

# Can Short-Term Rental Arrangements Increase Home Values?: A Case for Airbnb and Other Home Sharing Arrangements

By: Jamila Jefferson-Jones

## Introduction

The sharing economy or “new economy”<sup>1</sup> has redefined consumption in the housing context in a manner that impacts traditional notions regarding home values and neighborhood integrity. Housing sharing allows owners to share some of the benefits of property ownership – namely use and enjoyment<sup>2</sup> – while shifting some of the burdens of ownership – particularly, the economic burdens. With the advent of the sharing economy, there is a brewing conflict between this new economy and the realities of economic regulation. Thus, in the housing context, we see this conflict playing out in the tension between growing patterns of home sharing and existing regulations that prohibit such sharing. Many state and local governments, relying on their inherent police powers, regulate short-term housing. In particular, certain land use legislation overtly prohibits occupation by short-term renters. One prominent justification for such prohibitions is the maintenance of property values and neighborhood character.

I argue that, despite short-term housing prohibitions and the underlying policies supporting them, such exchanges can actually help to preserve property values by providing income to homeowners that can be used to offset mortgage and maintenance costs – in other words, by allowing owners to *share* the burdens of ownership. Thus, rather than frustrating the goals and purposes for which old economy regulations were designed (e.g., the preservation of property values and neighborhood character), housing exchanges may instead aid in achieving these aims. Specifically, if homeowners are able to do so, they are more likely to be able to maintain their homes in the short-term and, in the long-term, to maintain ownership.

Policies that curtail short-term rental housing are of a bygone era and are ill-suited to address the modern sharing economy. The number of online platforms designed to link property owners with potential short-term lessees has grown rapidly over the last few years. For instance, Airbnb.com (“Airbnb”) -- the most well-known of these platforms -- boasts that it has connected over twenty-five million guests with hosted properties in 34,000 cities in 190 countries since its founding in 2008.<sup>3</sup>

Sharing and bartering housing resources is not new. Historically, the concept has long existed in the context of lodging purchased on a time- or space-limited basis in inns and

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1 See Jenny Kassin and Janell Orsi, The Legal Landscape of the Sharing Economy, 27 J. Envtl. L. & Litig. 1, 2, 5 (2012) (listing some of the names of the new economy, such as the “relationship economy,” “cooperative economy,” “access economy,” “peer-to-peer (or p2p) economy,” and the “grassroots economy”). The modern sharing economy is diverse and is made up of various types of organizations and structures, including shared housing. *Id.* at 3 (noting that the sharing economy consists of “social enterprises, cooperatives, urban farms, cohousing communities, time banks, local currencies, and [a] vast array of other unique organizations.”). What ties these various components together is that they “generally facilitate community ownership, localized production, sharing, cooperation, [and] small scale enterprise.” *Id.*

2 The liberal view of property is represented by the prevailing Hohfeld-Honore “bundle of rights analysis.” See J.E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. Rev. 711, 712-13 (1996) (“The currently prevailing understanding of property . . . is that property is best understood as a ‘bundle of rights.’” (citations omitted)). Penner uses this term to describe the conflation of Wesley N. Hohfeld’s analysis of rights and the incidents of ownership delineated by A.M. Honore. In this view, property includes the rights of use and enjoyment, possession, and alienation. See John S. Mill, Principles of Political Economy bk. II, ch. ii, at 218 (W. Ashley ed., 1909)).

3 Airbnb, *About Us*, <https://www.airbnb.com/about/about-us> (last visited Mar. 2, 2015).

boarding houses, rooms for rent, housing cooperatives, and informal arrangements.<sup>4</sup> The catalyst for such sharing has often been the quest for affordability, coupled with housing scarcity. In the contemporary context, we see a home sharing proliferation the catalyst of which is also the scarcity of resources – both affordable housing itself and the monetary resources with which to maintain home ownership. What is unique to home sharing in the new economy is not the sharing, but rather the way in which such sharing is facilitated by technology and how the use of such technology is causing innovation in sharing to outpace changes in housing regulation.<sup>5</sup>

This Article focuses on the question of whether short-term rental arrangements negatively impact neighborhood character and home values. Part I gives an overview of the character of and justifications for municipal short-term leasing restrictions. Part II examines the Airbnb controversy in New York City. Finally, Part III argues that municipalities may actually be doing themselves a disservice when they prohibit these new economy housing exchanges because they may be missing out on an opportunity to reap enhanced economic benefits from permitting such exchanges.

