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# First Principles for Regulating the Sharing Economy

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# ARTICLE

## FIRST PRINCIPLES FOR REGULATING THE SHARING ECONOMY

STEPHEN R. MILLER\*

### TABLE OF CONTENTS

I. INTRODUCTION .....	149
II. FIRST PRINCIPLES FOR REGULATING THE SHARING ECONOMY .....	150
A. <i>Principle 1: The Sharing Economy Is Differentiated and Requires a Differentiated Regulatory Response</i> .....	151
B. <i>Principle 2: The Sharing Economy Must Be Daylighted</i> .....	153
C. <i>Principle 3: Regulating the Sharing Economy Requires (the Right Kind of) Information</i> .....	155
D. <i>Principle 4: The Sharing Economy Is Here to Stay (and That Is a Good Thing)</i> .....	156
E. <i>Principle 5: The Sharing Economy Disrupts and Reimagines Established Markets</i> .....	160
F. <i>Principle 6: The Sharing Economy Establishes New Markets (That Established Markets Want To Take Over)</i> .....	164
G. <i>Principle 7: The Sharing Economy Disrupts and Reimagines Established Regulatory Structures</i> .....	165
H. <i>Principle 8: The Sharing Economy Requires a Response beyond Traditional Regulation</i> .....	167
I. <i>Principle 9: The Harm and the Remedy Are Uniquely Challenging To Determine in the Sharing Economy</i> ....	169
J. <i>Principle 10: The Sharing Economy Implicates Diverse Parties, Each of Whom Should Be Considered in Establishing a Regulatory Response</i> .....	172

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- 1. *State and Local Governments* ..... 172
- 2. *Disrupted, Established Market Participant*..... 175
- 3. *The Economic Development Machine* ..... 177
- 4. *Disrupting Market Participant* ..... 179
- 5. *Residential Property Owners and Renters* ..... 181
- 6. *Neighborhoods* ..... 182
- III. EXISTING APPROACHES TO REGULATING THE SHARING ECONOMY ..... 184
  - A. *Bans*..... 184
  - B. *Use Definitions*..... 185
  - C. *Day Limits on STR Market Use* ..... 186
  - D. *Licenses and Permits* ..... 187
  - E. *Registries and Information Sharing* ..... 188
  - F. *Hosting Platform Required to Inform Posting Host of Applicable Law*..... 189
  - G. *Rent Control and the STR Market* ..... 189
  - H. *Taxes, Impact Fees, and Exactions* ..... 189
  - I. *Tax Evasion by Hosts* ..... 190
  - J. *Minimum Standards for Rentals* ..... 190
  - K. *On-site Property Manager* ..... 192
  - L. *Minimum Age* ..... 192
  - M. *Liability Insurance* ..... 192
  - N. *Good Neighbor Regulations: Noise, Parking, Trash* .... 192
  - O. *Compliance with Other Laws*..... 193
  - P. *Stakeholder Participation* ..... 193
  - Q. *Administrative Enforcement* ..... 193
  - R. *Annual City Reporting Requirement on Regulation*..... 194
  - S. *Existing Approaches and First Principles*..... 194
- IV. FUTURE OPTIONS FOR REGULATION ..... 195
  - A. *A Proposal for the STR Market: Transferable Sharing Rights* ..... 196
- V. CONCLUSION: THE ESTABLISHED MARKETS’ ENDGAME ..... 200

*This Article posits ten first principles on which a regulatory response to the sharing economy must rest. Given the rapid diversification of products in the sharing economy, this Article gives particular focus to the short-term rental market, typified by Airbnb, as one lens through which to illustrate these principles. This Article then turns to review existing regulatory responses to the sharing economy. Here again, the Article focuses on regulations related to the short-term rental market with a particular emphasis on the two strictest, existing local government regulatory structures: those of San Francisco, California and Portland, Oregon. This Article next proposes a response beyond such traditional regulatory strategies that are not well suited to regulating the sharing economy. Instead, this Article proposes a markets-based mechanism, transferable sharing rights, which is better suited to internalize externalities in the short-term rental market. Finally, this Article examines the corporatization of the sharing movement and the implications for regulations as sharing evolves from a peer-to-peer enterprise to a place where established market participants seek to assert themselves in the sharing economy’s new domains.*

## I. INTRODUCTION

The sharing economy is causing a seismic shift in the structure of retail and service businesses. The change is coming so quickly that it is hard to contemplate its scope. A recent report on the sharing economy found the following, for an average day in August 2014: 157,143 Uber rides; 66,666 Lyft rides; 10 million BlaBlaCar travel miles; \$2 million worth of ELance-oDesk work; 6,666 ELance-oDesk job postings; more than 25,000 people who earned income with TaskRabbit; 16,666 Blue Apron meals served; 1,500 Munchery meals delivered from a shared kitchen; 13 million available Fon-shared Wifi hot spots; 100,000 items traded on Listia; 247,000 items sold on Etsy; \$285,000 of funding raised on Indiegogo; 55 campaigns successfully funded on Kickstarter; \$8.7 million granted in peer-to-peer loans on LendingClub; a \$217 average gross by HomeAway hosts; and 375,000 people staying in Airbnb rooms, up from 140,000 per day the previous year.<sup>1</sup> None of these businesses existed a decade ago, and most did not even exist three years ago.<sup>2</sup>

Despite this rapid growth in the sharing economy, there has been little discussion within the academic literature of the sharing economy's import. There has been almost no discussion of how the sharing economy businesses relate to existing local government regulatory structures,<sup>3</sup> which is a surprise given that many sharing economy businesses have violated state or local government laws.<sup>4</sup> This Article seeks to begin a conversation about this rapidly evolving part of the economy while also addressing how, or if, the mass scale of the sharing economies' non-compliance with local government laws can be rectified.

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<sup>1</sup> Jeremiah Owyang, *Infographic: A Day in the Life of the Collaborative Economy*, WEB STRATEGIST (Sept. 29, 2014), <http://www.web-strategist.com/blog/2014/09/29/a-day-in-the-life-of/> [http://perma.cc/N5NN-FJQC].

<sup>2</sup> See, e.g., *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [http://perma.cc/R79G-FV9T] (noting that Airbnb started in 2008); *About Us*, UBER, <https://www.uber.com/about> [http://perma.cc/4BZ2-8CG5] (noting that Uber started in 2009). See generally Jeremiah Owyang, *Large Companies Ramp Up Adoption in the Collaborative Economy*, WEB STRATEGY BY JEREMIAH OWYANG (July 20, 2014), <http://www.web-strategist.com/blog/2015/07/20/large-companies-ramp-up-adoption-in-the-collaborative-economy/> [http://perma.cc/9SVU-A836] (noting that the large-scale adoption of "collaborative economy" models by "large corporations" increased rapidly after 2013).

