

Short-Term Rentals: Risks and Rewards to Consider in Counseling Clients

Dwight H. Merriam
of the Hartford, Connecticut Bar

The Gig Economy

Short-term rentals (STR), most notably exemplified by Airbnb, are part and parcel of the gig economy. The gig economy, as described in a recent Forbes article, is:

[A] term that refers to the increased tendency for businesses to hire independent contractors and short-term workers, and the increased availability of workers for these short-term arrangements. Due in part to the popularity of the internet (and with it, the capability for remote work) and in part due to the nature of new apps like Uber and Airbnb (which give more power to independent contractors and open up new opportunities for gig-based work), the gig economy has flourished in recent years.¹

The power of independent contractors is all about economics, just as the keystone to President Bill Clinton's 1992 campaign was the slogan James Carville dreamed up: "it's the economy, stupid." For all of us in the world of real estate today, thanks to the entirely new perspective brought to us by the Millennials, who have a much different relationship with things and owning than prior generations had, our theme must now be "it's the sharing economy, stupid." It is called variously collaborative consumption, the peer economy, and the sharing economy. More than half of the Millennials have used sharing services. It is permeating our daily lives in many ways.

This new ethic about our relationship to all manner of objects, to transportation, to where we bed down, and even to other people, has taken us away from owning and exclusively using, to not owning, not possessing, and not using alone. While our focus here is on STR, it helps to see where STR fits the larger context.

Ridesharing Revolution

This article is based in part on research in 2014 and 2015, published as an article: Merriam, D., "Peering into the Peer Economy: Short-Term Rental Regulation." American Planning Association, *Zoning Practice*, October 2015. Much has changed since then, with the issue for real estate lawyers spreading out over a much broader landscape. The challenges in counseling clients are many, because the operations are typically small scale and there is little precedent in many areas.

¹ L. Alton, Why The Gig Economy Is The Best And Worst Development For Workers Under 30, Forbes, Jan. 24, 2018. <https://www.forbes.com/sites/larryalton/2018/01/24/why-the-gig-economy-is-the-best-and-worst-development-for-workers-under-30/#129e0f006d76> see also N. Heller, Is the Gig Economy Working? The New Yorker, January 15, 2017. <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working>

We see the sharing economy in three broad spheres – transportation, goods and services, and housing. Transportation may be the most obvious and most pervasive. Millennials own fewer automobiles than other age cohorts. The AAA Foundation for Traffic Safety reports that Millennials purchased almost 30 percent fewer cars from 2007 to 2011. Why? Because they use short-term car rentals, public transportation, and ridesharing. They are less likely to get drivers licenses. One-third of Millennials 16-24 years old do not have a driver’s license, the lowest percentage in over 50 years. At the same, so we don’t get too carried away with this trend, as the Millennials age they will buy more cars. Forty-three percent said they are likely to buy a car in the next five years.² The trend is shifting slightly in favor of more vehicle ownership as we have come out of the recession and Millennials have aged into the time in their lives when they have families.³ Still, the attitude shift away from driving has been remarkable, as reported in a comprehensive study in 2014.⁴

Ridesharing as a generic term encompasses short-term rentals, making your car available to others, sharing rides, and driving or riding in the Uber-style taxi-like service.

Instead of owning a car, you can rent one on a short-term basis from Zipcar,⁵ and car2go in Austin, Columbus, Denver, New York City, Portland, Seattle, Washington, Calgary, Montreal, Toronto, and Vancouver.⁶ Why own a car when you can conveniently pick one up curbside and use it for a short-term?

AAA has seen the light and is reported to be developing its own ridesharing program, Gig Car share. It is a one-way car-sharing service, with a start up in San Francisco. Users can take a car one-way in the region and drop it off in a so-called HomeZone.⁷

Sharing a ride and splitting the cost is made easier with services like Zimride by Enterprise Rent-A-Car, which links drivers with riders at universities and businesses.⁸ The boomers among you will remember the rideshare bulletin boards on campus. Same thing.

Got a car, not getting much use out of it, and interested in making some money? You can make it available to others on a short-term basis through peer-to-peer car sharing services like Getaround, which presently operates in Portland, San Francisco, Berkeley, Washington, DC, San Diego, Austin, and Chicago.⁹ They will rent your car for you while you are away. Cars are covered with a \$1 million policy and Getaround even cleans it for you. Turo connects neighbors to let them rent cars by the hour or the

² Millennials Don’t Care About Owning Cars, And Car Makers Can’t Figure Out Why, Fast Company, March 26, 2014. <https://www.fastcompany.com/3027876/millennials-dont-care-about-owning-cars-and-car-makers-cant-figure-out-why>

³ How Ride Sharing is Eclipsing Millennial Car-Ownership, Millennial, September 26, 2017. <https://millennialmagazine.com/2017/09/26/how-ride-sharing-is-eclipsing-millennial-car-ownership/>

⁴ Millennials in Motion Changing Travel Habits of Young Americans and the Implications for Public Policy, U.S. PIRG, October 2014, <https://uspig.org/sites/pirg/files/reports/Millennials%20in%20Motion%20USPIRG.pdf>

⁵ <https://www2.zipcar.com/> a subsidiary of Avis Budget Group.

⁶ <https://www.car2go.com/US/en/>

⁷ Commentary: End of the road for car ownership? It starts with AAA’s car-sharing, Orlando Sentinel, June 8, 2017. <http://www.orlandosentinel.com/opinion/os-ed-future-without-cars-begins-with-car-sharing-aaa-interview-20170608-story.html>

⁸ <https://zimride.com/>

⁹ <https://www.getaround.com>

day. The company claims over 800 models of cars that rent at 35% less than conventional rentals. You can even do it for boats with Boatsetter.¹⁰ With the help of Spinlister, you can connect with others and rent a bicycle, surfboard, or snowboard.¹¹

Want to make some money by driving others around in your car, or are you a rider who wants to be driven? Just about everyone has heard of Uber, the leader in this form of ridesharing, which includes other services like Lyft and now HopSkipDrive for ferrying children around:

We wouldn't trust our kids with just anyone, and neither should you. That's why we developed a solution that makes scheduling rides with experienced caregivers easy and convenient, with built-in stringent safety features to give you real peace of mind. We fingerprint every CareDriver, monitor every ride in real time, and you can follow along on your app too.¹²

And we have Roadie delivering packages, claiming “over 80,000 pre-screened, verified drivers across all 50 states ...in more than 9,000 cities nationwide — a larger footprint than Amazon Prime.”¹³ Wireless communications, the Internet, and smart phones have made ridesharing and delivery services possible. This is a big deal. Lyft is worth \$11 billion¹⁴ and Uber is valued at \$72 billion¹⁵ (not a typo; more than FedEx and 405 companies in the S&P 500). Do you want to be a driver but don't have a car? You can rent one from HyerCar just for that purpose or list your own car with them for some passive income.¹⁶

Goods and Services Peer-to-Peer

Beyond transportation the sharing economy extends to relationships between people and service providers. There is peer-to-peer or collaborative consumption through services like TaskRabbit with 60,000 workers¹⁷ and Skillshare with access to over 21,000 lessons¹⁸ which provide help, paid or bartered, or sometimes free. Instacart will grocery shop for you and claims it will deliver to your door in an hour. You can be a shopper and delivery person for them, making up to \$25 an hour.¹⁹

There are services to connect workers with those needing help. If you live in Denver, Kansas City, Minneapolis or Northern Virginia, Zaarly seeks to create a marketplace to help small business home service workers connect with homeowner.²⁰

¹⁰ <https://www.boatsetter.com>

¹¹ <https://www.spinlister.com>

¹² <https://www.hopskipdrive.com>

¹³ <https://www.roadie.com>

¹⁴ Lyft Valued at \$11B After Alphabet Investment, Bloomberg, October 19, 2018.