## The Character of and Justification for Short-Term Rental Restrictions

The Supreme Court long ago recognized the validity of zoning regulations as a proper exercise of the police power.<sup>6</sup> However, the Court noted that the extent of the police power “varies with circumstances and conditions.”<sup>7</sup> Thus, when examining the character of the various state and local government restrictions, it is important to do so in the context of local community circumstances. Local considerations have resulted in a number of different types of short-term rental restrictions. Current short-term rental restriction can be divided into six types: (1) full prohibitions; (2) geographically-based restrictions; (3) quantitative restrictions; (4) proximity restrictions; (5) operational restrictions; and (6) licensing requirements.<sup>8</sup>

### ***Full Prohibitions and Geographically-Based Restrictions on Short-Term Rentals***

Those localities that fully prohibit short-term rentals do so on a community-wide basis.<sup>9</sup> However, some municipalities also enact such full prohibitions only in certain geographical locations, such as particular zoning districts or neighborhoods.<sup>10</sup>

Full prohibitions may constitute a regulatory taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.<sup>11</sup> Governmental restrictions on the use of real property for the purpose

4 See David Faflick, *Boarding Out: Inhabiting the America Literary Imagination, 1804-1860* 39-41 (2012) (noting that “Dutch merchants [in the New World] enjoyed the temporary shelter afforded them by boarding as early as the seventeenth century,” acknowledging the long-standing existence of such arrangement in Europe, and charting its development in America).

5 See Kassan & Orsi, *supra* note 1 at 5; Molly Cohen and Corey Zehngbot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58 Boston B.J. 6 (2014) (noting that the sharing economy is “[a]n old concept made new through internet-based sharing.”).

6 *Village of Euclid v. Ambler Co.* at 272 U.S. 365, 387 (1926).

7 *Id.*

8 Rental restrictions may also be organized with respect to the entity that imposes them – such entities being local governments, residents, developers or a combination of these entities. Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability* 29 St. Louis U. Pub. L. Rev. 41, 47 (2009).

9 See, e.g., N.Y. Multiple Dwelling Law, Article 1, §4.8(a) (“[a] Class A multiple dwelling shall only be used for permanent residence purposes”).

10 See e.g., Maui County, Haw., Code § 19.38.030(B) (2004) (Maui County, Hawaii ordinance limiting “transient vacation rentals” to “destination resort areas” and certain other business zoning districts).

11 The Takings Clause of the Fifth Amendment provides, “[N]or shall private property be taken for public use without just compensation.” U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. *Id.* amend. XIV, § 1 (“[N]or shall any State deprive any person of . . . property, without due process of law . . .”); see also *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 827 (1987) (The Takings Clause of the Fifth Amendment is made applicable to the states via the Fourteenth Amendment.). A property owner who is seeking to establish a claim pursuant to the Takings Clause must identify (1) the property taken; (2) the governmental conduct that resulted in the taking;

of short-term rentals may be classed as “inverse condemnation” – an instance where the government has taken property or impacted property rights without utilizing the condemnation process and, therefore, without providing just compensation for the taking.<sup>12</sup> Inverse condemnation applies both to physical invasions of private property and to so-called “regulatory takings”—those instances in which the government has regulated the use of property in a manner so as to constitute a constructive taking thereof. The genesis of the idea of the “regulatory taking” can be found in *Pennsylvania Coal Co. v. Mahon*,<sup>13</sup> wherein, Justice Oliver Wendell Holmes, Jr., writing for the Court, famously concluded that, with regard to government regulation of property rights, “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>14</sup>

### ***Quantitative Restrictions on Short-Term Restrictions***

Municipalities that have enacted quantitative restrictions allow short-term rentals throughout the community, but limit the number of such rentals. Often, these communities take the approach of issuing short-term rental permits to property owners, but capping the number of such permits that may be issued.<sup>15</sup> As an alternative to an absolute cap, some municipalities mandate that a certain ratio of long-term to short-term residential use be maintained throughout the community or within certain designated zoning areas.<sup>16</sup> The impact of either approach is that owners who may want to enter the short-term rental market may be prohibited from doing so if the permitting cap has already been reached or if the mandated ratio cannot be maintained.

