Regulating Short-term Rentals

Charles W. Malcomb

The Sharing Economy

- Generally, online, peer-to-peer type exchange of goods and services.
  - Focus on underused assets
- Car/ride sharing
  - Uber, Lyft
  - Zipcar
- Services
  - Taskrabbit
  - Skillshare
- Goods
  - Ebay
  - Rent the Runway
- Workspace
  - WeWork
- Accommodations
  - Airbnb
  - VRBO
  - HomeAway

What are short-term rentals?

- Sometimes called vacation rentals.
- Tenancies for less than 30 days (in most states, including NY).
- Renting traditionally residential dwelling units.
- Marketed on websites or apps like Airbnb, VBRO, HomeAway.
  - Typically advertised by the owner or tenant of homes and apartments, customers scan available properties for lodging.
- In many cases cheaper than traditional hotels and may allow for the use of a larger home.

Basic Information on Airbnb

- Founded in 2008 by two roommates who started out in 2007 by putting air mattresses in their living room, turning their apartment into a bed and breakfast to make rent in San Francisco.
- Company still headquartered in San Francisco
- 5 million listings in 191+ countries (660,000 in the US)
- 400 million guest arrivals since 2008 – average of 2 million per night!
- Fastest growing demographic: seniors
- $2.6 billion in revenue (2017)
- Accommodations range from castles to studio apartments, tropical tree houses to igloos
- Now also includes “Experiences,” where hosts offer services including wildlife encounters, boat tours, photo shoots, and hikes.

Unique listings

Igloo + Aurora Tour

Sweden - $338/night, 2 adults.

“A once-in-a-lifetime experience to sleep in your very own igloo! Each igloo is hand-built right on the frozen Torne River which has a perfect, uninterrupted view north. This gives you the best opportunity to watch the northern lights dancing in the sky.

An overnight igloo booking includes an Aurora Colosseum tour for 2 (with dinner), breakfast the following morning, sleeping bags and winter suits to keep you warm, plus arrival/departure transfers from the Kiruna Guidetur office in town.

The staff at Aurora Camp will show you where the shared toilet and shower facilities are, as well as the wood-fire sauna. You will also have access to an outdoor jacuzzi which can be booked privately in 2 hour blocks (fees apply).

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Unique listings

Fully Restored 1920s Sheep Wagon

Wyoming – $141/night, 2 adults

“Are you looking for a rare and unique adventure? Do you want to have a rustic and real-life western experience? Transport yourself back to the old west to a more basic and simple time and lifestyle. We welcome you to a stay in one of our sheep wagons.

Our family ranch is a 65,000 acre spread of ground that your are welcome to enjoy and explore.”

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Unique listings

Treehouse

$423/night, 2 adults – Atlanta

“Suite of three beautifully furnished rooms set among the trees. Just minutes from downtown, this secluded property is an urban retreat like no other. The treehouse provides an intimate, simple and restful retreat for 2 people. The treehouse is the subject of innumerable articles, blogs, Treehouse Masters and Today Show.”

Unique listings

Windmill in Amsterdam

$222/night – Abcoude, Netherlands

“Our romantic windmill (1874) is just a few miles from Amsterdam. Easy access to the city. You have the entire windmill for yourself. Three bedrooms, with double beds: it easily sleeps 6, a kitchen, living, 2 toilets and a bathroom with bath. Bikes for rent at 7,50 EUR a day please reserve in advance and pay during your stay.”

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Continued Growth

- Airbnb is growing steadily…
  - Morgan Stanley researchers estimate that Airbnb will generate 150 million room nights in 2019 in the U.S., U.K., France, and Germany alone
  - Forbes reports Airbnb has a $31 billion valuation
- …but not as quickly as it once was.
  - Morgan Stanley research indicates that the percentage of travelers using Airbnb during the prior 12 months increased by 8% from 2015 to 2016, but by only about 2% from 2017 to 2018.
  - Earnings of $100 million with $2.6 billion in revenue – a slim 4% margin compared to publicly traded competitors' margins that are closer to 27%.
- Strategies for continued growth (2018-2019)
  - IPO expected sometime in 2019
  - Added "Experiences" – seeks to capitalize on tour guide market
  - Added "unique homes" category – differentiates Airbnb from traditional hotel marketplace
  - Added Airbnb for Families and Airbnb for Work – ease of use for particular purposes
  - Added Airbnb Plus – higher tier listings; 100-point inspection by Airbnb staff; additional service support
  - Added Beyond by Airbnb – luxury listings, "once in a lifetime" settings, holistic trip planning