<https://www.bloomberg.com/news/videos/2017-10-19/alphabet-funding-pushes-lyft-value-to-11-billion-video>

¹⁵ Uber's latest valuation: \$72 billion, Recode, February 9, 2018. <https://www.recode.net/2018/2/9/16996834/uber-latest-valuation-72-billion-waymo-lawsuit-settlement>

¹⁶ <https://www.hyreacar.com>

¹⁷ <https://www.taskrabbit.com>

¹⁸ <https://www.skillshare.com>

¹⁹ <https://www.instacart.com> ; for insights into what this job entails, see <https://www.indeed.com/cmp/Instacart/reviews?fjobtitle=Personal+Shopper>

²⁰ <https://www.zaarly.com>

There seems no end to the sharing. Fon, touting over 35 million members, lets you share your home WiFi in exchange for access. The Lending Club connects borrowers and investors enabling, so they say, better rates than credit cards and more return for lenders than what banks offer.²¹ Over \$35 billion has been borrowed by over 2.4 million customers since it started in July 2007, with investors earning a median of 4%.²² Poshmark lets you show your unneeded fashion clothing in a virtual closet and get linked with people who share your sense of style. You can even share your dog, or become a sitter, with DogVacay and Rover helping you find a local dog sitter to care for your dog at your home or theirs.

The power of the internet in facilitating collaborative consumption was probably best evidenced first when eBay and craigslist provided an on-line marketplace never experienced before. Today, we have web-based services like Freecycle where people can post things they don't want, the remnants of our overconsumption, and others can take that flotsam and jetsam for free. Yes, for free. It solves the donor's solid waste disposal problem and provides free goods for the takers.

Sharing the Roof over Our Heads

That brings us to the gig economy subject matter of greatest interest to real estate lawyers -- the sharing of space. Maybe it began with the sale of timeshares in the U.S. in 1974. The fractional interests proved difficult to sell. Short-term vacation rentals emerged as a better way for linking property owners with vacationers through companies like HomeAway and its numerous related entities, claiming over 2 million listings in 190 countries.²³ Flip Key, part of TripAdvisor Rentals, has 830,000 properties in 190 countries, and does much the same.²⁴

But Airbnb goes beyond vacation rentals. You can rent a room for a night, a whole house, an apartment for your exclusive use for a week, a British castle (Airbnb says it has 1,400+ castles), a tipi for \$45/night,²⁵ an igloo,²⁶ a caboose,²⁷ or a treehouse in New York (\$195 a night)²⁸ if you wish. Maybe try hippy camping at \$15/night in New Sweden, Maine.²⁹ You can even use Airbnb to store your luggage near JFK/LGA at \$10/night.³⁰

The company, originally "AirBed & Breakfast", was founded in 2008 by Brian Chesky, Joe Gebbia, and later Nathan Blecharczyk. It began when Chesky and Gebbia, to help pay their rent, rented sleeping accommodations on three air mattresses in their San Francisco apartment living room and made breakfast for the guests. The company is now worth \$3 billion and joins the ranks of the rest of the great ideas we all note with "I wished I had thought of that."³¹

True to its origins, Airbnb notes on its website that you can also rent a shared room:

²¹ www.lendingclub.com

²² www.lendingclub.com/info/statistics-performance.action

²³ www.homeaway.com

²⁴ www.flipkey.com

²⁵ www.airbnb.com/rooms/4615980

²⁶ www.airbnb.com/rooms/9386477

²⁷ www.airbnb.com/rooms/7846081

²⁸ www.airbnb.com/rooms/13460229

²⁹ www.airbnb.com/rooms/13169691

³⁰ www.airbnb.com/rooms/16579094

³¹ www.investopedia.com/articles/investing/112414/how-airbnb-makes-money.asp

Shared rooms are for when you don't mind sharing a space with others. When you book a shared room, you'll be sleeping in a space that is shared with others and share the entire space with other people. Shared rooms are popular among flexible travelers looking for new friends and budget-friendly stays.³²

Good or Bad?

Are short-term rentals good or bad for your real estate clients and your community? Like so many things, it depends.

-Affordable Housing

There is an unresolved debate over whether STRs promote or reduce affordable housing. The argument on the side of promoting affordability is that STRs increase the stock of available housing, particularly for furnished, short-term accommodations. Because many of the rentals are essentially house sharing by renting a room in an owner-occupied dwelling, they are inexpensive. They benefit the homeowner by providing some additional income. The same goes for long-term tenants who also host STR guests. This income enables people to stay in the homes they own and for long-term tenants to pay their rent.

One example of how this can work is described in a Fast Company article about Nesterly,³³ a web-based operation that matches people for multi-generational living.³⁴ The article describes one example of the arrangement:

Brenda Atchison's home in the Boston suburb of Roxbury has been in her family since 1946, and she's lived there for nearly her entire life. At 66 years old, she's an empty nester—she describes her house as rooms that are collecting dust. But expenses are rising and her ability to earn is dwindling. She knew she wanted to stay in her home, but she wasn't sure how to host someone to bring in some extra cash.

Then she heard of Nesterly. The brainchild of Noelle Marcus and Rachel Goor, two recent graduates of MIT's masters program in urban planning, it's a simple enough idea: You match younger people who need affordable housing with older adults who charge affordable prices—including help around the house—for the extra rooms of their homes.

Nesterly describes what it provides:

Nesterly is a trusted service for intergenerational homesharing.

We connect households with spare space to younger people seeking a place to stay for over a month. In a twist that's unique to Nesterly, young people can also exchange help around the house for lower rent.

³² www.airbnb.com/help/article/5/what-does-the-room-type-of-a-listing-mean

³³ <https://www.nesterly.io>

³⁴ “[The Airbnb for Affordable Housing Is Here](http://www.fastcompany.com/90151804/the-airbnb-for-affordable-housing-is-here),” Fast Company, November 21, 2017.
www.fastcompany.com/90151804/the-airbnb-for-affordable-housing-is-here

With Nesterly, you can:

Make Money

Turn your spare room into monthly income

Get help around the house

Find someone happy to help you with those pesky chores

Build New Friendships

Connect with interesting people from another generation

This does sound good and almost certainly will be mutually-beneficial to young and old households seeking shelter in expensive housing markets. An internet search, however, reveals no scholarly studies with any empirical analysis.

A hybrid approach to multi-generational house sharing is to retrofit established neighborhoods with accessory dwelling units (ADUs). Accessory apartments can increase density in terms of dwelling units per acre and provide smaller units more fitting for households today, all in the context of older neighborhoods with houses that are physically, functionally, and economically obsolescent.³⁵ But the literature suggest a mixed result with ADUs. The Portland Tribune reports that ADUs can be affordable, but that 25% of the ADUs there are used for higher-priced short-term rentals.³⁶ Some communities are now limiting short-term rental of ADUs to preserve affordability.³⁷

One possible negative is that by providing an alternative to long-term affordable housing in a community, STRs may decrease demand for that housing and create a problem where occupancy levels for existing affordable housing are lower than desired. The availability of Airbnb rentals is not permanent and cannot be a long-term solution to affordability. The mix of Airbnb units is also not likely to meet the mix of affordable units needed. There is nothing in the literature that appears to support the notion that STRs decrease demand for affordable housing.