### ***Proximity Restrictions on Short-Term Rentals***

In contrast to the quantitative restrictions, some municipalities restrict new short-term rentals from being located within a certain distance of an existing short-term rental property.<sup>17</sup> Again, the manner of restriction may have the effect of preventing new entrants into the short-term market.

### ***Operational Restrictions Affecting Short-Term Rentals***

Many regulations restricting short-term rentals focus on the operational aspects of renting. These restrictions are also designed to prevent new entrants into the short-term rental market. For example, a municipality may limit the maximum overnight occupancy of

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and (3) the just compensation that would remedy the taking. See generally 3 Sands, Libonati & Martinez, Local Government Law: A Transactional Approach §16.53.20 (2000).

12 *Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 317 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that the taking may occur without such formal proceedings.”). If the government would like to acquire private property for public use, it must usually commence by attempting to negotiate a purchase agreement with the owner. If its attempts at negotiation fail, it will begin the condemnation process via the courts. At trial the government has to establish authority to condemn, which may require it show that the proposed taking is ‘necessary’, thus establishing its authority to condemn the property. If successful, the government will be required to pay just compensation to the owner for the taking. See Jessie Dukeminier, James E. Krier, Gregory S. Alexander & Michael H. Schill, *Property* 1081 (2010) (7th ed. 2010).

13 260 U.S. 393, 415 (1922).

14 The issue in *Pennsylvania Coal* was whether the effect of the Kohler Act—which prohibited the mining of anthracite coal in a manner that, among other things, would cause subsidence to any residential structure—amounted to a taking. The Court held that “To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.” *Id.* at 515.

15 See, e.g., City of Santa Fe, N.M., Code §14-6.2(A)(6)(a)(i) (2011) (limiting the number of short-term rental permits to 350, unless the dwelling unit in question qualifies for a permit as an “accessory dwelling unit, owner-occupied unit, or unit located within a ‘development containing resort facilities.’”

16 See, e.g., Mendocino County, Cal., Code § 20.748.020(A) (1995) (mandating that a ratio of thirteen long-term to one short-term dwelling units be maintain throughout the county).

17 See, e.g., San Luis Obispo County, Cal., Code § 23.08.165(c) (2012) (prohibiting residential vacation rentals from being established within 200 feet on the same block of any existing residential vacation rental or “visitor-servicing accommodation”).

short-term rental properties. Such restrictions may be based on the number of bedrooms<sup>18</sup> in the property or on some other quantitative aspect of the property.<sup>19</sup> Alternatively, rental period regulations that limit the number of times that a property may be rented may be enacted.<sup>20</sup> These types of operational restrictions increase the cost of providing short-term rentals and, therefore, frustrate the very aim of owners seeking to reduce, shift or share the cost of ownership.

## ***Licensing Requirements Affecting Short-Term Rentals***

Some local government entities require that property owners seeking to use their properties for short-term rentals obtain a license to do so. Such licensing is often conditioned upon the property's passing various inspections.<sup>21</sup> Moreover, licensees may be subject to the payment of licensing fees and periodic renewals and, thus, additional fees. Often, this type of "procedural rental requirement [is employed] to ensure that landlords maintain their rental properties and that renters are well-behaved."<sup>22</sup>

## ***Justifications for Municipal Short-Term Rental Restrictions***

Communities justify restrictions of short-term leasing using various lines of reasoning, the most prominent of which (2) focus on issues related to taxation and revenue; (3) are public safety-based; or (3) relate to protecting property values and the character of the neighborhood;

### **1. Revenue and Competition with Licensed Lodging**

The hotel industry has lobbied for bans prohibiting short-term rentals, or at the very least, tougher regulations that would compel owners to pay the same sorts of occupancy taxes and other fees to which licensed hotels are subject. By the same token, local governments have often couched their objections to prohibited short-term rentals in terms of lost hotel occupancy tax revenue.<sup>23</sup>

