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Making More Better and Less More for Real Property Owners: Achieving "Highest and Best Use" in the Sharing Economy

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What we are seeing across the country is "a tale of two cities."* In some communities, policymakers and regulators embrace new technology and competition. In these communities, consumers and the local economy have seen job creation and growth. A couple in Texas, summoning a ride home on a dark and stormy night from the comfort of their smartphone can speak to the consumer-first convenience of ridesharing. A hard-working family in Illinois, able to pay their mortgage with the extra money earned from Airbnb, can speak to the life-changing flexibility and opportunity brought by home sharing. Unfortunately, in some other communities, policymakers and regulators have put up roadblocks to consumer choice and competition. In these areas, the community is worse off when arbitrary barriers are placed on new entrants. Competition is stamped out, growth is stifled, and opportunities are lost.

> *"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only." *A Tale of Two Cities*, Charles Dickens, English novelist (1812-1870).

Testimony of Michael Beckerman, President & CEO, Internet Association, September 29, 2015, Hearing Before the Subcommittee on Commerce, Manufacturing, and Trade of the Committee on Energy and Commerce, H.R., 114th Cong., 1st Sess., September 29, 2015 (hereinafter, the "*Hearing on Sharing Economy*").

Members of the Internet Association include *Airbnb, Amazon, Auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, IAC, Intuit, Unkedin, Lyft, Monster Worldwide, Netflix, Pandora,* and *PayPal*. Admittedly not an impartial observer, Michael Beckerman nonetheless grasps the burgeoning economic and social "sharing phenomena" not only in America but worldwide:

> Ridesharing and home sharing get most of the attention, but those business models are just the tip of the iceberg. Companies like *Instacart, Washio, TaskRabbit, GetAround, Handy*, and *ThumbTack* are changing the way we shop, do our laundry, rent cars, and improve our homes. The incredible consumer benefits of the Internet age are matched only by the flexible money earning opportunities for those that opt-in to devoting their time to participation in the sharing economy.

HEARING ON SHARING ECONOMY

Not surprisingly, Mr. Beckerman sees a silver lining in a gold cloud: "These companies have an extraordinary story to tell. Their story is about job creation, economic growth, opportunity, and life changing flexibility." *Hearing on Sharing Economy.* Some commentators take equally upbeat, "pro-sharing" positions, at least regarding economic efficiency in the use of real property assets.

> Airbnb is a freight train that cannot be stopped. It does not matter whether a city likes STRs (short-term rentals) or not: people in the sharing economy will find a way to use them. Companies like Airbnb allow for the everyday homeowner to make some extra money by using his or her own property, and that innovation is something that cities should seek to exploit rather than restrict. STRs are a positive contribution to society, but should not have unbridled power.
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> STRs are not a nuisance to the community and STRs do not undermine the residential character of a neighborhood. STRs are, however, part of the future of real property. Zoning and land use regulations should seek to help companies like Airbnb flourish. Airbnb, in turn, should help cities by forcing their hosts and guests to comply with the local law. The fight between Airbnb and STRs and local governments does not need to exist. They can, and should, cooperate and co-exist, because neither plan on disappearing anytime soon.
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> *The New American Home: A Look at the Legal Issues Surrounding Airbnb and Short-Term Rentals*, 42 Dayton L. Rev. 27 (Spring,

> 2017); Author: Alexander W. Cloonan (hereinafter cited as the "Cloonan Article").

But is the cloud genuinely gold and the lining truly silver? Real estate industry answers range from "absolutely not" to "probably not." The Hotel Association of New York City ("HANYC") proffered the "absolutely not" perspective at the *Hearing on Sharing Economy*:

> Airbnb, Inc. and other companies, such as HomeAway, that are in the business of listing residential properties in New York City for rent for transient lodging purposes. These companies have used their booking platforms to create massive virtual hotels that violate Federal, New York State, and New York City laws.
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> As we explain below, these companies are, at the very least, aiding and abetting violations of the law in New York City, tortiously interfering with contracts between lessees and their landlords, and creating situations that endanger not only the Airbnb guests, but, more critically, the other long-term residents in the apartment buildings who have no say in, and thus, no control over the flood of transient guests in the hallways of their homes. These virtual hotels control thousands of rooms located throughout the City, without any of the safeguards that hotels are required to put into place to protect guests and the community, and without obeying the numerous laws applicable to hotels that address everything from consumer protection to fire safety. These massive virtual hotels comply with none of the construction or fire standards that are dictated for hotels in order to ensure guest safety. As a practical matter, they operate outside the purview of the federal or state laws banning unlawful discrimination and in particular, discrimination against the disabled and their rights to transient lodging. If these virtual hotels pay any transient hotel related taxes at all, they do not pay the same taxes paid by hotels, most notably real estate tax. In short, these companies are operating illegally, putting at risk those who list on their sites, those who book on their sites, and the residents of the buildings who live in the apartment buildings in which they do business.