<sup>3</sup> Georgios Zervas, Davide Proserpio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 6 (Bos. Univ. Sch. Mgmt., Research Paper No. 2013-16, 2015), <https://www.heartland.org/sites/default/files/airbnb.pdf> [http://perma.cc/6T6L-6HS8] ("Relatively few empirical papers have yet studied the sharing economy and its interplay with incumbent firms offering similar goods or services. . . . As for accommodation sharing, we find a large number of opinion pieces in the popular press and on blogs, but little in the way of academic literature."). A growing literature promises to be on the horizon. See, e.g., Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16 (2015).

<sup>4</sup> Steven T. Jones & Parker Yesko, *Into Thin Air*, S.F. BAY GUARDIAN ONLINE (Aug. 6, 2013), <http://www.sfbg.com/2013/08/06/thin-air> [http://perma.cc/NQ65-9XCH].

This Article uses the term “sharing economy” to describe this new economic activity. Other names for the same movement include “collaborative consumption,” “access-based consumption,” and “the mesh,” to name a few.<sup>5</sup> The sharing economy remains a rapidly evolving, elusive concept. As a reference point, this Article will use the term sharing economy inclusively to mean an “economic model where people are creating and sharing goods, services, space and money with each other.”<sup>6</sup>

As the sharing economy is diverse, any coherent discussion requires some focus. For this reason, this Article will use the short-term rental market (the “STR Market”), typified by Airbnb and similar short-term rental web platforms, as an illustration of both the issues associated with the sharing economy and the ways in which regulation must be tailored to effectively respond to differentiated aspects of the larger sharing economy.

Part II of this Article establishes ten “first principles” for regulating the sharing economy. Part III evaluates existing approaches to regulating the sharing economy. In particular, this section uses the regulatory approaches of San Francisco, California; Portland, Oregon; and several other local governments for the STR Market as indicative of the types of regulations local governments are pursuing in response to the sharing economy. Part IV then proposes a theoretical alternative method for regulating the sharing economy through a markets-based mechanism, referred to here as a “transferable sharing rights” marketplace. Finally, Part V evaluates how regulation of the sharing economy might evolve as established, incumbent market participants move into the new markets created by sharing economy companies.

## II. FIRST PRINCIPLES FOR REGULATING THE SHARING ECONOMY

This section provides ten “first principles,”<sup>7</sup> or building blocks, from which a discussion about regulating the sharing economy might evolve.

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<sup>5</sup> Christopher Smolka & Christoph Hienerth, *The Best of Both Worlds: Conceptualizing Trade-offs between Openness and Closedness for Sharing Economy Models 2* (July 2014) (unpublished), <http://userinnovation.mit.edu/conf2014/282115148171894989/Christopher%20Smolka%20%26%20Christoph%20Hienerth%20-%20Sharing%20Economy%20-%20Paper.pdf> [<http://perma.cc/KTG6-HYU9>].

<sup>6</sup> *See About Us*, CROWD COMPANIES, <http://crowdcompanies.com/about.html> [<http://perma.cc/Z8LN-E4WC>]. This definition is taken from a “brand council” of major corporations that are trying to understand ways for established market participants to participate in the sharing economy. *See id.* The irony of using a definition from established market participants seeking to intervene in peer-to-peer economic exchange is not lost here, and indeed, is discussed in depth in Part V of the Article.

<sup>7</sup> The term “first principle” has its origin with Aristotle’s *Metaphysics*, but its modern usage as a philosophical concept emerges out of the work of René Descartes. *See* RENÉ DESCARTES, *PRINCIPLES OF PHILOSOPHY* xvii–xviii (Valentine Rodger Miller & Reese P. Miller trans., 1982) (“And these [First] Principles must meet two conditions: first, they must be so clear and so evident that the human mind cannot doubt of their truth when it attentively considers them; and second, the knowledge of the other things must depend upon these Principles in such a way that they may be known without the other things, but not vice versa. And then, one must attempt to deduce from these Principles the knowledge of the things which depend upon

None of the principles are intentionally provocative; rather, they seek to define the ways that the sharing economy is transforming commerce, which in turn transforms the nature of the necessary regulatory response. As a result, this section also seeks to provide the first principles on which any future regulation must rest.

A. *Principle 1: The Sharing Economy Is Differentiated and Requires a Differentiated Regulatory Response*

In the popular press, and even in academic circles, there is considerable discussion of the sharing economy as a coherent new industry.<sup>8</sup> Sharing economy businesses do typically maintain certain characteristics. Most commonly, these businesses use an Internet-based application, often called a web platform, which permits individuals to share or sell things where previously the transaction costs would have prohibited such commerce. That change in how the transactions occur tends to focus conversation on the Internet format of the transaction; however, a regulatory response to the sharing economy requires recognition that the types of transactions occurring differ substantially in how they affect the real world and thus require a differentiated regulatory response. Viewed in light of the dramatic number of sharing economy industries, the need for a differentiated response is especially evident. Consider that a 2014 visualization of sharing economy companies, the “Collaborative Economy Honeycomb 2.0,” places over 150 presently-incorporated, sharing-economy companies in twelve market sectors: learning; municipal; money; goods; health and wellness; space; food; utilities; transportation; services; logistics; and corporate.<sup>9</sup> Another website lists over 9,000 sharing economy companies.<sup>10</sup> More sharing economy companies, in even more market sectors, emerge almost daily.

A brief review of the differences between just two large sharing economy companies makes clear the need for a diversified response. For instance, an Uber patron uses the ride-sharing web platform to obtain a ride between locations,<sup>11</sup> while an Airbnb user employs the web platform to find

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them, in such a way that there is nothing in the whole sequence of deductions which one makes from them which is not very manifest.”). The term is used here to connote proposed “irreducible” background concepts against which sharing economy regulation must proceed. The necessity of this exercise, while perhaps seeming either basic or audacious, appears necessary at this point in the legal literature given the paucity of attempts to otherwise address the sharing economy and offer policy solutions.

<sup>8</sup> See, e.g., *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013) <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<http://perma.cc/X5NM-LLZK>].