Advantages of Short Term Rentals

- Easy way to generate additional income from otherwise unused space
  - Short term rentals generate more income on a per diem basis than long-term rentals do.
- Guests contribute to economies of municipalities where they are staying – restaurants, transit, entertainment, etc.
- According to Airbnb, tourists using Airbnb tend to stay longer and spend more money at local businesses
  - In New York City, one study indicated that guests stayed 2.5 nights longer and spent $210 more.
  - In Paris, one study indicated guests stayed 2.9 nights longer and spent €426 more.
- Guests report feeling much more “like a local” when they use Airbnb

Disadvantages of Short Term Rentals

- "In the history of the world, no one has ever washed a rented car." - Lawrence Summers

  - Transforms residential community into tourist area.
  - Despite safeguards, false advertising is possible.
  - Hosts may experience property damage or theft, which is not fully covered by Airbnb's Host Guarantee program.
  - Landlords may see it as an opportunity to increase rental costs for residents in popular Airbnb locales.
  - Neighborhood and neighboring tenants may experience increased noise, traffic, litter, trespassing, theft, or a decrease in the feeling of safety.

More Disadvantages

- One story out of Florida exposed serious privacy concerns:
  - Guests discover hidden cameras in a smoke detector pointed at the bed while staying at an Airbnb.
  - Host was arrested for video voyeurism.
  - Video and computer storage devices seized.
  - “Experts recommend that people untrained in such matters look for hidden cameras by using the camera light on a smartphone to spot the reflection from a lens. There are also apps that claim they can detect hidden cameras. In addition, if you are extremely concerned about your privacy, you can also purchase an RF detector, which checks for wireless signals and may be able to detect hidden cameras.”

    http://abcnews.go.com/US/couple-find-hidden-camera-florida-airbnb/story?id=50402059

And more . . .

- Airbnb has a Host Guarantee policy, but that does not *prevent* guests from damaging your property:
  - Teenager lies about age and holds huge NYE party of hundreds of friends. Homeowners property in Oakland was trashed, left with garbage, empty or spilled alcohol containers, broken glass, cigarettes. http://abc7news.com/news/oakland-home-trashed-by-airbnb-renter-who-threw-wild-party/1144601/
  - A couple with children ruined an Ohio man's Sunsetter awning, and two weeks later, a guest held a house party. These two visits cost him upwards of $3,000, plus the bureaucratic nightmare of getting refunds from Airbnb. https://www.proper.insure/more-than-3000-in-damages-to-cape-cod-airbnb-home/?doing_wp_cron=1552340318.4210700988769531250000

“Superhosts” from Hell in Los Angeles

Posted on **November 17, 2018**

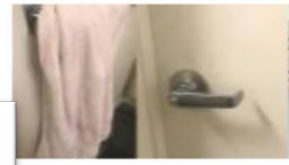
The arrangement at our Airbnb was of the kind where you let yourself in. This means that there is no one on the premises to talk to, and if something is wrong, there is no one who can set it right. Although we paid for two people, t
the floor, and
texting, so the

Airbnb House Nightmare, Just Wanted a Clean, Quiet Place

Posted on **September 25, 2018**

Ant-infested College Dorm Poses As Luxury High-Rise

Posted on **November 8, 2018**



Airbnb Guest Left the Bedroom in a Oily Mess

Posted on **November 12, 2018**

Regulation as Protection

- Municipalities are taking notice and working to regulate Airbnb in a way that protects guests, hosts, and neighbors.

- New York City led the way
  - First major city to enter into a legal/political battle with short term rental companies
  - In 2014, then-Attorney General Eric Schneiderman asserted that Airbnb circumvented NYC residence regulations.
  - October 2014 Attorney General Report
    - Suggests that short-term rentals increased tenfold since 2010
    - Airbnb and its hosts saw $282 million in revenue in this four year span
    - Commercial users (people who controlled 10 or more unique Airbnb units) dominated the rental market
    - Airbnb had a significant effect on displacing long-term renters and 72 percent of rentals violated New York City laws

Violations of Multiple Dwelling Law

- Multiple Dwelling Law ("MDL") regulates multiple-unit residence buildings in New York City.
- 2014 AG report suggested up to 72% of Airbnb listings in NYC violated MDL
- Prior to 2010, a "Class A multiple dwelling" was defined as being "occupied as a rule, for permanent residence purposes."
  - Following litigation, the First Department determined that the phrase "as a rule" could allow for at least some measure of short-term occupancy.
- In 2010, the MDL was amended. Now, permanent residency of a dwelling means at least 30 consecutive days' occupancy by a "natural person or family" in a unit.
  - Result: no renting Class A multiple dwelling for less than 30 days without a permanent resident present.
- The AG also noted that the NYC Administrative Code prohibits changes to the use and occupancy of a building without an updated certificate of occupancy.