### **2. Public Safety**

Local governments argue that the state is obliged to regulate the relationship between property owners and renters in order to protect the public from possibly unsafe lodging situations. Thus, municipalities argue that occupancy limits and inspection requirements, for example, are not designed to prevent owners from entering the rental market, rather they are meant to ensure that the renting public remains safe. As noted above, this reasoning is best-suited for a regulatory scheme that is mediating vertical relationships, rather than horizontal peer-to-peer relationships that have the tendency to be self regulating. Such burdensome requirements may have the unintended consequence of creating an "underground" market for short-term housing rentals. In essence, this is what is happening in municipalities with total bans as well. Although hosts are using a publicly-accessible website to facilitate short-term rental relationships, these hosts have often taking the calculated risk of disregarding bans or onerous regulation in

18 See, e.g. Isle of Palms City, S.C., Code § 5-4-202(1) (2007) (limiting overnight occupancy to two persons per bedroom, plus and additional two persons).

19 See, e.g. Sonoma County, Cal., Code § 26-88-120(f)(2) (2010) (limiting maximum overnight occupancy by the design load of the septic system).

20 See, e.g., Santa Fe, NM City Code §14-6.2(A)(6)(a)(ii) (limiting short-term rental units to a maximum of 17 rental periods per calendar year and limiting properties to one rental per consecutive seven-day period).

21 See, e.g., Tillamook County (OR) Short Term Rental Ordinances, Section 6 (Standards) and 9.A.b (Short Term Rental Permit Application Requirements) (requiring that short-term rental properties be certified by a building inspector with regard to minimum fire extinguishers and smoke detectors and emergency escape standards, as well as structural requirements).

22 See Pindell *supra* note 8 at 49.

23 See, e.g., *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014) available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9> (last visited Feb. 28, 2015).

order to shift a portion of their ownership burden, thus creating a “black market” in housing sharing.

### 3. Property Values and Character of the Neighborhood

Conventional thinking has been that short-term rental restrictions increase property values by causing owners to adhere to maintaining a gold standard of single-family ownership and occupancy. However, it is possible that property values may increase as a result of government’s allowing owners to enter into the short-term market, especially if, in the long-run, by doing so, the owner is able to alleviate some of the burden of ownership and thereby avoid deferring maintenance or, in the extreme, avoiding foreclosure.

The argument regarding the protection of the character of a particular residential neighborhood pits permanent residents against short-term residents and the owners that rent to them. Permanent residents may argue that short-term tenants do not have ties to the community and do not or cannot, therefore, reflect the values of the community. These arguments conflate the length of stay in a community with the ability (or more precisely the inability) to be a good neighbor.

## The New York Airbnb Controversy

The recent New York Airbnb controversy is a good example of the tensions between new economy home sharing and old economy regulation. In October 2013, New York Attorney General Eric Schneiderman subpoenaed Airbnb’s records, requesting data on its hosts<sup>24</sup> for the previous three years.<sup>25</sup> Schneiderman contended that Airbnb hosts in New York City — Airbnb’s largest United States market<sup>26</sup> — were violating a provision of the New York Multiple Dwelling Law which requires that certain multiple dwelling units only be occupied by “permanent occupants” – those residing in the unit for thirty or more consecutive days.<sup>27</sup> The Attorney General also asserted that Airbnb hosts in New York City were not complying with state and local tax registration and collection requirements.<sup>28</sup>

Airbnb moved to quash the subpoena, arguing that: “(i) there is no reasonable, articulable basis to warrant such an investigation and the subpoena constitutes an unfounded ‘fishing expedition’; (ii) any investigation is based upon laws that are unconstitutionally vague; (iii) the subpoena is overbroad and burdensome; and (iv) the subpoena seeks confidential, private information from petitioner’s [Airbnb’s] users.”<sup>29</sup>

Judge Gerald W. Connolly of the Supreme Court of the State of New York, Albany County held that the subpoena must be quashed because the requests contained therein were overly broad. The court made this determination despite its finding that a predicate factual basis had been established with “evidence [supporting the assertion that a substantial number of Hosts may be in violation of the Multiple Dwelling Law and /or New York State

24 Airbnb refers to the property owners who use its platform as “hosts” and the lessees as “guests.” Airbnb, *supra* note 3.