On the negative side, expressing concern about the adverse effects on affordability, is a recent study by the Jane Place Neighborhood Sustainability Initiative in New Orleans finding, for that city, that:

[T]he City's approach to STR regulation accelerates gentrification and the displacement of residents by permitting the limitless removal of homes from the housing market for conversion into STRs and ignoring the inflation of overall housing costs to which STRs contribute.³⁸

³⁵ L. Bliss, "Portland's 'Granny Flats' Get an Affordable Boost," CityLab, March 12, 2018.

www.citylab.com/equity/2018/03/portlands-granny-flats-get-an-affordable-boost/555083/;

"Do ADUs Provide Affordable Housing?" Accessory Dwellings, undated.

<https://accessorydwellings.org/2014/08/07/do-adus-provide-affordable-housing/>

³⁶ S. Law, "ADUs often more affordable, except when short-term rentals," Portland Tribune, July 2, 2018.

<https://portlandtribune.com/pt/9-news/399876-294987-adus-often-more-affordable-except-when-short-term-rentals->

³⁷ P. Hastings, "Accessory dwelling units: Housing help or hazard?: Supporters say 'granny flats' could help ease dwelling crunch; others fear degradation of neighborhoods," The Columbian, June 25, 2017.

www.columbian.com/news/2017/jun/25/accessory-dwelling-units-housing-help-or-hazard/

³⁸ www.documentcloud.org/documents/4421169-Short-Term-Rentals-Long-Term-Impacts-the.html; see also

www.bizneworleans.com/March-2018/Housing-Rights-Organization-To-Release-Report-On-Impacts-Of-Short-Term-Rentals

The Jane Place Neighborhood Sustainability Initiative is an advocacy organization which describes itself as:

[A] ten-year old Community Land Trust (CLT) and housing rights organization committed to creating sustainable, democratic, and economically-just neighborhoods and communities in New Orleans. We work to transform unjust housing policies, discriminatory practices, and predatory development schemes by engaging in strategies that create permanently-affordable housing, expand housing security, and uphold equitable housing patterns and land-use planning. We are celebrating our tenth anniversary with a series of programs and projects of which this report is a part.

The report details these findings as to New Orleans:

The Dominance of Whole-Home Rentals

Eighty-two percent of Airbnb listings are for whole-homes, single units of housing as opposed to accommodations within an operator's residence, with the average of such listings being available 174 nights per year. Most Airbnb listings are exclusively used as vacation housing for tourists, as the units are off-market for over half of the year and, therefore, unavailable to residents.

Single Operators with Multiple Listings

Large-scale STR operators, many of whom are based outside of New Orleans, are essentially running scattered-site hotels. Just over 16% of STR operators control nearly half of all permitted STRs in the city. Administrative flaws allow STR operators to register permits under different names or the names of employees, making it difficult for the City or independent researchers to track their footprint within the market.

The Oversaturation of STRs in Residential Neighborhoods

City Council has placed no limits on the number of rooms or homes per block that can be converted into full- or part-time STRs, leading to extreme concentrations of STRs in certain blocks, particularly in neighborhoods that are close to amenities that tourists want but residents need, such as access to public transportation, public parks and greenspace, and the restaurants and bars of the French Quarter that provide thousands of jobs for residents. Over the past two years, the geographic concentration of STRs has shifted away from neighborhoods more commonly associated with tourism (such as the French Quarter and the Marigny), towards the CBD and many working-class Black neighborhoods that are close to downtown, particularly the Seventh Ward, Treme, and Central City.

STRs are capitalizing on and contributing to the displacement of Black communities, making it more difficult for families to remain in or return to their neighborhoods as more and more housing units are dedicated away from housing and towards tourist use, causing overall housing prices for both renters and homeowners in the neighborhood to rise.

The Inflation of Overall Housing Costs

The proliferation of whole-home rentals in residential and commercially-zoned neighborhoods is making it more difficult for families to return to or remain in their neighborhoods as more housing units are dedicated away from residents and towards tourist use, causing overall housing prices to rise. Rent has increased in the nine neighborhoods with the highest concentration of STRs, including rent increases of 30% for a two-bedroom unit in the Seventh Ward, a 27.95% increase in a two bedroom in MidCity, and a 71.93% increase for a three-bedroom unit in Bywater.

The Prioritization of Tourists over Residents

The City's STR policy offers property owners a high economic incentive to remove housing from the residential market in order to offer it to tourists who, attracted to the year-round festivals and other event calendar, will pay many times more per night than the resident laborers who provide services. The policy included measures that the City claimed would offset the impact of STRs by exacting \$1.00 per rental night from Airbnb alone for affordable housing development. Airbnb reported that between January 1 and September 30, 2017 only \$230,000 in funding for affordable housing was generated through legal STRs - enough for one unit of housing to be produced.

A similar view that STRs adversely affect affordability in Los Angeles is offered in a law review article:

Airbnb likely reduces the affordable housing supply by distorting the housing market in two interconnected mechanisms. The first such mechanism is one of simple conversion: any housing unit that was previously occupied by a city resident, but is now listed on Airbnb year round, is a unit that has been removed from the rental market and has essentially been added to Los Angeles's supply of hotel rooms. This leads to a real, but likely mild, increase in citywide rents, an effect that is concentrated in affluent or gentrifying neighborhoods along the city's central core. More disconcertingly, conversion reduces Los Angeles's already-limited supply of affordable housing. The second mechanism is "hotelization." So long as a property owner or leaseholder can rent out a room on Airbnb for cheaper than the price of a hotel room, while earning a substantial premium over the residential market or rent-controlled rent, there is an overpowering incentive to list each unit in a building on Airbnb rather than rent to Los Angeles residents, thereby creating "cottage hotels." This decreases the supply of housing and spurs displacement, gentrification, and segregation.³⁹

On the other hand (and isn't there almost always an "on the other hand" when it comes to real estate?), some argue there is no impact on affordability. Zillow Research surveyed 111 experts and only 5% said they believed STRs have a large impact on affordability.⁴⁰

³⁹ D. Lee, How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations, 10 Harvard Law & Policy Review 230, February 2, 2016.

<http://blogs.ubc.ca/canadianliteratureparkinson/files/2016/06/How-Airbnb-Short-term-rentals-disrupted.pdf>

⁴⁰ C. Hopkins, Experts: Short-Term Home Rentals Have Little to No Impact on Housing Affordability, December 6, 2016, <https://www.zillow.com/research/short-term-home-rentals-zhpe-13927/>. See also Zillow Research, Press Releases, Experts: Short-Term Home Rentals Have Little to No Impact on Housing Affordability December 6, 2016.