NYC Regulatory Efforts

- Additional Issues in NYC
  - New York also has an interest in supporting its local hotels
  - Hotels' hospitality taxes and additional money to comply with various City laws
  - Airbnb represents a total departure from this traditional business model
  - City officials are thinking about potential regulations and taxes to help with this problem

Regulation Sparked Litigation

- New York City
  - *Airbnb Inc. v. Schneiderman et al.*, No. 1:16-cv-08239 (S.D.N.Y. October 21, 2016)
    - Airbnb filed a complaint seeking to declare invalid and enjoin enforcement of MDL § 121 and NYC Administrative Code § 27-287.1, which resulted in City enforcement against Airbnb for advertising non-compliant short term rentals in the City.
    - Hosts could be fined up to $7,500 for these rentals, but Airbnb was concerned about potential civil and criminal liability for itself based on allegedy ambiguous wording
    - The parties settled in December 2016, when New York agreed not to enforce against the websites.
  - Airbnb Inc. v. City of New York, 18-cv-7712, (S.D.N.Y. August 30, 2018)
    - Again, Airbnb filed in federal court regarding a law passed *unanimously* by NYC Council requiring Airbnb and similar sites to turn over user data on hosts in order for the City to track and enforce.
    - January 3, 2019 – Judge granted injunction. City stands by the law in an effort to protect residents from living in de facto hotels with security concerns; Airbnb stands by their argument that the lack of neutral forum to challenge the requirements of the law is unconstitutional.

San Francisco Regulatory Efforts

- Initially, Airbnb had mixed reactions from residents of San Francisco
- Some residents valued the opportunity for additional income that Airbnb provided
- Other residents worried landlords would evict tenants in order to rent rooms full time on Airbnb (more profitable) amid a housing crisis
- San Francisco came up with a plan to balance these competing concerns

San Francisco Regulatory Efforts

- San Francisco Administrative Code, Chapter 41A
  - Requires short-term rental hosts to acquire a business license from the San Francisco Office of the Treasurer and Tax Collector
    - Certificate number must be posted on all listings
  - Property owners re required to show that they occupy their homes for 275 days out of the last year
  - Homeowners are limited to 90 days of occupancy by short-term renters
  - Renting the space for more than 30 days can subject the host to tenant protection laws, rent control provisions, and business personal property taxes.

San Francisco Regulatory Efforts

- Established the Office of Short Term Rentals
  - Enforces the provisions in the Code
  - Issues certificates
  - Investigates complaints
- The City passed additional regulations on reporting, recordkeeping and safety for short term rentals.
  - Hosting platforms are responsible for verifying that listings are registered – must submit affidavit verifying reasonable care exercised.
- Illegal for landlords to evict tenants to make de facto hotels
  - One couple was caught in 2014 and settled the enforcement action with $276,000 fine and an injunction against listing any of their 45 apartments
  - In 2015-2016, they were listing 14 units, rented out for 2,271 nights, and made more than $700,000 in profits.
  - During inspections, they staged each apartment identically to make it seem as if there was a permanent resident living there – investigators picked up on it.
  - Fined $5.5 million – out of a possible $30 million allowable under the regulations.

San Francisco Regulatory Efforts

- Airbnb initially sued over the requirements to check all the listings in the City, but the parties settled and Airbnb and HomeAway now provide monthly lists to the Office of Short Term Rentals to assist with enforcement.
- Airbnb responded to regulations by adding a section to their website on how to comply with San Francisco's regulations
- San Francisco was able to accomplish its regulatory goals by amending outdated laws, enacting a series of new requirements, and developing a special regulatory Office.
- Many believe San Francisco serves as an exemplary model for how municipalities should deal with short term rentals.

Unique Challenges in Los Angeles

- LA is experiencing unique issues with Airbnb because of the severity of its housing crisis

- L.A. lawmakers first proposed regulating short-term rentals nearly three years ago, seeking to regulate a practice that has boomed in the area

- Rent prices skyrocketed, possibly with intent – and definitely with the result – of permanent tenants getting priced out, freeing up space for short term renters.