<sup>9</sup> Jeremiah Owyang, *Collaborative Economy Honeycomb 2—Watch it Grow*, WEB STRATEGIST (Dec. 7, 2014), <http://www.web-strategist.com/blog/2014/12/07/collaborative-economy-honeycomb-2-watch-it-grow/> [<http://perma.cc/YU97-MM9H>].

<sup>10</sup> MESH: THE PULSE OF THE SHARING ECONOMY, <http://meshing.it> [<http://perma.cc/XZ65-CWWJ>] (listing 9,544 sharing economy companies in its directory as of October 2015).

<sup>11</sup> *About Us*, UBER, *supra* note 2 (“By seamlessly connecting riders to drivers through our apps, we make cities more accessible, opening up more possibilities for riders and more busi-

a short-term rental.<sup>12</sup> The fact that the two transactions use a web platform as a means of permitting peer-to-peer commerce does not mean that the two transactions share other similarities, or demand similar regulatory responses. Notably, the nature of the public health and safety concerns associated with ride-sharing and apartment-sharing differ. With Uber, for instance, concerns include the personal safety of the driver and passenger, as well as the vehicle's compliance with relevant safety and environmental fleet rules. With Airbnb, similar questions about the safety of the owner or tenant, as well as the short-term occupant need to be addressed. However, other concerns arise in the short-term rental context, such as potential property theft and associated insurance issues, as well as issues regarding: common areas in multi-unit buildings; compliance with rent-control, leases, and Covenants, Conditions & Restrictions ("CC&Rs") requirements; zoning and building code compliance; tax payments; and neighborhood externalities that could include noise, loitering, or overuse of neighborhood amenities by increasingly transient populations. None of these issues are relevant to a ride-sharing web platform.

Because of the differences between these two industries, most major cities have separate commissions and laws that regulate the existing taxi and hotel industries. For instance, San Francisco maintains the San Francisco Municipal Transportation Agency, and New York City maintains the New York City Taxi and Limousine Commission, both of which specifically regulate taxis.<sup>13</sup> Similarly, both cities maintain special laws that apply only to hotels.<sup>14</sup>

Just as the disrupted industries of taxis and hotels have each had their own regulatory structures to address their unique health and safety concerns for decades, their sharing economy analogues also demand differentiated regulatory responses. The kinds of solutions that will work for regulating Uber, for instance, are unlikely to work for regulating Airbnb. Thus, in contemplating a regulatory response to the sharing economy, the regulator needs to first understand the market segment being disrupted and what new mar-

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ness for drivers. From our founding in 2009 to our launches in hundreds of cities today, Uber's rapidly expanding global presence continues to bring people and their cities closer.").

<sup>12</sup> *About Us*, AIRBNB, *supra* note 2 ("Founded in August of 2008 and based in San Francisco, California, Airbnb is a trusted community marketplace for people to list, discover, and book unique accommodations around the world—online or from a mobile phone.").

<sup>13</sup> *Taxi*, SFMTA, <http://www.sfmta.com/getting-around/taxi> [<http://perma.cc/EH3Z-JCJK>]; *NYC Taxi & Limousine Commission*, CITY OF N.Y., <http://www.nyc.gov/html/tlc> [<http://perma.cc/8DSU-NTCJ>].

<sup>14</sup> *See, e.g.*, S.F., CAL., ADMIN. CODE § 10.100-45 (2000) (discussing payment of Apartment and Hotel License Fee); *id.* § 10E.1 (2013) (requiring informational reporting of net increment or tourist hotel rooms and additional hotel employment in downtown districts); *id.* § 37.2(r)(1) (2015) (applying rent control to hotel stays of longer than thirty-two days); *id.* § 41 (2005) (imposing strict conditions on residential hotel unit conversion and demolition); *New York, NY*, AIRBNB, <https://www.airbnb.com/help/article/868/new-york—ny> [<https://perma.cc/5PZN-ZVVK>] (last updated Aug. 19, 2015).

kets are being created by the sharing economy platform.<sup>15</sup> With that information, the regulator can then begin to contemplate how regulation should respond to permit growth of sharing economy segments in a way that also accounts for the needs of all constituencies and is within the laws as written or newly conceived.

Further, the regulatory response should not be based around cutting one-off deals with specific new market players; instead, the regulatory response should be based upon regulating the entry of the sharing economy platform into the existing market and regulating the new market. For instance, a regulatory response to ride-sharing should not be based solely upon a market-dominant company, such as Uber. Rather, cities should undertake a broader analysis considering the changes caused by the sharing economy technology to transportation services generally. Such changes may implicate taxis and limousines, but may also involve policies and programs like HOV lanes, congestion-pricing mechanisms, and so on. While working with a market-dominant participant can be useful as a means of crafting regulation, the rapid commodification of Internet technology means that such market dominance can quickly disappear. Regulators need to take the time to understand the complexity of the changes wrought by the technology to existing and new markets in order to respond effectively.

### *B. Principle 2: The Sharing Economy Must Be Daylighted*

Despite the rapid rise of the sharing economy, most sharing economy companies often explicitly violate local government ordinances and state statutes.<sup>16</sup> The large number of violations is increasingly problematic; it simply should not be that a growing sector of the economy is illegal. When a growing portion of the economy is illegal, it forces that economic activity underground, where it is more difficult to understand the nature of the economic activity.<sup>17</sup> Further, when danger is associated with an illegal activity,

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<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *Uber, Airbnb and Consequences of the Sharing Economy: Research Roundup*, JOURNALIST'S RESOURCE, <http://journalistsresource.org/studies/economics/business/airbnb-lyft-uber-bike-share-sharing-economy-research-roundup> [<http://perma.cc/5HMD-A2P9>] (last updated Oct. 19, 2015) (providing numerous sources of sharing economy companies' illegality); Press Release, N.Y. State Att'y Gen., A.G. Schneiderman Releases Report Documenting Widespread Illegality Across Airbnb's NYC Listings; Site Dominated By Commercial Users (Oct. 16, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-releases-report-documenting-widespread-illegality-across-airbnbs-nyc> [<http://perma.cc/LU9H-YBJL>] (noting that up to 72% of Airbnb listings are illegal: "Of the 35,354 private, short-term listings, data suggest that 25,532 of them violated either New York State's Multiple Dwelling Law and/or New York City's Administrative Code (zoning laws). Hosts generated approximately \$304 million in revenue from these listings alone and, [sic] Airbnb itself earned almost \$40 million from these transactions.").

