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The New American Home: A Look at the Legal Issues Surrounding Airbnb and Short-Term Rentals

Alexander W. Cloonan
University of Dayton

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Cover Page Footnote

He would like to offer his sincere thanks to Professor Blake Watson for his valuable guidance and advice, and to the Staff Writers and Editorial Board that spent countless hours perfecting this Comment. He would also like to thank his family, friends, and fiancée, Erika, for their patience and help throughout the entire writing process. Finally, he would like to thank Airbnb, for this comment could not have existed without it.

THE NEW AMERICAN HOME: A LOOK AT THE LEGAL ISSUES SURROUNDING AIRBNB AND SHORT-TERM RENTALS

*Alexander W. Cloonan**

I.	INTRODUCTION.....	28
II.	BACKGROUND.....	29
	<i>A. What If We Turned Our House into a Bed and Breakfast?</i>	<i>29</i>
	i. 2007: Airbed and Breakfast is Born	29
	ii. 2015: The Airbnb of Today	30
	<i>B. The Legal Issues Plaguing Airbnb's Existence</i>	<i>32</i>
	<i>C. Framing the Problem: Short-Term Rentals and Zoning</i>	<i>33</i>
	i. Short-Term Rentals	33
	ii. Zoning and Land Use	35
	a. Traditional Zoning.....	36
	b. Mixed Use Zoning.....	37
III.	ANALYSIS.....	38
	<i>A. Short-Term Rentals Do Not Change the "Use" of a Home.....</i>	<i>38</i>
	i. The "Accessory Use" Dilemma.....	38
	ii. Short-Term Rentals, Accessory Uses, and <i>In Re Toor</i>	39
	iii. Determining the Impact of an Unclear Ordinance	42
	<i>B. Short-Term Rentals Do Not Disrupt Economic and Community Stability</i>	<i>42</i>
	i. Short-Term Rentals Are Not a Nuisance in the Community	43
	ii. Short-Term Rentals Do Not Undermine the "Residential Character" of the Community.....	44
	iii. Considering the Denigration of the Supply of Affordable Housing.....	46
	<i>C. Finding a Balance: Successfully Regulating Short-Term Rentals.....</i>	<i>47</i>
	i. Durational Limitations.....	47
	ii. Registration Limitations	48
	iii. Occupancy Limitations.....	50
	iv. Location Limitations.....	51

* The author is a 2016 graduate of the University of Dayton, School of Law, and 2013 graduate of Miami University. He would like to offer his sincere thanks to Professor Blake Watson for his valuable guidance and advice, and to the Staff Writers and Editorial Board that spent countless hours perfecting this Comment. He would also like to thank his family, friends, and fiancée, Erika, for their patience and help throughout the entire writing process. Finally, he would like to thank Airbnb, for this comment could not have existed without it.

v. Taxation Requirements.....51
 D. The Best Solution.....51
IV. CONCLUSION52

I. INTRODUCTION

The year is 1995. Bill is flying from Dayton, Ohio, to Los Angeles, California, for a business conference. Bill has booked his stay at an overly expensive hotel within a bland and underwhelming room. The bed is as hard as a rock and the sheets have clearly seen better days. Although the circumstances that Bill has found himself in are not ideal, what other options does he have (other than spending even more money at a different hotel)? Enter 2015. Bill is flying from Dayton, Ohio, to Los Angeles, California, for a business conference. Bill has used the short-term rental website, Airbnb, to rent a room for nearly half the price of any other hotel in the area. In addition, Bill gets to experience the more localized atmosphere that Los Angeles has to offer. This is the future of short-term rentals – and it is here to stay.

The above scenarios demonstrate the effects of the modern day “sharing economy.” The sharing economy can be defined as “a socio-economic ecosystem built around the sharing of human [and] physical . . . resources. It includes the shared creation, production, distribution, trade and consumption of goods and services by different people and [organizations].”¹ The sharing economy is a global phenomenon that has changed every facet of the travel experience. It allows people to take full advantage of their property, real or personal, and create profit where there previously was none.

One of the most prominent and rising companies in the sharing economy is Airbnb. Airbnb is a short-term residential rental company that allows its guests to “[b]ook homes from local hosts in 191+ countries”² Airbnb “hosts” list their residences on the Airbnb website and Airbnb “guests” select a residence to rent for a short period of time.³ Airbnb further boasts that guests can stay at “unique accommodations like castles and igloos[,]” making it different than a hotel or the like.⁴ The meteoric rise of Airbnb has vastly changed the common dynamics of travel and has created a truly unique way for the everyday person to explore the world.

However, while these changes are both innovative and revolutionary, new companies in the sharing economy have found it difficult to comply with existing laws. Airbnb is no stranger to these legal dilemmas. What began as

¹ Benita Matofska, *What Is The Sharing Economy?*, THE PEOPLE WHO SHARE, <http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/> (last visited Apr. 1, 2017).

² AIRBNB, <https://www.airbnb.com/host> (last visited Apr. 1, 2017).

³ *Id.* For the remainder of this Comment, “host” will be used to mean one who rents out their own home to another through the use of Airbnb. Similarly, “guest” will continue to be defined as one who rents, or stays in, the Airbnb rental listed by the aforementioned “host.”

⁴ *Id.*

a clever way to save people a few dollars has turned into nothing short of a regulatory nightmare. Airbnb has encountered a plethora of legal issues ranging from taxation to tort liability. However, the most prevalent issues concern zoning, land use, and short-term rental (“STR”) regulations. These three issues are of great concern to Airbnb because of the fact that no one city has the same laws, regulations, or zoning codes as another city.⁵ This leads to uncertainty among hosts and guests and a fear that the use of Airbnb will lead to negative consequences with the law.

One example of such a situation recently occurred with a 70-year-old San Diego woman named Rachel Smith.⁶ Ms. Smith began using Airbnb in May 2012 and listed her five-bedroom home on the website in order to help fill the vacant rooms.⁷ After several complaints from angry neighbors, Ms. Smith was fined \$25,000 “for failing to obtain the required permit to operate a bed-and-breakfast out of her home.”⁸

This example clearly shows that there are issues with the use of Airbnb and raises the following question: how can these issues be mitigated? Section II of this Comment provides an introduction of the history and evolution of Airbnb. It will then acquaint the reader with some of Airbnb’s legal issues, including problems with occupancy taxes, STR regulations, and zoning. Following this background material, Section III will demonstrate that (i) STRs do not change the “use” of a home and that (ii) STRs do not disrupt the economic and communal stability of a community. Subsequently, this Comment will discuss the different types of regulations that local governments have employed in an attempt to find “The Best Solution” for the use of STRs. Finally, Section IV of this Comment will present the author’s conclusions.

II. BACKGROUND

A. What If We Turned Our House into a Bed and Breakfast?

i. 2007: Airbed and Breakfast is Born

Our story starts in a small San Francisco apartment in October 2007.⁹ Friends and Airbnb founders Joe Gebbia and Brian Chesky had recently

⁵ Cities like New York City (“NYC”) and San Francisco have often been the subjects of comparative analyses for their clear differences in how to handle Airbnb. While NYC has shown an unwillingness to endorse Airbnb, San Francisco is virtually its polar opposite. See discussion *infra* Sections II, III.

⁶ Tess Owen, *A San Diego Woman Renting Rooms Through Airbnb Was Fined \$25K*, VICE NEWS (Aug. 13, 2015, 6:30 PM), <https://news.vice.com/article/san-diego-woman-renting-rooms-through-airbnb-is-fined-25000> (last visited Apr. 1, 2017).