Los Angeles Regulatory Efforts

- City lawmakers unanimously approved new rules in December 2018, which will go into effect in July 2019.
  - Must be your primary residence in order to rent (not a second home or investment property)
  - “Primary residence” means you live there for at least 50% of the year
  - Hosts can rent out their space for a maximum 120 nights per year, but they can get special permission to exceed cap if:
    - They do not have multiple citations in recent years, or
    - They can make a successful argument to planning officials that it would not hurt the neighborhood.
  - Hosting sites must not process listings without registration or for hosts who have exceeded 120 nights without approval.
    - Violations result in up to $1,000/day fines for the site.

Examples from Washington State

- Clyde Hill, WA – Municipal Code Ch. 5.20
  - Requires hosts to have an administrative permit and a business license
  - Rules on property representative (24/7 during rentals), occupancy, use, parking, signage, information packets for renters, insurance, inspections, and compliance with other City codes
  - Violations subject to criminal and/or civil penalties

- Spokane, WA – Municipal Code Section 17C
  - Requires annual permit, insurance, business license, notice, site plan, floor plan (for Type B), health permits if serving food or offering pool/sauna/etc., and proof of lodging and retail tax.
  - Makes a distinction between two kinds of short term rentals:
    - Type A, which requires an administrative permit, overnight stays with no commercial meetings allowed
    - Type B, which requires a Type III conditional use permit, overnight stays with commercial meetings allowed

International Regulatory Efforts

- Japan (the entire country!)
  - In June 2018, new home sharing laws went into effect
  - Almost 80% of listings were removed – including some with existing bookings
  - Hosts must register with the federal government, list registration numbers in the booking, operate under hotel laws, and cannot rent for more than 180 nights per year.

- Reykjavik
  - As of January 1, 2017, hosts may rent their space for up to 90 days per year before needing a hospitality license. They can also earn up to one million Icelandic kronor ($8,785) per year without needing to pay value added and income taxes.
  - Properties must be registered, which requires meeting health and safety regulations.

- Amsterdam
  - In February 2016, city officials allocated more than $1 million to gather facts about illegal rentals via "dating scraping," in which they pull information from various websites.
  - In February 2017, the city levied a record €297,000 fine on a landlord and agency.
  - In January 2019, nights per year that hosts were allowed to rent dropped from 60 nights down to 30 nights.

Airbnb Helps Hosts Comply

- Airbnb has a strong interest in helping hosts comply with requirements
  - More hosts means more booked nights means more profits
  - Non-compliance can get Airbnb in trouble too – fines add up

- Now, there is a list of more than 65 cities with links to help articles, regulations and City requirements and departments in order to assist hosts in assessing their compliance.

Airbnb Helps Hosts Comply

Your City's Regulations

Click to expand your city below.

Arlington County, VA
Aspen, CO
Atlanta, GA
Austin, TX
Berkeley, CA
Boulder, CO
Breckenridge, CO
Cambridge, MA
Charlotte, NC
Chicago, IL
Cleveland, OH
Coral Gables, FL
Denver, CO
Fort Collins, CO
Healdsburg, CA
Honolulu, HI
Houston, TX
Key West, FL
Kirkland, WA
New York, NY
Oakland, CA
Omaha, NE
Orlando, FL
Palm Springs, CA
Park City, UT
Pasadena, CA
Philadelphia, PA
Phoenix, AZ
Portland, OR
Redwood City, CA
Sacramento, CA
Saint Paul, MN
San Antonio, TX
San Bernardino County, CA
San Diego, CA
San Francisco, CA
San Jose, CA
San Luis Obispo County, CA (Unincorporated Areas)