<sup>17</sup> See, e.g., Edgar L. Feige, *Underground Activity and Institutional Change: Productive, Protective, and Predatory Behavior in Transition Economies*, in *TRANSFORMING POST-COMMUNIST POLITICAL ECONOMIES* 21, 23 (Joan M. Nelson, Charles Tilly & Lee Walker eds., 1997) ("The effort to conceal underground activity systematically distorts conventional information



the individual engaging in the activity might feel uncomfortable calling the police.<sup>18</sup> For example, when an Uber driver feels uncomfortable with a rider, he may fail to call the police. Further, the more economic activity remains illegal, the more difficult it will be for such companies to obtain investment capital due to regulatory risk.<sup>19</sup> For instance, the requirements to expose liabilities in initial public offerings may limit some sharing economy companies from access to capitalization in public markets.<sup>20</sup> In addition, economies permitted to linger in the shadows of the law face the likelihood of taking on more sinister malfeasance. As Justice Brandeis noted over a century ago, “Sunlight is . . . the best of disinfectants.”<sup>21</sup> For these reasons, the sharing economy needs to be daylighted and brought into the legitimized transactional world.

That said, recognizing the importance of daylighting this economic activity does not necessarily mean brushing away existing regulation without thoughtful consideration. In areas where the sharing economy has grown substantially, regulation needs to be reimagined to achieve the same purposes of the regulations first written for the traditional industry, as well as the new markets created by the sharing economy.

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systems and thereby complicates efforts to observe and monitor the consequences of policy reforms.”); Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 *YALE L.J.* 2289, 2302 (1994) (discussing efforts to “upgrade” informal economies to legal status and prescribing policies for doing so).

<sup>18</sup> See, e.g., Mark T. Berg, Lee Ann Slocum & Rolf Loeber, *Illegal Behavior, Neighborhood Context, and Police Reporting by Victims of Violence*, 50 *J. RES. CRIME & DELINQ.* 75, 93 (2013) (“[O]ffenders’ reluctance to call the police may stem from concerns about implicating themselves in their own unlawful actions or fears that reporting will result in retaliation or damage to their reputation.” (citations omitted)).

<sup>19</sup> See, e.g., *Big Weed*, *NAT’L PUB. RADIO: PLANET MONEY* (Feb. 6, 2015), <http://www.npr.org/sections/money/2015/02/06/384347628/episode-602-big-weed> [<http://perma.cc/5QYT-MHFF>] (describing limited access to bank accounts, loans, and investors in the quasi-legal marijuana industry).

<sup>20</sup> The two major securities laws of the United States—the Securities Act of 1933, codified at 15 U.S.C. §§ 77a–bbbb (2012), and the Securities Exchange Act of 1934, codified at 15 U.S.C. §§ 78a–kk (2012)—both require disclosure of illegal activity by corporations. See generally Eric D. Roiter, *Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws*, 50 *FORDHAM L. REV.* 781, 781 n.1 (1982) (describing applicable provisions in detail). If an issuer is effectuating a registered offering, the registration statement must contain a discussion of company-specific risk factors of which illegal activity would qualify. See Form S-1, 17 C.F.R. § 239.11 (2015); Reg. S-K, 17 C.F.R. § 229.503(c) (2015). If an issuer is effectuating an exemption from registration, some exemptions specifically require the disclosure of risk factors. See, e.g., Rule 502(b)(2)(i)(A), 17 C.F.R. § 230.502 (2015) (for certain Reg. D exemptions). For other exemptions without explicit disclosure requirements, issuers must nonetheless disclose risk factors, lest they be subject to securities fraud liability under Section 10(b) of the Securities Exchange Act of 1934. See 15 U.S.C. § 78j (2012).

<sup>21</sup> Louis D. Brandeis, *What Publicity Can Do*, *HARPER’S WEEKLY*, Dec. 20, 1913, at 10, [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913\\_12\\_20\\_What\\_Publicity\\_Ca.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf) [<http://perma.cc/X7CV-HFCU>].

C. *Principle 3: Regulating the Sharing Economy Requires  
(the Right Kind of) Information*

Because many sharing economy companies operate in a manner contrary to law, their resistance to efforts to obtain information about their practices is not surprising. For instance, New York City and Airbnb have famously fought over the release of data about hosts and travelers using Airbnb's web platform within New York City.<sup>22</sup> Airbnb's desire to retain customer records is understandable, especially in light of potential crackdowns on owners, tenants, and the STR Market generally. On the other hand, economists have long noted the importance of information to effective regulation. Thomas Dietz has noted that governance of complex systems "depends on good, trustworthy information."<sup>23</sup> Dietz further noted that "this information must be congruent in scale" with the events and decisions governed and that information needed is not only about what we do know, but also information about uncertainty and how to "[characterize] the types and magnitudes of this uncertainty."<sup>24</sup> The necessity of these information demands, in order to create effective regulation, equally applies to the sharing economy.

The continued effort to obtain this information will certainly be contentious. For example, in July 2015, the California Public Utilities Commission ("California PUC") fined Uber \$7.3 million for failing to provide information as required by the Commission's new regulations for a "transportation network company," under which Uber would be allowed to operate subject to the Commission's regulations.<sup>25</sup> While the fine is under appeal as of this writing, the types of information that the California PUC sought, and which Uber balked at providing, are illustrative of the daylighting issues at hand. For instance, the California PUC sought information with regard to service provided to those with disabilities that would detail the number and percentage of customers who requested accessible vehicles, and how often Uber was able to comply with requests for accessible vehicles.<sup>26</sup> In an effort to gain information on real or perceived racial or income discrimination in the provision of services, the California PUC similarly sought a verified report detailing the number of rides requested and accepted, as well as the number of rides that were requested but not accepted, by Uber drivers within each

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<sup>22</sup> Zach Miners, *Airbnb to Reveal 124 New York Hosts to Attorney General*, P.C. WORLD (Aug. 24, 2014), <http://www.pcworld.com/article/2598160/airbnb-to-reveal-124-new-york-hosts-to-attorney-general.html> [<http://perma.cc/W8LW-JVNJ>] (noting that the Attorney General sought "unredacted personal information" on 124 New York City Airbnb hosts).

<sup>23</sup> Thomas Dietz et al., *The Struggle to Govern the Commons*, 302 SCI. 1907, 1908 (2003).

<sup>24</sup> *Id.*

<sup>25</sup> See Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services, Rulemaking 12-12-011 (Cal. Pub. Util. Comm'n July 15, 2015) (Presiding Officer's Decision), <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M153/K171/153171722.pdf> [<http://perma.cc/W8CB-XFNJ>].

