Residential Rental Regulation Issues

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Emerging Issues in the Enforcement of Short-Term Rental Regulations

By

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Short-term residential rentals have existed for decades, primarily in popular tourist destinations, such as coastal communities. Although online companies, such as HomeAway, provided a venue to advertise short-term rentals, it was Airbnb's business model of facilitating short-term rentals that has brought short-term rentals to more communities; and in all communities, has allowed more individuals to enjoy the financial benefits of hosting a short-term rental. As cities struggle with the impacts from the growing popularity of short-term rentals, cities are adopting ordinances to regulate or to prohibit short-term rentals. They also are exploring how companies, like Airbnb, HomeAway or VRBO (collectively "Online Platforms"), could or should play a role in facilitating compliance with the applicable short-term regulations. This article provides an overview of the interaction between cities and Online Platforms over issues of enforcement of regulations and collection of transient occupancy tax,[2] exploring how cities' regulation of a matter that traditionally has been governed by state law may conflict with federal laws, such as the Communications Decency Act and Stored Communications Act, and how Airbnb has created the Voluntary Collection Agreement as a tool to use with cities to work through some of the potential conflicts.

Cities May Regulate Short-Term Rentals as a Land Use

There is well-established case law providing cities with the authority to regulate short term rentals as a land use matter. *Ewing v City of Carmel by the Sea*[3] upheld the city's ordinance prohibiting short term rentals in areas zoned for single family residences, which was intended to preserve the residential character of the city's neighborhoods. The owners of a short-term rental challenged the ordinance, arguing that the ordinance was arbitrary and capricious because 1) home occupation uses, which created the same parking and traffic impacts, were allowed in the zone and 2) transient use longer than 30 days i.e., long term rentals, were allowed.

The court rejected plaintiffs' arguments, and instead, focused on the short term rental impact to the residential character of the neighborhood. The court specifically found that the residential character of a neighborhood is threatened when a significant number of homes are occupied by short-term tenants, which could impact the stability of a community.[4] With respect to the plaintiffs' argument regarding the distinction between home occupations and short term rentals, the court was not persuaded by the fact that the two uses may create similar parking and traffic impacts.[5] Instead, the court focused

[2] For general reference, see Rusin, T. and Visveshwara, A. (2015 August). Home Sharing in the New Economy. *Western City.*
[3] (1991) 234 Cal.App.3d 1579, 1589.
[4] *Id.* at 1591.
[5] *Id.* at 1592-93.

on the impact to the residential character of the neighborhood and found that the distinction was reasonable because home occupations strengthened the community by fostering residents' talents in contrast to short term rentals, which the court already found threatened the stability of a community.[6] With respect to drawing the line at prohibiting rentals of less than 30 days, the court found that it was reasonable for the Council to discourage short term rentals, but to allow month to month tenancies for longer term tenants who may contribute to the community.[7]

Cities may continue to regulate problematic behavior, but ordinances that regulate solely the conduct of the guests of short term rentals, as opposed to other neighborhood residents, may present challenges. For example, *College Area Renters and Landlord Association v. City of San Diego*[8] held that the city's zoning ordinance regulating the number of residents age 18 or older in non-owner occupied residences violated the California Constitution's Equal Protection principles because there was no rational basis to distinguish between overcrowded homes that were owner occupied and overcrowded homes filled with tenants – both created the same impacts that the City was attempting to mitigate. The court cautioned: "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users."[9]

Thus, regulations of short-term rentals should address the land use impacts associated with such use and ensure that regulations governing personal conduct apply equally to guests of short term rentals and the neighborhood's residents. Common impacts include: deterioration of residential character of neighborhood, loss of housing stock, parking, traffic, noise, and safety. However, the impacts, and the ways to mitigate those impacts, differ from jurisdiction to jurisdiction, and therefore, there is no one model ordinance. Attached is a chart which provides links to information regarding regulatory approaches from cities throughout California.

Regulating Online Platforms that Facilitate Short-Term Rentals

Communications Decency Act

Given the challenge and cost of enforcement, and the data that platforms collect on hosts and guests, cities are exploring how such platforms might facilitate their enforcement efforts. In developing ordinances regulating short-term rentals and enforcing regulations, a key decision is whether the city will regulate only the underlying short-term rental activity or will also try to impose liability on platforms that somehow

[6] *Id.* at 1593.
[7] *Id.* at 1593.
[8] (1996) 42 Cal.App.4th 543, 521-22.
[9] 42 Cal.App.4th at 521.

