

Sharing is Caring: Regulating Rather than Prohibiting Home Sharing in Wisconsin

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SHARING IS CARING: REGULATING RATHER THAN PROHIBITING HOME SHARING IN WISCONSIN

“If the City is going to draw a line requiring a certain time period of occupancy in order for property to be considered a dwelling or residence, then it needs to do so by enacting clear and unambiguous law.”¹

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1. Heef Realty & Invs., L.L.P. v. City of Cedarburg Bd. of Appeals, 2015 WI App 23, ¶ 13, 361 Wis. 2d 185, 861 N.W.2d 797.

I. INTRODUCTION

Wisconsin is famous for a variety of reasons, beer and cheese of course, but also for its many tourist attractions. In 2016, Wisconsin attracted 107.7 million tourists bringing in \$20 billion for the state's economy.² Each year, Summerfest, EAA AirVenture Oshkosh, and the Wisconsin State Fair—just to name a few—bring in tourists from all over the world.³ With tourism comes lodging necessity, and people are finding that a short-term rental (STR) on popular sites like Airbnb, is an affordable alternative to hotels.⁴ An STR is generally defined as “[p]roperty advertised for rent for terms less than 30 consecutive days,”⁵ which is exactly the type of rental tourists regularly seek. Airbnb currently has thousands of active listings in Wisconsin, including 792 listings in Milwaukee, 490 in Madison, and 231 in Green Bay.⁶ Smaller areas like the City of Cedarburg and the Village of Ashwaubenon have 65 and 38 listings respectively.⁷ Additionally, in 2017, over 200,000 guests stayed in

2. *The Power of Wisconsin Tourism*, TRAVELWISCONSIN.COM, <http://industry.travelwisconsin.com/uploads/medialibrary/e4/e4babea4-c3a0-4c8c-a9f8-5ce446c05b2c-poweroftourism-sheet.pdf> [<https://perma.cc/V6DB-8QPX>] (last visited Jan. 1, 2018) (noting that tourism had an impact in 2016 up \$700 million from 2015 and a 35% increase in the last six years).

3. *See Fairs & Festivals in Wisconsin*, TRAVELWISCONSIN.COM, <https://www.travelwisconsin.com/things-to-do/entertainment-attractions/fairs-festivals> [<https://perma.cc/EGV5-X3FZ>] (last visited Jan. 1, 2018) (boasting over 1,000 scheduled fairs and festivals in Wisconsin in 2018).

4. *See Comparing Airbnb and Hotel Rates Around the Globe*, BUSBUD.COM, <https://www.busbud.com/blog/airbnb-vs-hotel-rates/> [<https://perma.cc/TZ9R-6PEG>] (last visited Jan. 1, 2018) (“In some cities, the difference in price is dramatic. For instance, in Toronto, a hotel room costs about 50% more than an Airbnb stay on average.”).

5. *Burnett County Short-Term Rental Guidelines: Land Use and Information Committee—January 2016*, BURNETTCOUNTY.COM, <http://burnettcounty.com/DocumentCenter/View/3658> [<https://perma.cc/Z59A-5RDX>]. Additionally, in the event a guest refuses to leave or inadvertently stays for over thirty days the host may subsequently become a landlord and must use eviction proceedings to remove the guest. *See* Skip Descant, *Airbnb ‘Squatter’ Checks Out of Palm Springs Condo*, USA TODAY (Aug. 21, 2014, 1:05 AM), <http://www.usatoday.com/story/news/nation/2014/08/21/airbnb-squatter-leaves-condo/14375429/> [<https://perma.cc/MYU5-56VH>].

6. *Wisconsin*, AIRDNA, <https://www.airdna.co/region/us/wisconsin> [<https://perma.cc/XZ5M-JV3X>] (last visited Apr. 1, 2018) [hereinafter AIRDNA].

7. *See, e.g., Cedarburg or Village of Ashwaubenon Listings*, AIRBNB, <https://www.airbnb.com> [<https://perma.cc/W42A-XL2C>] (enter “Cedarburg, WI, United States” or “Village of Ashwaubenon” in the search field; then press enter for results) (last visited Jan. 1, 2018).

Airbnbs throughout Wisconsin, earning hosts over \$25 million, which was almost double the number of visitors from 2016.⁸

Overall, STRs remain largely unregulated in Wisconsin, causing concerns with health and safety, tax evasion, disruption of neighborhoods, and issues with liability.⁹ Mainly, unregulated STRs create confusion for all involved.¹⁰ As Airbnb continues to grow, cities across the country are enacting ordinances to try to keep up with the ever-changing landscape of home sharing while preventing further confusion for its citizens.¹¹

Often at the center of the STR debate is property rights, including what they encompass and what they should encompass. Property is often described theoretically as a “bundle of sticks.”¹² The bundle of sticks metaphor refers to the different property rights that individuals hold: the right to use; the right to possess; the right to transfer or dispose of the property; and the right to exclude others from the property.¹³ Property owners who operate STRs are experiencing concerns with their bundle of sticks, specifically the right to use and the right to exclude. First, property owners believe their property rights include the right to use their private property as an STR. Second, property owners also believe they have the right to exclude others from using their property as an STR without their permission, such as is common in landlord-

8. Rick Barrett, *Wisconsin's Airbnb Hosts See a 97% Spike in Visitors in 2017*, MILWAUKEE J. SENTINEL (Dec. 23, 2017, 4:50 PM), <https://www.jsonline.com/story/news/2017/12/23/wisconsin-airbnb-hosts-see-97-spike-visitors-2017/979205001/> [<https://perma.cc/A3HG-7T78>] (“Airbnb service in Wisconsin grew 97% from 2016 as it became better known and benefited from large tourism events during which hotels were booked solid.”); *Wisconsin Airbnb Hosts Earned \$25.2 Million, Welcomed 210,000 Guests in 2017*, WIS. GAZETTE (Dec. 21, 2017), http://www.wisconsin gazette.com/news/wisconsin-airbnb-hosts-earned-million-welcomed-guests-in/article_96164e88-e684-11e7-b0e2-572f406479f9.html [<https://perma.cc/83BY-LXFA>].

9. Although, recently, the state of Wisconsin and Airbnb came to an agreement in which Airbnb will collect taxes for certain cities. Ross Terrell, *State, Airbnb Reach Tax Deal*, WIS. PUB. RADIO (June 9, 2017, 10:12 AM), <https://www.wpr.org/state-airbnb-reach-tax-deal> [<https://perma.cc/KC58-7X2K>]. This will be discussed more in Section IV.C. It is worth noting that Airbnb is not the only home-sharing company; therefore, hosts using other sites could continue to evade taxes.

10. See *infra* Part V.

11. See, e.g., PORTLAND, OR., PLANNING & ZONING CODE § 33.207 (2015), <https://www.portlandoregon.gov/bps/article/501886> [<https://perma.cc/W33C-8LSW>]; NASHVILLE, TENN., ORDINANCE No. BL2016-492 (2017), https://www.nashville.gov/mc/ordinances/term_2015_2019/bl2016_492.htm [<https://perma.cc/D2FH-DTVB>].

12. Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 FED. LAW. 30, 31 (2007).

13. *Id.*

tenant circumstances.¹⁴ Lastly, property owners are under the impression that they can exclude the government from restricting the use of their private property as they choose.¹⁵ Aside from the interests of the property owner, there are three other interests involved with STRs, those of the host, the guest, and the city.¹⁶

This Comment proceeds as follows. Part II begins with a discussion of the sharing economy, specifically home sharing, and its impact on the world thus far. Using Airbnb as an example, this Part will describe both the positive and negative aspects of home sharing. Next, Part III compares existing approaches to home sharing from San Francisco, California's regulatory approach to New York's prohibitory approach. Part IV addresses the current status of home sharing in Wisconsin, including three recent court cases regarding land use restrictions, a proposed state law encouraging home sharing, and three Wisconsin cities' different approaches to home sharing. Finally, Part V suggests a clear regulatory approach and enforcement procedure for Wisconsin cities that will combine the various competing interests in a way that is fair and manageable.

II. THE SHARING ECONOMY: WHAT IS HOME SHARING?

The sharing economy involves the exchange of underused assets or services from one individual to another either for a fee or for free.¹⁷ The exchange of

14. Since STRs are rather new, property owners are unlikely to realize that without a provision in their lease prohibiting the tenant from subleasing the property to guests on Airbnb, tenants can use the property without the landlord's express permission for such a purpose. This is assuming the tenant follows the subleasing laws of the city. See Michael Schultes, *Here to Stay or a Flash in the Pan? How Zoning and Property Laws May Affect Airbnb in Baltimore and the Nation*, 5 U. BALT. J. LAND & DEV. 77, 82–83 (2015).

15. See generally Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557, 560 (2015) (discussing "the question of whether municipal restrictions on short-term leasing constitute unconstitutional takings of private property without just compensation").

16. One might think the host is the same as the property owner. However, they are not always one and the same. When cities began regulating STRs little was done to distinguish between the two. Cities have now come to realize the interests may be intertwined, but they are not always the same. A host may be a tenant or a landlord, but ultimately the ability to use a property as an STR should be solely up to the property owner, meaning the person who owns the home. There is not an issue when the property owner gives permission to the tenant or the landlord to use the property as an STR. Property owners should also realize the importance of re-visiting their lease templates in order to ensure they now account for STRs and whether they do or do not want the tenant or landlord to use the property should be explicitly mentioned. See *infra* Part V.

17. See *Consumer Intelligence Series: The Sharing Economy*, PWC.COM 5 (2015), <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the->

assets or services is often completed through sharing platforms or marketplaces.¹⁸ Two of the most common examples include Airbnb—allowing users to share their homes with guests—and Uber—allowing users to use their personal vehicles for transportation services.¹⁹ According to a national Pew Research Center survey, 72% of the U.S. adult population has used at least one type of shared, online service.²⁰ Of the 72%, 11% have used an online home-sharing service and 15% have used a ride-sharing service.²¹ In addition, research conducted in 2014 by PriceWaterhouseCoopers estimates that by 2025 the global sharing economy will have potential revenue worth \$335 billion.²²

In a triumph of understatement: the sharing economy is shaking up established markets.²³ One market in particular is the hospitality industry and the most well-known home sharing company is Airbnb.²⁴ Roommates Joe Gebbia and Brian Chesky founded Airbnb in 2008 while living in San Francisco struggling to pay rent.²⁵ The idea began with guests sleeping on air mattresses in their apartment and receiving breakfast in the morning; hence the name, Air

sharing-economy.pdf [<https://perma.cc/SB7X-74RA>] [hereinafter *Consumer Intelligence Series*] (including examples such as hospitality and dining, automotive and transportation services, retail and consumer goods, and media and entertainment).

18. *Id.* at 15.

19. *See id.* at 5.

20. Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEWRESEARCHCENTER 3 (2016), http://www.pewinternet.org/files/2016/05/PI_2016.05.19_Sharing-Economy_FINAL.pdf [<https://perma.cc/4W9X-VY6G>] [hereinafter *Shared, Collaborative and On Demand*]. The national Pew Research Center survey consisted of 4,787 American adults, looked at 11 different shared services, and was conducted between November 24 to December 21, 2015. *Id.*

21. *Id.*

22. *The Sharing Economy: Sizing the Revenue Opportunity*, DECLARA (Nov. 12, 2017), <https://declara.com/content/kaZnB43a> [<https://perma.cc/H25Y-Q7SW>]. The PwC research “compared the revenue potential in five new ‘sharing economy’ sectors (peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music and video streaming) with the potential in five traditional ‘rental’ sectors (equipment rental, B&B and hostels, car rental, book rental and DVD rental).” *Id.* Both of which have a revenue potential worth \$335 billion in 2025. *Id.*; *see also* Judith Wallenstein & Urvesh Shelat, *Hopping Aboard the Sharing Economy*, BCG.COM (Aug. 22, 2017), <https://www.bcg.com/publications/2017/strategy-accelerating-growth-consumer-products-hopping-aboard-sharing-economy.aspx> [<https://perma.cc/ML2N-JW65>] (discussing the rapid growth of the sharing economy as evidenced, in part, by “[a]n estimated \$23 billion in venture capital funding . . . poured into the market since 2010”).

23. *See Consumer Intelligence Series*, *supra* note 17, at 4.

24. *See Shared, Collaborative and On Demand*, *supra* note 20, at 15.

25. Biz Carson, *How 3 Guys Turned Renting an Air Mattress in Their Apartment into a \$25 Billion Company*, BUS. INSIDER (Feb. 23, 2016, 11:22 AM), <http://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2> [<https://perma.cc/4LKX-Q9JC>].

Bed and Breakfast.²⁶ Airbnb now contains over 3 million listings in over 191 countries,²⁷ and, as of March 2017, it was reportedly worth \$31 billion.²⁸

A large part of Airbnb's success is the simplicity of the process. Anyone can use Airbnb (as a guest or a host) by going to its website and creating an account, a process that takes mere minutes. Hosts can post listings that range from rentals of an entire home, apartment, or private room,²⁹ and the rentals range from one day to an entire month.³⁰ The hosts fill out the description of the listing including pictures, amenities, and price.³¹ Further, hosts decide "house rules," stating whether pets, parties, or smoking is allowed, and the check-in time available.³² Guests find listings on Airbnb based on their preferred dates of stay, number of guests, room type, and price range.³³

Airbnb's success, however, is not without challenges. For instance, Airbnb's simplistic approach, allowing anyone to use the site, provides few safeguards for screening.³⁴ Because Airbnb functions as a "reputation-based

26. *Id.*

27. *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [<https://perma.cc/3LNS-T25X>] (last visited Jan. 1, 2018). Airbnb listings include renting "an apartment for a night, a castle for a week, or a villa for a month." *Id.*

28. Lauren Thomas, *Airbnb Just Closed a \$1 Billion Round and Became Profitable in 2016*, CNBC (Mar. 9, 2017, 10:45 AM), <https://www.cnbc.com/2017/03/09/airbnb-closes-1-billion-round-31-billion-valuation-profitable.html> [<https://perma.cc/VY39-DKZN>]. Airbnb's previous valuation was \$30 billion, thus, its valuation increased by \$1 billion in just six months. See Maureen Farrell & Greg Bensinger, *Airbnb's Funding Round Led by Google Capital*, WALL ST. J. (Sept. 22, 2016, 3:23 PM), <http://www.wsj.com/articles/airbnb-raises-850-million-at-30-billion-valuation-1474569670> [<https://perma.cc/B36H-H3VQ>].