The problem seems to be focused on the renting of entire affordable homes or units, taking those out of the market. Austin has attempted to address this by regulation prohibiting and phasing out by 2022 all STRs of dwellings where the owner is not on site. The state is challenging the ban. The Texas Attorney General says the ban: “[takes] away its citizens’ property right to lease their homes as they see fit.”⁴¹

-Aging in Place

Short-term rentals of rooms in homes and apartments not only generate additional revenue for those aging in place but they provide an opportunity for sharing of chores and bartering for services. This can enable older people to stayhome longer before transitioning to an independent or assisted living facility. AARP cites with approval an Airbnb report on how aging in place can be facilitated by STR.⁴²

The key findings of this report

As Americans age, housing cost burdens can become excessive.

Older Americans experience a median household income drop of 25 percent upon reaching age 65, compared to their income at ages 55-64. Income drops another 37 percent for adults over age 75.

With this drop in income, housing burdens rise. A typical family’s monthly mortgage payment of \$1,500 represents 49 percent of income for American adults age 65 to 75, and an astounding 63 percent of income for adults over age 75.

On average, severely cost-burdened households—those spending more than half their income on housing—spend 43 percent less on food and 59 percent less on healthcare than less cost-burdened peers.

As America ages, housing costs will burden an ever-widening swath of the population.

Supplemental income from home sharing can make the difference between whether aging in place is affordable or a financial hardship. The average American Airbnb host over the age of 65 earns \$8,350 in supplemental income annually for a single listing. For the typical host, this income could:

[L]ower housing/mortgage costs from 49 percent of gross income to an affordable 26 percent of income. ○ represent a full 52-percent increase over typical Social Security

<http://zillow.mediaroom.com/2016-12-06-Experts-Short-Term-Home-Rentals-Have-Little-to-No-Impact-on-Housing-Affordability>

⁴¹ Widner, C., State challenges Austin’s short-term rental laws
Texas AG takes aim in appeals court, CurbedAustin, April 2, 2018.

<https://austin.curbed.com/2018/4/2/17189530/austin-short-term-rental-laws-suit>

⁴² <https://www.aarp.org/livable-communities/housing/info-2016/home-sharing-report.html>; Report: Home Sharing: A Powerful Option To Help Older Americans Stay In Their Homes, November 21, 2016

<https://www.aarp.org/content/dam/aarp/livable-communities/documents-2016/Airbnb-HomeSharing-OlderAmericans-Report-11-2016.pdf>

fixed income. ○ cover more than two years' worth of real estate taxes, repairs, insurance and other housing expenses.

Older Americans are embracing home sharing at record rates.

Hosts aged 60 and older have earned a collective \$747 million from home sharing on Airbnb.

The fastest-growing age demographic of US Airbnb hosts is people age 60 or over.

Older women hosts in particular are growing faster than any other Airbnb host demographic and are rated the best Airbnb hosts in the US.

63 percent of US Airbnb trips hosted by older women resulted in a 5-star review.

Older Americans report both financial and social benefits data from home sharing.

58 percent of older adults report that income from Airbnb hosting has helped them stay in their homes.

13 percent report that hosting has helped them avoid foreclosure.

35 percent report that hosting has helped them avoid eviction.

64 percent of older adults report that hosting has positively changed the way they think, and 45 percent say that hosting has positively affected the way they interact with their community.

AARP offers this guidance in addition:

The benefits of home sharing and the ability to be a host can vary by individual and community.

Hosting can have tax implications for the hosts and some cities do regulate or prohibit short-term home share rentals operated by commercial entities or properties in which the owner does not reside.

Also, hosting is work. A host should be able to provide clean, well-maintained accommodations.

Hosts also need to be mindful of their own safety and security and that of their guests.

-Commercial Lodging

The only possible benefit of STRs with regard to existing commercial lodging is that it may stimulate competition and lower prices for the consumer. The negatives are several. Short-term rentals may

reduce commercial lodging revenues.⁴³ In many situations STRs have an advantage over commercial lodging because STRs sometimes do not pay the occupancy tax paid by commercial lodging. One report is that less than 15% of STR hosts in Austin pay hotel taxes.⁴⁴ Short-term rentals generally do not need the service workers employed in commercial lodging. Unions and service workers often oppose STRs.⁴⁵

-State and Local Government

Revenues to state and local government may go down as a result of STRs because, as noted, such rentals usually do not pay the occupancy and other taxes levied on commercial lodging. In Massachusetts, for example, the uncollected taxes are estimated at over \$18 million annually.⁴⁶ Airbnb does provide 1099 forms to hosts to report their income and it has begun collecting and remitting hotel and tourist taxes in over 400 municipalities and other jurisdictions worldwide.⁴⁷

-Health and Safety

Much of the STR market today is unregulated. Those who rent typically do not have their premises inspected to determine compliance with health, building, housing, and safety codes. The Commonwealth of Massachusetts Department of Public Health “has determined that lodging provided through Airbnb or similar online services is subject to local licensure or permitting as a lodging house or bed and breakfast in the same manner as traditional lodging houses and bed and breakfast establishments are licensed or permitted.”⁴⁸ Airbnb recognizes this possibility full well and states on its website:

Some cities have laws that restrict your ability to host paying guests for short periods. These laws are often part of a city's zoning or administrative codes. In many cities, you must register, get a permit, or obtain a license before you list your property or accept guests. Certain types of

⁴³ Showley, R., Rise of short-term rentals: Will hotels suffer? The Sand Diego Union-Tribune, November 11, 2016. www.sandiegouniontribune.com/business/economy/sd-fi-econometer13nov-20161110-htmlstory.html

⁴⁴ Dimmick, I., Fewer Than 15% of SA Short-Term Rental Owners Pay Hotel Taxes, The Rivard Report, April 24, 2018. <https://therivardreport.com/fewer-than-15-of-sa-short-term-rental-owners-pay-hotel-taxes/>

⁴⁵ In Los Angeles, Unite Here Local 11, the service industry union, advocated for regulation of short-term rentals, ostensibly on the issue of the impact on affordability, but it was suspected that the union had other interest in mind:

In a statement to Curbed, Airbnb spokesperson Charlie Urbancic agreed that the city’s short-term rental industry requires regulation, but suggested union leaders may have ulterior motives for pushing the city to adopt restrictions.

“We ... don’t support the notion that hotel industry front groups should determine how thousands of Angelenos use their homes to pay the bills,” said Urbancic.

Chiland, E., Protestors ask city to crack down on Airbnb rentals: A local labor union says short-term rental sites are taking away affordable apartments, L.A. Curbed, March 8, 2018 <https://la.curbed.com/2018/3/8/17096772/los-angeles-airbnb-rules-protests>

⁴⁶ Murphy, M., Mass. Leaving millions on the table in short-term rental revenue, Worcester Telegram, November 19, 2017. www.telegram.com/news/20171119/mass-leaving-millions-on-table-in-short-term-rental-revenue

⁴⁷ J. Scalfani, Airbnb agrees to collect tax for vacation rentals in El Dorado County, Sacramento Bee, June 20, 2018. <https://www.sacbee.com/news/business/article213470974.html> ; www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available

⁴⁸ Licensing of Online Home Rental Services, May 16, 2014. www.mass.gov/files/documents/2016/07/wv/hsg-licensing-online-home-rental-services.docx

short-term bookings may be prohibited altogether. Local governments vary greatly in how they enforce these laws. Penalties may include fines or other enforcement.