participate in short-term rental transactions. If a city attempts to impose liability on a platform for short-term rental activity, the city must be mindful of the application of Section 230 of the Communications Decency Act ("CDA") to Online Platforms. The CDA prohibits "treat[ing]" websites that host or distribute third-party content, like Online Platforms, "as the publisher or speaker of any information provided by another information content provider," and immunizes them from liability under any "inconsistent" state or local law.[10]

A fundamental purpose of Congress in passing the CDA was to shield website operators from compulsory obligations to screen user content, and instead to provide them with the incentive to build innovative online platforms while having the flexibility to experiment with and develop tools to address undesirable content without fear of legal retribution.[11] The scope of this immunity is broad, and applies regardless of whether a website may know that third parties are using its services to create or post unlawful content.[12] Since its passage in 1996, the CDA has functioned as the bedrock upon which online services, such as eBay, Amazon, Yelp, and craigslist, have founded and built their operations. Thus, as discussed below, an ordinance which attempts to punish Online Platforms for failing to verify and screen third-party listings, and for publishing unverified listings may conflict with, and be preempted by, the CDA.

Airbnb, Inc. v. City and County of San Francisco

Several California cities recently have adopted ordinances attempting to impose liability on platforms for facilitating listings which might violate local law and these ordinances have been the subject of litigation. Most notably, the City and County of San Francisco adopted an ordinance in June 2016, which attempted to hold platforms criminally and civilly liable for publishing, and for failing to screen and remove their users' advertisements of rentals that lack City-issued permits.

In June 2016, Airbnb and HomeAway filed suit in federal court seeking to enjoin the enforcement of the ordinance on the grounds that the ordinance violated the CDA, as well as the First Amendment, and the Due Process Clause of the Fourteenth Amendment.[13] Prior to the hearing on the preliminary injunction, the City requested a stay and the Board of Supervisors amended the ordinance in attempt to overcome the legal challenge. More specifically, the City amended the ordinance to impose penalties

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[10] 47 U.S.C. §§ 230(c)(1), (e)(3); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).
[11] 47 U.S.C. §§ 230(b)(1), (2), (4).
[12] *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009).
[13] *Airbnb, Inc., v. City and County of San Francisco,* N.D. Cal., Case no. 3:16-CV-03615.

on a platform which provides "booking services" in connection with a short-term rental of a unit lacking a permit rather than merely the advertisement of an unpermitted unit. The City's position is that the amended ordinance does not violate the CDA because the ordinance no longer imposes liability on a platform based on content provided by third party hosts, but rather imposes liability on platforms for providing booking services for an illegal short-term rental. Airbnb and HomeAway renewed their challenge after the passage of the amendments. In November 2016, the court denied the Online Platforms' request for an injunction, concluding that the CDA did not preempt the ordinance. The court subsequently issued a temporary restraining order prohibiting the City from enforcing the ordinance against the Online Platforms because the City lacked a mechanism to provide platforms with the information regarding registered units which the platforms needed to comply with the law. The court ordered the parties to mediation and mediation continues.

Airbnb, Inc. v City of Anaheim

Likewise, the City of Anaheim adopted an ordinance in July, 2016, which attempted to hold platforms criminally and civilly liable for publishing, and for failing to screen and remove, their users' advertisements of rentals that lack City-issued permits or are otherwise not compliant with "any" City law or regulation, including building codes. The ordinance provided the City Attorney with the ability to determine whether the ordinance violated state or federal laws and, if so, to suspend the application of the ordinance. Again, Airbnb and HomeAway filed suit to enjoin the enforcement of the ordinance on similar grounds to the San Francisco case.[14] Shortly after the filing of the lawsuit, the Anaheim City Attorney reviewed the ordinance and concluded, presumably based on the CDA claims made in the case, that the ordinance should not be applied to Airbnb, HomeAway, and other Online Platforms and that no penalties will be issued against Online Platforms under the ordinance.

Airbnb, Inc. v. City of Santa Monica

Lastly, the City of Santa Monica adopted an ordinance in 2015 which attempted to hold platforms liable for publishing advertisements of rentals that lack City-issued permits. Airbnb and HomeAway filed suit in September 2016 seeking to enjoin the enforcement of the ordinance on similar grounds to the San Francisco and Anaheim cases.[15] As in the San Francisco case, Santa Monica requested a stay and amended the ordinance to impose liability on platforms for completing booking transactions. The parties then set a revised briefing schedule for a new motion for preliminary injunction. Shortly before the platforms were to file their motion, Santa Monica proposed that the parties stay proceedings pending the outcome of the San Francisco case, including a potential

[14] *Airbnb, Inc. v. City of Anaheim, C.D. Cal.,* Case no. 8:16-cv-01398.
[15] *Airbnb, Inc. v. City of Santa Monica,* C.D. Cal., Case no. 2:16-cv-06645.

decision on an appeal to the Ninth Circuit. The City's proposal was agreed to and the ordinance is not being enforced.