29. Lara Major, *There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 474 (2016). See generally AIRBNB, <https://www.airbnb.com> [<https://perma.cc/W42A-XL2C>] (last visited Jan. 1, 2018) [hereinafter AIRBNB].

30. *About Us*, *supra* note 27.

31. *Host on Airbnb*, AIRBNB, <https://www.airbnb.com/host/homes> [<https://perma.cc/7H49-SP9T>] (last visited Jan. 29, 2018).

32. See AIRBNB, *supra* note 29 (viewing any current listing will show the "house rules" established for that listing).

33. See generally AIRBNB, *supra* note 29 (typing in any city will bring up current listings in which one can filter by preference).

34. See *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> [<https://perma.cc/U79H-ZRDV>] (last updated Jan 29, 2017). Under "Eligibility, Using the Airbnb Platform, Member Verification" it states:

2.4 User verification on the Internet is difficult and we do not assume any responsibility for the confirmation of any Member's identity. Notwithstanding the above, for transparency and fraud prevention purposes, and as permitted by applicable laws, *we may, but have no obligation to* (i) ask Members to provide a

system,” hosts and guests must rely on reviews left by one another to determine whether the property is safe and secure.³⁵ In addition to limited screening safeguards, some Airbnb users have experienced issues concerning racially discriminatory conduct.³⁶ However, on the upside, the reputation-based system has actually been shown to slightly deter such discrimination.³⁷

Another problem arises when guests cause damage to homes, as one user complained about on Airbnb’s Community Center page, detailing damages in excess of \$3,500 from an out of control house party.³⁸ Airbnb provides a \$1 million host guarantee in the event property damage occurs,³⁹ but it does not apply until after the host seeks recovery from the responsible guest and his or her existing insurer.⁴⁰ Additionally, few cases exist in which Airbnb followed

form of government identification or other information or undertake additional checks designed to help verify the identities or backgrounds of Members, (ii) screen Members against third party databases or other sources and request reports from service providers, and (iii) where we have sufficient information to identify a Member, obtain reports from public records of criminal convictions or sex offender registrations or an equivalent version of background or registered sex offender checks in your local jurisdiction (if available).

Id. (emphasis added).

35. Joseph Shuford, Note, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. ON. 301, 307 (2015).

36. See Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECONOMIC J. APPLIED ECON., Apr. 2017, at 1, 1 (“In an experiment on Airbnb, we find that applications from guests with distinctively African American names are 16% less likely to be accepted relative to identical guests with distinctively white names.”). The study also discussed how an Airbnb guest must display a picture on their profile and how a picture is often a “market design choice that may further enable discrimination.” *Id.* at 2.

37. See Jun Li et al., *A Better Way to Fight Discrimination in the Sharing Economy*, HARV. BUS. REV. (Feb. 27, 2017), <https://hbr.org/2017/02/a-better-way-to-fight-discrimination-in-the-sharing-economy> [<https://perma.cc/U4TW-92TN>] (“[W]e found that when guests have even one positive review on their profiles, it statistically eliminates racial discrimination against them.”).

38. See *Community*, AIRBNB (Apr. 26, 2016, 10:45 AM), <https://community.airbnb.com/t5/Hosts/House-trashed-wrecked-destroyed-by-guest/td-p/76067> [<https://perma.cc/T9EU-G99A>]. See generally *AirbnbHell: Uncensored Airbnb Stories from Hosts & Guests*, AIRBNBHELL.COM, <http://www.airbnbhell.com> [<https://perma.cc/7LWZ-YYPL>] (last visited Jan. 1, 2018) (providing Airbnb hosts and guests with a forum to tell their stories to show the “risks and dangers of using Airbnb”).

39. *The \$1,000,000 Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee> [<https://perma.cc/4Z36-ZS5Z>] (last visited Jan 1, 2018).

40. *Host Guarantee Terms and Conditions*, AIRBNB, https://www.airbnb.com/terms/host_guarantee [<https://perma.cc/S78M-AR7G>] (last updated June 19, 2017).

through on this guarantee, creating a false sense of security in its users.⁴¹ It is inevitable that as Airbnb continues to grow in popularity, more issues will come to light. For now, cities should focus on enacting clear regulations and enforcing appropriate penalties for non-compliance.

III. REGULATING OR PROHIBITING HOME SHARING? SAN FRANCISCO VS. NEW YORK

There are generally three options when approaching home sharing: cities can do nothing, cities can create a regulatory structure, or cities can completely prohibit home sharing. The regulatory structures throughout different cities come in many different forms, ranging from having only a few requirements⁴² to having several pages of requirements.⁴³ On the other hand, cities that prohibit home sharing do so by either banning home sharing altogether or prohibiting certain kinds of home sharing.⁴⁴ The city of San Francisco and the state of New

41. See *What Does the Airbnb Host Guarantee Actually Guarantee?*, PROPER INSURANCE, <https://www.proper.insure/airbnb-host-guarantee/> [<https://perma.cc/YGF5-PLKU>] (last visited Jan. 1, 2018) (“Relying on Airbnb’s Property Damage Guarantee Could Leave You Broke & Homeless.”); Julie Bort, *Airbnb Banned From Condo Complex After Guest Caused \$10,000 Of Damage*, BUS. INSIDER (Oct. 9, 2014, 2:50 PM), <http://www.businessinsider.com/airbnb-guest-caused-10000-of-damage-2014-10> [<https://perma.cc/AHL4-MNLS>]; see also *Is the Airbnb \$1 Million Host Guarantee a Marketing Gimmick?*, QUORA, <https://www.quora.com/Is-the-Airbnb-1-million-host-guarantee-a-marketing-gimmick> [<https://perma.cc/RN6V-3G3S>] (last visited Jan 1, 2018) (“The Airbnb Host Guarantee is definitely a fraud, and Airbnb should be absolutely ashamed for their deceptive advertising.”).

42. See *Burnett County Short-Term Rental Guidelines*, *supra* note 5 (demonstrating how Burnett County in Wisconsin has a mere nine requirements for regulating STRs).

43. See, e.g., PORTLAND, OR., PLANNING & ZONING CODE § 33.207 (2015). Portland’s STR ordinance is eight pages long and includes two different types of STRs: Type A—which is a rental where no more than two bedrooms are rented to overnight guests—and Type B—where three or more bedrooms are rented to overnight guests. *Id.* Nashville, Tennessee’s STR ordinance is also several pages long, including three different types of STRs and an STR permit cap in which the owner must check an availability map to determine if their property can be listed. NASHVILLE, TENN., ORDINANCE No. BL2016-492 (2017). *Id.*

44. See Bianca Barragan, *Santa Monica Just Banned Airbnb’s Biggest Moneymakers*, CURBED L.A. (May 13, 2015, 12:04 PM), <http://la.curbed.com/2015/5/13/9961560/santa-monica-just-banned-airbnbs-biggest-moneymakers> [<https://perma.cc/CH7X-47BN>]. Santa Monica has some of the strictest laws of any city when it comes to home sharing. Like the state of New York, Santa Monica completely bans home sharing of entire units lasting under thirty days, but does allow home sharing of rooms or a couch if the occupant “registers and pays taxes on the unit.” See *id.* The village of Ashwaubenon in Wisconsin wanted to prohibit home sharing completely but settled on confining the STRs to only twenty-two homes. Richard Ryman, *Ashwaubenon Limits Short-Term Rentals*, USA TODAY NETWORK–WIS. (Aug. 24, 2016, 6:44 PM), <http://www.packersnews.com/story/news/2016/08/24/ashwaubenon-limits-short-term-rentals/89297080/> [<https://perma.cc/5HCU-THPE>].

York have adopted completely opposite approaches to regulating home sharing. Although limited housing is a large problem for both cities,⁴⁵ San Francisco approaches the problem with comprehensive regulation while New York utilizes outright prohibition. The following Sections will discuss both approaches: Section A will summarize the regulatory scheme in San Francisco by outlining the positive and negative aspects of its current ordinance and Section B will examine the prohibitory approach of STRs in New York with arguments from both proponents and opponents of its state law enacted in late 2016.

A. *San Francisco, California*

In 2015, San Francisco enacted a Short-Term Rental Ordinance in Chapter 41A of the San Francisco Administrative Code (Ordinance), creating the Office of Short-Term Rental (OSTR).⁴⁶ Because San Francisco suffers from “a severe shortage of decent, safe, sanitary, and affordable rental housing,” the city created the Ordinance to limit people from buying and renting properties to use solely as STRs.⁴⁷ Thus, if the residential unit is subject to the Inclusionary Affordable Housing Program, it is prohibited from being used as an STR.⁴⁸ The OSTR has an extensive regulatory structure with many essential features, but the fact that it is so extensive also places a seemingly undue burden on individuals seeking to host in the city.

45. S.F., CAL., ADMIN. CODE § 41A.3(a) (2016), [http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?fn=document-frameset.htm&f=templates\\$uq=\\$up=1\\$force=7158\\$vid=amlegal:sanfrancisco_ca_m\\$anc=JD_Chapter41A](http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?fn=document-frameset.htm&f=templates$uq=$up=1$force=7158$vid=amlegal:sanfrancisco_ca_m$anc=JD_Chapter41A) [https://perma.cc/MF3H-UNXE]; Michael Greenberg, *Tenants Under Siege: Inside New York City's Housing Crisis*, N.Y. REV. OF BOOKS (Aug. 17, 2017), <http://www.nybooks.com/articles/2017/08/17/tenants-under-siege-inside-new-york-city-housing-crisis> [https://perma.cc/SPK8-UU7P].

46. S.F., CAL., ADMIN. CODE § 41A.7; see Letter from Kevin Guy, Director, Office of Short-Term Rentals, to Short-Term Rental Hosting Platform Company (July 31, 2017), https://shorttermrentals.sfgov.org/sites/default/files/OSTR_Letter_to_Platforms_Admin_Guidelines073117.pdf [https://perma.cc/R7RK-PY3Z] [hereinafter Letter from Kevin Guy].

47. S.F., CAL., ADMIN. CODE § 41A.3.

48. *Id.* § 41A.4. Planning Code Section 415 requires each local government agency to develop a comprehensive long-term plan that establishes policies encouraging the development of a variety of types of housing for all income levels, including multifamily rental housing. S.F., CAL., PLANNING CODE § 415.1(A)(1)(d) (2016), [http://library.amlegal.com/nxt/gateway.dll/California/planning/article4developmentimpactfeesandprojectr?f=templates\\$fn=altmain-nf.htm\\$q=\[field%20folio-destination-name:%27415.1%27\]\\$x=Advanced#JD_415.1.1](http://library.amlegal.com/nxt/gateway.dll/California/planning/article4developmentimpactfeesandprojectr?f=templates$fn=altmain-nf.htm$q=[field%20folio-destination-name:%27415.1%27]$x=Advanced#JD_415.1.1).

The OSTR has several important eligibility requirements for individuals but the occupancy requirements appear to be excessive. The first step is to verify eligibility, requiring an individual to be a permanent resident of San Francisco and to have lived in his or her unit for at least sixty days before applying.⁴⁹ The occupancy requirements further prohibit a permanent resident from using their residence as an STR unless they occupy the property for at least 275 days in a calendar year.⁵⁰ This is likely due to the aforementioned shortage of affordable housing in the city, but it prevents individuals from using their property as they choose.

San Francisco's Ordinance uses the term permanent resident when describing an STR owner. The permanent resident "may be an owner *or* a lessee,"⁵¹ which means that San Francisco considers a tenant to be a permanent resident who can use the unit as an STR. However, the OSTR attempts to protect the property owner's interest in a few ways. First, the Office warns the tenant that registering the unit does not override any lease agreement and strongly recommends the tenant review the lease beforehand.⁵² Second, the Office requires the tenant to provide a copy of the lease or rental agreement when applying to be added to the STR registry.⁵³ Third and finally, when the tenant applies to be added to the STR registry, the Office sends a mailed notice to the owner of record of the residential unit, informing the owner that the Office received an STR application for the unit.⁵⁴

An important step towards becoming a host is the permit process. The OSTR has several requirements to obtain a permit, with some more burdensome than others. The OSTR requires a permanent resident to register as a business and then register to become a certified host, both of which can be completed by applying online or in-person.⁵⁵ The permanent resident, however, is not allowed to use the unit as an STR until receiving a certificate and certificate

49. *Short-Term Residential Rental Guide*, S.F. BUS. PORTAL 1, <https://businessportal.sfgov.org/start/starter-kits/short-term-rental> [<https://perma.cc/9PTX-D9T2>] (last visited Jan. 2, 2018) [hereinafter *STR Starter Kit*].

50. S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(A).

51. *Id.* § 41A.4 (emphasis added).