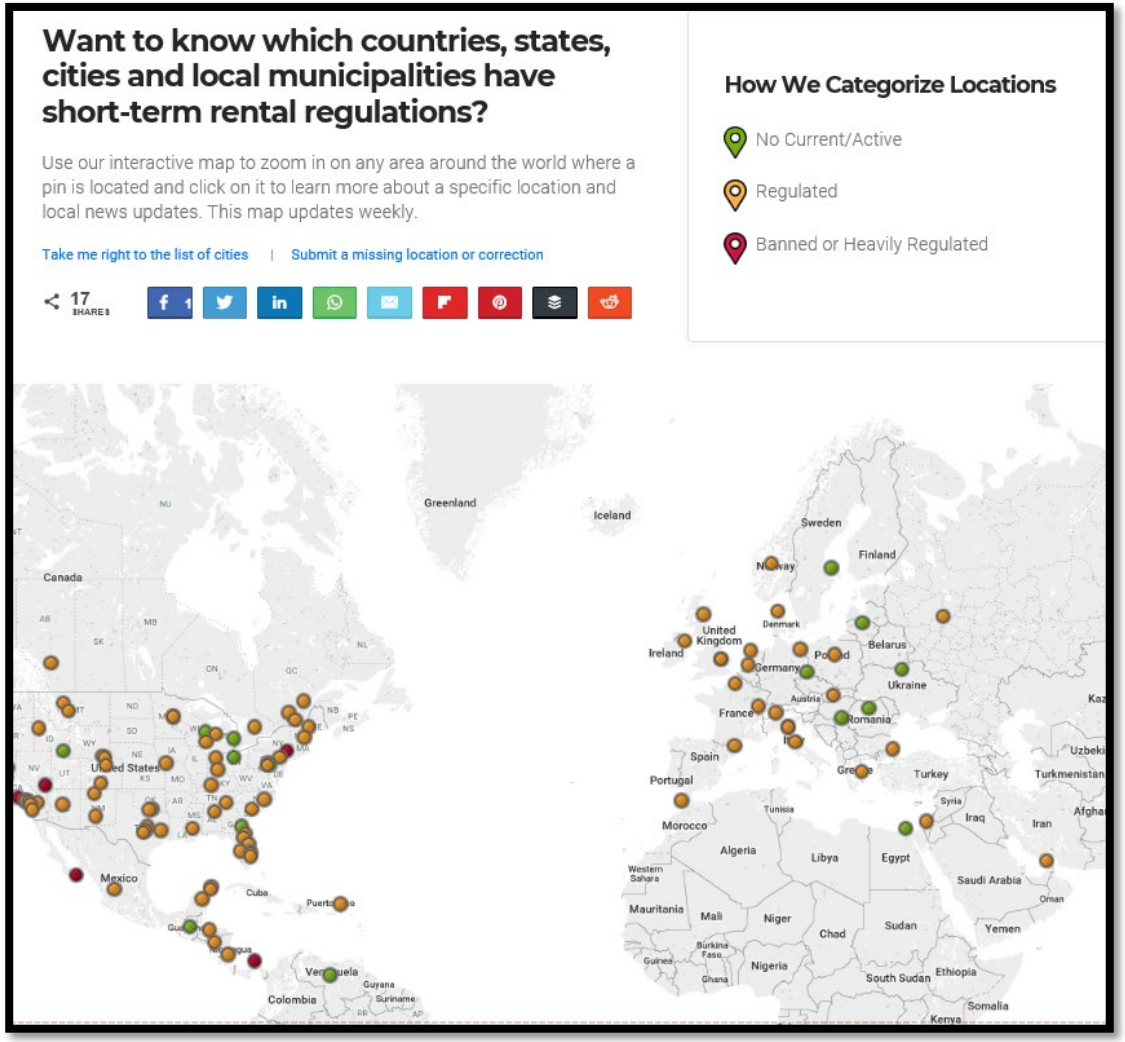
Chicago, IL

When deciding whether to become an Airbnb host, it's important for you to understand the laws in your city. As a platform and marketplace we do not provide legal advice, but we want to provide some useful links that may help you better understand laws and regulations in Chicago, IL. This list is not exhaustive, but it should give you a good start in understanding your local laws. Please also see our FAQ regarding Chicago registration requirements here. If you have additional questions, contact the Department of Business Affairs and Consumer Protection directly or consult a local lawyer or tax professional.

- **Shared Housing Unit Registration Requirement.** Chicago requires all hosts to register shared housing units with the City in order to list their spaces on home sharing sites like Airbnb. Hosts can do this through a process set up by hosting platforms like Airbnb. The City has provided information about shared housing rules in Chicago here, and we've separately put together a summary of the City's registration requirements here. Section 4-14-020 of the Municipal Code contains information regarding the registration requirements. The full text of recent changes to short term rental rules can be found here (2016 amendments) and here (2017 amendments).
- **Zoning Ordinance**. The Chicago Zoning Ordinance regulates zoning requirements and land use in the City. You should consult the Zoning Ordinance -- and the 2016 and 2017 home sharing amendments to the Municipal Code here and here -- to see if your listing implicates any zoning requirements or use definitions.
- **Vacation Rental Licensing.** The City of Chicago requires a license for a "vacation rental." Section 4-6-300 of the Municipal Code contains information regarding the licensing process and the duties of a vacation rental licensee. Additional details, including fees and process information, are available at the City of Chicago Small Business Center page and Business Licensing page.
- **Bed and Breakfast Licensing.** The City of Chicago requires a license for a "bed and breakfast." Section 4-6-290 of the Municipal Code contains information regarding the licensing process and the duties of a bed and breakfast licensee. Chicago regulations require registration and licensing for bed and breakfast activities, as described in Section 4-6-290 of the Municipal Code. Additional details, including fees and process information, are available at the City of Chicago Small Business Center page and Business Licensing page.