These rules can be confusing. We're working with governments around the world to clarify these rules so that everyone has a clear understanding of what the laws are.⁴⁹

Airbnb tries to cover all the issues for hosts on its website and what they do address is good guidance for local real estate professionals and regulators, and thus worth reading.⁵⁰ How many hosts read and follow up on the suggestions is another matter. Airbnb's list is a good starting point for local action.

-Insurance

Many STR hosts do not have homeowners and liability insurance to cover losses that may result from occupancy. Some STR companies, like Airbnb, have some coverage.⁵¹ There are limits and exclusions, of course.⁵² Chinese drywall, believe it or not, is one, example.

Allstate has offered some guidance. The take-aways are these. Check with your agent. A one-time rental may be covered under the existing policy (though the host may need to give notice to the insurer), but ongoing, multiple rentals will likely require an endorsement and may put the homeowner into a commercial operations category. A landlord policy might be required. Guests' belongings are probably not covered by the host's typical homeowner's policy and the homeowner won't be covered if the guests walk off with the host's property or damages it. As expected, Allstate has a product line to cover that, Allstate HostAdvantageSM at a cost of \$50 or so a year. Finally, Allstate suggests hosts might have the guests provide their own insurance, something that seems impractical.⁵³

As a USAA spokesperson said as well: "If you're conducting a business, on a full- or part-time basis, by renting out your home or apartment (or a room in your home or apartment) as a way to earn money, your homeowner's or renter's insurance policy probably would not provide liability coverage."⁵⁴ Some companies offer insurance just for short-term rentals.⁵⁵

There is a life safety issue here and in the event of death, injury, or property damage, there may not be insurance coverage and there may not be sufficient assets available to cover the liability.

-Mortgages and Leases

⁴⁹ "Airbnb, What legal and regulatory issues should I consider before hosting on Airbnb?"

www.airbnb.com/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb

⁵⁰ www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states

⁵¹ www.airbnb.com/host-protection-insurance

⁵² www.airbnb.com/users/hpi_program_summary_pdf

⁵³ "Is Home Sharing Covered By Homeowners Insurance?" January 2018.

www.allstate.com/tools-and-resources/home-insurance/home-sharing.aspx

⁵⁴ Lieber, R., "A Liability Risk for Airbnb Hosts, New York Times, December 5, 2014. www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html

⁵⁵ <http://cbizspecialtyinsurance.com/>; at Progressive, insurance can be purchased on-line for just the days of the rental. <https://www.progressive.com/homeshare-insurance/>; a company called Slice sells STR insurance on-line at \$7/night <https://www.slice.is/homeshare/>.

As Jack Levey points out in the appended article, it is important to consider mortgage and lease provisions. Borrowers need to be careful to be truthful in their representations to lenders as to the use of their properties. Some lenders may not allow the rental income to be considered with a Home Equity Line of Credit. It may be a better practice to report STR income on Schedule E (normal rental income for an investment property) rather than Schedule C (small business income).⁵⁶

Lenders may not always be able to consider income from short-term rentals in rates for refinancing a residential property because the income is commercial, but there may be some hybrid approaches to gaining the advantage of that rental income.⁵⁷ Airbnb has a program set up with three lenders (Quicken Loans, Citizens Bank, or Better Mortgage) that will consider STR income in refinancings.⁵⁸

A tenant who rents out an apartment may be in default with dire consequences including eviction.⁵⁹ And, yes, there can be problems with holdover guests, who do not pay their bill and will not leave.⁶⁰

Closely related to the lease restrictions are condominium covenants, restrictions, and bylaws, many of which prohibit or limit rentals.⁶¹ The same holds true with typical single-family and noncommercial subdivision covenants and negative easements. A Houston home presently on the market is promoted with these selling points: “MOTIVATED SELLER Endless opportunities with LIVE/WORK... AIRBNB/VRBO NOT FLOODED DURING HARVEY! ... No HOA nor deed restriction making this property ideal for Airbnb and Vacation rental models.”⁶²

-Discrimination

Another of the exclusions from coverage is this:

Employment Related Practices – any bodily Injury arising out of refusal to employ a person; termination of a person’s employment; or and employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person. This exclusion applies whether the injury-causing event occurs before employment, during employment or after employment of that person, and whether the insured may be liable as an employer or in any other capacity.

⁵⁶ M. Wells, Short-term rentals and your home mortgage, blog post, March 1, 2017.

<http://preferredfinancialgreenville.com/short-term-rentals-home-mortgage/>

⁵⁷ Taylor, S., What Airbnb Means for Your Mortgage: Using a spare room or your house as a rental? Consider the impact on your mortgage or refinance, US News & World Report, December 20, 2017.

⁵⁸ <https://www.airbnb.com/help/article/2193/mortgage-refinancing> ; see also Kusisto, L., Gig Economy Grows Up as Lenders Allow Airbnb Income on Mortgage Applications: Initiative will let anyone renting out property on the service for a year or longer to count that money as income, The Wall Street Journal, February 8, 2018. <https://www.wsj.com/articles/gig-economy-grows-up-as-lenders-allow-airbnb-income-on-mortgage-applications-1518094800>

⁵⁹ Dannen, C., My Airbnb Biz Got Me Evicted; Here’s What I Learned, Fast Company, June 19, 2012.

<https://www.fastcompany.com/1840715/my-airbnb-biz-got-me-evicted-heres-what-i-learned>

⁶⁰ Thompson, C., ‘Professional scammers’ refuse to leave Airbnb host’s house, CNN, July 24, 2014.

<https://www.cnn.com/travel/article/airbnb-squatters/index.html>

⁶¹ Kass, B., Your condo probably has a rule against renting your unit out on Airbnb, The Washington Post, January 13, 2017.

https://www.washingtonpost.com/realestate/your-condo-probably-has-a-rule-against-renting-your-unit-out-on-airbnb/2017/01/12/74844e78-d41a-11e6-945a-76f69a399dd5_story.html?utm_term=.5da2ddd45b72

⁶² <http://www.urbanliving.com/listing/89836901-2506-la-branch-st-houston-texas-77004-1028/>

A word search reveals that here is no other reference to “discrimination” in the Airbnb insurance summary. Discrimination in STRs is an issue and real estate lawyers may find themselves counseling clients on this issue.⁶³ Airbnb engaged former Attorney General Holder in 2016 to assist in drafting rules to prevent discrimination⁶⁴ following a report, later published, on the extent of discrimination:

In an experiment on Airbnb, we find that applications from guests with distinctively African American names are 16 percent less likely to be accepted relative to identical guests with distinctively white names. Discrimination occurs among landlords of all sizes, including small landlords sharing the property and larger landlords with multiple properties. It is most pronounced among hosts who have never had an African American guest, suggesting only a subset of hosts discriminate. While rental markets have achieved significant reductions in discrimination in recent decades, our results suggest that Airbnb's current design choices facilitate discrimination and raise the possibility of erasing some of these civil rights gains.⁶⁵

This report is well-done and worth the read. The authors acknowledge the difficulty in reducing discrimination by hosts, but offer much guidance for STR companies like Airbnb.