52. *See Become a Certified Host*, S.F. OFFICE OF SHORT-TERM RENTALS, <https://shorttermrentals.sfgov.org/hosting/become-certified> [<https://perma.cc/VS9S-GS3R>] (last visited Jan. 1, 2018) (located under "Are you a tenant (renter), condominium owner, or TIC owner?"). In addition, the OSTR advises that individuals should be cognizant that "homeowner's association bylaws, and Covenants, Conditions & Restrictions" can prohibit subletting as well. *Id.*

53. *See id.*

54. S.F., CAL., ADMIN. CODE § 41A.5(g)(3)(A).

55. *See Become a Certified Host*, *supra* note 52.

number from the OSTR.⁵⁶ The cost of initial registration is \$250.⁵⁷ Although the fee is not excessive, the fee is less of a burden if the applicant could rent out the unit while waiting for approval.⁵⁸ An approved application is valid for two years and must be renewed by filling out a renewal application.⁵⁹ Additionally, in order to maintain good standing on the registry, the permanent resident must submit quarterly reports to the OSTR using an online form indicating the number of days the unit was listed as an STR.⁶⁰

In the event one qualifies as a permanent resident and receives a permit, when the permanent resident is present overnight at the same time as a guest, he or she can rent out the unit for an unlimited number of nights.⁶¹ If he or she is not present, there is a 90-night maximum per year.⁶² It is not clear where the 90-night maximum came from but it is unnecessarily restrictive. For example, someone who travels often would benefit from not only the extra income but also from the added security of having someone occupy their home. Furthermore, if an individual owns a multi-unit building, that person is only allowed to register the unit in which they reside.⁶³

The health and safety of all involved is of utmost concern when regulating STRs,⁶⁴ and San Francisco's Ordinance is no exception. For instance, the permanent resident must post a clearly printed sign inside the STR that provides the location of all fire extinguishers in the building and unit, fire exits, gas shut off valves, and pull fire alarms.⁶⁵ Additionally, the permanent resident must

56. *See id.* ("You may only offer (list/advertise) short-term-rentals after you have received this certificate . . ."). *But see* Letter from Kevin Guy, *supra* note 45 ("Once a host has submitted an application, the host may continue to book and host short-term rentals while the application is pending.").

57. *See STR Starter Kit, supra* note 49, at 2.

58. Not to mention, if your application is denied, you lose the \$250 fee. *Id.*

59. S.F., CAL., ADMIN. CODE § 41A.5(g)(3)(A).

60. *See About the Office of Short-Term Rentals*, S.F. OFFICE OF SHORT-TERM RENTALS, <https://shorttermrentals.sfgov.org> [<https://perma.cc/Z9MZ-77LG>] (last visited Jan. 1, 2018). The permanent resident must also maintain records for two years demonstrating compliance with the ordinance and the records must be available upon request. *See* S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(B).

61. *See STR Starter Kit, supra* note 49, at 1.

62. *See Become a Certified Host, supra* note 52.

63. *See id.*; *STR Starter Kit, supra* note 49, at 1.

64. *See* ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT'Y GEN., REPORT ON AIRBNB IN THE CITY 2 (2014), <https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf> [<https://perma.cc/L3PP-4BNZ>] [hereinafter SCHNEIDERMAN, AIRBNB IN THE CITY]; *see also* S.F., CAL., ADMIN. CODE ch. 41A.

65. S.F., CAL., ADMIN. CODE § 41A.5(g)(2)(D).

demonstrate that the STR is in compliance with all “Building, Electrical, Plumbing, Mechanical, Fire, Health, Housing, Police, or Planning Code enforcement.”⁶⁶ And, if at any time the unit is not in compliance, the Planning Department can suspend the registration and registration number until the violation is resolved.⁶⁷ Additionally, if members of the public wish to file a complaint, they can do so through a designated contact person of the city’s Planning Department.⁶⁸ The contact person shall also provide information to the public regarding noise violations, vandalism, and illegal dumping.⁶⁹ Lastly, through the OSTR, if an individual is concerned that a neighbor is using the property illegally as an STR, the individual can go onto the OSTR website and search the property address to verify compliance.⁷⁰

Another requirement in San Francisco is mandatory compliance with tax provisions. Before using a unit for STR purposes, an individual must register with the Treasurer and Tax Collector and obtain a Business Registration Number, which is a process free of charge.⁷¹ When a permanent resident begins renting, the Ordinance states that he or she must collect and remit all required transient occupancy taxes.⁷² The practice has since evolved, however, and Airbnb now collects these amounts in a few cities, including San Francisco, and then sends the taxes to the tax authority on the host’s behalf.⁷³ The tax authority for San Francisco is the Tax Collector’s Office, and it charges a “Transient Occupancy Tax,” which is 14% of the listing price, plus any cleaning fee for reservations.⁷⁴

66. *Id.* § 41A.5(g)(1)(H).

67. *Id.*

68. *Id.* § 41A.5(g)(6).

69. *Id.*

70. See *Complaints & Enforcement*, S.F. OFF. OF SHORT-TERM RENTALS, <https://shorttermrentals.sfgov.org/complaints> [<https://perma.cc/G4XE-C8FY>] (last visited Jan. 1, 2018) (located under “How do I find out if a property has a City-issued registration number?”).

71. See *STR Starter Kit*, *supra* note 49, at 2.

72. S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(C).

73. *What is Occupancy Tax? Do I Need to Collect or Pay It?*, AIRBNB, <https://www.airbnb.com/help/article/654/what-is-occupancy-tax—do-i-need-to-collect-or-pay-it> [<https://perma.cc/EX3K-JY34>] (last visited Jan 1, 2018) [hereinafter *What is Occupancy Tax?*].

74. *STR Starter Kit*, *supra* note 49, at 3; *In What Areas is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available> [<https://perma.cc/48BP-LAWZ>] (last visited Jan. 1, 2018); see also S.F., CAL., BUS. & TAX REGULATIONS CODE §§ 6.7-1, 6.16-1 (2018), [http://library.amlegal.com/nxt/gateway.dll/California/business/article6commonadministrativeprovisions?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD_6.7-1](http://library.amlegal.com/nxt/gateway.dll/California/business/article6commonadministrativeprovisions?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_6.7-1)).

San Francisco's Ordinance does not provide many requirements to address potential liability. However, the permanent resident is required to maintain liability insurance appropriate to cover the STR in an amount of not less than \$500,000 or conduct each STR transaction through a Hosting Platform that provides equal or greater coverage.⁷⁵

San Francisco's enforcement structure includes requirements for hosting platforms (meaning companies like Airbnb), as well as permanent residents. Hosting platforms are required to provide notice to any user listing a unit on its site.⁷⁶ The notice must include the following information: "Administrative Code Chapters 37 and 41A regulate Short-Term Rental of Residential Units; the requirements for Permanent Residency and registration of the unit with the Department; and the transient occupancy tax obligations to the City."⁷⁷ Although the ordinance requires the permanent resident to collect and remit all transient occupancy taxes, the ordinance also requires the hosting platform to collect and remit all required transient occupancy taxes.⁷⁸ Currently, Airbnb collects these amounts and sends them directly to the tax authority, but based on the language of the ordinance, it is unclear which party actually has this responsibility.⁷⁹ The hosting platform must also "maintain a record demonstrating that the taxes have been remitted to the Tax Collector."⁸⁰ If the hosting platform does not abide by the ordinance, the Planning department can penalize it up to \$1,000 per day.⁸¹

75. S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(D). Additionally, the ordinance states that the coverage shall "defend and indemnify the Owner(s), as named additional insured, and any tenant(s) in the building for their bodily injury and property damage arising from the Short-Term Residential Use." *Id.*

76. *Id.* § 41A.5(g)(4)(A).

77. *Id.*

78. *Id.* §§ 41A.5(g)(1)(C), 41A.5(g)(4)(B).

79. *See id.* §§ 41A.5(g)(1)(C), 41A.5(g)(4)(B); *see also What is Occupancy Tax?, supra* note 73.

80. S.F., CAL., ADMIN. CODE § 41A.5(g)(4)(B).

81. *Id.* § 41A.5(d)(3). Airbnb filed suit against the City and County of San Francisco because of the potential fines placed on Airbnb for actions by hosts on their site. *See Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1070 (N.D. Cal. Nov. 8, 2016). The lawsuit subsequently settled in 2017 with Airbnb compromising by vowing to improve its relationship with city regulators. *See Heather Somerville & Dan Levine, Airbnb, San Francisco Settle Lawsuit Over Short-term Rental Law*, REUTERS (May 1, 2017, 12:47 PM), <https://www.reuters.com/article/us-airbnb-sanfrancisco-settlement/airbnb-san-francisco-settle-lawsuit-over-short-term-rental-law-idUSKBN17X254> [<https://perma.cc/MM9M-LDL9>].

For permanent residents, San Francisco utilizes an administrative enforcement structure.⁸² The first violation of any of the requirements in the ordinance results in a fine of not more than \$484 per day from the notice of the violation until the unlawful activity terminates.⁸³ The second and any subsequent violation results in not more than a \$968 fine per day.⁸⁴ Additionally, if there are multiple violations by any individual, the unit shall be removed from the registry for one year and its continued use is subject to penalties of up to \$1,000 per day.⁸⁵ To date, San Francisco has charged \$1.68 million in penalties and, of that, has collected over \$700,000.⁸⁶

According to the OSTR, as of May 2017, there were more than 8,000 hosts listed on Airbnb in San Francisco.⁸⁷ The OSTR, however, has only 2,100 registered STR hosts,⁸⁸ meaning that 73.7% of Airbnb hosts are not in compliance. The OSTR is hopeful the number of hosts in compliance will increase due to its recent agreement with Airbnb.⁸⁹ In the agreement, Airbnb agreed to ensure all hosts abide by the OSTR's requirement of registering their units.⁹⁰ Airbnb will do this by automatically registering each host with the city when an individual becomes a host on its site.⁹¹ Additionally, Airbnb must cease business with a host and remove listings if Airbnb cannot verify a valid registration or a pending application.⁹² Lastly, Airbnb must provide up to three

82. S.F., CAL., ADMIN. CODE § 41A.6(d). The administrative penalties provided apply to not only an Owner or Business Entity but also to the Hosting platform. *Id.* § 41A.6(d)(1)(A).

83. *Id.* § 41A.6(d)(1)(A).

84. *Id.* § 41A.6(d)(1)(B).

85. *Id.* § 41A.6(d)(2).

86. Carolyn Said, *SF Warns Home-Stay Companies that Hosts Must Register*, S.F. CHRON. (Aug. 1, 2017), <http://www.sfchronicle.com/business/article/SF-warns-home-stay-companies-that-hosts-must-11725790.php> [<https://perma.cc/2XSR-UDEU>] (noting that the uncollected penalties are either being appealed or were submitted to a collection agency).

87. Elizabeth Weise, *Airbnb Rentals in San Francisco May Dive With New Host Rules*, USA TODAY (May 1, 2017, 6:01 PM), <https://www.usatoday.com/story/tech/news/2017/05/01/airbnb-san-francisco-settlement-regulations-illegal-homeaway/101168688/> [<https://perma.cc/3E46-BE6X>].

88. *Id.*

89. *See* Said, *supra* note 86. The Director of the OSTR stated: "We're entering a very different world in how we do our enforcement, working collaboratively with platforms It will be a much more efficient way of operating." *Id.*; *accord* Weise, *supra* note 87.

90. *See* Said, *supra* note 86. To note, the agreement is only with Airbnb and HomeAway (another hosting platform), but the OSTR states that all hosting platforms are required to comply with the mentioned requirements due to its already enacted Ordinance. *See also* S.F., CAL., ADMIN. CODE § 41A.5(g)(4); Letter from Kevin Guy, *supra* note 46.

91. *See* Weise, *supra* note 87.

92. *See* Letter from Kevin Guy, *supra* note 46.

years of records upon request,⁹³ which is an important step towards compliance due to the fact that city officials lack the ability to get their hands on consistent home-sharing data without the help of sharing platforms.⁹⁴

San Francisco's Ordinance is an example of a comprehensive regulatory structure that is relatively easy to understand. The Ordinance also, importantly, balances competing interests in a way that is realistic for San Francisco's particular needs. Moreover, the Ordinance protects property owners' rights but also seeks to protect guests with health and safety requirements. San Francisco's Ordinance has penalties in place for non-compliance and unlike many other cities, actually enforces them. San Francisco goes even a step further and has come to an agreement with hosting platforms to work collaboratively to ensure STR hosts abide by the city's Ordinance.

B. New York

While San Francisco takes a regulatory approach towards STRs, New York's law on STRs is an example of a prohibitory approach. On October 21, 2016, New York Governor Andrew Cuomo signed into law a bill restricting STRs.⁹⁵ The law bans STRs lasting under thirty days when the owner is not present during the stay.⁹⁶ The law passed in New York is the first of its kind and no other state has enacted such a law.⁹⁷ New York is Airbnb's biggest

93. See Said, *supra* note 86.

94. See FRED BROUSSEAU ET AL., SHORT-TERM RENTALS 2016 UPDATE, CITY & CTY. OF S.F. BD. OF SUPERVISORS POL'Y ANALYSIS REP. 3 (Apr. 7, 2016), <http://sfbos.org/sites/default/files/FileCenter/Documents/55575-BLA.ShortTermRentals%20040716.pdf> [<https://perma.cc/82GB-DX64>].

95. The bill was introduced by Republican Andrew Lanza and passed the Senate on June 17, 2016. See S. 6340A, 2016 Leg., 239th Reg. Sess. (N.Y. 2016). Governor Cuomo received the bill on October 18 and signed it into law three days later. See N.Y. MULT. DWELL. LAW § 121 (McKinney 2017); Kia Kokalitcheva, *New York Just Cracked Down on Airbnb With a New Law*, FORTUNE (Oct. 21, 2016), <http://fortune.com/2016/10/21/airbnb-new-york-2/> [<https://perma.cc/U3P9-BY3X>].

96. N.Y. MULT. DWELL. LAW § 4(8); Kokalitcheva, *supra* note 95. When an owner must be present during the stay means that an owner can rent out a room(s) in their home to guests while the owner is also staying overnight but cannot rent out their entire home to guests if they are not also staying in the home during the stay.