Internet Resources for Compliance

- GuestBook.com offers an interactive map of regulations
  - Includes categories showing no regulation/not enforced, regulated, or banned/heavily regulated.



https://www.useguestbook.com/short-term-rental-regulations/

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Zoning Concerns

- Issue: Is a short term rental a residential or commercial use?
  - There is a commercial aspect for the host.
  - But guests are generally using the property in a similar manner as any long-term resident would.

- The issue may look different depending on location – a highly trafficked tourist area swamped with short term rentals causes a bigger zoning question than a quiet family staying in a short term rental in a suburb generally unknown to tourists.

- Many municipalities do not routinely update their zoning codes and therefore do not have a codified answer.

Real Zoning Conflict: New Orleans

POLITICS

Condo developer seeks zoning change for unlimited short-term rentals

Updated Dec 19, 2017; Posted Dec 19, 2017

This condo project at 2100 St. Thomas St., completed in July 2017, is the subject of a zoning change request to allow owners to rent their units out as short-term rentals.(Kevin Litten, NOLA.com | The Times-Picayune)

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Real Zoning Conflict: New Orleans

- Owners of a condo wanted unlimited short term rentals without being subject to 90 night annual cap
- Owners applied to Zoning Board for change in zoning from residential to commercial
- Neighbors strongly oppose – “it’s the scale that really gets us … If I wanted to raise my family surrounded by hotels, I would’ve bought in the CBD [Commercial Business District].”
- City Planning Commission recommended denial in April 2018
  - Inconsistency with Master Plan
  - “Spot zoning” resulting in disparate treatment of this property compared with other, similarly situated properties
  - Noncompliance with Historic Urban Neighborhood District usage.

https://www.nola.com/politics/2017/12/short-term_rentals_spot_zoning.html

Code Interpretation

- Who interprets the zoning code in the first instance?
  - *Quentin Rd. Development, LLC v. Collins*, 150 A.D.3d 859 (2d Dep't 2017).
    - New York City Department of Buildings ("DOB") determined that a provision of the zoning ordinance setting forth a maximum permitted floor-to-area ratio for a portion of a building applied.
    - NYC Board of Standards and Appeals ("BSA") upheld the DOB determination.
    - Court upheld – a determination of the BSA may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion.

Zoning Cases

- *Sullivan v. Albany Bd. of Zoning,* 144 A.D.3d 1480 (3d Dep't 2016).
  - Church notified City of intention to establish a "home base" for up to 14 homeless individuals in its parsonage and asked whether it needed a use variance.
    - City Zoning Enforcement Official: Yes. Proposed use was not for a "house of worship."
  - Church appealed to ZBA, which found that the proposed use is consistent with the mission and actions of a house of worship and that no additional zoning exemptions or permissions are necessary.
  - Neighbor commenced an Article 78 proceeding, and the Supreme Court annulled the ZBA's determination
  - Appeal to Third Department: Reversed – Zoning Board's decision reinstated.
    - Agency afforded great deference, only disturbed if unreasonable or irrational
    - If no defined term, court will afford the term its plain or ordinary meaning
    - Ambiguity resolved in favor of the property owner.
    - Examined meaning of "worship" – Black's Law Dictionary "any act of religious devotion." Court was "satisfied that the plain or ordinary meaning of "house of worship" permits and encompasses" the proposed use.

Zoning Cases

- *Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep't 2012).
  - Petitioners own 6-bedroom lakeshore property located in a single- or multi-family residential zoning district.
    - Petitioners bought the property in 2009, joined the Chamber of Commerce, and began advertising aggressively online as a short-term rental.
  - Neighbors complained; Zoning Enforcement Officer determined it was a tourist accommodation in violation of zoning code, and ZBA affirmed.
  - Petitioners commenced an Article 78 – Supreme Court annulled ZBA.
  - Third Department affirmed. Despite general rule of agency deference, "where, as here, the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required."
    - Some level of ambiguity regarding whether this is a single-family use, but zoning regulations are in derogation of common law, must be strictly construed, and ambiguity must be resolved in favor of the property owner.