⁷ *Id.*

⁸ *Id.*

⁹ *Inside AirBnB With Its Co-Founders*, BLOOMBERG, at 02:08, <http://www.bloomberg.com/news/videos/b/1efd6a5d-def9-4d7a-abfc-6b6ce7a7e5a1> (last visited Apr. 1, 2017).

moved in with each other only to learn that their landlord was planning on raising the rent an intimidating 25%.¹⁰ Unable to pay the rent, Gebbia and Chesky, both industrial engineers, needed an idea.¹¹ The two founders discovered that an International Design Conference would be taking place in San Francisco that weekend and that most local hotels were booked.¹² It was at that moment the founding concept of Airbnb was born: “What if we turned our house into a bed and breakfast for this conference?”¹³ Armed with an air bed and an apartment, Gebbia and Chesky hosted Airbnb’s first three guests that weekend.¹⁴

Officially founded as “Airbnb” in August 2008,¹⁵ Gebbia and Chesky recruited friend, and fellow engineer, Nathan Blecharczyk to be the third founder.¹⁶ In an interview with Bloomberg’s Charlie Rose, Chesky indicated that people use Airbnb for two reasons.¹⁷ Chesky noted that hosts likely begin using Airbnb as a way to make a few extra dollars, but hosts continue to use Airbnb because of the unique experiences and new people they meet.¹⁸ After realizing the true potential Airbnb’s future held, Gebbia stated that:

At that point we started to brainstorm what a larger, international version of the site would be. That was basically our market research. People told us what they wanted, so we set off to create it for them. Ultimately while solving our own problem, we were solving someone else’s problem too. We were at a point professionally where we were very ready to pursue our own idea. We were anxious though, like waiting in line for a roller coaster. We didn’t know exactly what was ahead, but we knew we were in for a ride.¹⁹

Having been a company for over seven years, Airbnb truly is the definition of unique – how many hotels can boast a stat of having over 1400 castles?²⁰ Its rise in popularity seems to be never-ending and its driven founders have every intention of keeping things that way.

ii. 2015: The Airbnb of Today

Airbnb’s website describes itself as “a trusted community

¹⁰ *Id.* at 02:20.

¹¹ *Id.* at 02:34.

¹² *Id.* at 02:47–02:53.

¹³ *Id.* at 02:54–03:00.

¹⁴ *Id.* at 03:06–03:29.

¹⁵ *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Apr. 1, 2017).

¹⁶ *Inside Airbnb*, *supra* note 9, at 04:40–04:44.

¹⁷ *Id.* at 03:54.

¹⁸ *Id.* at 03:54–4:05.

¹⁹ *Travel Like A Human With Joe Gebbia, Co-founder of AirBnB!*, ALLENTREPRENEUR (Aug. 26, 2009), <https://allentrepreneur.wordpress.com/2009/08/26/travel-like-a-human-with-joe-gebbia-co-founder-of-airbnb/> (last visited Apr. 1, 2017).

²⁰ *About Us*, *supra* note 15.

marketplace for people to list, discover, and book unique accommodations around the world — online or from a mobile phone or tablet.”²¹ Since finding success, Airbnb has grown from hosting three guests in Gebbia and Chesky’s living room to hosting over 60 million guests through 2 million different listings.²² Further, Airbnb is in more than 34,000 cities and 191 countries.²³ From a Parisian apartment overlooking the Eiffel Tower or a majestic Havana villa in Cuba to a four-person tent in Alaska, guests can find Airbnb virtually anywhere.²⁴

Undoubtedly, this sort of growth comes with financial benefits. As of June, 2015, Airbnb had received \$2.29 billion in funding from 41 investors.²⁵ PrivCo, a provider of financial data on major privately-held companies, suggests that as of June 2015, Airbnb was valued at \$25.5 billion.²⁶ As former PrivCo CEO Sam Hamadeh stated, that is “crazy money.”²⁷ Although Airbnb does not reveal its exact profits, it takes “3% from a host’s booking rate and 6% to 12%” from the fee charged overall to each guest.²⁸ This system has allowed for the Airbnb’s founders’ stakes in the company to amount to over \$1.5 billion each.²⁹

While Airbnb’s founders and investors have benefited substantially from its success, tangential victories are felt by the hosts who use it every day.³⁰ “People providing these services in many ways are entrepreneurs or micro-entrepreneurs,” says Chesky, “[t]hey’re more independent, more liberated, a little more economically empowered.”³¹ SmartAsset, a personal finance technology company, conducted a recent study that “analyzed the profit potential of rentals in 15 of the largest Airbnb markets in the U.S.”³² The study found that Airbnb hosts renting out a full two-bedroom apartment

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See Jason French, Sam Schechner & Matthias Verbergt, *How Airbnb Is Taking Over Paris*, WALL ST. J. (June 26, 2015, 5:30 AM), <http://graphics.wsj.com/how-airbnb-is-taking-over-paris/> (last visited Apr. 1, 2017); Beth J. Harpaz, *Airbnb is Booming in Cuba*, BUS. INSIDER (June 2, 2015, 12:53 PM), <http://www.businessinsider.com/airbnb-is-booming-in-cuba-2015-6> (last visited Apr. 1, 2017); Alex DeMarban, *Yurts, Tents and Urban Suites -- Airbnb Options Grow in Alaska*, ALASKA DISPATCH NEWS (May 24, 2015), <http://www.adn.com/article/20150524/yurts-tents-and-urban-suites-airbnb-options-grow-alaska> (last visited Apr. 1, 2017).

²⁵ *Airbnb*, CRUNCHBASE, <https://www.crunchbase.com/organization/airbnb#/entity> (last visited Apr. 1, 2017). It should be noted that this statistic was current as of October 14, 2015.

²⁶ See Sara Ashley O’Brien, ‘Crazy Money’ - Airbnb Valued at Over \$25 Billion, CNN MONEY (June 27, 2015, 6:59 PM), <http://money.cnn.com/2015/06/27/technology/airbnb-funding-valuation-update/> (last visited Apr. 1, 2017).

²⁷ O’Brien, *supra* note 26.

²⁸ Alex Konrad, *Airbnb Cofounders Are Billionaires As Share Economy Leader Closes \$450 Million Round At \$10 Billion Valuation*, FORBES (Apr. 18, 2014, 04:55 PM), <http://www.forbes.com/sites/alexkonrad/2014/04/18/airbnb-closes-round-at-10-billion/> (last visited Apr. 1, 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Nick Wallace, *Where Do Airbnb Hosts Make The Most Money*, SMARTASSET (Jan. 12, 2016), <https://smartasset.com/mortgage/where-do-airbnb-hosts-make-the-most-money> (last visited Apr. 1, 2017).

or house in fifteen selected cities made an annual profit of \$20,619.³³ Airbnb's increased success, however, has been accompanied by a mirrored rise in legal issues.

B. The Legal Issues Plaguing Airbnb's Existence

Airbnb is no stranger to the courtroom. Since its inception, it has faced legal issues that range from taxation to tort liability.³⁴ While these issues are not the main focus of this Comment, it is necessary to highlight the major concerns encompassing hotel occupancy taxes in order to realize why Airbnb and STRs have come under fire.

Hotel owners are angry because a vast majority of Airbnb hosts and guests do not pay occupancy taxes.³⁵ Airbnb vaguely describes an occupancy tax on its website as "a tax on the rental of rooms that your state or locality may require. In many places this is known as an occupancy tax, but may also be known as a lodging tax, a room tax, a sales tax, a tourist tax, or a hotel tax."³⁶ In other words, occupancy taxes are taxes that hosts (or often times guests) must pay when renting out a home for less than thirty days.³⁷ Airbnb requires its hosts to pay occupancy taxes and makes it the hosts' responsibility to be aware of their existence.³⁸

Logically, before Airbnb, occupancy taxes generally applied only to hotels, motels, bed and breakfasts, and the like. In the past, occupancy taxes were almost exclusively paid by hotels. However, with the emergence of Airbnb and other similar companies, short-term rental companies have caught the eye of the government.³⁹ While the government seeks the payment of these occupancy taxes for revenue, hotels are upset due to the diversion of business. Put simply, if Airbnb hosts and guests do not pay occupancy taxes, then the Airbnb rentals will be less expensive than the hotel rentals thus

³³ *Id.* Of course, depending on the location and size of the home, profits are likely to vary. For example, a host in Columbus, Ohio, that routinely rents his apartment for \$15 a night is certainly not going to make more than the host in San Bernardino, California, that routinely rents his home for \$10,000 per night.

³⁴ For a more in depth analysis on Airbnb's issues with occupancy and taxation, see generally Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103 (2015). For a more in depth analysis on Airbnb tort liability, see generally Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329 (2015).

³⁵ For example, see *Airbnb, Inc. v. Schneidman*, 44 Misc. 3d 351, 358 (N.Y. Sup. Ct. 2014), where the City of New York asserted that research suggested that the "vast majority of the over 15,000 AirBnB Hosts in New York City are not paying [hotel occupancy taxes]."

³⁶ *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 Apr. 1, 2017).

³⁷ Ann Carms, *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=2 (last visited Apr. 1, 2017).

³⁸ *What is Occupancy Tax? Do I Need to Collect or Pay It?*, *supra* note 36 ("Occupancy tax is generally paid by the guest, but the obligation to remit the taxes to the government usually falls on the host. We expect all hosts to familiarize themselves with and follow their local laws and regulations.").

³⁹ Carms, *supra* note 37.

causing a decline in the hotel business.