97. Shiloh Frederick, *Should Airbnb Be Illegal in NY? State Housing Committee Says 'Yes,' Passes Bill*, BK READER (May 18, 2016, 1:00 PM), <http://www.bkreader.com/2016/05/new-york-assembly-housing-committee-votes-bill-curb-airbnb-users/> [<https://perma.cc/VZ4L-GYQ6>]. Notably, no other state has followed suit, but several cities either outright prohibit or restrict STRs in a way that makes it practically impossible to operate an STR. These cities include the following: Fort Worth, Jacksonville, Kansas City, Los Angeles, New Orleans, Santa Barbara, Fresno, Atlanta, Denver, and Oklahoma City. See Andrew Moylan, *Roomscore 2016: Short-Term Rental Regulation in U.S. Cities*,

market in the United States⁹⁸ so, unsurprisingly, Airbnb adamantly opposed the law and filed suit against New York.⁹⁹ Airbnb and New York have since settled, with New York agreeing to impose the law only on STR owners for non-compliance and not to fine Airbnb.¹⁰⁰

New York passed the law primarily because of its housing crisis, which has resulted in at least 61,000 people in New York living in shelters.¹⁰¹ Of the 61,000, 75% are families with children and at least a third have at least one working parent.¹⁰² The housing crisis is due in large part to the real estate market in New York, which attracts the global financial elite who are willing to pay tens of millions of dollars for an apartment.¹⁰³ The supply of higher-paying renters drives lower-income individuals out of their apartments at an alarming rate.¹⁰⁴ One such example includes a woman whose landlord presented her with a new lease that increased her rent to almost 70% of her income.¹⁰⁵ She simply could not pay and was forced to move her and her daughter in with relatives when she could not find alternative affordable

R STREET 10 (2016), <http://www.rstreet.org/wp-content/uploads/2016/03/RSTREET55.pdf> [https://perma.cc/M69H-9DP9].

98. Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), <http://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html> [https://perma.cc/SWE6-PV2Y].

99. See Complaint, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239 (S.D.N.Y. Oct. 21, 2016); Benner, *supra* note 98 (“In its lawsuit, filed Friday afternoon in Federal District Court in the Southern District of New York, the company contends that the law violates the company’s constitutional rights to free speech and due process, as well as the protection it is afforded under the Communications Decency Act, a federal law that says websites cannot be held accountable for content published by their users.”).

100. Stephen R. Miller & Jamila Jefferson-Jones, *Airbnb and the Battle Between Internet Exceptionalism and Local Control of Land Use*, 31 PROB. & PROP., May–June 2017, at 36, 38; Katie Benner, *Airbnb Ends Fight With New York City Over Fines*, N.Y. TIMES (Dec. 3, 2016), <http://www.nytimes.com/2016/12/03/technology/airbnb-ends-fight-with-new-york-city-over-fines.html> [https://perma.cc/9C2U-4J7D].

101. Greenberg, *supra* note 45 (“New York’s [situation] is what aid groups would characterize as a ‘complex emergency’: man-made and shaped by a combination of forces that have led to a large-scale ‘displacement of populations’ from their homes.”).

102. *Id.*

103. Beckie Strum, *Ultra-Rich to Demand More Elite Homes in New York: Report*, MANSION GLOBAL (Nov. 15, 2017), <https://www.mansionglobal.com/articles/80555-ultra-rich-to-demand-more-elite-homes-in-new-york-report> [https://perma.cc/K2GJ-GYPW] (“New York City’s super-prime housing market . . . [primarily includes] homes sold at \$10 million or more.”).

104. Greenberg, *supra* note 45.

105. *Id.*

housing.¹⁰⁶ That, unfortunately, is the situation many tenants in New York find themselves in.

Supporters of the New York law emphasize its ability to address the New York housing supply problem. New York State Senator Liz Krueger, a proponent of the law, believes STRs take affordable housing off the market, aggravating New York's housing crisis.¹⁰⁷ She also believes the new law is a win for anyone who enjoys a quiet and safe neighborhood.¹⁰⁸ State Assemblywoman Linda B. Rosenthal, author of the New York law, advises that the law is intended to target "serial illegal hotel kingpins from breaking the law and taking away affordable housing from the New Yorkers who need it most."¹⁰⁹ In fact, an investigation by the State Attorney General found that more than a third of the units listed on Airbnb come from large commercial operators.¹¹⁰ Airbnb argues, however, that STRs do not hurt the housing supply, commenting that "outdated zoning laws, longstanding political opposition to new development, and layers of bureaucracy accumulated over years are combining to various degrees from city to city to create housing challenges, not 8-year-old Airbnb."¹¹¹ Further, Airbnb argues that allowing STRs, which create new tax revenues, would help cities to construct new affordable housing.¹¹²

Additionally, proponents of the law believe Airbnb risks public safety and threatens the quality of life in New York neighborhoods.¹¹³ Because nearly 72% of Airbnb listings are illegal, they often do not comply with building, fire,

106. *Id.*

107. Deanna Ting, *Airbnb Loses New York Battle as Governor Signs New Law Aimed at Hosts*, SKIFT (Oct. 21, 2016, 3:04 PM), <https://skift.com/2016/10/21/airbnb-loses-new-york-battle-as-governor-signs-new-law-aimed-at-hosts/> [<https://perma.cc/W4LV-VLW9>].

108. *Id.*

109. *Assembly Member Linda B. Rosenthal and Senator Andrew J. Lanza Unveil New Legislation to Crack Down on Airbnb & Illegal Hotel Operators*, SHAREBETTER, <http://www.sharebetter.org/story/assembly-member-linda-b-rosenthal-and-senator-andrew-j-lanza-unveil-new-legislation-to-crack-down-on-airbnb-illegal-hotel-operators/> [<https://perma.cc/7TQP-JEAG>] (last visited Jan. 6, 2017) [hereinafter SHAREBETTER].

110. *Id.*

111. *Zillow Panel: Home Sharing Not Hurting Housing Supply, Affordability*, AIRBNB CITIZEN (Dec. 7, 2016), <https://www.airbnbcitizen.com/zillow-panel-home-sharing-not-hurting-housing-supply-affordability/> [<https://perma.cc/TQP5-6WAY>].

112. *Id.* ("[S]everal cities, including Chicago and Los Angeles, are beginning to apply the new tax revenues generated by Airbnb to build more affordable housing and aid the homeless. On December 1, New Orleans passed landmark new rules for home sharing that also direct a portion of the new revenue to the construction of affordable housing.").

113. SHAREBETTER, *supra* note 109.

and other safety codes.¹¹⁴ Also, proponents of the law believe that Airbnb leads to homes functioning illegally as hotels, which is in violation of zoning laws and safety codes.¹¹⁵

Furthermore, proponents argue that the law is committed to protecting property owner and landlord rights. Sherwin Belkin, an attorney who represents landlords, said that what is “being forgotten is that what Airbnb and other short-term rental groups are sharing is not their property.”¹¹⁶ In addition, landlords and property owners, not tenants, are the ones who are fined when violations occur.¹¹⁷ Landlords specifically argue that STRs increase wear on their units because of the added traffic and increase potential liability concerns.¹¹⁸ Moreover, proponents point out that the law is only enforcing what is already prohibited because most residential leases prevent tenants from utilizing their units as an STR.¹¹⁹

On the other side of the argument are individuals who strongly oppose the law because it takes away property owners’ rights to use their property as they choose and imposes steep penalties if they are caught doing so. State Senator Phil Boyle, sharing the sentiment of most who oppose the law, said, “I think that most people understand that [home sharing] is the way of the future, and anything we do to try and stop it is just going to slow down an area of the economy that has a chance to be positive for the state of New York.”¹²⁰ One of the biggest complaints is that the law takes away income from the potential hosts who are trying to defray high rent and pay their bills.¹²¹ Josh Meltzer, Airbnb’s New York head of public policy, echoed the concern about lost income to potential hosts, stating that the bill is “disappointing,” but that he was not surprised “to see politicians . . . cut a last minute deal with the hotel industry

114. See SCHNEIDERMAN, AIRBNB IN THE CITY, *supra* note 64, at 2.

115. See *id.* at 14.

116. Rich Bockmann, *Airbnb is Not Taking it Lying Down: Startup Ramps Up for Fight of Its Life in NYC*, REAL DEAL (Mar. 1, 2016), http://therealdeal.com/issues_articles/as-opponents-line-up-airbnb-fights-to-win-legitimacy-in-nyc/ [<https://perma.cc/9JJX-YJQU>].

117. *Id.*

118. Reuters, *New York Bill Would Ban Airbnb Listings for Some Short-Term Rentals*, NBC NEWS (June 21, 2016, 7:00 AM), <http://www.nbcnews.com/tech/tech-news/new-york-bill-would-ban-airbnb-listings-some-short-term-n596111> [<https://perma.cc/929E-9V5Q>].

119. Liz Krueger, *Answers for New Yorkers Concerned or Confused About the Illegal Hotel Law*, N.Y. ST. SENATE (May 27, 2014), <https://www.nysenate.gov/newsroom/articles/liz-krueger/answers-new-yorkers-concerned-or-confused-about-illegal-hotel-law> [<https://perma.cc/6BH4-6USF>].

120. Bockmann, *supra* note 116.

121. Erica Byfield, *Airbnb Hosts, Opponents Square Off Over New Fines in NYC*, NBC NEW YORK (Oct. 26, 2016, 3:59 PM), <http://www.nbcnewyork.com/news/local/Airbnb-Fines-New-Restrictions-New-York-State-Law-Cuomo-398743741.html> [<https://perma.cc/U4HD-L6PY>].

that will put 30,000 New Yorkers at greater risk of bankruptcy, eviction or foreclosure.”¹²² Additionally, opponents argue that the fines are outrageous; with a penalty of up to \$1,000 for first time offenders, \$5,000 for the second offense, and \$7,500 for the third, the fees are impractical for the average homeowner.¹²³

As earlier mentioned, the law does not prohibit a guest from staying under thirty days if the owner simultaneously occupies the unit during the stay.¹²⁴ Therefore, proponents of the law believe it is adequately aimed at individuals who run illegal hotels and that it does not interfere with property rights.¹²⁵ However, that is not the case because the law does not only target illegal hotels, the law places all individuals in the same basket. Meaning, regardless of whether individuals buy several buildings to use as STRs or travel often on business and want to utilize their homes as STRs when they are away, both are now prohibited from listing on Airbnb. Thus, the bill could distinctively prohibit individuals who own multiple units rather than prohibiting all unoccupied STRs under thirty days.

New York’s law is over-inclusive. The need for action regarding STRs because of the affordable housing crisis is understandable, but the knee-jerk reaction of an over-inclusive law is not. An STR regulation should seek to combine competing interests of property owners with guests and the city in a way that is fair and manageable. It should not outright prohibit one side in the interest of the other. New York should consider reevaluating and revising its current law by categorizing STRs into different types based on their impact rather than placing all users into one category.¹²⁶

IV. HOME SHARING’S IMPACT ON WISCONSIN

Although home sharing is not as robust in Wisconsin as other areas around the country, Wisconsin is experiencing the impact and its cities are actively

122. Brian Solomon, *New York Wants to Fine Airbnb Hosts Up to \$7,500*, FORBES (June 17, 2016, 3:59 PM), <https://www.forbes.com/sites/briansolomon/2016/06/17/new-york-wants-to-fine-airbnb-hosts-up-to-7500/#792dbd0e4d86> [<https://perma.cc/5YSZ-CDBU>].

123. N.Y. MULT. DWELL. LAW § 121(2) (McKinney 2017); *see also* Byfield, *supra* note 121 (“Airbnb hosts in New York City . . . say the service helps make ends meet and that the new fines are ‘outrageous.’”).

124. *See* N.Y. MULT. DWELL. LAW § 4(8); *New York Senate Passes Bill that Would Ban Some Short-term Airbnb Listings*, FOX NEWS (June 21, 2016), <http://www.foxnews.com/travel/2016/06/21/new-york-senate-passes-bill-that-would-ban-some-short-term-airbnb-listings.html> [<https://perma.cc/SC8S-VGR8>].

125. FOX NEWS, *supra* note 124.

126. This idea will be discussed later in this Comment. *See infra* Part V.

attempting to find a fair resolution for all parties involved.¹²⁷ In Wisconsin, an STR is often referred to as a “tourist rooming house.”¹²⁸ A tourist rooming house is defined as “any lodging place or tourist cabin or cottage where sleeping accommodations are offered for pay to tourists or transients.”¹²⁹ STRs are regulated by local and state law, but in Wisconsin STRs are mainly regulated by local law.¹³⁰ However, STR regulation in Wisconsin is largely inconsistent from one municipality to another, which leads to confusion for all involved.¹³¹ Further, the few regulations that cities have adopted do not have appropriate penalties for non-compliance, and those that do, are not enforced. The following Sections will outline the various regulations that cause confusion at various levels of law in Wisconsin. Section A will discuss land use restrictions including zoning laws and restrictive covenants; Section B will discuss proposed and enacted state laws; and Section C will discuss individual city regulations including those of Milwaukee, Green Bay, and Madison.

A. Land Use Restrictions

One of the biggest issues regarding STRs is land use restrictions, most notably with zoning law, and less so with restrictive covenants. Many cities attempt to incorporate STR regulation into pre-existing zoning law, causing confusion and frustration for STR users.¹³² Other cities that do not have STR regulations in place cause confusion for STR users because property owners think the lack of regulation means all STRs are allowed, only to find out that zoning law applies.¹³³

For example, one Wisconsin case demonstrates an attempt to incorporate STR regulation into pre-existing zoning law. In *Heef Realty and Investments, LLP v. City of Cedarburg Board of Appeals*, the Wisconsin Court of Appeals looked at the question of whether “short-term rental is a permitted use for property in a single-family residential district under the City of Cedarburg’s

127. See *infra* Section IV.C.

128. Q. *I Want to Rent My House Short Term (Less Than 30-days At a Time): What Do I Need To Know?*, VILLAGE OF FONTANA, <http://www.villageoffontana.com/documents/shorttermrentalinfo.pdf> [https://perma.cc/K37S-44XA] (last visited Apr. 1, 2018).