The outcome of the San Francisco and Santa Monica cases will likely have a large impact on whether cities in California can impose liability on Online Platforms for third-party listings that do not comply with local laws. The cases, and possible appeals to the Ninth Circuit, will likely be concluded by the end of 2018. A city, which is considering adopting an ordinance which imposes liability on Online Platforms, may want to consider the status of this litigation before moving forward with adopting such an ordinance.

Compelling Online Platforms to Disclose Transaction Data

To enforce short-term regulations, cities also are turning to platforms to obtain evidence of the transaction through their legislative subpoena power. For general law cities, the authority to issue a legislative subpoena within the context of an investigation (i.e., pre-litigation) is found at Government Code sections 37104-37109. For charter cities, the authority to issue legislative subpoenas is derived from California Constitution Article XI, sections 3(a) and 4(e) and the city's charter may also address issuance of subpoenas.[16]

Cities may be tempted to impose obligations on platforms to share data. Requiring an Online Platform to share data regarding its customers implicates the Stored Communications Act (SCA), a federal law which was enacted "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."[17] Under the SCA, "a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity," without a subpoena or other legal process.[18] More specifically, the "SCA clearly prohibits communications providers from disclosing to the government basic subscriber information—including a customer's name [and] address …—without a subpoena."[19] Indeed, "[t]hat Congress intended [the SCA] to

[16] Please see Rusin, T., et al., *supra,* Home Sharing in the New Economy. *Western City* for further information about issuing legislative subpoenas for short term rental enforcement actions.
[17] Senate Report No. 99–541, at 1–2 (1986).
[18] 18 U.S.C. §§ 2702(a)(3), (c)(1); 2703(c).
[19] *Telecomms. Regulatory Board of Puerto Rico v. CTIA*, 752 F.3d 60, 68; see 18 U.S.C. § 2702(a)(3) (ECS "shall not … divulge a record or other information pertaining to a subscriber to or customer of such service ... to any governmental entity" without legal process).

restrict the ability of a service provider to turn over even a list of customers to a governmental entity" is "abundantly clear."[20]

Many Online Platforms probably qualify as a provider of a remote computing services and a provider of an electronic communication service within the meaning of the SCA. Likewise, a city would be considered a "governmental entity" under the SCA. As a result, any ordinance which would purport to require a hosting platform to disclose its customers' names without a subpoena or other legal process could be preempted by the SCA.

Several cities have adopted ordinances which require platforms to share data without a subpoena or legal process. San Francisco adopted an ordinance in June 2016 which required platforms to turn over user data on a monthly basis. As discussed above, San Francisco amended the law, after Airbnb and HomeAway filed suit, to remove the data sharing provision and instead created a process by which the Office of Short Term Rentals could issue an administrative subpoena to obtain information from platforms. Because the data sharing provision was removed, the court never issued an order regarding whether the data sharing provision violated the SCA. However, in an unrelated case regarding tax obligations, HomeAway attempted to use the SCA as a defense to a request from San Francisco's Treasurer/Tax Collector for user information.[21] In this case, the trial court determined that HomeAway did not qualify as a provider of remote computing services or as a provider of an electronic communication services; the case is currently on appeal. More recently, a federal court in Portland enjoined data sharing provisions adopted by the City of Portland after concluding that HomeAway was a provider of a remote computing services and electronic communication services.[22]

As with the litigation over platform liability issues described above, the case law regarding the ability of a city to require Online Platforms to share data is evolving. Again, if a city is considering adopting an ordinance, which imposes data sharing obligations on Online Platforms, it should analyze whether the SCA preempts the ordinance and consider the status of the San Francisco and Portland cases.

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[20] *Id.* At 67.
[21] *In Re: City and County of San Francisco et. al*., San Francisco Superior Court, CPF-16-515136.
[22] *HomeAway.com, Inc. v. City of Portland*, U.S. District Court, D. Or., Case no. 3:17-cv-00091.

Airbnb's Voluntary Collection Agreements Facilitating TOT Collection

Short-term rentals also have the potential to generate revenue pursuant to a transient occupancy tax ordinance. Revenue and Taxation Code section 7280, et seq., authorizes cities to levy a tax on the "privilege of occupying a room or rooms" including that in a house, provided the period of occupancy is for less than 30 days. Accordingly, many cities have adopted transient occupancy tax ("TOT") ordinances. In general, a city's TOT ordinance should apply to a short-term rental in a residence, in addition to short-term rentals in a hotel or motel, but the city's ordinance should be reviewed carefully to determine applicability.[23] Assuming the TOT ordinance is applicable, cities may want to consider ensuring short-term rental regulations limit stays to less than 30 days to ensure TOT generation.