<sup>26</sup> *Id.* at 23–25, 84.

zip code where Uber operates.<sup>27</sup> The California PUC also requested data on safety violations by drivers;<sup>28</sup> the average and mean number of hours and miles each Uber driver drove for Uber;<sup>29</sup> and the nature of driver trainings that Uber provided.<sup>30</sup> In all cases, the administrative finding held that Uber had failed to meet its informational burden under the regulation.<sup>31</sup> The California PUC's informational requests are indicative of the types of public policy issues that regulators will likely seek to address in sharing economy companies, especially in states with more aggressive regulatory regimes.

*D. Principle 4: The Sharing Economy Is Here to Stay  
(and That Is a Good Thing)*

Several cities, faced with citizen concern, have taken to banning certain sharing economy uses.<sup>32</sup> This response has occurred in both large cities, such as New Orleans with its ban of Airbnb,<sup>33</sup> and mid-sized cities like Boise, which tried to ban Uber.<sup>34</sup> These bans may prove politically popular to a constituency afraid of change, but they are not long-term strategies for addressing the sharing economy. Moreover, they are largely ineffective and potentially embarrassing: Boise's city attorney thought it had a deal with Uber to end the ban several weeks after it became effective; however, that interim agreement was rejected by the city council.<sup>35</sup>

The major problem facing such efforts to ban sharing economy uses is simple: the market for sharing economy uses is insatiable, even in light of its illegality. Another problem may arise for cities seeking to regulate sharing economy uses in conservative states. The Boise example is telling. Rather than continue negotiating with the Democratic-led Boise city government, Uber instead decided to lobby the conservative Idaho Legislature, which decided to pass a statute preempting all local government regulation of trans-

<sup>27</sup> See *id.* at 25–29, 84.

<sup>28</sup> *Id.* at 29–30, 84.

<sup>29</sup> *Id.* at 85.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> In some cases, such as in San Francisco, even the passage of ordinances has not quelled some citizens' concerns, and referenda have been placed on ballots to tighten short-term rental regulations. See, e.g., *City of San Francisco Initiative to Restrict Short-Term Rentals, Proposition F (November 2015)*, BALLOTOPEDIA, [http://ballotpedia.org/City\\_of\\_San\\_Francisco\\_Initiative\\_to\\_Restrict\\_Short-Term\\_Rentals,\\_Proposition\\_F\\_\(November\\_2015\)](http://ballotpedia.org/City_of_San_Francisco_Initiative_to_Restrict_Short-Term_Rentals,_Proposition_F_(November_2015)) [http://perma.cc/D8S8-YSAY].

<sup>33</sup> See *infra* Part III.A.

<sup>34</sup> Zach Kyle, *Uber Defies Boise, Starts Charging*, IDAHO STATESMAN (Dec. 31, 2014), <http://www.idahostatesman.com/news/business/government-and-business/article40834851.html> [http://perma.cc/HR2Q-36KC].

<sup>35</sup> George Prentice, *Uber Agreement With City of Boise Is Still Up on Blocks*, BOISE WKLY. (Feb. 11, 2015), <http://www.boiseweekly.com/CityDesk/archives/2015/02/11/uber-agreement-with-city-of-boise-is-still-up-on-blocks> [http://perma.cc/KL93-YQYW].

portation network companies (“TNCs”), thereby preventing Boise from having any regulatory power over TNCs in its jurisdiction.<sup>36</sup>

Politics aside, the market demand remains the major driver that permits these illegal uses to flourish. The high market demand is indicative of two facts: consumer interest in sharing economy products, and the desire to monetize under-utilized existing uses, such as the extra bedroom in a house. Forbes estimated that “revenue flowing through the sharing economy directly into people’s wallets” would surpass \$3.5 billion in 2013 with annual growth exceeding 25% in the years since.<sup>37</sup> Investors regard the sharing economy as the new “megatrend” and are investing hundreds of million into related start-ups.<sup>38</sup> The STR Market exemplifies this growth. Airbnb claims some 550,000 homes are shared by hosts in cities all over the world and 76% of Airbnb properties are outside the main hotel districts, which leads Airbnb guests to spend money in neighborhoods where they not otherwise stay.<sup>39</sup>

Although local governments are reasonably worried about runaway market growth of an unregulated economy, they should also consider the unprecedented opportunities that the sharing economy provides. Most local governments are jurisdictionally bound; for some cities surrounded by adjacent cities, there is no way to grow but through annexation.<sup>40</sup> As a result, the growth of a local government’s economy is typically based on the nature of land use decisions that provide jobs, taxes, or other resources to the community. These growth-inducing decisions are balanced against those land use decisions that result in municipal costs.<sup>41</sup> Most municipal land use decisions today maintain some component of the monetization of land use, in which a

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<sup>36</sup> 2015 Idaho Sess. Laws 1075, 1078 (adopting into law Idaho Code section 49-3715, which provides: “Notwithstanding any other provision of law, except as provided in section 49-3708, Idaho Code, TNCs and TNC drivers are governed exclusively by this chapter. No municipality or other local entity may impose a tax on, or require a license for, a TNC, a TNC driver, or a vehicle used by a TNC driver where such tax or licenses relates to providing TNC services, or subject a TNC to the municipality or other local entity’s rate, entry, operational or other requirements.”); see also H.B. 262, 63d Leg. (Idaho 2015), <http://www.legislature.idaho.gov/legislation/2015/H0262.htm> [<http://perma.cc/7M7G-FSHQ>].

<sup>37</sup> Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Feb. 11, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/> [<http://perma.cc/7PYA-GQ5L>].

<sup>38</sup> See *infra* Part V and accompanying notes.

<sup>39</sup> David Hantman, *Airbnb Economic Impact Around the World*, AIRBNB (Mar. 25, 2014), <http://publicpolicy.airbnb.com/airbnb-economic-impact-around-the-world/> [<http://perma.cc/APX9-5P98>].

<sup>40</sup> In many states, the growth of cities is further bound by agreements governing growth with counties. See, e.g., CAL. GOV’T CODE § 56425 (West 2015) (governing cities’ extraterritorial “spheres of influence” into adjoining county territory); CECILY TALBERT BARCLAY, CURTIN’S CALIFORNIA LAND USE AND PLANNING LAW 454–71 (29th ed. 2009) (discussing detailed procedures for city annexation and sphere of influence boundary changes).