129. WIS. STAT. § 97.01(15k) (2015–2016). For purposes of this Comment, I will continue to use the term STR rather than TRH.

130. See *infra* Section IV.C.

131. Eric Olson, *Short-Term Rentals Back in the Spotlight: What is Reasonable Regulation?*, LAKE TIDES, Spring-Summer 2016, at 1, 3.

132. *Id.* at 2–3.

133. *Id.*

zoning code.”¹³⁴ The owners of two homes initiated a suit against the City of Cedarburg (City) when they were told they could not use their homes as STRs because such a use was in violation of City Ordinance 13-1-46.¹³⁵ The court ultimately ruled in favor of the home owners in finding that STRs are permitted based on the fact that the Ordinance permits single family dwellings in a single-family residential zone and only one family occupies the short-term rental at any given time.¹³⁶ The court further stated that, in construing the Ordinance in favor of the free use of property, the City cannot impose time or occupancy restrictions or requirements that are not in the zoning scheme.¹³⁷ Therefore, since the Ordinance only requires that the dwelling be occupied by a single family and does not mention time or occupancy restrictions, the City would need to enact clear and unambiguous law if they want to draw a line requiring a certain time period of occupancy.¹³⁸

Just four months later, in *Vilas County v. Accola*, the Wisconsin Court of Appeals faced the same issue of whether a Vilas County ordinance permits short-term rentals of single family detached dwelling units located in the single-family residential district.¹³⁹ The court in this case, however, granted summary judgment in favor of the County, holding that the ordinance unambiguously prohibited short-term rentals of single family detached dwelling units.¹⁴⁰ The court stated that if it were limited to only section 4.1 of the County’s zoning ordinance, which governs the R-1 district where the property is located, the court would agree with the home owners that the “ordinance does not unambiguously prohibit the rental of single-family detached dwelling units in the R-1 district for periods of less than one month.”¹⁴¹ However, the court stated that it must read all sections of the ordinance in conjunction with one another.¹⁴² In doing so, the court looked at section 4.2, governing the RL district, which permits both of the following: “(1) the rental of single-family detached dwelling units for periods of less than one month; and (2) all uses permitted in the R-1 district, which includes single-family detached dwelling

134. Heef Realty & Invs., L.L.P. v. City of Cedarburg Bd. of Appeals, 2015 WI App 23, ¶ 1, 361 Wis. 2d 185, 861 N.W.2d 797.

135. *Id.* ¶ 2.

136. *Id.* ¶ 10.

137. *Id.* ¶ 12.

138. *Id.* ¶ 13.

139. *Vilas County v. Accola*, 2015 WI App 52, ¶ 1, 364 Wis. 2d 409, 866 N.W.2d 406.

140. *Id.*

141. *Id.* ¶ 15.

142. *Id.* ¶ 16.

units.”¹⁴³ The court held that “rental of single-family detached dwelling units for periods of less than one month is not a permitted use in the R-1 district because a contrary interpretation would render section 4.2(B)(4) superfluous.”¹⁴⁴

Although it seems as if *Vilas County* alters the court’s ruling in *Heef Realty*, it does not. The decision in *Heef Realty* is distinguishable from *Vilas County* because in *Heef Realty* the ordinance simply listed single-family dwellings as a permitted use in a zoning district.¹⁴⁵ The ordinance did not have additional sections for the court to interpret and thus, without more, the ordinance did not unambiguously prohibit short-term rentals of single family dwellings.¹⁴⁶

Another STR issue that leads to confusion is restrictive covenants. A restrictive covenant is “[a] private agreement . . . in a deed or lease, that restricts the use or occupancy of real property . . . by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put.”¹⁴⁷ A restrictive covenant is distinguishable from zoning law because it is between private parties, whereas local governments impose zoning laws.¹⁴⁸ Most recently, in the summer of 2017, a case over a restrictive covenant came before the Wisconsin Court of Appeals. In *Forshee v. Neuschwander*, Lee and Mary Jo Neuschwander (Neuschwanders) used their home as an STR for several years, taking in over 170 guests in 2015.¹⁴⁹ Richard Forshee and several other neighbors (Neighbors) of the Neuschwanders filed suit in 2016, alleging that the use violated a restrictive covenant prohibiting “commercial activity.”¹⁵⁰ The district court ruled in favor of the Neighbors with the belief that “commercial” is commonly defined as “viewed with regard to profit” in which the Neuschwanders had clearly profited over the STR.¹⁵¹ The district court also relied on extrinsic evidence from an individual involved in the creation of the

143. *Id.* ¶ 19.

144. *Id.* (“Where possible, an ordinance must be read ‘to give reasonable effect to every word, in order to avoid surplusage.’” (quoting *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110)).

145. Compare *id.* ¶ 21, with *Heef Realty & Invs., L.L.P. v. City of Cedarburg Bd. of Appeals*, 2015 WI App 23, ¶¶ 1–2, 361 Wis. 2d 185, 861 N.W.2d 797.

146. Compare *Vilas County*, 2015 WI App 52, ¶ 21, with *Heef Realty*, 2015 WI App 23, ¶ 14.

147. *Restrictive Covenant*, BLACK’S LAW DICTIONARY (10th ed. 2014).

148. *The Basics of Restrictive Covenants*, ROBERTS & ROBERTS, LLP, <http://www.robertslegalfirm.com/rerestrictions.html> [https://perma.cc/PZV4-EN8T] (last visited Jan. 2, 2018).

149. *Forshee v. Neuschwander*, 2017 WI App 43, ¶ 4, 377 Wis. 2d 162, 900 N.W.2d 100.

150. *Id.* ¶ 5.

151. *Id.* ¶ 6.

parties' subdivision.¹⁵² The individual stated that the "purpose of the restrictive covenant was to ensure and maintain a quiet neighborhood where people would know their neighbors."¹⁵³ The court believed that the use of the property as an STR did not follow that purpose, and that, therefore, STRs were prohibited by the restrictive covenant.¹⁵⁴

On appeal, the Court of Appeals used principles of statutory construction to interpret the restrictive covenant. The Court of Appeals began its discussion by explaining that

Wisconsin's public policy favors the free and unrestricted use of property. "Accordingly, restrictions contained in deeds . . . must be strictly construed to favor unencumbered and free use of property." In order to be enforceable, deed restrictions must therefore be expressed "in clear, unambiguous, and peremptory terms." When the meaning of language in a restrictive covenant is doubtful, all doubt should be resolved in favor of the property owner's free use.¹⁵⁵

The Court of Appeals then, similar to the district court, looked at the specific wording of the restrictive covenant to ascertain what "commercial activity . . . on any of said lots" meant.¹⁵⁶

The court concluded that the covenant was ambiguous because "reasonable minds could differ as to whether the restrictive covenant prohibits short-term rentals."¹⁵⁷ The crux of the finding was that the commercial activity did not occur "on" the Neuschwanders property.¹⁵⁸ The court reasoned that although the Neuschwanders accepted money for the STR, they did not buy or sell goods on their property, nor did they use the space for an office to promote their STR.¹⁵⁹ Ultimately, the Neuschwanders and their tenants did not use the property for anything but a residential purpose.¹⁶⁰

The court then discussed how the use of the extrinsic evidence was an error by the district court. Although a court can interpret provisions by looking at

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* ¶ 9 (first citing *Crowley v. Knapp*, 94 Wis. 2d 421, 434, 288 N.W.2d 815, 822 (1980); then quoting *id.*; and then quoting *id.* at 435; and then citing *Zinda v. Krause*, 191 Wis. 2d 154, 165, 528 N.W.2d 55, 58 (Ct. App. 1995)).

156. *Id.* ¶ 11.

157. *Id.* ¶ 14.

158. *Id.* ¶ 13.

159. *Id.*

160. *Id.* ¶ 18.

the “intent” of a restrictive covenant, the “intent” refers to the “scope and purpose of the covenant *as manifest by the language used*,” not “the subjective intent of the drafter.”¹⁶¹ Furthermore, the court looked at the surrounding provisions of the restrictive covenant and came to the conclusion that “when read together, the restrictive covenant’s three provisions do not clearly show that the intent of the covenant is to maintain a quiet neighborhood where people know their neighbors.”¹⁶² The Court ultimately reversed in favor of the Neuschwanders.¹⁶³ The Neighbors appealed and in October 2017 the Wisconsin Supreme Court granted review.¹⁶⁴ The Wisconsin Supreme Court heard oral arguments in February 2018 but as of the time of this writing, the Court has not yet issued a decision.¹⁶⁵

Moving forward, it would be wise for cities to revisit zoning laws, specifically their definition sections, to ensure short-term rentals are unambiguously accounted for. Because restrictive covenants are private agreements, individuals should diligently check for such restrictions before operating their property as an STR.

B. Statutory Law

In 2015, following the pair of Wisconsin Court of Appeals decisions,¹⁶⁶ the Wisconsin legislature proposed a law regarding TRHs. 2015 Assembly Bill

161. *Id.* ¶ 14–15 (quoting *Zinda v. Krause*, 191 Wis. 2d 154, 166, 528 N.W.2d 55, 58 (Ct. App. 1995)).

162. *Id.* ¶ 19. “The first provision in the restrictive covenant prohibits the erection of any dwelling with a living space of less than 1,000 square feet.” *Id.* ¶ 16. The court took this to mean that larger dwellings means more people in the neighborhood including noise and activity. *Id.* The second provision prohibits the subdivision of existing lots. *Id.* ¶ 17. The court acknowledged that this showed an intent to keep population density low. However, it stated that STRs have no effect on population density because whether it is the owner’s occupying the property or guests, it is still the same amount of people at any given time. *Id.* The third provision is the one in question in this case in which the intent of the provision is to limit activities on the lot to residential only. *Id.* ¶ 18. The court reiterated that there is no evidence that “either the Neuschwanders’ or their tenants’ use of the Neuschwanders’ property is anything other than residential.” *Id.*

163. *Id.* ¶ 22.

164. *Forshee v. Neuschwander*, 2017 WI 94, 378 Wis. 2d 222, 904 N.W.2d 371; Brief of the Defendants-Appellants, *Forshee v. Neuschwander*, No. 2016 AP 1608 (Nov. 28, 2017).

165. Oral Argument, *Forshee v. Neuschwander*, 2017 WI 94, 378 Wis. 2d 222, 904 N.W.2d 371 (No. 16-1608), https://www.wicourts.gov/supreme/scoa.jsp?docket_number=2016AP001608&begin_date=&end_date=&party_name=&sortBy=date [https://perma.cc/3XEK-7UVL] (last visited Mar. 31, 2018).

166. *Heef Realty & Invs., L.L.P. v. City of Cedarburg Bd. of Appeals*, 2015 WI App 23, 361 Wis. 2d 185, 861 N.W.2d 797; *Vilas County v. Accola*, 2015 WI App 52, 364 Wis. 2d 409, 866 N.W.2d 406.

583 and Senate Bill 446 “prohibit[] any city, village, town, or county . . . from enacting or enforcing an ordinance that prohibits, regulates the duration or frequency of, or unreasonably restricts the rental of a residential dwelling for seven consecutive days or longer.”¹⁶⁷ This new law would have excluded from regulation any residential dwelling that is rented exclusively for periods that are seven consecutive days or longer.

Proponents of the bill saw it as a lifeline for struggling homeowners to avoid foreclosure by using STRs as substitute income.¹⁶⁸ Proponents also believed the bill would boost the tourism industry by giving less wealthy families the opportunity to rent lakeside cabins.¹⁶⁹ In addition, State Senator Frank Lasee, the only Senator to sponsor Senate Bill 446, believed the bill would have “reinforced property rights.”¹⁷⁰ State Representative Scott Allen, author of Assembly Bill 583, shares Senator Lasee’s sentiment, stating, “Do we err on the side of local government and their rights or do we err on the rights of the individual property owner? If I’m getting that question, nine times out of ten, I’m coming down on the side of the property owner.”¹⁷¹ In 2016, despite proponents’ arguments in favor of the bill, the proposed law failed to pass in the legislative session.¹⁷²

On September 21, 2017, Governor Scott Walker signed the annual budget for 2018.¹⁷³ In a move that has garnered much criticism, state legislators included an amendment in the budget that legalized STRs lasting more than seven days.¹⁷⁴ The amendment specifically states: “[A] political subdivision

167. A. 583, 2015 Leg., 102d Reg. Sess. (Wis. 2015); S. 446, 2015 Leg., 102d Reg. Sess. (Wis. 2015).

168. Teymour Tomsyck, *Proposed Bill Could Remove Local 30 Day Rental Limit on Airbnb*, BADGER HERALD (Mar. 14, 2016), <http://badgerherald.com/news/2016/03/14/people-could-use-airbnb-longer-in-madison-despite-local-restrictions-if-bill-passes/> [https://perma.cc/K8U3-BCC8].

169. *Id.*

170. Daniel Bice, *Lasee Pushes Online Home Rental Bill—While Renting His Home Online*, MILWAUKEE J. SENTINEL (May 30, 2016), <http://archive.jsonline.com/news/statepolitics/lasee-pushes-online-home-rental-bill—while-renting-his-home-online-b99734864z1-381315001.html> [https://perma.cc/HL4T-QUV3].

171. Polo Rocha, *Local Limits on Short-Term Rentals Could be Blocked under Pending Bill*, WISBUSINESS.COM (Dec. 21, 2015), <http://www.wisbusiness.com/index.html?Article=361961> [https://perma.cc/AUV4-PY36].

172. WIS. S. JOURNAL, 2015 Leg., 102d Sess. 856 (Wis. 2016).

173. Theo Keith, *Gov. Scott Walker Signs State Budget in Advance of Re-election Run*, FOX6NOW.COM (Sept. 21, 2017, 12:30 PM), <http://fox6now.com/2017/09/21/governor-scott-walker-to-sign-state-budget-nearly-3-months-late/> [https://perma.cc/HXT8-KWXF].