Although some hosts of short-term rentals are accustomed to collecting and remitting TOT, hosts who offer short-term rentals through Online Platforms without the use of a professional property manager may struggle with remitting TOT. It can be difficult for cities to collect TOT from these hosts.

To address this challenge, Airbnb developed a tool, the Voluntary Collection Agreement (VCA), to ensure that TOT is collected and remitted while relieving hosts of tax filings and cities of the burden of collection and enforcement. When a city signs a VCA with Airbnb, Airbnb collects appropriate local taxes from guests as part of their booking transactions and remits the tax revenue directly to the city on behalf of the short-term rental hosts. A VCA is a legally binding agreement between Airbnb and a taxing authority for the former to contractually assume the tax collection and remittance obligations of hosts for booking transactions completed on the Airbnb platform. Under the VCA, Airbnb registers as a taxpayer, remits the collected tax, and files a single tax return.

In determining whether to enter into the a VCA, cities will need to weigh the benefit of Airbnb's cooperation in facilitating TOT collection against the concessions made by the city entering into the VCA. One of the first steps is to consider how many short-term rentals are in the city's market, and how many of those short-term rentals use Airbnb as a platform. A provision of Airbnb's VCA requires cities to waive and release "any and all actions, causes of action, indebtedness, suits, damages or claims arising out of or relating to payment of and/or collection of TOT or other tax indebtedness, including but not limited to, penalties, fines, interest or other payments relating to TOT on any transaction prior to the effective date of the VCA. The statute of limitations for instituting

[23] See e.g., *In re Transient Occupancy Tax Cases,* 2 Cal. 5th 131 (2016).

an action to collect TOT is 4 years.[24] Therefore, cities should consider the fiscal impact of waiving outstanding TOT, prior to entering into the VCA.

In addition, cities should consider the likelihood and frequency of their TOT audits, and how that may interplay with enforcement actions in their jurisdictions. A provision of the VCA requires the city to agree that it will only audit Airbnb once per any consecutive 48-month period (4 years), and that the audit, and any subsequent assessment based on the audit, will be limited to a consecutive 12-month period. The city also agrees that it will not seek personally identifiable information relating to a host or a guest until the city has conducted an audit of Airbnb. The practical effect of these two provisions is to discourage seeking information related to specific hosts from Airbnb.

Conclusion

In sum, there is inherent tension between the state law that cities use to regulate short-term rentals, and the federal laws that Online Platforms rely upon to shield themselves from certain liabilities. How courts will resolve this tension is to be determined. Until there is published appellate case law providing clear guidance, cities should be mindful of short-term regulations that may apply to Online Platforms.

Regulatory Approaches to Short-Term Rentals in Various California Cities

[24] See Revenue and Taxation Code, § 7283.51.

Below are links to information regarding regulatory approaches to short-term rentals in various California cities:

City	Link
Aliso Viejo	Ordinance
Anaheim	Ordinance
Arroyo Grande	Ordinance
Berkeley	March Ordinance
Big Bear Lake	Current Code
Buellton	Ordinance
Capitola	Ordinance
Carlsbad	Ordinance
Carmel-by-the-Sea	Ordinance
Carpinteria	City Page
Cathedral City	City Page
Chula Vista	Code
City of Napa	Ordinance
Coronado	Ordinance
Dana Point	Ordinance
Danville	Ordinance
Desert Hot Springs	Ordinance
Encinitas	Ordinance
Eureka	Ordinance
Fort Bragg	Code
Goleta	Ordinance
Hermosa Beach	City Page
Indio	City Page
La Quinta	Ordinance
Laguna Beach	CC Report
Mammoth Lakes	Ordinance
Manhattan Beach	City Page
Mill Valley	Ordinance
City	**Link**

Monterey	Ordinance
Ojai	City page
Pacific Grove	City page
Palm Desert	Ordinance
Palm Springs	Ordinance
Palos Verdes Estates	Ordinance
Petaluma	City Page
Piedmont	Staff Report
Rancho Mirage	Ordinance
Redding	City Page
Sacramento	City Page
Saint Helena	Code
San Clemente	City Page
San Francisco	City Page
San Jose	San Jose Ordinance
San Juan Capistrano	Ordinance
Santa Barbara City	City Page
Santa Cruz	Ordinance
Santa Monica	City Page
Sausalito	Ordinance
Solana Beach	City Page
Sonoma	Current Code
South Lake Tahoe	Ordinance
Sunnyvale	Ordinance
Temecula	Ordinance
Tiburon	Ordinance
Truckee	City Page
West Hollywood	City Page