25 See *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014), available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9>; see also, Stephanie Burnett, *Airbnb Hands Over Data on 124 Hosts in New York City to the Authorities*, Time, Aug. 25, 2014, available at <http://time.com/3180103/airbnb-hands-over-data-on-124-hosts-in-new-york-city-to-the-authorities/> (last visited Feb. 28, 2015).

26 Tom Slee, Whimsley, *Trust, Ratings and the Data Behind Airbnb’s Host Turnover*, available at <http://skift.com/2014/06/12/trust-ratings-and-the-data-behind-airbnbs-host-turnover/> (last visited Feb. 28, 2015).

27 N.Y. Multiple Dwelling Law, Article 1, §4.8(a) (providing that “[a] Class A multiple dwelling shall only be used for permanent residence purposes” and defines “Class A dwelling” as including tenements, apartment houses, studio apartments, duplex apartments and kitchenette apartments. Further providing that “[f]or purposes of this definition, ‘permanent residence purposes’ shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.”); see *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014) available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9>; N.Y. Multiple Dwelling Law, Article 1, §4.8(a).

28 See *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014) available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9>; Affidavit of Sumanta Ray in Opposition to Airbnb, Inc’s Motion to Quash and in Support of the Attorney General’s cross-Motion to Compel Responses to an Investigatory Subpoena, *Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014), available at <http://www.documentcloud.org/documents/1145999-new-york-attorney-general-analysis-of-airbnb.html#document/p3> (last visited Feb. 28, 2015).

29 See *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014), available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9>.



and/or New York City tax provisions.”<sup>30</sup>

The court also held that Airbnb’s constitutional vagueness argument was not yet ripe for review because there was no actual controversy ongoing between the state and the hosts.<sup>31</sup> Additionally, the court held that Airbnb had failed to show that the information requested by the subpoena was confidential.<sup>32</sup>

The court noted that the subpoena demanded information on “all Hosts that rent Accommodation(s) in New York State.”<sup>33</sup> The Multiple Dwelling Law, however, applies only to “cities with a population of three hundred twenty-five thousand or more.”<sup>34</sup> Moreover, the court found fault with the subpoena’s not limiting its request to rentals of less than thirty days.<sup>35</sup>

With respect to the tax-related allegations made by the Attorney General, the court also took issue with the fact that the subpoena was not limited to New York City hosts and did not take into account the various exceptions to the state and city tax regulations.<sup>36</sup> In particular, the court noted that the Attorney General acknowledged the existence of exceptions to the hotel occupancy tax that exempted hosts who rented their properties “for less than 4 days, or for fewer than three occasions during the year (for any number of total days).”<sup>37</sup>

One day after the court’s ruling, the Attorney General issued a second subpoena to Airbnb.<sup>38</sup> This second subpoena was revised to address the court’s concerns about over breadth.<sup>39</sup> Less than a week after the issuance of the second subpoena, Airbnb and the Attorney General entered into an agreement whereby Airbnb would provide the Attorney general with anonymized data on its New York City hosts.<sup>40</sup> If after reviewing such data, the Attorney General or the New York City Office of Special Enforcement instituted an investigation of or undertook an enforcement action against a specific host, Airbnb agreed that it would provide non-anonymized information on that host.<sup>41</sup>

Five months later, in October 2014, Attorney General Schneiderman released *Airbnb in the City*, a report on the information that it had gathered from Airbnb as a result of the May 2014 agreement.<sup>42</sup> The report analyzed Airbnb bookings for “private stays”<sup>43</sup> in New York City from January 1, 2010 through June 2, 2014 (referred to in the report as the “Review Period”).<sup>44</sup> According to the report, during the Review Period, “72 percent of units used as private short-term rentals on Airbnb appeared to violate [the Multiple Dwelling Law].”<sup>45</sup>

The New York Attorney General’s earlier subpoena and eventual conclusions

30 *Id.*; see also Affidavit of Sumanta Ray in Opposition to Airbnb, Inc.’s Motion to Quash and in Support of the Attorney General’s cross-Motion to Compel Responses to an Investigatory Subpoena *Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014), available at <http://www.documentcloud.org/documents/1145999-new-york-attorney-general-analysis-of-airbnb.html#document/p3>.