Zoning Cases

- *Spilka v. Town of Inlet*, 8 A.D.3d 812 (3d Dep't 2004)
  - Plaintiff owns a single family dwelling in R-1 Zone and has been renting it out for three months out of the year since 2001.
  - In 2002, Zoning Ordinance was amended to restrict short-term rentals, requiring a Special Use Permit for rentals of less than four months.
  - Is there a prior non-conforming use?
  - Plaintiff brought declaratory judgment action that rental can continue.
  - Supreme Court denies Town's Motion to Dismiss
  - Holding:
    - 2002 Amendment is valid as it expresses legitimate governmental purposes
    - Plaintiff's use was allowed under 1966 Zoning Ordinance (pre-amendment)
    - Prior non-conforming uses generally allowed to continue, but issue of material fact as to whether Spilka established same.
    - Unit is not "owner-occupied" under 2002 amendment.

Zoning Cases

- *DeVogelaere v. Webster ZBA*, 87 A.D.3d 1407 (4th Dep't 2011)
  - Petitioner owns property in a residential district and since 2007, has rented from 1 night to 3 months.
  - In 2010, Webster amended its zoning ordinance to prohibit transient rental, or dwelling rental "for a period of less than 28 continuous days."
  - Zoning Enforcement Officer determined her use was not permitted and issued an order to cease.
  - Petitioner appealed to the ZBA, but they denied her petition.
  - "Here, respondent reasonably determined that petitioner's serial rental of the subject property was prohibited under the zoning ordinance and that it did not constitute a legal nonconforming preexisting use, and thus petitioner had no right to continue such use."

Zoning Cases

- *Fruchter v. Zoning Bd. of Hurley*, 133 A.D.3d 1174 (3d Dep't 2015).
  - Property owner rents single-family residence on Airbnb for anywhere from 1 night to a season.
    - Does not stay when guests book; does not offer food or drink
  - Code Enforcement Officer brought action against owner as operating illegal bed and breakfast
  - Owner appealed to ZBA, which determined that he needed a special use permit
  - Owner brought Article 78 – Supreme Court dismissed; Owner appealed
  - Holding:
    - Town Code had not "been updated to consider the ramifications…of the…'sharing economy."
    - Activity did not fit definition of bed and breakfast or hotel – not owner-operated, no common exterior entrance.
    - Code does not expressly prohibit this action, and since it must be construed against the Town, owner can continue.

Zoning Requirements

- *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131-32 (1988) (internal citations omitted)
  - "Because Zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt."
  - "[T]he analysis follows traditional due process rules: if the zoning ordinance is adopted for a legitimate governmental purpose and there is a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end,' it will be upheld.
  - "An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement. The court will not pass on its wisdom."
    (internal citations omitted)

Restrictions on Zoning Regulations

- *Bonefish Grill, LLC v. Zoning Bd. of Rockville Centre*, 153 A.D.3d 1394 (2d Dep't 2017)
  - Issue: ZBA conditioned a variance from parking requirements on limiting hours of operation to the same hours as adjacent parking lot, and upon use of valet parking. Petitioner sought annulment of conditions.
  - Holding: The conditions "were proper because the conditions related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of the petitioner's operation, such as the anticipated increase in traffic congestion and parking problems."
  - Consider short-term rental applicability – regulation protects neighboring properties from easily anticipated issues.

Restrictions on Zoning Regulations

- *St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988).
  - Petitioners contracted to purchase house for real estate business. Zoned residential, but prior owners had a variance that was only applicable to their real estate business.
  - Planning Board denied Petitioners' site plan and application for continued use as a real estate office. ZBA denied (Petitioners did not appear).
  - Lower court overturned – variances run with the land.
  - Court of Appeals – Variance condition "focuses on the persons occupying the property rather than the use of the land or the possible effects of that use on the surrounding area. As this condition bears no relation to the proper purposes of zoning, therefore, it was properly ruled invalid."

- *Old Country Burgers Co. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805, 806 (2d Dep't 1990)
  - Town Zoning Board attempted to regulate hours of operation of drive-through window based on traffic concerns, but failed to demonstrate any traffic impacts unique to this business.
  - Court found that ZBA conditions were "no more than an impermissible attempt to regulate the details of the operation of the petitioner's enterprise."