Not only did Airbnb adopt rules, but it undertook in partnership with the NAACP to recruit more black hosts.⁶⁶

-Privacy

Real estate lawyers ought to be concerned for their clients, whether they be hosts or guests in STRs, about privacy. Do regulations potentially require disclosure of guests? Do hosts have security cameras monitoring their properties that record the coming and goings of guests? The issue has surfaced in many areas, most recently in Charleston, South Carolina, where proposed regulations have raised concerns.⁶⁷ The city is seeking a consultant to set up monitoring software that will provide for:

1. Creation and maintenance of a database of short term rental units
Physical Address Identification
 - Listing of all jurisdiction’s active STR listings

⁶³ See also, D. Smith, Renting Diversity: Airbnb as the Modern Form of Housing Discrimination, 67 DePaul L. Rev. 3, Spring 2018, Article 6. <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=4059&context=law-review>

⁶⁴ Benner, K. Airbnb Adopts Rules to Fight Discrimination by Its Hosts, New York Times, September 8, 2016. www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html; Airbnb’s Nondiscrimination Policy: Our Commitment to Inclusion and Respect. <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect>;

⁶⁵ B. Edelman et al., Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, American Economic Journal: Applied Economics 2017, 9(2): 1–22. <https://doi.org/10.1257/app.20160213> and www.aeaweb.org/articles?id=10.1257/app.20160213

⁶⁶ Jan, T., Faced with complaints of discrimination, Airbnb partners with NAACP to recruit black hosts, The Washington Post, July 26, 2017. www.washingtonpost.com/news/wonk/wp/2017/07/26/faced-with-complaints-of-discrimination-airbnb-partners-with-naacp-to-recruit-black-hosts/?utm_term=.789e84339765

⁶⁷ Manno, A., Could Charleston's short-term rental enforcement tactics pose privacy concerns? R U Hosting? The Charleston City Paper, May 16, 2018. <https://www.charlestoncitypaper.com/charleston/could-charlestons-short-term-rental-enforcement-tactics-pose-privacy-concerns/Content?oid=18589342>

- High resolution screenshots of all active listings (captured weekly or at the request of the City)
- Full address and contact information for identifiable STRs in jurisdiction
- All available listing and contact information for non-identifiable STRs in jurisdiction

2. Compliance Monitoring

3. Assist the City with court cases when necessary.⁶⁸

As to cameras, at least 13 states have some laws regarding video and audio recordings.⁶⁹ It is important to understand what cameras and other recording devices may be installed, what recordings may be retained, and what disclosure may be required.

Local Regulation: An Ounce of Prevention Is Worth a Pound of Cure

So said Benjamin Franklin and it is apt here. Real estate lawyers need to be activists in local regulation. You need only take a few, relatively easy steps to get out ahead of the potential problems with STRs and capitalize on the good that such rentals can provide your community.

-Moratorium

This is not a recommendation, but something worth considering. As you work down this list of steps you will have the sense that you need to do six things at once. You do. One way to get a grip on it is take a “planning pause” moratorium on all STRs for, say, six months during which time no one can rent. However, given that the number of such rentals in many places is still relatively small, it is unlikely that much harm will come from letting them continue while you plan and prepare to regulate. It may not be worth the effort to have a moratorium. A moratorium takes time, drafting, maybe some legal advice, and the expenditure of political capital in most cases, and may cause some pushback from those already renting, all of which may cost more than the planning pause is worth. Moratoria sometimes serve only to delay the inevitable hard work and are often extended. Back to Ben Franklin: “Don't put off until tomorrow what you can do today.”

-Education

Learn what is available out there now by going to all of the websites and services that you can find, many of which are identified here. Look online to see what STRs are being offered in your community. You may be surprised at how many of your friends and neighbors are already in the STR business. Don't forget to check craigslist as well and use one of the online search engines such as Google with a few key terms, like "rentals Anytown" and "house sharing Anytown", to find other STR activity.

⁶⁸ https://www.charlestoncitypaper.com/media/pdf/18-p021r_short_term_rental_software_final.pdf

⁶⁹ Reporters Committee for Freedom of the Press, Introduction: Recording -- State hidden camera statutes, undated <https://www.rcfp.org/first-amendment-handbook/introduction-recording-state-hidden-camera-statutes> referencing The First amendment Handbook, 2011. <https://www.rcfp.org/rcfp/orders/docs/FAHB.pdf>

Conduct educational sessions in your community (“Everything You Need To Know About Short-Term Rentals”), even before trying to regulate, to sensitize present and potential hosts to the need for proper code compliance, fire prevention, emergency response, following rules for rent controlled units, first aid, protecting privacy (disclose security cameras), insurance coverage, parking, noise, smoking, pets, childproofing, operation of heating and ventilating systems including fireplaces and heating stoves, safe access, occupancy limits, deciding what to tell neighbors, homeowners association approval, tax obligations, and any required zoning approvals. These sessions may also provide an opportunity to learn who is renting and to connect with them. Consider establishing a section of your municipal website as a resource portal. You will not have all the answers to all the questions as you start, but you need to start.

-Planning

Yes, planning. The rational planning model in its simplest terms is what do you have, what do you want, and how do you get it. Local regulators need to know who is renting, and what is being rented to whom for how long. They need to determine what to expect in the future. What will be the demand for STRs, in what mix of accommodations, and for what length of tenancy? This will prove useful to deciding whether it is appropriate to limit the number of units available for STR and decide whether there needs to be any regulation of the length of occupancy.

-Regulate

Regulation seems to be coming in two forms: licensing of individual hosts to insure code compliance, and general regulation as to location, number of units, and terms of tenancy; probably through zoning, but possibly through regulation independent of zoning, including bundling it with the licensing process. It is necessary to draw the line somewhere as to what is an STR and what is simply an unregulated rental. Is an STR 30 days or less, or three months or less, and everything else is just an unregulated rental? It is for you to decide. You will also want to consider whether STRs with owner occupancy might be regulated less strictly given that the owner is present during the STR.

Austin, Texas, has a robust program with licensing.⁷⁰ Austin carves out three types of STR: Type 1 - owner-occupied (single-family, multifamily or duplex), Type 2 - not owner-occupied (single or duplex), and Type 3 - not owner-occupied (multifamily).

There is a 3% limit by census tract on the Type 2 single-family and duplex STR and “applicable geographic caps” on Type 3 STRs.⁷¹

Austin’s Type 1 registration form includes information on the owner and property, but it also requires insurance information, number of sleeping rooms, occupancy limit, and average charge per structure.⁷²

The form for the rental of a primary structure declares: “(owner-occupied) short-term rental primary structures are (1) rented for periods of less than 30 consecutive days, (2) owner-occupied at least 51% of

⁷⁰ <http://austintexas.gov/str>

⁷¹ <https://www.biggerpockets.com/forums/759/topics/524552-austin-2018-neighborhoods-short-term-rentals>

⁷² <http://www.austintexas.gov/page/short-term-rental-types>

the time, (3) an entire dwelling unit, and (4) recorded with Travis County Appraisal District as a homestead."⁷³

For a secondary structure it declares: "(owner-occupied) short-term rental secondary structures are (1) rented for periods of less than 30 consecutive days, (2) associated with an owner-occupied principal residential unit, and (3) an entire dwelling unit."⁷⁴

For a partial unit, namely a room rental, the form declares: "(owner-occupied) short-term rental partial units (one) must include the exclusive use of a sleeping room and shared use of the full bathroom, (two) the owners generally present at the licensed short-term rental property for the duration of any short-term rental of a partial unit, (three) not more than one partial unit at the property is simultaneously rented for any less than 30 consecutive days and (four) limited to a single party of individuals."⁷⁵

To register the STR in Austin the fee is \$443.