<sup>41</sup> See *DeVita v. County of Napa*, 889 P.2d 1019, 1036 (Cal. 1995) (“[T]he planning and zoning amendment process has become in many communities one of ‘piecemeal adjustment’ by local planners and local legislators in response to development pressures. . . . This conclusion comports with the well-known phenomenon commonly referred to as the ‘fiscalization of land use,’ whereby planning decisions are frequently driven by the desire of local governments to approve development that will compensate for their diminished tax base in the post-Proposi-

city's build-out of its limited land is based in part upon the relative economic and social costs and benefits derived from particular uses.<sup>42</sup>

The sharing economy, however, offers a second bite at the apple for those jurisdictions that have already built out their land.<sup>43</sup> Indeed, cities routinely spend considerable effort and resources to redevelop areas deemed to be under-performing in terms of their civic use, or more bluntly, their tax performance.<sup>44</sup> The whole impetus of "urban renewal" and "redevelopment" districts, much less "tax increment financing," is to assist areas of cities in developing.<sup>45</sup> Quite often, these districting and funding techniques are used to help urban areas compete against low-cost "greenfield," suburban development patterns that offer easy, cheap access to land.<sup>46</sup> Cities rou-

tion 13 era." (quoting Linda C. Dalton, *Limits of Regulation: Evidence from Local Plan Implementation in California*, 55 J. AM. PLAN. ASS'N 151, 159 (1989)).

<sup>42</sup> See Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 198 (1997); Michelle Wilde Anderson, *Sprawl's Shepherd: The Rural County*, 100 CALIF. L. REV. 365, 376 n.59 (2012); Edwin S. Mills & Wallace E. Oates, *The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior*, in *FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES* 1, 6–11 (Edwin S. Mills & Wallace E. Oates eds., 1975).

<sup>43</sup> This issue is especially important in the context of school funding. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 486 (7th ed. 2008) ("[P]ublic elementary and secondary education is the most important service provided by local governments. . . . [T]here are enormous differences in the amount of taxable property per school-age child among different localities. These differences are the direct result of the uneven geographical distribution of tax-generating properties, such as industrial facilities, commercial centers, and wealth residences.").

<sup>44</sup> See Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 423 (2010) (describing modern antecedents of urban renewal dating back to Haussmann-era Paris).

<sup>45</sup> Perhaps the most important tool in redevelopment is not the declaration of a redevelopment, or "urban renewal" district, but the ability to access tax increment financing that is linked to such districts in most states. See Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 65 (2010) ("Tax increment financing (TIF) is the most widely used local government program for financing economic development in the United States . . .").

<sup>46</sup> Although the original purpose of redevelopment and TIF was to assist urban areas in interlocal competition with suburban areas, many suburban areas now compete aggressively with TIF projects and redevelopment districts of their own. Greg LeRoy, *TIF, Greenfields, and Sprawl: How an Incentive Created to Alleviate Slums Has Come to Subsidize Upscale Malls and New Urbanist Developments*, 60 PLAN. & ENVTL. L. 3, 6 (2008) ("Even if a suburb's economic development strategy is not distorted by a need for sales tax revenue, TIF may become a tool with which it can entice companies to relocate from elsewhere in the same metro area (and thereby win jobs and long-term tax-base growth). When there is no regional mechanism to promote cooperation and TIF's targeting rules have been relaxed so that even newly developing areas can create TIF districts."). It is this abuse of TIF, in part, that has led to some dramatic overhauls of redevelopment, including, most notably, the decision by California Governor Jerry Brown to eliminate redevelopment altogether. See *Redevelopment Agency Dissolution*, CAL. DEP'T FIN., <http://www.dof.ca.gov/redevelopment/> [<http://perma.cc/K5CC-BDG8>] ("As part of the 2011 Budget Act, and in order to protect funding for core public services at the local level, the Legislature approved the dissolution of the state's 400 plus RDAs. After a period of litigation, RDAs were officially dissolved as of February 1, 2012.").

tinely use these financing techniques to provide infrastructure for redevelopment uses.

The sharing economy offers cities a whole new model for development not limited by the availability of land. Most sharing economy uses require very little additional infrastructure because they typically do not increase use to the point where new infrastructure is necessary. As a result, the sharing economy provides cities the potential to redevelop certain areas, for instance, a wholly residential neighborhood into a mostly residential neighborhood with a small, distributed transient occupancy use. Just as the sharing economy industry has illustrated that it is creating value in places once non-monetized, so too does that monetization opportunity provide cities a way to reconceptualize the cities' economies with a much lighter touch than the traditional tools—annexation, redevelopment, infrastructure—have typically required.<sup>47</sup> As a result, the continuing rise of the sharing economy should be a boon to cities, both in terms of economic development for its citizens overall and for the tax revenues—presuming they are ultimately collected on sharing economy uses—that cities sorely need.<sup>48</sup>

Finally, the sharing economy can provide a variety of services to local governments, especially by helping to complete the economic and consumer offerings.<sup>49</sup> Consider the STR Market. Many families with young children prefer vacationing in homes that afford amenities suitable to caring for young children: ready access to a playground, a backyard, a kitchen, a place to change diapers, multiple rooms for sleeping children while adults stay up at night. Providing this kind of travel amenity has been largely impossible for the traditional hotel industry, which derives much of its profits from corporate travel and thus builds its rooms largely to accommodate such travelers. The STR Market opens up travel options precisely in the kinds of communities built for families: residential neighborhoods. Similarly, other sharing economy uses may provide consumer services in demand at a level below traditional market-entrance prices.

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<sup>47</sup> City annexation has long been fought with bitterness. *See, e.g.,* *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) (involving contested annexation of the city of Allegheny, Pennsylvania by Pittsburgh, Pennsylvania). The battle these days is often primarily over taxes, which are typically higher in incorporated areas. *See* JON TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850-1970* 32–63 (1976). *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (describing a theoretical region in which citizen-voters choose their city within the region based upon relative tax and service packages).

<sup>48</sup> Cities' fiscal problems often derive, in great part, from state laws that control the nature and extent of city taxation, as well as restrict cities' authority to borrow money. *See* Rubin Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27 (1956). *See generally* M. DAVID GELFAND, *STATE AND LOCAL GOVERNMENT DEBT FINANCING* (2008).

<sup>49</sup> Small- and mid-sized cities that might not otherwise be able to support a brick-and-mortar retail offering may benefit the most from offerings of the sharing economy because low overhead costs and decentralized distribution may permit a broader array of niche markets in those areas.

These examples illustrate just a few ways that the sharing economy has brought tremendous economic opportunities to individuals, businesses, and even local governments, in addition to the personal satisfaction created by the STR Market for many travelers. For these reasons, among many others, the sharing economy is unlikely to go away any time soon, and that is good for everyone.