Hearing on Sharing Economy, HANYC Letter dated September 28, 2015 to Chairman Michael C. Burgess, M.D. Ranking Member Jan Schakowsky.

Not all liberal U.S. cities, however, resist the Airbnb, short-term housing phenomenon:

> Cities like New York City ("NYC") and San Francisco have often been the subjects of comparative analyses for their clear differences in how to handle Airbnb. While NYC has shown an unwillingness to endorse Airbnb, San Francisco is virtually its polar opposite.

Cloonan Article at footnote 5.

Sharing arrangements are also making significant inroads in Chicago. See http://33realty.com/chicagos-growing-airbnb-culture/:

> From extremely modern to high-end boutique, Chicago's neighborhoods are full of unique hotels, but there's a growing trend for accommodations in the city that has nothing to do with hotels. Airbnb changes the way you stay in Chicago, and the options are anything but boring.
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> Airbnb gives property owners with space to rent a place to connect with travelers looking for a place to stay. The owner posts the property with images and details of the rental. Potential renters browse the listings, and when a user finds a place to rent, booking and payment take place online. It's an easy way to rent out your extra space or a vacation home you only use occasionally.

Airbnb benefits for property owners include:

- Meeting people from all over
- Supplementing income
- Easy management of rentals
- Increased profits over long-term rentals
- Renters get a unique experience instead of being limited to hotels.
- Many Airbnb users want to save money over staying in a hotel in the same area.
- Others look for truly unique accommodations in a home-like atmosphere.
- Chicago has some amazing Airbnb locations that wow visitors to the city.

The benefits of using Airbnb for the renters include:

- Personalized attention from hosts
- Excellent customer service from Airbnb
- Option to check reviews before booking
- Often cheaper than hotels
- Locations in neighborhoods to fully experience the culture
- Unique buildings
- Private accommodations.

In the Statement for the Record submitted by the American Hotel & Lodging Association ("AHLA") and the Illinois Hotel & Lodging Association to the U.S. House of Representatives

Energy & Commerce Committee, Subcommittee on Commerce, Manufacturing, and Trade for hearing entitled: 'The Disrupter Series: How the Sharing Economy Creates Jobs, Benefits Consumers, and Raises Policy Questions," 9/29/15, the AHLA was more moderate:

We appreciate Congress and other federal agencies such as the FTC beginning to explore the appropriate federal role regarding regulation and oversight for the "sharing economy." That said, many issues surrounding the emergence of short-term rentals are being decided at the state and local level. To that end, we believe state and local jurisdictions should ensure that:

- Hosts register and obtain a business license and other applicable transient occupancy or vacation rental permits.
- Short-term online companies are not enabling or encouraging illegal activity.
- Basic health, safety and cleanliness standards are met.
- All taxes and fees are paid.
- Zoning laws are followed.
- Appropriate insurance in placed to protect homeowners, guests and communities.

> The hotel industry looks forward to working with Congress, the Administration, and city and state governments to promote these goals and develop policies to ensure that short-term rental platforms, and their users who are engaged in commercial transactions, respect the rules of the road and protect the safety and security of guests and surrounding communities.

Anecdotal wisdom often outpaces regulatory and other bureaucratic pedantic controls.

- See, e.g., Pope, Ways to Prevent Sharing Economy Fraud, tnooz (7/18/16), at https://www.tnooz.com/article/ways-to-prevent-sharing-economy-fraud/ (examples of frauds in the sharing economy).
- See also Airbnb Guest Stories, airbnbHELL:
  - ˜ http://www.airbnbhell.com/airbnb-guest-stories (last visited 8/24/17);
  - ˜ http://www.airbnbhell.com/airbnb-host-stories/ (last visited 8/24/17).
- Airbnb Reviews, Trustpilot, https://www.trustpilot.com/review/ www.airbnb.com (last visited 8/24/17).

Note: complaints on www.AirbnbHell.com are unverified.

Courts are entering the "sharing economy" fracas. In *Watts v. Oak Shores Community Assn*., the court held that a homeowners association ("HOA") may adopt reasonable rules for, and impose fees on, owner-members to control short-term rentals of condominiums. Watts v. Oak Shores Community Association, 235 Cal. App. 4th 466, 185 Cal. Rptr. 3d 376 (2d Dist. 2015). The court upheld an HOA rule providing that the minimum short-term rental must be seven days, along with an annual $325 fee on owners who rented their units.

