

Home Sharing in the New Economy

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About Legal Notes

This column is provided as general information and not as legal advice. The law is constantly evolving, and attorneys can and do disagree about what the law requires.

Local agencies

interested in determining how the law applies in a particular situation should consult their local agency attorneys.

This article is the second in a two-part Legal Notes series on “New Economy” issues in cities.

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With short-term residential rentals exploding in popularity in the “new” or “sharing” economy, many cities are taking a hard look at the impacts of such rentals in the community. Online hosting platforms such as Airbnb, HomeAway and Flipkeyⁱ have created a direct connection between hosts (for example, residential owners) and travelers or other temporary visitors and make it easy to rent a home or room for short periods of time. Opponents are concerned with loss of housing stock and the residential character of neighborhoods. Neighbors may complain about impacts from parking, traffic and noise, as well as other public safety issues. Hotels may also complain that short-term residential rentals do not have the same overhead costs and regulation that they face.

Alternatively, proponents may desire to supplement their income with such rentals for a variety of reasons, such as to offset a job loss. The business community may also welcome the positive effects of more visitors who frequent city restaurants and purchase other services.

Although not specifically designed to address the sharing economy, cities' traditional regulatory tools allow communities to address short-term rentals and their potential impacts. This article provides an overview of these tools and their reach.

Short-Term Residential Rentals Can Be Regulated as a Land Use

The California Court of Appeal in *Ewing v. City of Carmel-By-The-Sea* considered whether a city ordinance that banned short-term rentals (residential property rentals of 30 days or less) was valid.ⁱⁱ The ordinance was based on the city's General Plan policies related to strengthening the residential character of neighborhoods in the city by limiting commercial uses in residential neighborhoods.ⁱⁱⁱ The plaintiffs owned a single-family property in a residential district and rented the property to tourists for short stays.^{iv} They argued the ban ordinance did not advance a legitimate government interest, citing a lack of complaints about the rentals.^v However, the court found that the short-term rentals alone sufficiently threatened the residential character of a neighborhood because "short-term tenants have little interest in public agencies or in the welfare of the citizenry."^{vi} Accordingly, the court upheld the city's prohibition.



A city is not limited to imposing a strict prohibition or ban and may use its constitutional police power to allow short-term rentals subject to conditions designed to address potential negative impacts. Options include a density restriction or allowing the rentals only in certain areas to mitigate against harm to a neighborhood's residential character. Alternatively, a city may allow short-term rentals where the host is present (for example, renting a room or guesthouse), but prohibit them where the host is not present (for example, renting the entire residence). Cities may also consider limiting the number of days in a calendar year that a property can be used as a short-term rental or implement related parking or noise restrictions.

One option for implementing conditions is requiring hosts to obtain an administrative permit or otherwise register with the city pursuant to an ordinance. A key benefit of this practice is that it makes the host known to the city and facilitates communication. The city may also charge a permit fee, which can offset the cost of administering the permitting program.

Short-Term Rentals May Be Taxed

Short-term rentals also present a potential source of revenue for cities. Revenue and Taxation Code section 7280 allows a city to tax "the privilege of occupying a room or rooms, or other living space, in a hotel, inn, tourist home or house, motel or other lodging unless the occupancy is for a period of more than 30 days." Thus, these rentals may already be subject to a city's transient occupancy tax (TOT) ordinance, depending on how the jurisdiction has defined its ordinance.

In addition, SB 593 (the Thriving Communities and Sharing Economy Act) is a two-year bill in the Legislature that may be taken up again in January 2016. If passed, the bill would amend section 7280 to declare that existing law allows a city to levy a tax on short term rentals pursuant to its TOT ordinance on either a host or a hosting platform.

A short-term rental may also be considered a business, subject to a city's business license and tax requirements.

Enforcing Compliance With Local Ordinances

Permitted Use by Right in All or Certain Zones. The easiest and most cost-effective ordinance to enforce is one that allows short-term rentals. This type of ordinance may



include a requirement that hosts register with the city. Such an ordinance will also generate the greatest tax revenue if the rentals are subject to the city's TOT. It encourages registration and payment of taxes because:

- There is no benefit to avoiding registering; and
- There are heavy financial penalties (including back taxes, penalties and interest) for not complying.

Cities that employ this type of ordinance will not only be able to take enforcement action against problem rental properties (for example, properties that violate nuisance, noise or special-event permit ordinances), they will also be able to educate and communicate more effectively with hosts. If short-term rentals are permitted in only some areas of the city, the benefits will decrease proportionally. This type of ordinance may work best in a city where there are not significant concerns about housing stock being depleted.

Bans. This type of ordinance is the next easiest to enforce because a single violation is enough for city staff to take enforcement action, and once a violating property is found it can be monitored. Although a ban

may eliminate some short-term rental use, it may also drive the hosts underground. Some hosts may disguise their properties online, falsify or eliminate the rental paper trail and use middlemen to avoid detection and repercussions. Such deception makes enforcement costly and time consuming, with no tax revenue to offset the cost of enforcement.

One option to simplify enforcement is to adopt an ordinance that bans advertising of short-term rentals. There is no right to advertise illegal activity, which opens the door to taking action directly against websites that facilitate such rentals.^{vii} If passed, SB 593 might provide another tool for enforcing a ban as it would prohibit website platforms from advertising short-term rentals in cities where they are not allowed.

Allowed Subject to Conditions. These ordinances are seen as a compromise between local proponents and opponents of short term rentals. However, the conditions imposed:

- **Are harder to prove.** A city must show not just that a rental occurred, but that the rental violated the conditions because, for example, it exceeded the number of rentals allowed in a year for the property or rented out an entire home instead of a room (depending on the conditions in the ordinance);
- **Make violators harder to detect because renting is allowed.** It is much easier to detect rental activity than to determine if specific conditions are being violated; and
- **May discourage host registration if conditions are too complex or burdensome.**

The effect conditions will have on registration should therefore be carefully considered. If SB 593 passes in 2016, enforcement of such ordinances may be more feasible because of the information that hosting platforms will be required to provide to cities. For now, enforcement may prove challenging.