C. Framing the Problem: Short-Term Rentals and Zoning

Airbnb's model is one that reaches nearly every level of the legal spectrum; however, some of the more difficult legal issues can be found in the areas of short-term rentals, zoning, and land use.⁴⁰ Airbnb has found problems with a host's ability to have paying guests for short periods of time.⁴¹ These issues are only made worse by the unpredictability of laws in each different city.⁴² This unpredictability, paired with the often unclear wording and perplexing structure of local zoning and ordinance codes, leads to confusion for hosts, guests, and even the local governments themselves.

i. Short-Term Rentals

Traditionally, the term "short-term rentals" has referred almost exclusively to hotels, bed and breakfasts, or vacation/seasonal rentals. However, with the rise of companies like Airbnb, the STR market has undergone a major change. Today, STRs "serve a broad variety of purposes including families remodeling their homes, business people staying for more than a few days, patients and their families in town for extended medical visits, and groups attending out-of-town functions"⁴³ While the exact number of days can vary among places, an STR can be generally defined as any "residential property that is rented to a visitor for less than 30 days."⁴⁴

With the number of uses for STRs growing every year, the amount of criticism grows with them. Disregarding the discontent hotels (discussed above), "permanent residents"⁴⁵ that choose not to use Airbnb have taken

⁴⁰ Each of these three areas work in a similar fashion and have a high degree of relatedness. For example, land use could easily be considered a subcategory of zoning. This Comment seeks to look at them as separate areas of law in an attempt to reach a solution to Airbnb and STR problems. That being said, the reader should be aware that no one area holds the sole key to a solution, and ultimately each area will have to be involved in some way or another.

⁴¹ *What Legal and Regulatory Issues Should I Consider Before Hosting on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb> (last visited Apr. 1, 2017).

⁴² *Id.*; *Zoning Laws*, NAT'L PARALEGAL C., http://nationalparalegal.edu/public_documents/courseware_asp_files/realProperty/RightsandDuties/ZoningLaws.asp (last visited Apr. 1, 2017) ("Zoning laws are almost always enacted and enforced by local, and not statewide or nationwide, authorities. City governments, town governments, village governments and the like are merely functions of the state government. They derive all of their authority from the states in which they reside.").

⁴³ *The Basics: Best Practices in Short-Term Rental Regulation*, SHORT TERM RENTAL ADVOC. CTR. (Nov. 27, 2012), <http://www.slideshare.net/STRadvocacy/best-practices-15370368> (last visited Apr. 1, 2017).

⁴⁴ *Id.*

⁴⁵ For the remainder of this Comment, "permanent resident" will be used to identify one who lives in their home full-time, or year round, and may be considered as an opponent to the expansion or use of short-term rentals and Airbnb.

issue with the constant turnover.⁴⁶ This dilemma is documented in the following excerpt from LA Weekly:

You're one of six college friends in, say, New York or even Nepal, and you want to visit Hollywood for a weekend. You can book a hotel for \$75 to \$350 a night, or you can seek an apartment or room in somebody's home via Roomorama, VRBO or the granddaddy of online short-term rental services, Airbnb.

On Airbnb, you and your pals find a cozy, clean one-bedroom apartment in a 12-unit Franklin Village co-op – a complex owned mostly by on-site residents – for \$150 per night. . . .

After your host, the apartment unit's owner, gives you the keys and a gate opener, you and your compatriots go drinking before rolling two rented minivans into your allocated space under the building. You drag your suitcases up the stairwell at 2 a.m. to be confronted by the irate homeowners association president. The neighbors are weary of tourists jarring them awake in a residential neighborhood.

They're even madder at the host, for turning their homes into a hotel.

The following morning, you're met with hostile glares – one neighbor, who lives next door, mutters that he was kept awake by the sound of the toilet being flushed all night by six occupants. Another screams at you to move the second minivan because it's blocking her car. Of course you didn't know that only one vehicle is allowed per space. You shrug. What difference does it make? You'll be gone tomorrow.⁴⁷

This scenario represents two prime criticisms of STRs and Airbnb. The first is that STRs and Airbnb disrupt economic and community stability. While some Airbnb guests may be the perfect neighbors, others have the potential to be loud, dirty, and disruptive. However, regardless of the type of guest that stays in a short-term rental, most guests are unlikely to have knowledge of the legal overlay or social norms of the city and community. This helps to create hostile neighbors and government entities as well as a disdain for STRs.

⁴⁶ Steven Leigh Morris, *Airbnb is Infuriating the Neighbors. Is it Time for New Rules?*, LA WKLY. (Jan. 22, 2015, 2:47 PM), <http://www.laweekly.com/news/airbnb-is-infuriating-the-neighbors-is-it-time-for-new-rules-5343663> (last visited Apr. 1, 2017).

⁴⁷ *Id.*

This lack of knowledge is the essence of the second criticism. Airbnb hosts will often continue to list their properties for rent in spite of the laws they are supposed to be following.⁴⁸ It seems quite unlikely their failure to follow the law is based solely on a desire to challenge the law. The more logical answer is that the decision is based on a lack of understanding of the laws that Airbnb hosts must interpret for their own individual city.⁴⁹ These laws can almost always be found in a city's ordinances and/or zoning codes; however, just because one might know where to find these answers does not mean that it is easy to understand the requirements. After all, there is a reason most laypeople do not read city ordinances and zoning codes for fun; they are challenging to sort through and even more difficult to fully comprehend.

ii. Zoning and Land Use

As author Donald L. Elliot has observed, zoning "is not a sexy topic."⁵⁰ His book, *A Better Way to Zone: Ten Principles to Create More Livable Cities*,⁵¹ deals with a wide variety of issues that range from permitted and prohibited uses to landscaping requirements.⁵² Furthermore, Elliot suggests many current zoning systems "are more complex than they need to be; actually prevent many types of development that cities would like to approve; . . . [and] adjust poorly to changed circumstances"⁵³ An example of a typically obtuse zoning ordinance is as follows:

17-2-0103 RT, Residential Two-Flat, Townhouse and Multi-Unit Districts. The primary purpose of the RT districts is to accommodate *detached houses, two-flats, townhouses* and low-density, *multi-unit residential buildings* at a density and building scale that is compatible with RS districts. The districts are intended to be applied in area characterized by a mix of housing types. The districts are also intended to provide a gradual transition between RS districts and higher *density* RM districts. The RT districts are differentiated primarily on the basis of allowed *density* (minimum *lot area* per unit) and *floor area ratios*. The RT4A designation is intended to accommodate and promote *multi-*

⁴⁸ Nathan P. Bettenhausen, *There Goes the Neighborhood: Regulating the Growing Short-Term Rental Industry*, 57 ORANGE COUNTY L. 16, 16–17 (2015) (noting that "the online availability of short-term rentals in areas that have total bans [on short-term rentals] suggests that, despite the total bans, clandestine leasing continues").

⁴⁹ It should be noted that Airbnb's website provides a summary of the local ordinances for nearly 50 cities. *Responsible Hosting in the United States*, AIRBNB, <https://www.airbnb.com/help/responsible-hosting> (last visited Apr. 1, 2017). While this is helpful, it disregards roughly 33,950 other cities in the world. See *About Us*, *supra* note 15.

⁵⁰ DONALD L. ELLIOT, *A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES* 1 (2008).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2.

unit buildings containing accessible dwelling units. See also Sec. 17-2-0105.⁵⁴

In its fundamental meaning, zoning is “[t]he legislative division of a region, [especially] a municipality, into separate districts with different regulations within the districts for land use, building size, and the like.”⁵⁵ However, in practice, the purpose of zoning is much broader.⁵⁶ It “is used as a permitting system to prevent new development from harming existing residents or businesses.”⁵⁷

a. Traditional Zoning

Zoning first became an issue in the United States in 1926, when the United States Supreme Court upheld a zoning ordinance in *Euclid v. Ambler Realty Co.*⁵⁸ Euclid paved the way for the creation of the aptly titled Euclidian zoning plan, which is the most well-known and common zoning code since its creation.⁵⁹ “Euclidean zoning is characterized by the segregation of land uses into specified geographic districts and dimensional standards stipulating limitations on the magnitude of development activity that is allowed to take place on lots within each type of district.”⁶⁰ In other words, Euclidean zoning restricts use of certain areas to a specified purpose. A map of a Euclidean zoned city would show different colors, each designating a specific permitted use.⁶¹ The most common designations are single-family residential, multi-family residential, commercial, and industrial.⁶² Although Euclidean zoning is used all across the world, it is often criticized “for its unnecessary separation of land uses, its lack of flexibility, and its institutionalization of now-outdated planning theory.”⁶³ Due to this criticism, several different approaches to zoning have emerged.

