* Section IV.C.

290. *See supra* note 276 and accompanying text.

appropriate compromise for the situation.<sup>291</sup> Without legalizing permitted short-term rentals, residents would fear retaliation from the city and refrain from using Airbnb, losing out on its benefits.<sup>292</sup> This is the unfortunate situation facing New Yorkers. New York City residents' property rights are drastically limited by the MDL, which may force them to face the impossible decision of either using Airbnb to meet their rent payments or abiding by the law.<sup>293</sup>

Portland has formulated the best method of enforcing its new law, which gives the legislation actual meaning.<sup>294</sup> Portland has veered away from the method employed by New York City and San Francisco, which turns neighbor against neighbor and forces them to report each other's violations.<sup>295</sup> Although San Francisco's legislators had good intentions, difficulty in enforcing the Airbnb Ordinance makes it as though the act was never passed.<sup>296</sup> However, the effective enforcement mechanisms in Portland protect its residents from increasing rent prices, which is a major concern for all three cities and across the United States.<sup>297</sup> Portland protects its residents from hosts who abuse Airbnb by ensuring each host meets certain standards, which is a more effective approach than New York City's, which simply placed an unacceptable total ban on its residents right to license in a desperate attempt to keep housing affordable.<sup>298</sup>

Furthermore, Portland has agreed to let Airbnb collect hotel taxes on behalf of hosts, which is revenue that can be put back into the city for the benefit of residents and visitors alike.<sup>299</sup> New York City continues to lose as much as 65 million dollars in tax revenue every year by resisting Airbnb's offer to collect the hotel tax.<sup>300</sup> Portland and San Francisco reap this benefit,

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291. *See supra* notes 276–79 and accompanying text.

292. *See supra* Section IV.C.

293. *See supra* Section IV.B.

294. *See supra* Section IV.C.2.

295. Tracey Lien, *San Francisco Residents to Vote on Contentious Prop. F Targeting Airbnb*, L.A. TIMES (Nov. 1, 2015), <http://www.latimes.com/business/la-fi-agenda-airbnb-20151031-story.html/>.

296. *See supra* Section IV.A.4.

297. *See supra* Section IV.C.

298. *See supra* Section IV.C.2.

299. *See supra* note 265 and accompanying text.

300. Ryan Lawler, *As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There*, TECHCRUNCH (Jan. 16, 2015), <http://techcrunch.com/2015/01/16/airbnb-65-million-in-ny/>.

and more cities should follow their lead and remove the responsibility from hosts who may not understand how to remit the taxes themselves.

As cities begin or continue to face questions about regulating short-term rentals, they should look to Portland, “the Shared City,” for inspiration. Although San Francisco and New York City have valid concerns and have implemented certain successful regulations, overall, their systems are not as well-rounded as Portland’s.<sup>301</sup> By limiting infringement on the rights of property owners, allowing Airbnb to collect and remit taxes, and implementing safety measures to protect hosts and visitors alike, Portland’s model proves the most successful of the three major approaches employed to date.

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301. *See supra* Part IV.

\* J.D. Candidate, 2017, Pepperdine University School of Law, Managing Editor, *Pepperdine Law Review*, Volume XLIV. I would like to thank my family for their unwavering support and encouragement. I would also like to thank my husband Jared for setting the bar so high and forcing me to reach it. Finally, I must sincerely thank the staff of *Pepperdine Law Review* for meticulously editing this Comment.

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