*E. Principle 5: The Sharing Economy Disrupts and Reimagines Established Markets*

The sharing economy challenges established markets, sometimes referred to as the “incumbent” market participant.<sup>50</sup> Here again, the STR Market proves a useful example of the sea change the sharing economy is causing within certain sectors of the economy. Take, for instance, the established hotel industry. A recent industry magazine article noted that Marriott (inclusive of Ritz-Carlton, Bulgari, and Fairfield Inn brands) had 675,000 rooms in seventy-four countries, with 2013 revenues of \$12.7 billion and a September 2014 market value of \$20 billion (1.6 times prior year revenues).<sup>51</sup> Hilton (inclusive of the Waldorf-Astoria, Embassy Suites, and Hampton Inn brands) had 679,000 rooms in ninety-one countries, 2013 revenues of \$9.7 billion, and a market value of \$25 billion (about 2.5 times prior year revenues).<sup>52</sup> The InterContinental Hotels Group (inclusive of Crown Plaza and Holiday Inn brands) in 2014 had 674,000 rooms in 100 countries, 2013 revenues of \$1.9 billion, and a market value of \$9 billion (about five times prior year revenues).<sup>53</sup>

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<sup>50</sup> Incumbency, disruption, and related concepts derive from the theory of disruptive innovation that has been popularized by business scholar Clayton Christensen, and which has been largely adopted as the guiding template for sharing economy companies. In simplified terms, Christensen’s theory posits that a disruptive innovation can upend the dominance of an incumbent market participant through offering a product that is: cheaper than the product of the market incumbent, which typically chases higher-profit portions of the market; simple to use while meeting the basic demands of the customer; more reliable than the market incumbent’s basic product; and more convenient than the product of the market participant. See CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA* 221–22 (1997). This Article uses the language of disruptive innovation where relevant to exploring these business concepts; however, the Article will not use this language throughout, as the theory is focused primarily on business growth and does not seek to explore the externalities of business or best approaches to regulating disruptive innovations. In addition, this Article uses the term “established” in place of “incumbency” in most instances to facilitate understanding within a broader, non-business scholarship audience. See generally Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Governmental Policy: The Future of Local Regulation of the “Sharing Economy”* (George Mason L. & Econ. Research Paper Series, Research Paper No. 15-01, 2015) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2549919](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549919) [<http://perma.cc/7WAV-6467>].

<sup>51</sup> Michael A. Cusumano, *How Traditional Firms Must Compete in the Sharing Economy*, 58 COMM. ACM 32, 33 (2015).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

In contrast, as of February 2015, Airbnb had expanded to more than a million listings in 34,000 cities and 190 countries.<sup>54</sup> Airbnb claims over forty million guests since its origin in 2008.<sup>55</sup> Airbnb has also raised \$826 million in venture capital, with a most recent valuation of \$10 billion, about forty times 2013 estimated revenues of \$250 million.<sup>56</sup> In other words, the largest hotel chains had fewer rooms, much slower growth rates, and much lower valuations compared to their revenues than Airbnb.<sup>57</sup>

Further, Airbnb is eating into the established market. An empirical study of the effect of the STR Market on the established hotel market estimated that “each 10% increase in Airbnb supply results in a 0.35% decrease in monthly hotel room revenue, translating to an impact exceeding 13% of revenue in Austin, where Airbnb supply is highest.”<sup>58</sup>

The numbers are sufficient to illustrate the concern that established hotel markets feel towards the STR Market, but it is worth some further investigation to understand some of the complexity of the issue. First, the established market has spent considerable effort in building itself through established means. For instance, a hotel must typically receive some sort of discretionary permit to build and operate under most zoning codes; building codes govern hotels through stringent regulations governing places of transient occupancy.<sup>59</sup> For those hotels with public assembly facilities, such uses are typically subject to the highest scrutiny of uses under building codes.<sup>60</sup>

Second, the established market, even if it bristles at regulation, typically works within the rules or seeks to change the rules to an approach under which they can prosper while sharing economy companies nimbly dodge such regulation.<sup>61</sup> They respond this way for several reasons. The established market typically has a regulator that can cease the established market’s operation through traditional command-and-control regulation,<sup>62</sup> such as a local

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<sup>54</sup> *About Us*, AIRBNB, *supra* note 2; see also Julie Weed, *Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now*, N.Y. TIMES (May 12, 2015), <http://www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html> [<http://perma.cc/G9RW-HEDL>].

<sup>55</sup> *About Us*, AIRBNB, *supra* note 2.

<sup>56</sup> Cusumano, *supra* note 51, at 33.

<sup>57</sup> *Id.*

<sup>58</sup> Zervas, Proserpio & Byers, *supra* note 3, at 1.

<sup>59</sup> See, e.g., S.F., CAL., FIRE CODE § 1103.5.3 (2015) (requiring automatic sprinkler systems for all hotels); *id.* § 1103.7.10 (2015) (requiring certification of fire alarm system in all hotels); S.F., CAL., BUILDING CODE § 1301A (2015) (requiring hotels to participate in water conservation through “installation of water conservation devices in commercial buildings upon the occurrence of specific events and in any event no later than January 1, 2017”).

<sup>60</sup> See S.F., CAL., BUILDING CODE ch. 3 (2015) (incorporating use and occupancy classifications from California Building Code).

<sup>61</sup> Much of the best analysis of the relationship between regulated entities and administrative agencies exists in scholarship on federal agencies. See generally 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, *Administrative Law and Practice* § 4:40 (3d ed. 2015) (describing theories of decision-making in relation to influence of regulated parties and interests of the agencies).