31 See *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014), available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9>.

32 See *Id.* (noting that petitioner’s privacy policy provides that it will disclose hosts’ information at its discretion).

33 *Id.*

34 N.Y. Multiple Dwelling Law §3.

35 See *Decision and Order, Airbnb v. Schneiderman*, No. 5393-13 (N.Y. Sup. Ct. May 13, 2014), available at <http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9>.

36 *Id.*

37 *Id.* (quoting Respondent Memo. In Opp., p. 13).

38 See Benjamin Snyder, *New York Attorney General Issues New Subpoena in Airbnb Case*, *Fortune* (May 15, 2014), available at <http://fortune.com/2014/05/15/new-york-attorney-general-issues-new-subpoena-in-airbnb-case/> (last visited Feb. 28, 2015); see also Letter from Attorney General Eric T. Schneiderman to Belinda Johnson, General Counsel, Airbnb, Inc., dated May 20, 2014, available at [http://www.ag.ny.gov/pdfs/OAG\\_Airbnb\\_Letter\\_of\\_Agreement.pdf](http://www.ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf) (last visited Feb. 28, 2015) (noting that a subpoena for records was issued on May 14, 2014).

39 See Snyder, *supra* note 38.

40 See Letter from Attorney General Eric T. Schneiderman to Belinda Johnson, General Counsel, Airbnb, Inc., (May 20, 2014), available at [http://www.ag.ny.gov/pdfs/OAG\\_Airbnb\\_Letter\\_of\\_Agreement.pdf](http://www.ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf).

41 See *Id.* Airbnb has complied with this agreement, supplying the Attorney General with anonymized information on approximately 16,000 hosts and in August 2014, giving the Attorney General specific, non-anonymized information on 124 hosts. Stephanie Burnett, *Airbnb Hands Over Data on 124 Hosts in New York City to the Authorities*, *Time*, Aug. 25, 2014, available at <http://time.com/3180103/airbnb-hands-over-data-on-124-hosts-in-new-york-city-to-the-authorities/>.

42 New York State Office of the Attorney General, *Airbnb in the City*, Oct. 2014, available at <http://ag.ny.gov/pdfs/Airbnb%20report.pdf>.

43 A “private stay” is one in which the entire house or apartment is available to the guest and the host is not present in the unit during the stay. *Id.* at n. 1.

44 *Id.* at 2.

45 *Id.* at 2, 8.

regarding Airbnb and its hosts is emblematic of the tension inherent in the current regulatory scheme. A revision of the underlying policies justifying the restricting of short-term rentals is necessary in order to align our legal framework with our new economic reality.

## Using "New Economy" Principles to Analyze the Impact of Short-Term rental Restrictions on Property Values and the Character of the Neighborhood

An owner's participation in home sharing by renting his or her property on a short-term basis impacts the use and enjoyment "sticks" in the traditional Hohfeld-Honore "bundle of rights analysis" of property.<sup>46</sup> By contrast, regulations prohibiting or restricting short-term rentals are a restraint on the right to alienate property – another stick in the bundle of rights. A question that must be addressed is whether by imposing such a restraint on alienation – one that restricts an owner's right to shift use and enjoyment on a short-term basis – state and local governments actually further their stated goals of preserving property values and neighborhood integrity.

The New York Attorney General's report was critical of the fact that six percent of hosts seemed to be "Commercial Users" in that they accounted for 36% of all private short-term bookings.<sup>47</sup> However, it must be noted that all Airbnb hosts are engaged in commercial activity – not just those deemed "commercial" by the Attorney General's office. A hallmark of the sharing economy is the blurring of the line between commercial and non-commercial activities. As Professor Arun Sundararajan noted,

One hundred years ago there wasn't a clear line between someone who ran a hotel and someone who let people stay in their homes. It was much more fluid. Then we drew clear lines between people who did something for a living and people who did it casually not for money. Airbnb . . . [is] blurring these lines.<sup>48</sup>

Jurisdictions outside of New York have addressed this issue. For example, the plaintiffs in a case heard by the California Court of Appeal, Sixth District argued that the defendant municipality Carmel-by-the-Sea acted arbitrarily by restricting transient commercial use of residential property – in particular short-term rentals – while other commercial uses such as home occupations were permitted by the ordinance in question.<sup>49</sup> The court, however, found that home occupations "do not threaten the basic character of a residential neighborhood. Rather, they strengthen the community by fostering the talents of its residents."<sup>50</sup> I argue that the Ewing court's definition of "community-strengthening" activities is too limited and should include the economic strengthening provided by an influx of short-term rental income and the benefits that this income provides to property owners.