Performance zoning differs from Euclidean zoning because it deemphasizes distance and size control, and primarily seeks to limit the “bad

⁵⁴ CHICAGO, IL, ZONING ORDINANCE tit. 17, ch. 2, § 0103 (2017), [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il) (last visited Apr. 1, 2017).

⁵⁵ *Zoning*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵⁶ ELLIOT, *supra* note 50, at 2.

⁵⁷ COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT’L RESEARCH COUNCIL, URBAN STORMWATER MANAGEMENT IN THE UNITED STATES 73 (2008) [hereinafter STORMWATER MANAGEMENT].

⁵⁸ 272 U.S. 365 (1926). Ambler Realty claimed the zoning ordinance deprived it of liberty and property without due process of law and denies it the equal protection of the law. *Id.* at 384. The Supreme Court disagreed and rejected the argument that the ordinance’s provisions “are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Id.* at 395.

⁵⁹ STORMWATER MANAGEMENT, *supra* note 57, at 75.

⁶⁰ *Id.*

⁶¹ ELLIOT, *supra* note 50, at 11.

⁶² Eliza Hall, Note, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 923 (2007).

⁶³ STORMWATER MANAGEMENT, *supra* note 57, at 89.

impacts” often associated with traditional zoning.⁶⁴ In more recent years, form-based zoning codes have emerged.⁶⁵ This type of zoning system focuses “more on the form of development . . . and less on permitted uses.”⁶⁶

b. Mixed Use Zoning

Land use regulation is almost certainly a subcategory of zoning; after all, a zoning ordinance without the ability to address land use would essentially be powerless. However, while the two categories can be combined, they may also be addressed separately. The idea behind mixed use zoning is not only that certain uses can coexist together, but also that certain uses must be able to coexist together.⁶⁷ Traditional zoning codes seek to place different activities (such as short term rentals) in certain imaginary boxes. These types of codes want concrete definitions for “uses” and want everybody and everything to fall in line with those “uses.” However, as will be discussed in greater depth *infra*, there is no great need for these uses. As described by Donald Elliot:

[T]he benefits of lightening up on use control are offset in part by the fact that some uses really do matter. Bookstores are different from bars. Mainstream cinemas have different impacts than adult film arcades. What the form-basers really mean (I think) is that many forms of retail, commercial, and (at least) light industrial uses can be substituted for one another with few, if any, adverse land use impacts on surrounding areas. And there is no inherent reason why most commercial, institutional, and residential uses *need* to be separated, as long as the scale of the uses is compatible. Some may want them separated and others may want them together, but there is no reason why the government *has* to separate them.⁶⁸

⁶⁴ ELLIOT, *supra* note 50, at 23–26. Touted as being a more flexible zoning system, performance zoning deemphasizes specific land uses and creates fewer zoning districts with each permitting an array of different uses. Lane Kendig & Mark White, *Comparing Four Zoning Codes: Euclidian, Conditional, Form Based, and Performance*, KENDIG KEAST COLLABORATIVE 3 (2014) <http://www.kendigkeast.com/wp-content/uploads/2012/03/Comparison-of-4-Forms-of-Zoning-Kendig-White-APA-National-2014.pdf> (last visited Apr. 1, 2017).

⁶⁵ See ELLIOT, *supra* note 50, at 26.

⁶⁶ *Id.* Perhaps the most fitting for our modern society, form-based zoning follows a New Urbanism approach, and “relies on rules applied to development sites according to both prescriptive and potentially discretionary criteria.” STORMWATER MANAGEMENT, *supra* note 57, at 91. For an in-depth and fascinating analysis of form-based zoning, see generally Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVT'L. L. 35 (2010).

⁶⁷ ELLIOT, *supra* note 50, at 26; PAS Quick Notes No.6, *Zoning for Mixed Uses*, AM. PLANNING ASS'N, <https://www.planning.org/pas/quicknotes/pdf/QN6.pdf> (last visited Apr. 1, 2017) (“Mixed use zoning sets standards for the blending of residential, commercial, cultural, institutional, and where appropriate, industrial uses.”).

⁶⁸ ELLIOT, *supra* note 50, at 33.

III. ANALYSIS

Are changes to zoning laws the best way to create more effective regulation of STR use? The common answer among legal scholars discussing this issue generally seems to be no.⁶⁹ However, as land use is a chief factor in zoning, it would be foolish to disregard it. In a municipality that employs a more traditional zoning code, it may be difficult to see productive changes coming from zoning. Conversely, if a municipality is implementing a more modern zoning code, it is much easier to see how changes to zoning could have a useful impact on the issue of short-term rentals.

This analysis will begin by arguing that STRs and Airbnb do not change the actual “use” of a home. Subsequently, the second part of this analysis discusses the policy-based arguments on which the courts rely when barring the use of STRs. The third section of this analysis introduces and compares a number of different regulations addressing the STR quandary. Finally, the fourth section of this analysis proposes “The Best Solution,” which suggests, with a certain balance of regulation, STRs and Airbnb may live happily ever after.

A. Short-Term Rentals Do Not Change the “Use” of a Home

A frequent and recurring concern over the usage of STRs is that hosts are renting out their homes with no regard for the law. As discussed *supra*, local governments employ zoning ordinances that regulate the “uses” of each and every district. Airbnb naysayers are often quick to conclude that the practice of renting out one’s home short-term is an illegal commercial use in a district zoned for residential use only. Conclusions such as these are the epitome of a misguided trust in this modern system and are often made because of a lack of accurate information.⁷⁰

i. The “Accessory Use” Dilemma

Perhaps the most logical place to start this analysis is by identifying and distinguishing primary uses and accessory uses. In order to determine what the primary use of a certain property is, one must ask how the individual is primarily using the property.⁷¹ Conversely, an accessory use is a use that is incidental or subordinate to the primary use of the property.⁷² There are

⁶⁹ See Dana Palombo, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287, 306 (2015) (suggesting that “[w]hile Airbnb offers tourists a unique experience and allows hosts to make extra income, zoning may not be the best solution to its legal issues”); Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 ST. LOUIS U. PUB. L. REV. 41, 55 (2009) (noting that “[j]urisdictions that enact short-term rental restrictions through their zoning powers can face significant hurdles”).

⁷⁰ Note that this section is most applicable when the local government has not enacted any short-term rental regulations of their own.

⁷¹ Terry Rice, *Zoning and Land Use in New York State*, 50 SYRACUSE L. REV. 917, 922 (2000).

⁷² *Id.*

several tests that may be used in order to ascertain whether a use of property is an accessory one.⁷³ Two of the more applicable tests ask (1) “whether there is a primary permitted use”⁷⁴ or (2) “how the space in the residence is used.”⁷⁵

In order to better understand the importance of accessory uses, consider the following scenario based on “home occupations.” Barry owns and lives in his four-bedroom home in Central City. Barry is an accountant and runs his business in what he calls the “office room” in his home. Barry’s home is located in a residentially zoned neighborhood. Furthermore, it is not unusual for Barry’s clients to come to his home for meetings or to pick up important documents. This requires some of his clients to park on the street outside Barry’s home for a prolonged amount of time.

In this fact pattern, the primary use of Barry’s home is seemingly residential in nature. Barry lives in the home all year long and only utilizes one room in the four-bedroom house to do his work as an accountant. Because of this, Barry’s living in his home is likely a permitted primary use and Barry’s working in his home is likely a permitted accessory use.

These scenarios are directly tied to several prevalent zoning questions. As is demonstrated in our fact pattern, Barry is making money from his business in his home that is zoned residential and *not* commercial. However, this mixed use is more than likely acceptable and legal.

As a general matter . . . accessory uses are allowed if they are customarily incidental and subordinate to the principal use of the property. From a zoning viewpoint, the purpose of the requirement is clear. So long as the commercial use is a secondary one, conducted on a small scale relative to the principal use, it will presumably not harm—or inflict only minimal harm upon—other residential users.⁷⁶

Thus, as long as the claimed commercial use is ancillary to the permitted primary use, there should be no reason for complaints. While the above example with Barry the accountant is in regard to home occupations, it is no stretch to apply the same logic to STRs and Airbnb hosts.⁷⁷

ii. Short-Term Rentals, Accessory Uses, and *In Re Toor*

One of the most useful cases discussing the allowance of STRs was

⁷³ *Contemporary Issues in Land Use Permitting*, A Practical Guide to Winning Land Use Approvals and Permits (MB) § 7.03 (2015).