174. 2017 Wis. Act 59 § 996g; see JOINT FINANCE COMMITTEE, SHARED REVENUE, TAX RELIEF, LOCAL GOVERNMENT AND BUDGET MANAGEMENT, Omnibus Motion No. 418 (Wis. 2017), <http://legis.wisconsin.gov/democrats/media/1789/shared-revenue-tax-relief-local-government-and->

may not enact or enforce an ordinance that prohibits the rental of a residential dwelling for 7 consecutive days or longer.”¹⁷⁵ The amendment also requires that if an individual has an STR for more than ten nights in a year, they must (1) obtain a license as a TRH from the Department of Agriculture, Trade, and Consumer Protection and (2) obtain a license from the political subdivision if there is an ordinance enacted that requires it.¹⁷⁶ Additionally, the amendment states that any ordinance currently in effect that contradicts these provisions does not apply and must not be enforced.¹⁷⁷

This means that cities in Wisconsin can no longer *prohibit* rentals that last over seven days. However, it does not appear to mean that cities cannot *regulate* these rentals, which is an important distinction. The ability to regulate was a concern with the 2015 law because it explicitly stated that an ordinance could not “regulate[] the duration or frequency of, or unreasonably restrict[],” an STR,¹⁷⁸ but the amendment does not include this language. Furthermore, although the day limit might be a problem for some cities, specifically cities trying to completely prohibit STRs, the vast majority should remain unaffected because the overwhelming number of individuals who use STRs are not renting spare rooms or homes for “seven consecutive days.”¹⁷⁹ Thus, because the average guest stays for less than seven consecutive days, the law does not interfere with STRs that primarily concern residents in Wisconsin.¹⁸⁰

budget-management-omnibus-motion-418.pdf [https://perma.cc/Z9N9-LHJJ]; see also Jeff Bollier, *State Budget Restricts Local Government's Ability to Regulate Short-Term Rentals*, GREEN BAY PRESS GAZETTE (Sept. 26, 2017, 10:04 PM), <http://www.greenbaypressgazette.com/story/news/2017/09/26/ashwaubenon-upset-walker-short-term-rentals/706820001/> [https://perma.cc/V5UQ-DP4A].

175. 2017 Wis. Act 59 § 996g.

176. JOINT FINANCE COMMITTEE, SHARED REVENUE, TAX RELIEF, LOCAL GOVERNMENT AND BUDGET MANAGEMENT, Omnibus Motion No. 418 (Wis. 2017), <http://legis.wisconsin.gov/democrats/media/1789/shared-revenue-tax-relief-local-government-and-budget-management-omnibus-motion-418.pdf> [https://perma.cc/Z9N9-LHJJ].

177. *Id.*

178. See A. 583, 2015 Leg., 102d Reg. Sess. (Wis. 2015); S. 446, 2015 Leg., 102d Reg. Sess. (Wis. 2015).

179. Airbnb conducts a study which measures the economic impact it has on cities around the world. In one of the reports, Airbnb provided results from eight different cities. Five of the cities included length of stay information, and all five showed that on average the length of stay was less than seven days. For example, San Francisco's average length of stay is 3.5 days, New York is 6.4 nights, Amsterdam is 3.9 nights, Berlin is 6.3 nights, and London and Edinburgh is 4.6 nights. *AIRBNB ECONOMIC IMPACT*, AIRBNB, <http://blog.airbnb.com/economic-impact-airbnb/#san-francisco> [https://perma.cc/8KYU-Q4FB] (last visited Jan. 29, 2018).

180. Because the budget was recently passed, there is little information on why the specific language was used. Nor do we know who included the amendment in the budget because it was a 999

Overall, more information is needed on the specifics regarding this new amendment but two points are important. First, the amendment appears to still allow local cities to regulate STRs. Although it does not prevent local governments from prohibiting STRs under seven consecutive days, local governments do not respond well when their autonomy is blindly challenged.¹⁸¹ In addition, local governments are often better equipped than the state to handle creating regulations specific to their needs as interests vary from city to city.¹⁸²

Second, although the amendment is a step in the right direction, it should not specify a number of days. The amendment should state that local government can regulate *any* STR and cannot prohibit *any* rental of a residential dwelling unit.¹⁸³ This would allow local governments to retain their autonomy by allowing regulation of STRs as they see fit while also preventing any local government from out-right prohibition, which reinforces property rights. Other cities have moved in a similar direction by proposing zoning amendments that

motion, which is “introduced as the last portion of the committee’s work on the budget, bearing the names of the committee’s co-chairs. It is often introduced and passed in the middle of the night or early in the morning.” See Jessie Opoien, *Finance Co-chair Darling: Secretive 999 Motion ‘Taints’ the Wisconsin Budget Process*, CAPITAL TIMES (June 6, 2017), http://host.madison.com/ct/news/local/govt-and-politics/election-matters/finance-co-chair-darling-secretive-motion-taints-the-wisconsin-budget/article_3f33248b-faab-5392-8a6f-ce4e3f9434f9.html [https://perma.cc/2YY8-7BGF]. Therefore, looking at the reasons for the previous proposed law in Wisconsin might shine some light because it had the same “seven consecutive days” language. For example, Representative Scott Allen, Assembly Bill 583 author, says the bill was meant to help individuals in Wisconsin who have to leave the state for a job or for a military assignment and isn’t meant for the rentals on Airbnb and similar companies. See Rocha, *supra* note 171.

181. See, e.g., Bollier, *supra* note 174 (“This is going to wreak holy hell on this community. It’s going to be miserable to regulate It’s going to be horrendous. The governor didn’t do the right thing and the legislature didn’t do the right thing when they passed it. It’s a 999 motion, so we don’t know what elected official put that rotten piece of legislation in there. That’s terrible.”).

182. See *infra* Part V; see, e.g., Todd Richmond, *Local Wisconsin Officials Considering Own Mining Regulations*, U.S. NEWS (Nov. 19, 2017), <https://www.usnews.com/news/best-states/wisconsin/articles/2017-11-19/local-wisconsin-officials-considering-own-mining-regulations> [https://perma.cc/B3NJ-ZWVM] (“By having an ordinance in place, local officials can best position themselves to ensure that local concerns and needs are addressed.”).

183. See, e.g., Joey Garrison, *State Bill Would Override Nashville on Short-Term Rental Rules, Block Ban*, TENNESSEAN (Feb. 9, 2017, 12:54 PM), <http://www.tennessean.com/story/news/politics/2017/02/09/state-bill-would-override-nashville-short-term-rental-rules-block-ban/97699934/> [https://perma.cc/539J-DRMV] (reporting on a similarly proposed state bill in Nashville, Tennessee); Jonathan Oosting, *Vacation Rental Bans Under State Scrutiny*, DETROIT NEWS (Oct. 9, 2017, 12:05 AM), <http://www.detroitnews.com/story/news/politics/2017/10/09/airbnbs-rights-nuisance-complaints/106455878/> [https://perma.cc/6ND9-QXS5] (discussing bills introduced to prevent local governments from enacting zoning ordinances that prohibit or ban owners from renting out homes for less than 28 days).

would “remove the duration of tenancy requirements for residential uses,” allowing all forms of STRs.¹⁸⁴ Establishing this shift at the state level, however, would prevent fragmented city by city prohibitions and limit confusion for citizens.

C. Individual City Regulation

In Wisconsin STRs are mainly regulated by local law.¹⁸⁵ Some cities, such as Milwaukee, take a lenient approach by not having any STR regulations in place.¹⁸⁶ The benefit for such an approach is that potential hosts do not have multiple, sometimes expensive, hoops to jump through when renting out a unit.¹⁸⁷ However, this benefit may cause the false belief that all STRs are legal. These cities that take a lenient approach often also leave their citizens open to issues with health and safety and potential hidden liabilities, while also missing out on the prospective income from applicable taxes.¹⁸⁸ Other cities, such as Green Bay, take a more relaxed approach with a regulatory structure that few know of and virtually no one enforces.¹⁸⁹ These cities face similar issues as a city with a lenient approach but are in an arguably better position because there are at least some safeguards in place. Lastly, other cities, such as Madison, take a self-reporting approach.¹⁹⁰ The self-reporting approach is beneficial because it has regulations for citizens to follow, but it has its drawbacks based on the fact that a self-reporting enforcement structure is not reliable.¹⁹¹

There are undoubtedly positive and negative aspects to each approach, but the key to a successful regulatory scheme is a clear enforcement structure that is actively implemented, preferably by a designated OSTR. Additionally, uniform regulation and enforcement of STRs, rather than prohibition, should combine competing interests in a way that is fair and manageable. The

184. Memorandum from Jeffrey L. Zyontz, Legislative Att’y, to Montgomery Cty. Council on Zoning Text Amendment 15-01 (Jan. 9, 2015), http://montgomerycountymd.granicus.com/Viewer.php?view_id=6&event_id=1705&meta_id=74865 [https://perma.cc/MR6Z-G6SL].

185. See *infra* Section IV.C.1–3.

186. See *infra* Section IV.C.1.

187. See Moylan, *supra* note 97, at 5.

188. See Alexandra Silets, *Success of Airbnb Prompts Talk of Regulation, Taxes in Chicago*, CHI. TONIGHT (May 10, 2016, 7:51 PM), <http://chicagotonight.wttw.com/2016/05/10/success-airbnb-prompts-talk-regulation-taxes-chicago> [https://perma.cc/3JXJ-B7TP].

189. See *infra* Section IV.C.2.

190. See *infra* Section IV.C.3.

191. See *infra* Section IV.C.3.

following is a more in-depth analysis of each of these three cities' differing approaches on regulating STRs.

1. Milwaukee, Wisconsin

Compared to any other city in Wisconsin, Milwaukee currently has the most listings on Airbnb.¹⁹² In 2017, more than 40,000 guests stayed in Milwaukee using Airbnb, earning homeowners a staggering \$4.2 million in income.¹⁹³ As of April 2018, Milwaukee had over 800 listings on Airbnb with the number fluctuating daily.¹⁹⁴ The listings range from entire homes on the East Side to a college dorm style bedroom close to Brady Street.¹⁹⁵ And the prices range from \$19 a night for a room to almost \$1,000 a night for an entire apartment.¹⁹⁶ To any Wisconsin native, it is no surprise that Milwaukee boasts the largest STR listings because Milwaukee has some of the biggest tourist attractions in Wisconsin, including Summerfest¹⁹⁷ and Milwaukee Brewer games.

Milwaukee takes a lenient approach and does not currently have an STR ordinance in place.¹⁹⁸ The City does, however, respond to complaints (though there have been few), which includes neighbors complaining about loud parties.¹⁹⁹

This lack of regulatory and enforcement structure leaves Milwaukee open to many issues including health and safety concerns, tax evasion from hosts, and uses in violation of land use restrictions. In addition, when there is no regulatory structure in place, it causes confusion for property owners as to what STR uses are permitted because some owners are mistakenly under the

192. AIRDNA, *supra* note 6.

193. 2017 *Guest Arrivals and Total Host Income*, WIS. GAZETTE (Dec. 21, 2017), http://www.wisconsin Gazette.com/news/guest-arrivals-and-total-host-income/article_2c8201a0-e685-11e7-bae3-ab90f5618c0d.html [https://perma.cc/M7RT-UJ5U].

194. AIRDNA, *supra* note 6.

195. *See, e.g.*, AIRBNB, *supra* note 29 (enter "Milwaukee, WI, United States" in the search field; then click search button for results) (last visited Jan. 9, 2017).

196. *Id.*

197. Paul Gores, *Local Airbnb Use Spiked with Summerfest*, MILWAUKEE J. SENTINEL (Sept. 21, 2016, 12:01 PM), <http://www.jsonline.com/story/money/business/2016/09/21/local-airbnb-use-spiked-summerfest/90784900/> [https://perma.cc/Y935-NMCL] ("Airbnb said the Milwaukee area posted its biggest boost in home sharing June 25. 'While the festival did not begin until June 28, the mass arrival of over 2,000 seasonal staffers as well as producers, vendors and band crews initiated a spike on June 25,' Airbnb said in its report.").

198. *See* Moylan, *supra* note 97, at 11.

199. Colleen Henry, *Homeowners Speak Out Against Private Renting Regulation*, WISN.COM (Mar. 1, 2016, 5:42 AM), <http://www.wisn.com/article/homeowners-speak-out-against-private-renting-regulation/6331212> [https://perma.cc/U3JT-B3NV].

impression that no regulatory structure means no rules.²⁰⁰ Moreover, Milwaukee is missing out on the additional revenue that applicable taxes would generate for the city that could be used to improve homelessness and fund affordable housing in the city.²⁰¹

2. Green Bay, Wisconsin

Green Bay has the third largest number of listings on Airbnb in Wisconsin.²⁰² In 2017, over 6,500 guests stayed in Green Bay bringing in just under \$900,000 for hosts.²⁰³ The listings in Green Bay range from a private room for \$40 a night up to \$1,500 a night for a four-bedroom home.²⁰⁴ Green Bay contains substantially fewer listings than Milwaukee and Madison; however, Green Bay officials see STRs as a benefit,²⁰⁵ bringing tourists to shop in their malls and to eat in their restaurants. Further, STRs may deter individuals visiting for events, such as Green Bay Packer games, from driving under the influence by creating a place to stay in the city.²⁰⁶

In 2016, Green Bay enacted General Ordinance No. 20-16, which amended the city's current Zoning code.²⁰⁷ The ordinance is written clearly by removing the lesser-known term "transient residential use" and replacing it with "short-

200. Such a situation arose for one property owner who listed a Milwaukee mansion on Airbnb in a ritzy neighborhood near Lake Park. Olson, *supra* note 132. The city of Milwaukee prohibited such a rental because it constituted a hotel use in a residential zone. *Id.* It is important to note that whether or not Milwaukee has regulations for STRs, the use of a mansion to accommodate over 20 guests would be prohibited based on current zoning code. *Id.* The point being, when there aren't guidelines to follow, people mistakenly think any use of an STR is allowed because there aren't regulations to the contrary.