In the *Watts* case, neither the covenants, conditions and restrictions nor any ancillary documents prohibited the HOA board from adopting rules for short-term rentals, e.g., fees to defray the costs that transient rentals impose on all unit-owners. The *Watts* court held that an annual fee only on owners who rented out their units was fair and reasonable, since all owners should not be required to subsidize other owners' vacation rental businesses. 235 Cal. App. 4th at 468, 473.

The *Watts* court also found that short-term renters cost the HOA members more than long-term renters or permanent residents, based on the evidence as well as experience and common sense so the matter was beyond debate, since compelling evidence established that short-term, transient renters:

- Used common areas more intensely;
- Took more HOA staff time; and
- Were less careful in using the common areas, since they were not concerned with the long-term consequences of abuse. 235 Cal. App. 4th at 473.

Accordingly, the court held that the HOA was entitled to enact fair and reasonable rules to govern short-term transfers to protect the owners' quiet enjoyment of their units and to maintain security. 235 Cal. App. 4th at 473, 475.

In the still muddled world of the "sharing economy," as it may affect a client's interests, owners can unleash the underused utility in their real property and rent those uses without sacrificing or unduly compromising their fee ownership, if they sold or fully leased the property.

Another characteristic of the real property "sharing economy" is that sharing enables exchanges largely between individuals rather than between an individual and a company, or at most, may require merely facilitation by the latter. "Sharing owners" do not, for the most part, engage solely in exclusively renting their property or properties. Such owners also occupy, use, and enjoy the shared properties.

Traditional fee-owned property is fully controlled by, and dedicated to, the owner's interests. In a "sharing economy," occupancy, use and enjoyment are available to more users.

Such proliferation of use and enjoyment allows investment in properties traditionally dedicated to single owner use. Sharing can create "value proliferation" if the property is devoted to a sharing arrangement but begins to blur the line between purely traditional single family residential versus commercial "for profit" uses. New wine requires new wineskins.

With soaring real property values in certain regions of the country, many people may acquire real property that would otherwise be unavailable to them by entering sharing arrangements with non-owner users. Sharing part of the whole (the proverbial "straw in the bundle") is often cheaper and more realistic than buying, using and enjoying the whole bundle.

The real property "sharing economy" can allow individuals who were financially barred from owning certain (or any) real property assets to use and enjoy such otherwise unavailable assets. Thus, lower-income individuals or families can benefit from sharing the real property and effectively lower the effective or real price below the nominal fair market value possible in a traditional purchase deal, to wit, ownership is a more significant barrier if income or wealth are lower, and peer-to-peer rentals can facilitate inclusive and higher quality ownership, empowering owners who receive revenues generated from marketplace supply, and facilitating a more even distribution of consumer and property value, i.e., the property's "highest and best" use.

If regulation drives up sharing costs, however, the foregoing positive effects are reduced. Such actual or potential costs and obligations include, without limitation, the following:

- Obtaining a business license or transient occupancy or vacation rental permits.
- Not enabling or encouraging illegal activities.
- Satisfying basic health, safety and cleanliness standards, which in some states are embodied in the covenants of habitability as well as quiet use and enjoyment.
- Paying ALL taxes and fees.
- Identifying and following all Zoning Laws.
- Carrying appropriate levels of insurance to protect the owner, guests and community.

Sorting out the best of the "sharing economy," from the worst of sharing arrangements, requires knowledge and wisdom, as well as avoiding foolish mistakes. The sharing economy opens and expands more efficient use and enjoyment of real property assets. But owners will not share "straws in the bundle" of rights, if they fear losing more than they gain, upon sharing possession, or lack reasonable legal assurance of right to an effective return.

America's cherished protections of private property ownership can provide the fertile legal soil necessary to grow robust sharing arrangements. Real estate attorneys and their clients would do well to remember the power of ownership as a driver for the sharing principles learned by most of us as early as childhood, which often inform our "sharing instincts" ever since. Regulators should avoid unduly constricting sharing activities. Land use bureaucrats must remain conscious of the reality that over-regulation restricts the very private property rights that have attracted millions of people to the land of freedom and private property rights.

This article outlines the utility of an ownership-sensitive definition for sharing vis-à-vis real property in the sharing paradigm of private ownership. An ownership-sensitive notion of a "sharing economy" can provide the burgeoning "sharing phenomena" with a viable framework of property law while achieving the "highest and best use" of our real property assets.

*This article first appeared in Westlaw's publication entitled Sharing Economy. The publication is part of the Emerging Areas of Practice Series – a new publishing initiative which reduces product to market time to cover emerging areas of the law as they develop. New documents are loaded to Westlaw on a rolling basis as received and content is updated quarterly.**

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