Enforcement Tools

Short-term rentals can be easily disguised to look like legitimate long-term rentals. A few tools exist to make enforcement efforts easier. They include education efforts, legislative subpoenas, undercover operations, using advertising against hosts, and TOT collection by the hosting platform.

Education. Educating the community about an ordinance should be a primary focus. The hosting platforms may be open to assisting such efforts.

Legislative subpoenas. All California cities can issue subpoenas to aid investigation and enforcement related to short term rental ordinances. These subpoenas are a powerful tool and can be used to:

- Obtain information from hosting platforms; and
- Obtain information directly from hosts.

While effective at gathering information from hosts or websites based in the same county as a city, enforcing a legislative subpoena against more distant hosts may face stiff resistance. If enacted, SB 593 would also require hosting platforms to produce quarterly reports detailing the addresses, dates of stay and amounts paid for short-term rentals booked on their platforms. This information could aid a city in assessing TOT owed and detecting rentals that violate an ordinance.^{viii}

Undercover operations. These efforts can be an effective tool if a city has a ban or allows short-term rentals subject to conditions. However, a substantial investment of staff time is needed for the investigations.

Use advertising against hosts. Without online hosting platforms, short-term rentals would exist only on a small scale. As a result, most hosts advertise on the platforms. Information from hosting platforms should be downloaded, preserved and investigated.

TOT collection by the hosting platform. If a city collects TOT from short-term rentals, the city can request or require^{ix} the hosting platform to collect and remit the tax directly to the city. Thus far, Airbnb has been the only hosting platform willing to collect TOT at the request of a city and does so in San Francisco, San Jose and Malibu.

Consider Local Options Carefully

Cities have a variety of options available in crafting an ordinance that best addresses short-term rentals in the community. The right ordinance may differ greatly among cities, depending on the local goals for the regulation. Ordinances that focus on the key impacts of concern and that are easy to understand and straightforward to enforce will have the best success in meeting the community's needs. For more information about short-term rentals, visit the League's "Hot Issues" page at www.cacities.org/vacationrentals.



Legislative Subpoena Guide

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| <p style="text-align: center;">Authority</p> | <p>General Law Cities: Government Code sections 37104-37109</p> <p>Charter Cities: California Constitution Article XI, sections 3(a) and 4(e), and may be codified in city's charter.</p> <p>Note: <i>A charter city's subpoena power may be broader than a general law city's power.</i></p> |
| <p style="text-align: center;">Execution</p> | <ul style="list-style-type: none"> ● Subpoena must be authorized by ordinance or similar enactment, signed by the mayor and attested by the city clerk.^x ● Served in same manner as civil subpoenas.^{xi} ● Must detail a valid legislative purpose, the need for the subpoena and the relevance of the materials or testimony sought.^{xii} <ul style="list-style-type: none"> ○ Note: "Matters relating to the investigation and enforcement of tax measures are proper legislative concerns."^{xiii} ● Must comply with general subpoena requirements, notably: <ul style="list-style-type: none"> ○ The materials/testimony sought must be sufficiently defined; ○ It must not be overly broad or unduly burdensome; and ○ It must not run afoul of any statutory or common law privilege that prevents disclosure.^{xiv} ● To ensure complete records are produced, both records and an appearance at a city council meeting should be demanded. If complete records are produced three days before the meeting, the personal appearance can be excused. |
| <p style="text-align: center;">Consequences</p> | <p>If the subpoenaed party fails to comply, the city needs to report the violation to the superior court. The judge will issue an attachment for the party and begin contempt proceedings where the disobeying party faces fines and/or jail.^{xv}</p> |

Footnotes:

ⁱ See www.airbnb.com, www.homeaway.com, www.flipkey.com.

ⁱⁱ (1991) 234 Cal.App.3d 1579.

ⁱⁱⁱ *Id.* at p. 1589.

^{iv} *Id.* at p. 1584, 1590.

^v *Id.* at pp. 1589-90.

^{vi} *Id.* at p. 1591.

^{vii} *Pittsburg Press Co. v. Pittsburgh Commission on Human Relations* (1973) 413 U.S. 376, 388.

^{viii} An example of a legislative subpoena issued in a short-term rental context can be found online at <http://www.cacities.org/getattachment/Policy-Advocacy/Hot-Issues/Vacation-Rentals/Subpoena-to-YBYC-Inc-6-30-14.pdf.aspx>.

^{ix} An ordinance that requires hosting platforms to collect TOT may be challenged in court by the hosting platforms. Of note, San Francisco Municipal Code section 41B.5(d) requires hosting platforms to collect TOT owed, but it is not enforcing this requirement against hosting platforms such as HomeAway, which challenged the ordinance in federal district court. *HomeAway v. City and County of San Francisco*, No. 3:14-CV-04589, 2014 WL 5510760 (NDCA 2014).

^x Gov't Code § 37105; *Connecticut Indemnity Company v. Sup. Ct.* (2000) 23 Cal.4th 807, 814.

^{xi} See C.C.P. § 1987.

^{xii} *Connecticut Indemnity Company*, 23 Cal.4th at 814.

^{xiii} *City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 748.

^{xiv} See *Flora Crane Service, Inc. v. Sup.Ct.* (1965) 234 Cal.App.2d 767; *Southern Pacific Co. v. Sup.Ct.* (1940) 15 Cal.2d 206.

^{xv} Gov't Code §§ 37106-9.

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