The plaintiffs also complained that Carmel had drawn the line between impermissible short-term and permissible long-term rentals arbitrarily by permitting rentals of 30 consecutive days but not 29. The court, however, citing *Euclid v. Ambler Co.*,<sup>51</sup> gave great deference to the legislature in making this determination:

Line drawing is the essence of zoning. Sometimes the line is pencil-point thin—allowing, for example, plots of 1/3 acre but not 1/4, buildings of 3 floors but not 4, beauty

<sup>46</sup> See discussion of Hohfeld-Honore "bundle of rights analysis" *supra* note 3.

<sup>47</sup> New York State Office of the Attorney General, *supra* note 42 at 2, 10-11.

<sup>48</sup> Joel Stein, *Baby, You Can Drive My Car, and Stay in My Guest Room, and Do My Errands, and Rent my Stuff: My Wild Ride Through the New On-Demand Economy*, Time, 32, 38-40 (Feb. 9, 2015), available at <http://time.com/3687305/testing-the-sharing-economy/> (last visited Mar. 2, 2015).

<sup>49</sup> *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1592-93 (1991); Carmel Ordinance No. 17.24.020 permits home occupations in the R-1 District, including "painting and related graphics, music, dance, dramatics, sculpture, writing, photography, weaving, ceramics, needlecraft, jewelry, glass and metal crafts." By contrast the New York Multiple Dwelling Law allows joint living-working quarters for "artists," as defined by the statute. See N.Y. Multiple Dwelling Law, Article 7, § 277.

<sup>50</sup> *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d at 1593 (citing *County of Butte v. Bach*, 172 Cal.App.3d 848, 865 (1985) (home occupation exception in a zoning ordinance "implicitly premised upon expectations that the number and distribution of such encroachments will not be intolerable and that persons who live where they work are likely to have less detrimental impact than nonresidents").

<sup>51</sup> 272 U.S. 365.

shops but not beauty schools. In *Euclid*, the Supreme Court recognized that “in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.” Nonetheless, the line must be drawn, and the legislature must do it. Absent an arbitrary or unreasonable delineation, it is not the prerogative of the courts to second-guess the legislative decision.<sup>52</sup>

Moreover, the court opined that “long-term tenants may create as stable a community as resident homeowners.”<sup>53</sup> Further, the court found that “the 30-day cutoff [was] not arbitrary but, rather, reasonably linked to that goal [of creating community stability].”<sup>54</sup> As noted earlier, this type reasoning is best-suited for the old economy and a regulatory scheme that is mediating vertical relationships, rather than the horizontal peer-to-peer relationships of the sharing economy.

## Conclusion

Both vacationers and those traveling for business have expressed an increased interest in staying in homes rather than hotels. Although this may in the short-term cause a decline in hotel tax revenue in some cities, a well-thought-out taxing scheme for the sort of short-term rentals that are prevalent in the sharing economy can provide cities and states with a means of recouping these tax revenue losses while providing greater benefits in stabilizing existing ownership.

The ability to rent one’s property – even in the short-term – may be a tremendous aid to struggling homeowners. By providing short-term rentals, owner may shift and share the burden of homeownership. This shifting can help to defray mortgage, homeowners association, and real estate tax costs. Moreover, the sharing of this burden, through the consequent sharing of the benefits of homeownership – use and enjoyment in particular – can help to avoid or at least mitigate instances of blight due to disrepair, distressed sales at below-market-rate sales prices, and even foreclosures. Thus, allowing owners to home share can protect a community’s character and property values by helping to insulate individual owners from the effects of negative housing market downturns.

<sup>52</sup> *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App.3d at 1593 (citing *Euclid v. Ambler Co.*, 272 U.S. 365, 389); see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

<sup>53</sup> *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App.3d at 1593

<sup>54</sup> *Id.*