⁷⁴ *Id.*; see *Gratton v. Pellegrino*, 348 A.2d 349, 350–51 (N.H. 1975).

⁷⁵ *Contemporary Issues in Land Use Permitting*, *supra* note 73; see *Metro. Dev. Comm’n v. Mullin*, 399 N.E.2d 751, 752–53 (Ind. Ct. App. 1979).

⁷⁶ *Accessory Uses and Structures*, *Zoning and Land Use Controls* (MB) § 40A.03 (2015).

⁷⁷ See discussion *infra* Section III.A.ii.

decided in 2012 by the Supreme Court of Vermont.⁷⁸ *In Re Toor* sought to answer the question of whether the renting of a single family home altered the use of the home to the point where a permit was required.⁷⁹

John and Margaret Toor owned a beautiful five-bedroom home in Grand Isle, Vermont.⁸⁰ The property overlooked the Inland Sea and had private access to a lake.⁸¹ The Toors' home was "permitted as a single-family dwelling under Grand Isle's Zoning Bylaws and Subdivision Regulations."⁸² The Toors' principal residence was in California, and the Grand Isle home served as their vacation home.⁸³ In 2009, eight years after they had bought the property, the Toors began renting out the Grand Isle home.⁸⁴ The Toors rented out the home to paying guests eleven times in the summer and fall of 2009.⁸⁵ The rentals lasted anywhere from two nights to two weeks and groups renting the home used it primarily for "family vacations, birthday and anniversary celebrations, and entertaining guests."⁸⁶

In September of 2009, the Toors received notices of violations from the Town of Grand Isle alleging the Toors "had changed the use of their property either to a bed and breakfast, a rooming and boarding house, or a hotel or motel without a permit."⁸⁷ After a number of administrative reviews, the superior court decided that the Toors were using their property "as an income-producing short-term rental, [and that it did] not fit within the bylaws' definition of single-family dwelling use."⁸⁸

According to Grand Isle's bylaws, "a single-family dwelling is defined as '[l]iving quarters with cooking, sleeping and sanitary facilities provided within a dwelling unit for the use of a single family maintaining a household.'"⁸⁹ The bylaws did not define "household." However, dwelling and family were defined as:

A building designed or used as the seasonal or permanent living quarters for one (1) or more families (one (1) family domiciled per dwelling unit). For purposes of this definition, a "family" means one (1) or more persons living as a household (dwelling) unit, but not including individuals or groups occupying rooming and boarding houses, clubs,

⁷⁸ *In re Toor*, 59 A.3d 722 (Vt. 2012).

⁷⁹ *Id.* at 723.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 724. The court noted that the first two of these uses were permitted in the specific Grand Isle zone but the last one was not. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 723.

motels or hotels.⁹⁰

On appeal to the Vermont Supreme Court, the court used two main criteria in reversing the decision of the superior court.⁹¹ First, the court looked at whether the home met the definition of a single-family house.⁹² The court found it obvious that this was a single-family house as it had a kitchen, living room, and dining room like any other home.⁹³ The court then considered the uses the Toors and their renters put to the property when they were occupying it.⁹⁴ The court decided the use was the same for all parties involved; it was a vacation home.⁹⁵

The court addressed the superior court's concerns over the "numerous financial arrangements" the Toors were conducting; however, the high court dismissed this argument fairly quickly.⁹⁶ In sum, the court reasoned the Toors' renters fell into the "single-family" categorization and their use was the same as the Toors.⁹⁷ The court further noted Grand Isle's bylaws allowed other commercial uses in the zone already (through the categories of bed and breakfasts, rooming and boarding houses, and home offices).⁹⁸ Because of this, the court was not willing to exclude this sort of "transient and commercial living arrangement[.]" further noting that "[i]t is not the commercial nature of uses that define[d] the limits of [the] zone."⁹⁹

Taking *In Re Toor* into consideration, recall the following assertion:

As a general matter, . . . accessory uses are allowed if they are customarily incidental and subordinate to the principal use of the property. From a zoning viewpoint, the purpose of the requirement is clear. So long as the commercial use is a secondary one, conducted on a small scale relative to the principal use, it will presumably not harm—or inflict only minimal harm upon—other residential users.¹⁰⁰

In *In Re Toor*, the Toors primarily used their home as a vacation home and only rented it out a small number of times. Their "commercial use" was a secondary one and was conducted on a small scale relative to their "principal use." Under this reasoning, when an Airbnb host posts their home on Airbnb's website and rents it out to the occasional guest, as long as that guest is using the home in substantially similar ways as the host would, it should be

⁹⁰ *Id.* at 725.

⁹¹ *Id.* at 726.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 727.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Accessory Uses and Structures*, *supra* note 76, at § 40A.03.

an acceptable and permitted use.

iii. Determining the Impact of an Unclear Ordinance

Another interesting case discussing statutory interpretation in the age of the sharing economy was the recent New York Supreme Court case of *Fruchter v. Zoning Board of Appeals of Town of Hurley*.¹⁰¹ In *Fruchter*, the local zoning board considered the petitioner's use of his home as an illegal hotel or bed and breakfast as the petitioner had not acquired a permit to rent out the A-4 residential zoned home.¹⁰² The petitioner would list the home on the internet, offering to rent it out for periods ranging from a single night to a whole month.¹⁰³ The court decided that the way that the petitioner was using his home did not fall under the definition of a hotel or a bed and breakfast.¹⁰⁴ In other words, "the rentals [did not remove] the property from the definition of residential one-family dwellings"¹⁰⁵

Fruchter is an important decision for one key reason; it is an example of how courts should consider STRs absent clear ordinances. In *Fruchter*, the town had not updated their ordinances to account for STRs and, because of that, the Court was obliged to find for the petitioner.¹⁰⁶ *Fruchter* teaches us that STRs can, and should, be considered as valid uses of one's property if the city ordinance does not clearly regulate its use.

B. Short-Term Rentals Do Not Disrupt Economic and Community Stability

The preceding section of this Comment described a number of scenarios in which residential and "commercial" uses can co-exist.¹⁰⁷ While the author of this Comment is in full support of such an approach, it is important to evaluate the merit of the opposing argument as well. These arguments are made under the assumption that residential and commercial property cannot be fused together; "[t]he term 'residential' is normally used in contradistinction to 'commercial' or 'business.'"¹⁰⁸ The arguments against the practice of short-term renting can more or less be summed up into three relatable subdivisions. The first argument is that STRs create a nuisance in the community.¹⁰⁹ The second argument is that STRs destroy the *residential*

¹⁰¹ *Fruchter v. Zoning Bd. of Appeals of Town of Hurley*, 133 A.D.3d 1174, 1175 (N.Y. App. Div. 2015).

¹⁰² *Id.* at 1174–75.

¹⁰³ *Id.* at 1174.

¹⁰⁴ *Id.* at 1176.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1175.

¹⁰⁷ The word "commercial" remains in quotations because the combination of both uses (residential and commercial) is more closely related to residential. The use of the "commercial" is in no way meant to imply that short-terms rentals are a commercial use.

¹⁰⁸ *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1595 (1991) (alteration in original) (quoting *Sechrist v. Mun. Ct.*, 64 Cal. App. 3d 737, 746 (1976)).

¹⁰⁹ See discussion *infra*, Section III.B.ii.

character of a community.¹¹⁰ The third argument is that STRs are detrimental to the housing market and denigrate the *supply of affordable housing* across the nation.¹¹¹

i. Short-Term Rentals Are Not a Nuisance in the Community

The first—and in the author’s opinion, least persuasive—argument made by permanent residents is that short-term renters create a nuisance in the community. Common concerns of permanent residents include “increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the [c]ity.”¹¹² While these concerns may be considered more basic and common concerns, they are certainly not the only ones.¹¹³ More specifically, Leo and Jane Guariglia of Lake George, New York complained of “dealing with loose dogs on their lawn, seeing people littering and hearing drunken fights in the early morning hours.”¹¹⁴ However, it is not only the permanent residents that complain of these issues; local governments have found reasons to complain as well. For example, it is sometimes argued that an increase of commercial use in residential areas will lead to an increase in the demand of public services like “police, fire, and medical emergency services, and neighborhood watch programs.”¹¹⁵

While these arguments are superficially persuasive, when considered more closely, they lack any serious merit. It is illogical to think that these nuisance concerns only occur with short-term renters. There are an abundance of permanent residents that make similar, if not the same, irritating decisions. Permanent residents fail to cut their grass. Permanent residents have family and friends over that take up extra parking spots. Permanent residents probably even have the occasional drunken fight.¹¹⁶ Likewise, permanent residents probably use public services like police, fire, etc., just as often, if not more than, short-term renters do. The point is, while it is

¹¹⁰ See discussion *infra*, Section III.B.ii.