What Municipalities Can Do

- Town Law Article 16 – Zoning and Planning authority
- Town Law Article 10 – Police authority
- Town Law Article 9 – Ordinance and License authority
  - § 130(20) – "Regulating hotels, inns, boarding houses, rooming houses, lodging houses, associations, clubs or any building or part of a building used in the business of renting rooms, individual or several, … … sleeping accommodations for more than five persons; specifying the type of construction, the manner of their running and operation and prescribing regulations assuring proper sanitation, cleanliness and fire protection."
- Similar provisions in Village Law.

Lessons Learned

- Do not rely on out-of-date zoning codes to regulate short-term rentals
  - Because of the applicable standards of review, Courts are often siding with property owners.
  - Traditional deference does not always preserve municipal decision
- Local laws need to be specific, unambiguous, and serve a legitimate governmental purpose
- Should include definitions of types of dwellings, uses allowed or prohibited in certain districts
- Benefits of a comprehensive ordinance for short term rentals:
  - Creates a strong basis for enforcement
  - Clarity for hosts, guests, and web/app platforms

Nonconforming Use Problem

- What are they?
- "Nonconforming uses, though lawful, are disfavored."
  - *Gernatt Asphalt Prods, v. Town of Sardinia*, 87 N.Y.2d 668, 676, n.1 (1996).
- The Court of Appeals has reaffirmed that the "overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination."
  - *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 417 (1996).
- Is there a vested right?
- How do you get rid of them lawfully? – *People v. Miller*, 304 N.Y. 105 (1952)

Nonconforming Use Problem

- **Termination**
- *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 561 (1958).
  - It is well established that if the "zoning ordinance provides a sufficient period of permitted nonconformity, it may further provide that at the end of such period the use must cease . . . ."
  - "When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid."

Nonconforming Use Problem

- **Amortization**
  - Suffolk Supply, Inc. v. Board of Trustees of Village of Westhampton Beach, 59 A.D.3d 429 (2d Dep't 2009).
    - One year for asphalt plant upheld
    - "The validity of an amortization period depends on its reasonableness. We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that ***an amortization period is presumed valid***, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power."
- **Administrative remedies**
  - Clear process
  - Provisions for extensions

Use Variance Applications

- Area variance vs. Use Variance
- Use variance test
  - (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence (dollars and cents proof);
  - (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
  - (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; ***and***
  - (4) that the alleged hardship has not been self-created.

Initial Questions When Considering Short Term Rental Regulation

- Do you want short term rentals?
- Are they considered in your Comprehensive Plan?
- Where do you want them?
- If you allow them, how should they be regulated?
- How will the regulations be enforced?
- What do you want to do with the existing short term rentals?

Tips for Good Regulations

- Develop legislative findings.
- Must be specific as to the treatment of “short-term rentals.” Have a good definition.
- Develop a fee structure to administer/enforce the program.
- Determine what zoning/police power mechanisms to use in regulating short-term rentals.
  - Consider requiring a special use permit, license to operate, and/or registration which will require an application process and review of the proposal.
- Review other municipalities’ regulations – see what works and what gets challenged.

Tips for Good Regulations

- Application requirements
  - Minimum requirements should be clearly set forth
- Consider a residency requirement – owner must live in the unit to be rented for a certain time per year.
  - Helps guard against careless non-resident hosts
- Record keeping requirements for platforms and hosts alike
- Cap on the number of days per year the property may be rented as a short-term rental.
- Parking requirements.
- Consider allowing in higher-density neighborhoods, but limit for single-family neighborhoods.

Tips for Good Regulations

- Designation of ***local*** contact person who will be available 24/7 during rental periods for handling any problems that arise with the property.
- Noise and nuisance provisions, or reference to other ordinances addressing such situations.
- Garbage collection issues.
- Requirements for notifying neighbors.
  - Caution – can result in unnecessary discontent
- Limitations on the number of guests.
- Limitations on the turnover – minimum stay duration; minimum periods between rentals.

Enforcement Challenges

- Late night issues
  - Personnel limitations – this is why requiring a local designee is important
- Administrative enforcement, revocation of license/permit
  - Due process required
- Noise/nuisance laws
  - Vague
  - Court challenges
  - Can be difficult to prove
- Volume of rentals
  - In popular locations, sheer number of hosts and rental properties can make enforcement difficult.

Questions?

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