201. See Silets, *supra* note 188; see also *supra* note 101 and accompanying text.

202. AIRDNA, *supra* note 6. I note however that the STR rankings for each city vary daily with Green Bay fluctuating from the third to the fifth largest STR numbers in the past few months.

203. 2017 Guest Arrivals and Total Host Income, *supra* note 193.

204. See, e.g., AIRBNB *supra* note 29 (enter "Green Bay, WI, United States" in the search field; then click search button for results) (last visited Jan. 14, 2017).

205. See Adam Rodewald, *Green Bay Considers 11th Short-Term Rental House*, GREEN BAY PRESS GAZETTE (May 12, 2016, 2:01 PM), <http://www.greenbaypressgazette.com/story/news/local/2016/05/12/green-bay-considers-11th-short-term-rental-house/84276022/> [https://perma.cc/P3G6-98S9].

206. See generally Shelby Le Duc, *Ashwaubenon Short-term Rental Houses Get OK*, POST CRESCENT (June 15, 2016, 10:25 AM), <https://www.postcrescent.com/story/news/2016/06/15/packer-party-houses/85837736/> [https://perma.cc/UT55-CWCJ].

207. CITY OF GREEN BAY, MINUTES OF THE COMMON COUNCIL 54-55 (Sept. 20, 2016), http://greenbaywi.gov/wp-content/uploads/Council_Minutes_Longform-9-20-16.pdf [https://perma.cc/L48U-LNRF].

term rentals,”²⁰⁸ a step all cities should take when amending their Zoning code to include STR regulations. The ordinance defines an STR as a “dwelling unit in which paying guests are entitled to occupancy for a period of less than twenty-eight (28) calendar days.”²⁰⁹ The ordinance does not contain occupancy requirements for the property owner, meaning the property can be used as an STR for an unlimited amount of days per year whether the property owner lives in the home or not.²¹⁰

The ordinance requires the property owner to obtain several permits, including a Green Bay STR Permit, a State of Wisconsin TRH Permit, and a State of Wisconsin Sale and Use Tax Permit.²¹¹ Additionally, the property owner must show proof of registration with the City of Green Bay Treasurer regarding Brown County room tax requirements and proof of registration with the Brown County Health Department.²¹² Also when applying for an STR permit, the property owner must show proof of insurance.²¹³ The fee for an STR permit or renewal of the permit is a modest \$100, but lasts for only one year.²¹⁴ Further, the ordinance states that “STRs granted by the City may be subject to review on a yearly basis” and “STRs may be revoked based on the findings of the Plan Commission.”²¹⁵

The ordinance provides various protections to both property owners and guests. Regarding safety, the ordinance requires the number of occupants “not [to] exceed the limits set forth in the State of Wisconsin Uniform Dwelling Code and other applicable County and City of Green Bay housing regulations for residential structures.”²¹⁶ Green Bay’s ordinance also contains a section regarding violations including a penalty not to exceed \$500.²¹⁷ The ordinance further safeguards property rights by requiring the person seeking to use his or

208. *Id.*

209. GREEN BAY, WIS., MUN. CODE § 13-302 (2016), <http://info.ci.green-bay.wi.us/Files/CHPTR13-ZoningOrdinance.pdf> [<https://perma.cc/A3DZ-HEKA>].

210. *See id.* Other ordinances, like those in the city of Madison, have occupancy requirements in which property owners can rent out their property as an STR for only thirty days if they do not occupy the property when there is a guest, but allows the property to be rented for an unlimited amount of days if the property owners are present during the stay. *Short-Term Rentals*, CITY OF MADISON, <https://www.cityofmadison.com/mayor/programs/short-term-rentals> [<https://perma.cc/L6AN-3NYB>] (last visited Jan. 13, 2017) [hereinafter CITY OF MADISON].

211. GREEN BAY, WIS., MUN. CODE § 13-1602(j)(1).

212. *Id.*

213. *Id.* § 13-1602(j)(2).

214. *Id.*

215. *Id.* § 13-1602(j)(9).

216. *Id.* § 13-1602(j)(4).

217. *Id.* § 13-1602(j)(12).

her property as an STR to be what the ordinance refers to as a “local representative.” A local representative is “[a] property owner or his or her design who permanently resides within the City of Green Bay or a licensed property management company with a physically staffed office within the City of Green Bay who manages a short-term rental.”²¹⁸ Such a definition restricts tenants from obtaining an STR permit and using the property they are renting as an STR. The ordinance could go even further by requiring the local representative to provide a driver’s license when obtaining a permit and to have the driver’s license name match the name of record on the deed for the property.²¹⁹

Green Bay is headed in the right direction in terms of regulating STRs fairly. In August of 2017, Green Bay became the second city in Wisconsin to enter into a tax agreement with Airbnb.²²⁰ Airbnb estimates that the extra revenue will bring in over \$50,000 annually for the city.²²¹ This agreement is a giant step towards enforcing tax collection on Airbnb hosts.

However, Green Bay takes a relaxed approach in enforcing its ordinance. First, although there are over 100 Green Bay listings on Airbnb, the City Council has only voted to permit eleven STRs in the City.²²² Second, because the city has only permitted eleven homes as STRs, over 100 listings are not likely in compliance with health and safety regulations²²³ or lack sufficient liability insurance, or both.

3. Madison, Wisconsin

Arguably the largest opposition towards STRs in Wisconsin comes from the city of Madison. Madison contains over 500 listings on Airbnb, the second largest number of STR listings in Wisconsin.²²⁴ In 2017, Madison hosts made

218. *Id.* § 13-302.

219. Nashville, Tennessee takes this extra step by requiring that the property owner apply for the STR permit and that “[o]wnership information on [the] application must match the deed as recorded with the Davidson County Clerk’s office.” See *Short Term Rental Property*, NASHVILLE.GOV, <http://www.nashville.gov/Codes-Administration/Construction-and-Permits/Short-Term-Rentals.aspx> [<https://perma.cc/7VQU-S43H>] (last visited Feb. 28, 2018).

220. Jeff Bollier, *Airbnb to Collect Room Tax in Green Bay*, GREEN BAY PRESS GAZETTE (July 17, 2017), <https://www.greenbaypressgazette.com/story/money/2017/07/17/airbnb-room-tax-green-bay/484486001/> [<https://perma.cc/F864-HFUP>] (“Airbnb users will pay 10 percent hotel room tax on their rentals in Green Bay beginning Aug. 1.”).

221. *Id.*

222. Rodewald, *supra* note 205.

223. Bollier, *supra* note 220.

224. AIRDNA, *supra* note 6. These numbers are as of April 1, 2018.

\$3.6 million from over 27,000 guests.²²⁵ Madison Mayor Paul Soglin is an active supporter of regulating STRs, arguing that legislation should not override local ordinances.²²⁶ As such, Mayor Soglin actively opposed Assembly Bill 583 and Senate Bill 446, accusing the state legislature of continuously preempting local control.²²⁷ Soglin believes that STRs threaten affordable housing by encouraging individuals to buy properties specifically for use as STRs, which increases the cost of housing.²²⁸ He is also of the opinion that property owners are incentivized to put their rentals on Airbnb because property owners often make more when utilizing their property as an STR as opposed to renting the property at monthly rates.²²⁹

Madison is the home of the University of Wisconsin-Madison, which Soglin believes is also affected by STRs.²³⁰ Soglin stated that there are several listings near campus, which threaten students' ability to obtain affordable housing.²³¹ Further, Soglin surmises that students have used Airbnb to rent out their dorm rooms.²³² However, University of Wisconsin housing spokesperson Brendon Dybdahl advises there is no evidence of this occurring.²³³ In fact, Andra Ghent, professor of real estate and urban land economics at the University of Wisconsin-Madison, stated that "Wisconsin isn't dealing with limited housing stock and isn't as worried about Airbnb's impact on driving rental prices up," believing that in even highly populated metro areas, those concerns are mainly a distraction.²³⁴

The city of Madison has regulated STRs since 2013²³⁵ when the City Council adopted an ordinance with the purpose of striking a balance between

225. 2017 *Guest Arrivals and Total Host Income*, *supra* note 193.

226. Tomsyck, *supra* note 168.

227. Jeff Glaze, *Wisconsin Airbnb Bill Threatens Affordable Housing, Says Madison Mayor*, WIS. ST. J. (Feb. 11, 2016), <http://www.govtech.com/social/Wisconsin-Airbnb-Bill.html> [<https://perma.cc/4HJM-N7LF>].

228. *Id.*

229. Tomsyck, *supra* note 168.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Scottie Lee Meyers, *Airbnb Debate Arrives In Wisconsin Following Contentious Battle In San Francisco*, WIS. PUB. RADIO (Dec. 29, 2015, 3:35 PM), <http://www.wpr.org/airbnb-debate-arrives-wisconsin-following-contentious-battle-san-francisco> [<https://perma.cc/QW8X-QJ4P>].

235. MADISON, WIS., GEN. ORDINANCES § 28.061 (2013), <https://madison.legistar.com/LegislationDetail.aspx?ID=1500910&GUID=1AE70436-9DA2-4632-96B3-6148DD240182> [<https://perma.cc/47DP-LRST>].

the competing rights of property owners.²³⁶ Madison allows a property owner to offer STRs, and if the lease specifically authorizes it, a renter may use their residence as an STR.²³⁷ However, the property may only be rented if it is the owner's primary residence.²³⁸ If the owner occupies the residence at the time of the rental, there is no limit on the number of days the residence may be rented. But, if the owner does not occupy the residence at the time of the rental, the residence can only be rented for thirty days per licensing year.²³⁹ The owner must keep records on-site, from the previous year as well as the current year, that lists the identity of the guests, dates of stay, length of stay, and acknowledgement by the owner whether they were present at the time of the stay.²⁴⁰ Regarding safety, there are no additional requirements; owners are required to abide by preexisting building code rules for residential use, which involves a smoke detector and carbon monoxide rule.²⁴¹

The city of Madison advises the owner to check with four main agencies before listing their property: Zoning, Department of Revenue, Public Health, and the City Treasurer.²⁴² First, in regard to Zoning, the City recommends that owners contact the City of Madison Zoning to ensure STRs are allowed in their area and to confirm compliance with maximum family occupancy rules.²⁴³ Second, the owner needs to obtain a seller's permit from the Department of Revenue because owners of STRs must report and pay Wisconsin sales tax.²⁴⁴ The sales tax rate is based on the location of the STR.²⁴⁵ Third, the owner must also have a current license from Public Health Madison and Dane County,²⁴⁶

236. CITY OF MADISON, *supra* note 210.

237. MADISON, WIS., GEN. ORDINANCES § 28.151 (2018), https://library.municode.com/wi/madison/codes/code_of_ordinances?nodeId=COORMAWIVOIICH20--31_CH28ZOCOOR_SUBCHAPTER_28JSURE [<https://perma.cc/6TKQ-J93Q>].

238. *Id.*

239. *Id.* A licensing year is July 1 to June 30. *Id.*

240. *Id.*

241. *Id.* (meaning that these requirements are not new, all homes being used for residential purposes should already be following the smoke detector and carbon monoxide rules).

242. CITY OF MADISON, *supra* note 210.

243. *Id.*

244. *Homeowners and Individuals Providing Short-Term Lodging*, WIS. DEP'T OF REVENUE (Jan. 25, 2016), <https://www.revenue.wi.gov/Pages/TaxPro/news-2016-160125.aspx> [<https://perma.cc/LGW9-J4RY>] (last visited Jan. 13, 2017).

245. *Id.*

246. MADISON, WIS., GEN. ORDINANCES § 28.061 (2013), <https://madison.legistar.com/LegislationDetail.aspx?ID=1500910&GUID=1AE70436-9DA2-4632-96B3-6148DD240182> [<https://perma.cc/47DP-LRST>].

the fee for which is \$535 for a new license and \$160 for a renewal.²⁴⁷ Lastly, the owner must register with the City Treasurer and pay room tax. The current room tax is 9% of the gross receipt, and the tax only applies when an individual rents a room or house for less than thirty consecutive days.²⁴⁸

Madison's ordinance does not include an enforcement structure, relying mainly on self-reporting.²⁴⁹ In 2016, after three years of Madison's ordinance being in place, City Treasurer Dave Gawenda stated that of the hundreds of STR listings in Madison, only eight residences are currently registered as a tourist rooming house.²⁵⁰ The fact that there are only eight residences registered shows the problem with self-reporting and the need for a clear enforcement structure.

In 2017, Madison was the first city in Wisconsin to partner with Airbnb to collect taxes.²⁵¹ Mayor Soglin said that getting hosts in compliance with room taxes and licenses will not include penalties because the goal is education and compliance.²⁵² Airbnb collects the taxes during the booking process, which conveniently alleviates any work for a host.²⁵³ Airbnb then remits the tax directly to the state for the host.²⁵⁴ This process reportedly began on May 1, 2017.²⁵⁵

247. PUB. HEALTH MADISON & DANE CTY., LODGING, POOL AND BODY ART LICENSE FEES (2017), <http://www.publichealthmdc.com/documents/LicenseFeeSch-LodgingPoolTattoo.pdf> [https://perma.cc/6ANE-7T3R].

248. Memorandum from Maribeth Witzel-Behl, City Clerk, City of Madison on Room Tax Packet (Nov. 4, 2016), <https://www.cityofmadison.com/sites/default/files/city-of-madison/clerk/documents/licensing/RoomTaxPacket.pdf> [https://perma.cc/QAM6-V4P2].