¹¹¹ See discussion *infra*, Section III.B.iii.

¹¹² *Ewing*, 234 Cal. App. 3d at 1589; see *id.* at 1590 (noting that “[c]ommercial use of single-family residential property for such purposes create unmitigatable, adverse impacts on surrounding residential uses . . .” (alteration in original) (citation omitted))).

¹¹³ See *In re Toor*, 59 A.3d 722, 725 n.3 (Vt. 2012) (noting that permanent residents complained that the Toors practice of renting out their home undermined the “permanence, stability, and quiet seclusion of their lake-front properties.”).

¹¹⁴ Amanda May Metzger, *Residents Make Arguments on Short-Term Rentals*, POSTSTAR (Aug. 20, 2014), http://poststar.com/news/local/residents-make-arguments-on-short-term-rentals/article_2298004a-27ed-11e4-aa33-0019bb2963f4.html (last visited Apr. 1, 2017).

¹¹⁵ *Ewing*, 234 Cal. App. 3d at 1589.

¹¹⁶ See Pindell, *supra* note 69, at 46–47 (“A common failing of arguments supporting community character, however, is that they often cast renters as undesirable community members - a view this article does not endorse. Negative impacts on a community commonly ascribed to renters - overcrowding, short-term horizons, increased traffic, limited care of property - can also be attributed to many owners. As a consequence, distinctions (made by cities and communities) between renter activity and owner activity appear arbitrary, exclusionary, and often mean spirited.” (footnotes omitted)).

impossible to argue that these things do not happen with short-term renters, it is difficult to see them happening for every Airbnb rental. These actions are annoying and create a mistrust in short-term rentals, but it would be foolish to let a few bad apples spoil short-term rentals for everybody.

ii. Short-Term Rentals Do Not Undermine the “Residential Character” of the Community

Perhaps the most persuasive argument against the allowance of STRs is the “residential character” argument. The term “residential character” was likely introduced in the *Euclid* decision when the Court gave a lengthy description of non-residential uses and their destructive impact on residential districts.¹¹⁷ The term, however, is one of extreme breadth and can be defined in a multitude of ways. While it is up for debate which “definition” to use, it is undeniably a factor that courts and local governments consider.

A number of legal commentators writing on this issue cite to, and often agree with, the California case of *Ewing v. City of Carmel-by-the-Sea*.¹¹⁸ This case discusses the primary policy concerns regarding the practice of STRs and justifies its reasoning by relying on *Euclid* and *Miller v. Board of Public Works*.¹¹⁹ These two cases, set in 1926 and 1925, respectively, set the stage for zoning decisions to come and have remained extraordinarily persuasive. Describing the importance and meaning of residential character, Justice Thomas Lennon of the California Supreme Court said:

[W]e think it may be safely and sensibly said that justification for residential zoning may . . . be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole.¹²⁰

Although insightful, Justice Lennon in the *Miller* decision focuses on

¹¹⁷ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (“[U]ntil, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.”).

¹¹⁸ See *Ewing*, 234 Cal. App. 3d at 1579; see generally Pindell, *supra* note 69; Palombo, *supra* note 69, at 307.

¹¹⁹ See *Euclid*, 272 U.S. at 365; *Miller v. Bd. of Pub. Works*, 234 P. 381 (Cal. 1925).

¹²⁰ *Miller*, 195 P. at 386–87.

the ownership of residential property as opposed to homeowners renting out the property.¹²¹ While the court was not as concerned with transient residents, it does not mean that its words should be disregarded. When an individual owns a home and lives in that home permanently, they do care about the well-being of the community. They do participate in the activities that the community puts on and they do have a stake in the success of the community at large. These things are something short-term renters do not, and really cannot, have.¹²² While this argument can sound convincing, it certainly has its flaws.

In the City of Carmel-by-the-Sea, California, an STR was defined as anything “less than thirty (30) consecutive calendar days.”¹²³ So, if anybody wanted to rent out their residentially zoned property for a weekend, a week, two weeks, or even twenty-nine days, it would be prohibited by the ordinance and subject to penalties.¹²⁴ However, if somebody wanted to rent out their residentially zoned property for thirty days, just *one more day* than the ordinance mandates, the rental would be considered a long-term rental and would be permitted by the statute. To emphasize this point even more, an individual could actually rent out his home to twelve different people, each for a period of thirty days, and it would be acceptable according to the city and the ordinance.¹²⁵ This reasoning, relayed in *Ewing*, was approved by the court.¹²⁶ As a matter of fact, the court in *Ewing* noted that Carmel did not want to discourage month-to-month tenancies and concluded that “long-term tenants may create as stable a community as resident homeowners.”¹²⁷

As discussed previously in this Comment, STR regulations more often than not prohibit stays that are shorter than 30 days.¹²⁸ This Comment does not argue 30 days is too much or too little and has no intention of arguing month-to-month tenancies are (or are not) short-term rentals. The point of bringing up this argument is to demonstrate a logical flaw in the “residential character” argument. The “residential character” argument makes sense on its face and it should be a factor when considering STRs. However, the argument 29 days is different than 30 days in regard to the maintenance of residential or community character is one that does not make sense.

¹²¹ See generally *id.* at 381.

¹²² See *Ewing*, 234 Cal. App. 3d at 1591 (“[Short-term renters] do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow -- without engaging in the sort of activities that weld and strengthen a community.”).

¹²³ *Id.* at 1584.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1593.

¹²⁷ *Id.*

¹²⁸ In other words, 30 is a common number for these sorts of regulations.

iii. Considering the Denigration of the Supply of Affordable Housing

A third argument against Airbnb and STRs is the denigration of the supply of affordable housing. While this complaint may not be as prevalent in some areas as others, it has been an issue in San Francisco, California.¹²⁹

According to a May 13, 2015 report conducted by the City of San Francisco Budget and Legislative Analyst Office (hereinafter the “Report”):

Assessing only the impact of commercial hosts that rent entire housing units for short-term rentals, the Budget and Legislative Analyst estimates that between 925 and 1,960 units citywide have been removed from the housing market from just Airbnb listings. At between 0.4 and 0.8 percent, this number of units is a small percentage of the 244,012 housing units that comprised the rental market in 2013 (the latest number available from the U.S. Census Bureau’s American Community Survey). However, when compared to the 8,438 units reported as vacant by the American Community Survey in 2013, the percentage is estimated to be between 11.0 and 23.2 percent . . .¹³⁰

If this Report is accurate, the near 25% figure is astounding. This would show that a quarter of San Francisco’s vacant homes are being used to appease short term renters as opposed to helping supply affordable houses to those who potentially want to buy long-term.

Airbnb was quick to counter this report, noting that “[h]ome sharing is an economic lifeline for thousands of San Franciscans who depend on the extra income to stay in their homes’ . . . [and the Budget and Legislative Analyst Office] proposal would make it even harder for middle class families to stay in San Francisco and pay the bills.”¹³¹ In favor of Airbnb, the author of the Report did acknowledge “that the attempts to quantify Airbnb’s impact are a best guess, relying on webscrapes and assumptions about residents’ behavior.”¹³² While the actual impact Airbnb has on the affordable housing market may still remain unknown, San Francisco has no intention of giving up on the fight.

In 2015, San Francisco unsuccessfully backed a controversial

¹²⁹ See generally Katy Steinmetz, *Report Finds Airbnb May Contribute to San Francisco’s Housing Woes*, TIME (May 14, 2015), <http://time.com/3859539/airbnb-report-san-francisco/> (last visited Apr. 1, 2017); Lydia Chávez, *Airbnb’s Innocence (or Not) in SF’s Housing Shortage*, MISSION LOC. (June 23, 2015), <http://missionlocal.org/2015/06/a-closer-look-at-airbnbs-innocence-in-sfs-housing-shortage/> (last visited Apr. 1, 2017).

¹³⁰ CITY AND COUNTY OF SAN FRANCISCO, BUDGET AND LEGISLATIVE ANALYST, ANALYSIS OF THE IMPACT OF SHORT-TERM RENTALS ON HOUSING 3 (May 13, 2015), <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=52601> (last visited Apr. 1, 2017).

¹³¹ Steinmetz, *supra* note 129.