San Francisco has an Office of Short-Term Rentals.⁷⁶ The city adopted major revisions to its Planning Codes in 2014 for STRs.⁷⁷ The current codification includes some useful definitions of hosting platform, primary residence, residential unit, short-term residential rental, and tourist or transient use.⁷⁸ The code requires registration, occupancy of the unit by the owner not less than 275 days a year, maintenance of records for two years, certain insurance coverage, payment of transient occupancy taxes, compliance with the housing code; posting the registration number on the hosting platform's listing; and a clearly printed sign inside of the front door with the location of all fire extinguishers in the unit and building, gas shut off valves, fire exits, and pull fire alarms. The application fee and renewal fee every two years is \$50. The hosting platform has numerous responsibilities and there are fines for violations. It is a good model from which to start.

The amount of the application fee, \$443 in Austin and just \$50 in San Francisco, could be an issue. The economic incentive to not register, and risk a fine, logically seems to be greater when the fee is high. Even San Francisco with its modest fee, apparently had only 15% of its hosts registered in late 2016, a situation that changed dramatically for the better when litigation between the city and Airbnb was settled with Airbnb agreeing to de-list any properties that were not registered. The result was that Airbnb

⁷³

http://www.austintexas.gov/sites/default/files/files/Code_Compliance/STRs/STR_Type_1_Primary_revised_Dec.8_v2.pdf

⁷⁴

http://www.austintexas.gov/sites/default/files/files/Code_Compliance/STRs/STR_Hotel_Occupancy_Tax_Registration_Form.pdf

⁷⁵ http://www.austintexas.gov/sites/default/files/files/Code_Compliance/STRs/STR_Type_1-A_Partial.pdf

⁷⁶ <https://shorttermrentals.sfgov.org>

⁷⁷ <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf>

⁷⁸

[http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sanc=JD_Chapter41A](http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sanc=JD_Chapter41A)

de-listed 4,760 properties leaving just 6,300⁷⁹. Still, on-line, low-cost registration may facilitate registration and avoid litigation and enforcement problems.⁸⁰

The City of Isle of Palms, South Carolina, imposes STR regulation through zoning, defining an STR to be three months or less, and limiting the numbers of occupants overnight to six and oddly 40 during the day (Sec. 5-4-203; can we assume a wedding party or the like?), minimum floor area per occupant, and certain parking spaces.⁸¹ A placard is required to be posted on an STR setting limits on the number of overnight guests and cars that can be parked, along with other rules.⁸² One of them, 610 Ocean Boulevard, allows 29 people overnight and 12 cars. The code limits the total to 40 people.

Here is 610 Ocean Boulevard, on the ocean, for you and 28 of your closest friends:



Monterey County, California also regulates STRs in its zoning, defining STRs as not less than seven and not more than 30 consecutive calendar days, which by implication disallows an STR of less than seven days. It also only allows registration of properties in transient use the day the ordinance was adopted with the burden on the owner/registration to prove it. The number of days per year and the length of the rental are limited to those established by the owner/registrant. In short, they are perpetuating the status quo, nothing more and nothing less.⁸³

⁷⁹ Bowles, J., [Can San Francisco and Airbnb Finally Get Along?](http://www.thebaycitybeacon.com/politics/can-san-francisco-and-airbnb-finally-get-along/article_c0ebb7ee-271e-11e8-b606-cbcb32f3e23b.html), Bay City Beacon, March 13, 2018, www.thebaycitybeacon.com/politics/can-san-francisco-and-airbnb-finally-get-along/article_c0ebb7ee-271e-11e8-b606-cbcb32f3e23b.html

⁸⁰ Brinklaw, A., Airbnb says online registration will legalize all SF hosts, San Francisco Curbed, September 6, 2017. <https://sf.curbed.com/2017/9/6/16263986/airbnb-online-registration-san-francisco>; finding the unregistered rental units may be difficult. Villa, E., Unregistered Vacation Rentals in Palm Springs: How Many Exist and Are They a Serious Issue, March 8, 2018. <http://www.evillapalmsprings.com/unregistered-vacation-rentals-in-palm-springs-article.html>

⁸¹ https://library.municode.com/sc/isle_of_palms/codes/code_of_ordinances?nodeId=COOR_TIT5PLDE_CH4ZO_ART9SHRMRE

⁸² <https://www.iop.net/Data/Sites/1/media/short%20term%20rental%20placard%208.17.09.pdf>

⁸³ https://library.municode.com/ca/monterey_county/codes/code_of_ordinances?nodeId=TIT21ZO_CH21.64SPRE_21.64.280ADPETRUSREPRRE ; <http://www.co.monterey.ca.us/government/departments-i-z/resource-management-agency-rma-building-services/divisions/permit-center/short-term-rentals-transient-occupancy> ;

San Bernardino County, California, permits STRs, defined as rentals of less than 30 days (and not to be used for a wedding, fraternity party, or the like...). The development standards include code compliance, maximum occupancy based on floor area per occupant and the number of beds, parking, and signage. Conditions of operations address the contents of the rental agreement, posting of the property within the unit with all the conditions of use, and details of fire safety and maintenance.⁸⁴ Notice is required to “potentially affected property owners”, for example, those within 300 feet for STR parcels of 20 acres or less.

Miami Beach has struggled with enforcing its STR regulations and now promises to crack down on violators.⁸⁵ Short-term rentals are prohibited in large areas of the city.⁸⁶

Registering all these STRs can be burdensome. Nashville has had its share of problems with unregistered STRs and frustrated hosts who want to comply.⁸⁷ The result is that half of the STRs are not registered.

Montgomery County, Maryland, has one of the most recently-adopted STR programs.⁸⁸ It defines an STR as less than 30 consecutive days and limits the number of guests to six, with no more than two over age 18 in a bedroom. There must be a designated representative of the applicant owner with 15 miles of the property.

The Makings of Workable Program

Overarching issues to consider are:

-What is the nature of the activity you will regulate?

Presumably, STR is a private enterprise and almost certainly not a commercial lodging business. It is a type of lodging that is largely advertised on-line, through social media, and on bulletin boards. How do you draw the line between that modest, private activity and a commercial operation?

-How is it managed?

<http://www.co.monterey.ca.us/government/departments-i-z/resource-management-agency-rma-/planning/short-term-rental-ordinances-coastal-ref130043-inland-ref100042>

⁸⁴ <http://cms.sbcounty.gov/lus/CodeEnforcement/ShortTermRentals.aspx> ;

<http://cms.sbcounty.gov/Portals/5/CodeEnforcement/STR%20Ordinance%20070117.pdf?ver=2017-07-25-110907-313>

⁸⁵ Miami Beach proposes major crackdown on short-term rental platforms, CNBC, June 4, 2018.

<https://www.cnbc.com/2018/06/04/miami-beach-proposes-major-crackdown-on-short-term-rental-platforms.html>

Unwelcome guests: Airbnb, cities battle over illegal short-term rentals, CNBC, May 24, 2018.

<https://www.cnbc.com/2018/05/23/unwelcome-guests-airbnb-cities-battle-over-illegal-short-term-rentals.html>

⁸⁶ <https://www.miamibeachfl.gov/wp-content/uploads/2017/12/Short-Term-Rentals-3.pdf> ; see Sec. 142-1111. - Short-term rental of apartment units or townhomes.

https://library.municode.com/fl/miami_beach/codes/code_of_ordinances?nodeId=SPBLADERE_CH142ZODIRE_ARTIVS_UDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO

⁸⁷ Junewicz, N., Metro Codes: Nearly half of short term rentals operate illegally in Nashville, Fox17, August 2, 2017.