249. See MADISON, WIS., GEN. ORDINANCES § 28.061 (2013), <https://madison.legistar.com/LegislationDetail.aspx?ID=1500910&GUID=1AE70436-9DA2-4632-96B3-6148DD240182> [https://perma.cc/R2MW-4GS3]. The text of the fiscal note merely states “[n]on-compliant entities *may* be cited for non-compliance and subject to penalties.” *Id.* (emphasis added).

250. Jeff Glaze, *Paul Soglin Threatens Airbnb Tax Collection, Enforcement*, WIS. ST. J. (Mar. 15, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/paul-soglin...ction-enforcement/article_47be7605-c6c1-50a9-935a-d102d7cd178c.html [https://perma.cc/DJ3P-EFQ4].

251. Terrell, *supra* note 9.

252. Shamane Mills, *Madison Could Ink Deal with Airbnb to Collect Room Taxes*, WIS. PUB. RADIO (Mar. 21, 2017, 5:00 AM), <https://www.wpr.org/madison-could-ink-deal-airbnb-collect-room-taxes> [https://perma.cc/BCN3-XTWG].

253. *Id.*

254. *Id.*

255. Molly Dill, *Airbnb to Start Collecting Taxes in Wisconsin: Will Automatically Tax Hosts on Home Sharing Income*, BIZTIMES (June 8, 2017, 1:04 PM), <https://www.biztimes.com/2017/industries/accounting/airbnb-to-start-collecting-taxes-in-wisconsin/> [https://perma.cc/WLN6-7238].

The city of Madison is enmeshed in home sharing regulation, and with strong proponents and opponents of regulation, Madison will continue to struggle until it implements a clear enforcement structure. Additionally, the day limits are more prohibitive than necessary—there should not be a thirty-day limit when an individual is not present during the stay. The rest of the regulatory structure appears to balance competing interests in a way that is fair and manageable. With Mayor Soglin’s successful partnership with Airbnb, the city has made giant steps towards an effective enforcement structure.

V. MOVING FORWARD: HOME SHARING IN WISCONSIN

A. *Achieving Uniformity and Enforcement*

Certainly, there is no one-size-fits-all solution to STR regulation because each city has different objectives and needs. However, uniform regulation and enforcement of STRs, rather than prohibition, can combine competing interests in a way that is fair and manageable. The four main interests involved with STRs are those of the property owner, the host, the city, and the guest. When implementing a regulatory framework, cities should include the following categories: an enforcement structure; a permit process; lease applicability; land use restrictions; health and safety; tax collection; and liability.

Below are recommendations for each of these seven categories.

B. *Proposed Regulating Framework*

1. Enforcement structure

The largest and most important aspect of STR regulation is an appropriate enforcement structure. The enforcement structure must incentivize compliance with appropriate fees and fines, but it should not be over burdensome and prevent users from participating in the regulatory process. An enforcement structure is likely to succeed with the participation of hosting platforms because such platforms hold a lot of data that is essential to the success of cities’ regulatory structures.²⁵⁶ Without the participation of hosting platforms, cities do not have the relevant data to see who is utilizing their property as an STR, for how long, and how often. Cities should also contemplate a three strikes policy in which a user is prohibited from using their property as an STR if they are caught out of compliance on three occasions.²⁵⁷

256. See Somerville & Levine, *supra* note 81.

257. See Avery Hartmans, *Airbnb Has Finally Come to the Table in New York—But It Might be Too Late*, BUS. INSIDER (Oct. 19, 2016, 3:35 PM), <http://www.businessinsider.com/airbnb-releases->

Overall, cities cannot continue listing fines in their regulatory structures when they have no intention of enforcing them. Cities should first reach out to hosting platforms to come to an agreement on the relevant data needed. Cities must then create either an entire Office of STR enforcement or put existing employees in charge of enforcement and follow through on it.

2. Permit process

Cities need a permit process that is convenient and equitable but not burdensome on potential hosts. Similar to San Francisco, allowing individuals to obtain a permit through an online system is extremely convenient and increases the likelihood that individuals will comply.²⁵⁸ The permit process should also categorize STRs into different types based on their impacts, including owner-occupied and non-owner occupied.²⁵⁹ Cities should also categorize owner-occupied and non-owner occupied permits into different types depending on how many days per year the owner utilizes the property as an STR. For example, 0–59 days of usage per year should require the smallest fee, 60–119 days should require a mid-range fee, and 120 days or more per year should require the highest fee. Non-owner occupied permits should have a similar structure but include higher fees due to the potential additional impact on neighbors and affordable housing. Additionally, potential hosts should be able to rent their units until their permits are approved, which can help alleviate some of the burden that comes with a fee. Overall, cities should not use the price of the permit to prevent STRs; it should be used to incentivize compliance.²⁶⁰

Again, cities should also consider the possibility of creating an STR Office to handle the permit process, not dissimilar to the San Francisco Office of Short-Term Rentals.²⁶¹ If the Office handled all STR-related issues, it would prevent confusion for users. This includes creating a name for the office that is easily understood for users, and the Office of Short-Term Rentals would surely

new-homesharing-rules-2016-10 [https://perma.cc/N2QV-8E3F]. Airbnb proposes a good neighbor rule, “Airbnb will implement a ‘three-strikes’ rule that would bar hosts from renting their property if they violate city or state laws.” *Id.* The amount of time a city would ban a STR user is something that needs clarification by each individual city. One suggestion is a ban for six months or, alternatively, a progressive ban starting at six months for the first violation of the three strikes rule, then a year for the second, and then a permanent ban for the third and final violation.

258. See *STR Starter Kit*, *supra* note 49, at 3.

259. This would follow a similar format as Nashville, Tennessee’s. See *Short Term Rental Property*, *supra* note 219.

260. See, e.g., *id.* In Nashville, both a permit and a permit renewal cost a mere \$50. *Id.*

261. See *San Francisco Office of Short-Term Rentals*, *supra* note 60.

suffice.²⁶² Currently, individuals are supposed to reach out to the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) for information pertaining to renting out their property,²⁶³ which is anything but clear for someone interested in home sharing. At the very least, cities must create a website or designate a portion of their existing website to STR information.

On the other hand, if the city is able to come to an agreement with hosting platforms such as Airbnb, Airbnb could handle the permit process. This would alleviate confusion because the property owners would not have to figure out the STR regulations for the specific city in which they are listing. They would simply list their property, and in doing so, Airbnb would send their information to the appropriate city. The process is also convenient because it could be an automatic approval instead of waiting for an STR Office to approve or deny a request. The approval would be automatic, and if an issue occurs later, the city would reserve the right to revoke the permit. Additionally, cities could work with Airbnb to require property owners to input their permit number in order to list on Airbnb, preventing any user from home sharing without proper approval.

3. Lease applicability

As mentioned throughout this Comment, property owners and hosts are not one and the same and should not be treated as such. Cities need to continue distinguishing between the two when creating STR regulations to prevent abuse by either party. Options range from San Francisco's approach that requires a potential host to bring in their lease for approval of a permit,²⁶⁴ to Nashville's approach, which requires the name on the deed of sale to match the name of the applicant.²⁶⁵ In addition, property owners need to look at their existing leases and make changes to account for STRs, whether that is to prohibit their tenants and landlords from using the property as such, or to work with them on finding a balance to meet both parties' interests. Lastly, tenants need to be cognizant of leases and be aware that their lease determines whether they can use their unit as an STR, not the city.

262. The name could also include the name of the city to differentiate between different offices, such as the Milwaukee Office of Short-Term Rentals.

263. LEAGUE OF WIS. MUNICIPALITIES ET AL., THINKING OF RENTING OUT YOUR PROPERTY FOR OVERNIGHT STAYS? 3 (2016), <https://datcp.wi.gov/Documents/ShortTermRentalGuidance.pdf> [<https://perma.cc/78TR-Q4B3>].

264. See *Become a Certified Host*, *supra* note 52.

265. See NASHVILLE, TENN., ZONING CODE § 17.16.250(E)(2)(b) (2017), https://library.municode.com/tn/metro_government_of_nashville_and_davidson_county/codes/code_of_ordinances?nodeId=CD_TIT17ZO_CH17.16LAUSDEST_ARTIVUSPEACA [<https://perma.cc/44C3-7QSF>].

4. Land use restrictions

Local governments need to re-visit their zoning ordinances. First, they need to make updates that incorporate STR use. It generally is not clear to a property owner when looking through existing zoning laws that an STR is synonymous with a “tourist rooming house” or “transient residential lodging.” Creating new definitions for STRs will encourage users to utilize the zoning laws while also ensuring they are clear and understandable. Second, local governments need to make sure existing zoning laws are not ambiguous in areas in which they wish to prohibit STRs. As evidenced by recent court cases, zoning laws are often not clear or up to date when it comes to STR usage.²⁶⁶

Similar to leases, cities at the very least must provide a disclaimer for potential hosts stating that restrictive covenants, condominium association bylaws, and conditions and restrictions are not overruled by local law because they are private agreements.²⁶⁷ Potential hosts should check all of these documents before attempting to use a unit as an STR. If a land use restriction applies to the property in question and the meaning is not easily understood, seeking legal advice is a logical next step.

5. Health & safety

Cities already have regulations in place regarding health and safety in residential areas, such as requiring a smoke detector and carbon monoxide detector in the home.²⁶⁸ What most cities lack is an enforcement procedure to ensure compliance with these practices.²⁶⁹ Again, an Office of STR would help facilitate this process. The Office could set up and enforce an annual health and safety inspection. It could also notify neighbors that a home in their neighborhood is being used as an STR. For example, the city could require the property owner notify neighboring houses on all sides of the listing. Furthermore, cities could implement an age restriction to combat issues with noise, such as requiring guests be at least 21 or 24 years old.²⁷⁰

6. Tax collection

Cities should work with hosting platforms to reach agreements where the hosting platform is responsible for collecting and remitting taxes. With Airbnb responsible for doing so, it would alleviate confusion and create a convenient

266. See, e.g., *Heef Realty & Invs., L.L.P. v. City of Cedarburg Bd. of Appeals*, 2015 WI App 23, 361 Wis. 2d 185, 861 N.W.2d 797.

267. See *STR Starter Kit*, *supra* note 49, at 6.

268. See, e.g., PORTLAND, OR., PLANNING & ZONING CODE § 33.207.040(B)(4) (2015).

269. See *supra* note 249 and accompanying text.

270. See, e.g., NASHVILLE, TENN., ZONING CODE § 17.16250(E)(2)(4) (2017).

process that would incentivize compliance for all users. In the interim, the property owner should be responsible for tax collection. If property owners want to use their property as an STR, they should be held accountable to the same standards as hotels when it comes to taxes. A property owner needs to become acquainted with applicable taxes and have a process in place that ensures taxes are collected and remitted to the necessary enforcement area. Cities that do not currently have an enforcement method for tax collection are missing out on extra revenue for the city. As previously mentioned, other cities have used the extra revenue to help the homeless and create affordable housing.²⁷¹

7. Liability

All property owners are responsible for ensuring guests are safe, which includes appropriate liability insurance. Property owners are warned that existing homeowner's insurance likely does not cover situations in which their home is being used as an STR.²⁷² If the property owner has not re-evaluated their liability insurance with their insurance company, they likely are not covered. Some cities have required the property owner to show proof of insurance when applying for an STR permit²⁷³ and have allowed the property owner to substitute insurance with the hosting platforms offer of insurance.²⁷⁴ This practice is not recommended and should not be used because hosting platforms have been known not to follow through on the promise of liability insurance.²⁷⁵ The best method is to require a property owner and a hosting platform to have the appropriate insurance coverage and to not allow them to rely on each other for coverage. Property owners need to be aware of the possible liabilities with having guests stay in their home. Existing insurance policies often cover visitors who may get injured at your home but having paying guests stay in your home is unfortunately not the same.²⁷⁶ Overall, property owners need to be aware of the difference and seek necessary coverage to prevent an expensive shock in the future.

271. AIRBNB CITIZEN, *supra* note 111.

272. See *Understanding Home-Sharing in Wisconsin*, WIS. OFFICE OF THE COMM'R OF INS. (Dec. 2016), <https://oci.wi.gov/Documents/Consumers/PI-235.pdf> [<https://perma.cc/R9TL-XZDQ>].

273. See S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(D) (2016); see also NASHVILLE, TN, ORDINANCE No. BL2014-951 (2015).

274. See S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(D). As previously mentioned, Airbnb provides a \$1 million host guarantee in the event property damage occurs. See *supra* notes 39–41 and accompanying text.

275. See sources cited *supra* note 38 and accompanying text.

276. *Understanding Home-Sharing in Wisconsin*, *supra* note 272.

VI. CONCLUSION

Home sharing is indeed here to stay and will continue to shake up established markets. Whether regulation is at the state or local level, or both, implementation of some form of regulation is needed. Each city, as it should, has different needs it must address and regulation should seek to balance these needs. Cities should tailor regulatory schemes for the benefit of all interested parties, including the property owner, the host, the city, and the guest. Outright prohibition of STRs would not establish benefits for all interested parties. As Governor Scott Walker has said, the state of Wisconsin, as it stands, is not equipped to handle the emerging market of STRs.²⁷⁷ Governor Walker also agrees with regulation rather than prohibition of STRs in Wisconsin in order to encourage potential tourists: “We want to make sure [regulation] is not so prohibitive [that tourists] opt not to come to Wisconsin.”²⁷⁸ Wisconsin cities will continue to struggle when dealing with STRs unless a balance is sought that is fair and manageable. Achieving this balance means implementing a clear regulatory and enforcement structure that protects and benefits all interested parties.

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277. Frank Zufall, *State Also Struggles with STR Regulation, Says Gov. Walker*, SAWYER COUNTY REC. (Dec. 21, 2016), http://www.apg-wi.com/sawyer_county_record/news/regional/state-also...-says-gov-walker/article_9d9cdbce-c707-11e6-8533-27e99491010c.html [<https://perma.cc/2CP8-BKFN>].

278. *Id.*

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