¹³² *Id.*

initiative dubbed as “Proposition F” (hereinafter “Prop F”). Prop F sought to limit the number of nights an STR could be rented out to 75 days in a year—regardless of whether the rental was personally hosted by the host or not.¹³³ Additionally, Prop F sought the implementation of a strict reporting system as well as increasing the ability of third-parties to sue hosts.¹³⁴ After running a significant campaign against Prop F, Airbnb hosts and guests alike were relieved that it did not pass.¹³⁵

Prop F’s failure to pass can be seen as a victory for Airbnb. However, while the specifics of the law were too strict, it did have some points of merit. If Airbnb truly is negatively impacting the supply of affordable housing in San Francisco (or any other city), the only real way to fix it is through regulation. Prop F and San Francisco were unable to provide that solution; however, it is possible to find an agreeable middle ground.

C. Finding a Balance: Successfully Regulating Short-Term Rentals

Finding a balance between over-burdensome regulation and no regulation at all is one of the more difficult questions plaguing local governments. On one end, regulations that are over-burdensome lead to noncompliance. Conversely, a local government with little or no regulations may lead to mayhem and raging neighbors. It is crucial for local governments to recognize the inevitable attraction of Airbnb and create reasonable regulations that benefit all parties involved. There are a variety of regulations that a city might employ in order to better control short-term rentals. The following is not meant to be an exhaustive list of all regulations that can be applied to STRs, but, rather, a collection of options that best resemble reasonable attempts of regulation. It is also important to note that while many of these regulations can, and are, applied together, this Comment will focus on analyzing them, in the most part, separately.

i. Durational Limitations

The term “durational limitations” is fairly broad in regard to STRs and can be viewed in several different ways. For example, a city may set a

¹³³ Tracy Lien, *Everything You Need to Know About San Francisco's Airbnb Ballot Measure*, L.A. TIMES (Oct. 30, 2015, 1:55 PM) <http://www.latimes.com/business/technology/la-fi-tn-airbnb-prop-f-san-francisco-20151029-htmllstory.html> (last visited Apr. 1, 2017).

¹³⁴ *Id.* The following question for Prop F appeared on the ballot: “Shall the City limit short-term rentals of a housing unit to 75 days per year regardless of whether the rental is hosted or unhosted; require owners to provide proof that they authorize the unit as a short-term rental; require residents who offer short-term rentals to submit quarterly reports on the number of days they live in the unit and the number of days the unit is rented; prohibit short-term rentals of in-law units; allow interested parties to sue hosting platforms; and make it a misdemeanor for a hosting platform to unlawfully list a unit as a short-term rental?” *Ballot, CITY OF SAN FRANCISCO*, http://sfgov2.org/ftp/uploadedfiles/elections/candidates/Nov2015/PropF_BallotQuestion.pdf (last visited Apr. 1, 2017).

¹³⁵ According to the official election results, Proposition F lost the vote approximately 55.59% to 44.41%. Election results available at <http://www.sfelections.org/results/20151103/>. This legislation will be further discussed in the following section of this Comment.

fixed number of days in which hosts can rent out their residences to guests.¹³⁶ Or, perhaps, a city could set the minimum number of days and nights that a host can rent out her residence.¹³⁷ The California cities of San Francisco and Palm Desert each take such approaches.

Despite San Francisco's failure to pass the Prop F legislation, the city still has an exceptional STR policy.¹³⁸ In particular, San Francisco allows STRs when:

The Permanent Resident occupies the Residential Unit for no less than 275 days out of the calendar year in which the Residential Unit is rented as a Short-Term Residential Rental or, if the Permanent Resident has not rented or owned the Residential Unit for the full preceding calendar year, for no less than 75% of the days he or she has owned or rented the Residential Unit¹³⁹

San Francisco's policy is clever because it works to eliminate the practice of hosts purchasing property to be rented out year-round. The obvious criticism of a regulation such as this is that it limits the property rights of homeowners.

The approach taken by Palm Desert has merit as well. Palm Desert's ordinance limits the minimum number of days that an STR may be occupied to three days and two nights—anything shorter than that is prohibited.¹⁴⁰ This ordinance is ideal because it takes into consideration both hosts and the neighbors. By requiring a minimum stay of three days and two nights, Palm Desert essentially requires any guests to stay for a full weekend. This kind of regulation likely lessens the “come-and-go” aspect of single night rentals that neighbors often complain of and has the potential of diminishing weekday rentals that likely annoy permanent residents.

ii. Registration Limitations

The most common form of STR regulations are arguably registration requirements.¹⁴¹ While registration requirements are likely the most efficient ways to deal with STRs, they are also the most burdensome. This frustrating registration process thus leads to a certain degree of noncompliance with STR regulations around the nation. Cities that have simple and easy to obtain permits encourage STR growth and regulation. However, in cities that have more complex and avaricious registration processes, it is more likely that

¹³⁶ SAN FRANCISCO, CA, ADMIN. CODE § 41A.5(g)(1)(A) (2016).

¹³⁷ PALM DESERT, CA, MUN. CODE § 5.10.070(B) (2012).

¹³⁸ See *infra* Section III.B.iii.

¹³⁹ SAN FRANCISCO, CA, ADMIN. CODE § 41A.5(g)(1)(A) (2016).

¹⁴⁰ PALM DESERT, CA, MUN. CODE § 5.10.070(B) (2012).

¹⁴¹ A majority of the cities analyzed in this Comment contain at least some sort of registration/license requirement.

noncompliance with the law will arise.

The City of Palm Desert has efficient registration requirements. On March 8, 2012, Palm Desert passed Ordinance No. 1236, which established new regulations for the licensing of residential STRs.¹⁴² The newly created section of the Palm Desert Municipal Code mandated that anybody wanting to engage in short-term renting of their property must: (i) “obtain a short-term rental permit from the City[,]”¹⁴³ (ii) renew that permit on an annual basis,¹⁴⁴ and (iii) pay a registration fee.¹⁴⁵

Another example of an interesting registration process is that of Savannah, Georgia. Applicants are required to fill out a “Business Approval Application” that must be accepted before the home can be considered an STR.¹⁴⁶ If approved, the host will receive an annually-renewable rental certificate.¹⁴⁷ The interesting part of Savannah’s registration process is the city’s titling of the process as the “Business Approval Application.” By making this “Business Approval Application” a mandatory part of the overall application process, Savannah has essentially transformed the normal residential idea of an STR into a commercial use.

While both Palm Desert and Savannah have fairly reasonable registration processes, the approach taken by the City of New Orleans, Louisiana, has led to a plethora of illegal STRs.¹⁴⁸ New Orleans is unique because its STR regulations “cover any location renting rooms for 60 days or less in the French Quarter, or 30 days or less outside of the French Quarter.”¹⁴⁹ Making things even more difficult, New Orleans only allows bed and breakfasts and hotels/motels to apply for STR permits.¹⁵⁰ Additionally, the fee for registration of an STR ranges from \$200 to \$600.¹⁵¹ These perplexing registration requirements have resulted in a vast number of Airbnb guests

¹⁴² Palm Desert, Cal., Ordinance No. 1236 (Mar. 8, 2012), <http://qcode.us/codes/palmdesert/revisions/1236.pdf> (last visited Apr. 1, 2017).

¹⁴³ PALM DESERT, CA, MUN. CODE § 5.10.050 (2012).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 5.10.060. As of February 23, 2016, the application fee was \$26.00. See *Homeowner Application for Short-Term Rental Permit*, CITY OF PALM DESERT, <http://www.cityofpalmdesert.org/Index.aspx?page=712> (last visited Apr. 1, 2017).

¹⁴⁶ *City of Savannah Short-Term Vacation Rentals (STRs)*, CITY OF SAVANNAH, <http://www.savannahga.gov/DocumentCenter/View/4697> (last visited Apr. 1, 2017).

¹⁴⁷ *Id.*

¹⁴⁸ Jeff Adelson, *Plan to Legalize Short-Term Rental Market in New Orleans Gains Praise from Supporters*, THE ADVOC. (Jan. 22, 2016, 4:16 AM), <http://theadvocate.com/news/neworleans/neworleansnews/14632175-37/plan-to-legalize-short-term-rental-market-in-new-orleans-gains-praise-from-supporters> (last visited Apr. 1, 2017).

¹⁴⁹ *Short Term Rentals*, CITY OF NEW ORLEANS, <http://www.nola.gov/short-term-rentals/> (last visited Apr. 1, 2017). The idea of having different regulations for more tourist-based areas of a city will be briefly discussed later in this Comment.