<http://fox17.com/news/local/metro-codes-report-nearly-half-of-short-term-rentals-operated-illegally>

⁸⁸ http://apps.montgomerycountymd.gov/ccllms/bill_details.aspx?doc=1003&hl=3235

Does the host have to be the owner and does the host need to be occupying at the same time? If not, will the regulations be different in terms of numbers of units allowed, number of days per year, terms of occupancy?

-What is the limit of use?

Will the host be required to live in the residence at least some minimum number of days per year? Will rentals be limited to some maximum number of days per year? Will STR be defined as a rental of 30 consecutive days or less and longer rentals not regulated in any way? Will whole-house, exclusive-use rentals be regulated differently, for example by only regulating when the house is rented for less than a week or two weeks? And will the renting of rooms be regulated on a different schedule, for example by including room rentals only if they are less than one month and otherwise not regulating longer room rentals, which may be covered by zoning anyway, possibly under the definition of a rooming house? There are so many questions to be answered and so many lines to be drawn.

A checklist of considerations for real estate lawyers advising hosts, guests, and public officials, for planning, regulation, and operation might include:

- Current zoning requirements
- Applicable codes (sanitation, health, building, occupancy among many)
- Business licensing
- Business organization (none, limited liability company, corporation, general or limited liability partnership, etc.)
- Homeowners' association covenants and restrictions
- Other easements, covenants, restrictions on the land
- Lodging to be offered (room, whole house, host-occupied, length of stay)
- 911 marking at the street
- Placarding of the residence
- Emergency notifications
- Food service (permitted? licensed?)
- Federal, state, and local taxes
- Safety inspections
- Fire, smoke, CO, and other detectors
- Fire extinguishers
- Child safety
- Parking
- Insurance
- Emergency notifications
- Water and septic
- Safe hot water temperature
- Electrical and plumbing in good repair
- Pest/vermin-free, especially bed bugs
- Ventilation, heat, air conditioning adequate
- No hazards
- No mold or excessive moisture

- Working doors, windows, screens
- Adequate means of egress
- Linen sanitation
- Pool and spa maintenance

"You've made your bed, now lie in it."

So goes the idiom from the French as early as 1590: “Comme on faict son lict, on le treuve” (As one makes one's bed, so one finds it). In advising on STRs, and in joining in the planning for and regulation of STRs, you will indeed be the ones making the bed and you will have to lie in it. There are benefits and burdens in how we permit STRs and many considerations to be weighed. If we start with life safety issues first, we can be quite certain the most important aspect of this rapidly emerging sharing economy phenomenon will be addressed. After that, it is the usual planning and politics.

APPENDIX

Jack S. Levey of Plunkett Cooney in Columbus, Ohio, has generously permitted us to include his article on STRs:

7 THINGS TO CHECK BEFORE LISTING WITH AIRBNB

Jack S. Levey, Plunkett Cooney

Home-sharing for short-term rental has become a major industry. Even in today's informal sharing economy, renting your property can have legal consequences. A little bit of homework can help prevent serious problems. Here are a few things to check before listing your property with Airbnb or similar online platforms.

1. Zoning law and other local regulations.

Make sure you know how your property is zoned, and that short-term rentals are permitted in that zone. Find out what other regulations your city has in place. For example, the city of Columbus, Ohio is planning to regulate short-term rentals. Early discussions suggested that Columbus may limit each property to 90 days of rental each year. As of Jan. 19, City Council member Mike Stinziano said “Everything remains on the table,” and Columbus' regulations may include a longer or shorter limit, or none. Cleveland, Ohio's 2016 ordinance allows home-sharing arrangements in single family districts, and sets a series of requirements on such topics as smoke and carbon monoxide detectors, maintenance, trash collection, and furnishing the renter with the owner's contact information. Click here [<http://www.clevelandcitycouncil.org/ClevelandCityCouncil/media/CCCMedia/Documents/City-Planning-Comm-of-Whole-6-6-16.pdf>] to learn more about Cleveland's requirements.

2. Is there an occupancy tax?

The state of Ohio levies a sales tax on hotel stays of less than 30 days. Your house is not a hotel, right? Don't be too sure. If you have five or more sleeping rooms listed for home-sharing, Ohio sales tax law considers your property a hotel, even if the rooms are in several structures. Even one room can make your property a hotel for purposes of city or local sales tax, since local jurisdictions can set their own definition. The city of Cleveland, taxes all short-term rentals, even if only one room is held out for rent. Airbnb has agreements with some cities, including Cleveland, calling for Airbnb to collect the taxes for the owner and remit the taxes to the city. But as the owner, you would still be responsible for paying any state or county taxes on the transaction.

3. Do you need to register?

If five or more rooms are made available for short-term rental, Ohio sales tax law may consider your property a hotel, and you may need to register with the Department of Taxation as a vendor. Cleveland requires owners to register with the city if the property is rented more than 90 days in any year, regardless of the number of rooms. Columbus has not yet decided what registration to require. Be sure to comply with any registration requirements in your city. In counties with a population of 200,000 or more, landlords must also register with the county auditor. Does your county consider home-sharing to be within the definition of a landlord?

4. Will your insurance protect you if someone is injured?

Remember that you can be sued for personal injury or property damage to your home-sharing guest. Even if you were not at fault, you'll still have to pay the cost of defending the lawsuit, which can be substantial. Your homeowner's insurance might not cover claims resulting from business activities. Find out whether you need special coverage. While you're at it, make sure that the policy limits are high enough to give you the protection you need.

5. Is your property up to code?

If your property does not meet local building codes, you may be opening yourself to liability if your renter is hurt as a result.

6. Are you risking your lease or mortgage?

What about your owners' association? Most residential leases prohibit subletting. Make sure you have any necessary prior written consent from your landlord. If your lease has special provisions for home-sharing arrangements, make sure that you comply with them. Most home mortgages give the lender the power to declare the loan due if there is a transfer of ownership or any interest in the property. A home-sharing rental may fall within that definition. Some mortgages allow the borrower to grant leases for terms of up to three years, which would permit the short-term rental. Make sure that nothing in your mortgage gives the lender the right to declare the loan due for whatever rental you are planning. If you live in a condominium, a planned unit development, or a community with a homeowners' association, the association documents may restrict your ability to rent to others. Make sure to review the association documents and comply with any restrictions.

7. Review the fair housing and anti-discrimination laws.

In addition to federal and Ohio laws against housing discrimination, many cities have their own antidiscrimination laws protecting additional categories of people. It should go without saying, but don't reject, discourage or discriminate against a qualified prospect. Home-sharing can be a great way to earn extra cash and to meet interesting people. Doing some homework in advance can help prevent unpleasant meetings with the enforcement authorities.

Jack S. Levey is a senior attorney in the Columbus, Ohio office of Plunkett Cooney, one of the Midwest's oldest and largest law firms. Mr. Levey has extensive expertise in the negotiation and closing of commercial leases and multi-million dollar real estate and business transactions. His practice also includes all facets of corporate aircraft purchasing, sales and financing.

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