¹⁵⁰ *Id.* While there are several different categories of bed and breakfasts that fall into this category, it is unlikely that a normal residential home would be considered a bed and breakfast.

¹⁵¹ *Bed & Breakfast License*, CITY OF NEW ORLEANS, <http://www.nola.gov/onestop/business/bed-and-breakfast/bed-breakfast-license/> (last visited Apr. 1, 2017).

violating the law.¹⁵²

iii. Occupancy Limitations

If registration requirements are the most common types of STR regulations, then occupancy limitations are a close second. Occupancy limitations, like durational limitations, include a broad spectrum of regulations. Two of the most common regulations may include the puzzling “Owner Occupier Exception” or the more standard “Guest Limit” regulation.

Isle of Palms, South Carolina, a popular beachfront community, regulates STRs like many other communities, by setting “Guest Limits” that limit the number of occupants that an STR may have at any time.¹⁵³ The Isle of Palms approach is twofold. First, the community sets an occupancy limit to two people per bed per home, plus an additional two people, with a maximum of six people.¹⁵⁴ Additionally, the island’s code only allows 40 individuals to be at home at one time.¹⁵⁵ Regulations such as these are fairly common among local governments and help to keep out the type of “rowdy” guests that may create problems for the community.

New York City (hereinafter “NYC”) is known for its strict STR regulations.¹⁵⁶ Relevant to this portion of the analysis, NYC disallows STRs less than 30 days if the owner of the residence is not a “permanent resident.”¹⁵⁷ While the statute continues to raise questions, it has mostly been interpreted to mean a host must be living in the residence at the same time as the guest.¹⁵⁸ This sort of regulation works well to hinder STRs as many Airbnb guests likely prefer to stay in a residence without the host present.¹⁵⁹ However, such overly strict regulations also lead to an increase in illegal STRs, a common problem in New York.¹⁶⁰

¹⁵² Adelson, *supra* note 148 (“The Planning Commission staff, drawing on analyses of AirBnB and other services, estimate that between 2,400 and 4,000 properties are being used as short-term rentals and that about 70 percent of those involve the rental of a full house or apartment. Enforcement is relatively lax; only 231 violations have been reported in the past three years.”).

¹⁵³ ISLE OF PALMS, SC, CODE art. 9, § 5-4-202 (2007).

¹⁵⁴ *Id.* § 5-4-202(a)(1)–(2). These restrictions only apply to homes constructed prior to June 22, 2010; homes constructed after that date allow for a maximum of twelve guests as opposed to six. *Id.* § 5-4-202(c).

¹⁵⁵ *Id.* § 5-4-203.

¹⁵⁶ Jennifer Ferrino, *New York City Will Spend \$10M to Crack Down on Illegal Hotels*, N.Y. DAILY NEWS (Nov. 16, 2015, 12:04 AM), <http://www.nydailynews.com/new-york/nyc-spend-10m-crack-illegal-hotels-article-1.2436047> (last visited Apr. 1, 2017).

¹⁵⁷ See N.Y. MULT. DWELL. LAW § 4 (2011).

¹⁵⁸ *New York, NY*, AIRBNB, <https://www.airbnb.com/help/article/868/new-york--ny> (last visited Apr. 1, 2017).

¹⁵⁹ Carolyn Said, *Window Into Airbnb's Hidden Impact on S.F.*, S.F. CHRONICLE (June, 2014), <http://www.sfchronicle.com/business/item/window-into-airbnb-s-hidden-impact-on-s-f-30110.php> (noting that of 5,000 San Francisco homes, over two-thirds were “entire houses” as opposed to private or “shared” rooms) (last visited Apr. 1, 2017).

¹⁶⁰ See *id.*

iv. Location Limitations

One of the more unique regulations may be location limitations. Such a regulation exists in San Luis Obispo County, California, which states,

[N]o residential vacation rental shall be located within: (1) 200 linear feet of a parcel on the same side of the street as the vacation rental; (2) 200 linear feet of the parcel on the opposite side of the street from the vacation rental; and (3) 150 foot radius around the vacation rental.¹⁶¹

A regulation such as this certainly has the potential to limit STRs in a neighborhood; however, it would likely be difficult to enforce. Similar to other cities in this analysis, San Luis Obispo has a permit requirement.¹⁶² However, like the STR regulations employed in New Orleans, a limitation as great as this is likely one to give rise to illegal STRs. Because of this, it would seem as if location limitations have the tendency to lead to more bad than good.

v. Taxation Requirements

An additional regulation that has been adopted by many local governments is the implementation of occupancy and sales taxes for STRs. By requiring STR guests to pay an occupancy tax for rentals, the city can stand to make a considerable amount of money. For example, tourist-based cities like Orange County, Florida, have been able to generate upwards of \$16 million in taxes on STRs in just one summer month.¹⁶³ The taxes “are a key funding source for tourism-related projects and marketing” and are often used to support local projects.¹⁶⁴ The success that areas like Orange County have found have caused other cities to reconsider as to why they do not tax STRs.¹⁶⁵

D. The Best Solution

When considering the validity of STRs, it is crucial to first determine if the city’s ordinance regulates their use. In the case that the city ordinance does not explicitly allow or deny them, it is more than clear that the STRs should be allowed to operate freely (as essentially confirmed by *In Re Toor* and *Fruchter*). In these scenarios, particularly, the ordinary meaning of the statute must control. Although there will be always be the neighbors that

¹⁶¹ San Luis Obispo County, Cal., Ordinance No. 3226 (2012).

¹⁶² See *Vacation Rental Licenses*, CITY OF AUSTIN, <https://www.austintexas.gov/str> (last visited Apr. 1, 2017).

¹⁶³ Richard Bilbao, *Orange County Resort Tax Grows 7% in August*, ORLANDO BUS. J. (Oct. 2, 2015), <http://www.bizjournals.com/orlando/blog/2015/10/orange-county-resort-tax-grows-7-in-august.html> (last visited Apr. 1, 2017).

¹⁶⁴ *Id.*

¹⁶⁵ Nathaniel Minor, *Study: Denver Missing Out On Millions By Not Taxing Short-Term Rentals*, COLO. PUB. RADIO (Feb. 22, 2016), <https://www.cpr.org/news/story/study-denver-missing-out-millions-not-taxing-short-term-rentals#sthash.4Vuu7sky.dpuf> (last visited Apr. 1, 2017).

complain of their existence, it is important that each property owner be able to use his or her property as the law gives him or her the power to.

However, in this modern age it has become somewhat rare for a city to not have an ordinance controlling the use of STRs. In these scenarios, it is crucial the city not overregulate their use, but instead regulates them in a way that is fair and beneficial to all parties involved. Durational limitations like the one used in San Francisco is an example of a regulation that, with some tinkering, could work. By requiring the host to live in the home for a fixed number of days per year, the city is able to avoid the problem of people purchasing their homes and renting them out year-round. A use such as this would certainly be a concern to any neighbors. However, when the renting is done as an accessory use to the actual living of the property, neighbor concern undoubtedly diminishes.

Requiring hosts to register their property as an STR is also a positive step towards a more universal acceptance of STRs. When requiring registration, however, it is critical for the process to be clear and understandable and the cost of application not excessive. Palm Desert's application and \$26 annual fee are prime examples of reasonable registration requirements. The use of occupancy regulations are not necessarily positive or negative regulations. Restricting occupation to two people per bedroom is a reasonable restriction, but placing a cap on occupation would be potentially overly burdensome. A city should also refrain from employing locational limitations, as these have the tendency to create more illegal STRs. Finally, a city should feel free to reasonably tax STRs. However, this tax should be used to benefit the communities and neighborhoods in which the STRs are located. If cities with high STR activity begin to introduce these types of regulations, it is likely that lawful STRs will begin to flourish.

IV. CONCLUSION

Airbnb is a freight train that cannot be stopped. It does not matter whether a city likes STRs or not: people in the sharing economy will find a way to use them. Companies like Airbnb allow for the everyday homeowner to make some extra money by using his or her own property, and that innovation is something that cities should seek to exploit rather than restrict. STRs are a positive contribution to society, but should not have unbridled power.

STRs are not a nuisance to the community and STRs do not undermine the residential character of a neighborhood. STRs are, however, part of the future of real property. Zoning and land use regulations should seek to help companies like Airbnb flourish. Airbnb, in turn, should help cities by forcing their hosts and guests to comply with the local law. The fight between Airbnb and STRs and local governments does not need to exist.

They can, and should, cooperate and co-exist, because neither plan on disappearing anytime soon.