<sup>62</sup> See 1 ENVTL. LAW INST., *LAW OF ENVIRONMENTAL PROTECTION* § 3:25 (2015) (“The pure command and control system is a four-step regulatory process. Three steps are exclu-



government's abatement processes under building codes, food codes, and so on.<sup>63</sup> The sharing economy, on the other hand, is elusive to such regulators, which can make it difficult to use traditional command-and-control processes to regulate the sharing economy uses.<sup>64</sup>

Third, the established market often collaborates within a much broader business and governmental community in an effort to drive the local economy. One way to consider this is what might be considered the "convention complex."<sup>65</sup> In those large cities that compete for major conventions—New York, Chicago, New Orleans, San Diego, and San Francisco among them—hotels are part of a systemic collaboration between government and industry to bring conventions to town.<sup>66</sup> The local government typically pays for the infrastructure of the convention complex—the behemoth convention center itself that often looms at the periphery of a financial district in many cities.<sup>67</sup> The major hotels provide large blocks of transient occupancy space—hotel rooms—that can house large numbers of people easily and efficiently for coordinating groups. The relationship between the parties is often redoubled through special tax arrangements, such as transient occupancy taxes on hotel rooms, which are often earmarked specifically to pay for convention centers and other accoutrements.<sup>68</sup> Similarly, the major arts organizations in a region often receive some funding from local governments derived from art fee taxes on hotels. They also are located near the convention complex because cultural amenities in the host community help drive convention business.<sup>69</sup>

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sively the province of government; one step is exclusively the province of the regulated entity. First, government writes regulations setting general standards for pollution control [or other externality of a facility's operation in non-environmental scenarios]. Second, government writes permits setting particular requirements for individual facilities. Third, regulated private entities operate their facilities in any way they choose so long as they meet the minimum permit requirements. Fourth, if permit conditions are violated, government brings enforcement actions against the private parties." (emphasis omitted).

<sup>63</sup> See, e.g., S.F., CAL., BUILDING CODE § 102A (2015) (setting forth abatement procedures for unsafe buildings, structures, or property).

<sup>64</sup> See *infra* Part III and notes 158–160 (discussing New Orleans' efforts to ban sharing economy uses).

<sup>65</sup> See generally HEYWOOD T. SANDER, CONVENTION CENTER FOLLIES (2014).

<sup>66</sup> See *id.* at 17, 79.

<sup>67</sup> See, e.g., *Development and Financing*, MOSCONE CENTER, <https://www.moscone.com/press/dev.html> [<https://perma.cc/5PGE-2MBX>] ("All phases of The Moscone Center's development were financed by a combination of the proceeds from the sale of revenue bonds and accumulated hotel tax plus earnings on bond proceeds. The bonds were issued by the San Francisco Redevelopment Agency from whom the City leases the facilities. Lease payments drawn from the hotel tax fund are used to pay off the bonds. Project management for all development phases has been provided by the City and County of San Francisco, Department of Public Works.").

<sup>68</sup> See, e.g., *Hotel Occupancy Taxes*, CITY OF AUSTIN TEXAS, <http://austintexas.gov/department/hotel-occupancy-taxes> [<http://perma.cc/JFB4-6Z4G>] ("The revenue derived from the Hotel Occupancy Tax is used to promote tourism and the convention and hotel industry in Austin.").

<sup>69</sup> See, e.g., *About Us / History and Purpose*, GRANTS FOR ARTS, S.F. HOTEL TAX FUND, [http://www.sfgfta.org/about/history\\_and\\_purpose.php](http://www.sfgfta.org/about/history_and_purpose.php) [<http://perma.cc/QA4K-HBR7>] ("Since its inception in 1961, Grants for the Arts has distributed over \$320 million to hundreds of nonprofit cultural organizations in San Francisco.").

The result is often a tremendous economic benefit to other uses—restaurants, taxis, retail shops—that are not explicitly a part of the convention complex.

Thus, resentment toward sharing economy uses derives not only from their stealing market share, but also from their disrupting a long-established way in which cities and their business partners compete against other cities in bidding for major events.<sup>70</sup> (Of course, this could be easily rectified by the sharing economy uses—such as Airbnb—becoming a part of the planning effort. That would, however, likely require the legitimization of the sharing economy use.

Fourth, the disruption of the incumbent industry is not always a one-to-one match. Not all traditional hotel customers prefer a home-sharing arrangement.<sup>71</sup> Moreover, the sharing economy use is further distinguished from the incumbent industry because the sharing economy may disrupt more than one industry. For instance, on-line sharing economy uses like Airbnb not only disrupt the hotel market, but, in many vacation destinations, they have also disrupted the need for property managers and real estate brokers who for generations have been one of the few ways for vacationers to find a rental in a destination that is not within an established hotel use.<sup>72</sup> For this industry, the disruption may be even more complete: much of their business is providing a connection between host and traveler, an information business largely commodified and better performed through the online platforms. This effect illustrates that disruption in the sharing economy is not always a one-to-one tackling of a specific, established market; rather, the flexibility and novelty of sharing economy uses also permits the sharing economy to challenge multiple established markets at once.

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<sup>70</sup> Geoff Donaghy, *Convention Centers Face Fierce Competition*, EXHIBIT CITY NEWS (May 1, 2014), <http://www.exhibitcitynews.com/convention-centers-face-fierce-competition/> [<http://perma.cc/7GPS-CA2M>] (“For the destination, issues such as the quantity and quality of available accommodation, safety and security, ease of access, overall cost structure and attractiveness to delegates are most important. Two rapidly emerging factors for centers in recent years have been technology and connectivity (to respond to growing delegate communications expectations) and the quality of the experience offered in both the center itself and the immediate surrounding area as many delegates spend the bulk of their time in and around the facility.”).

<sup>71</sup> Zervas, Proserpio & Byers, *supra* note 3, at 20 (“Overall, we find that independent hotels, hotels that do not cater to business travelers, and lower-end hotels are all more heavily affected by Airbnb than our respective reference categories, hotels which [sic] without these characteristics.”).

<sup>72</sup> See Jason Blevins, *Resort Communities Weigh Regulation, Enforcement of Vacation Rentals*, DENVER POST (July 19, 2015), [http://www.denverpost.com/business/ci\\_28501988/resort-communities-weigh-regulation-enforcement-vacation-rentals](http://www.denverpost.com/business/ci_28501988/resort-communities-weigh-regulation-enforcement-vacation-rentals) [<http://perma.cc/9EV4-UWFE>] (noting study of Colorado ski towns where up to 41% of housing units were listed on short-term vacation rental sites).

*F. Principle 6: The Sharing Economy Establishes New Markets (That Established Markets Want To Take Over)*

The sharing economy also creates new markets. As the data in the previous section illustrated, the sheer volume of Airbnb rentals far surpasses any loss in market share seen by hotels.<sup>73</sup> Moreover, many vacation destination property managers use Airbnb and similar websites to advertise their properties, perhaps reaching a wider audience through the sites, generating more market demand, and increasing prices and profits for their rentals. This novel use of Airbnb shows that a new market has been created for a new type of travel beyond simply stealing or disrupting from the existing market.

In the fashionable parlance of the business school jargon, these new markets of the sharing economy seem to be “blue oceans.”<sup>74</sup> As the metaphor goes, established markets are typically “red oceans” where businesses must compete for a finite resource, resulting in “blood in the water” because one market participant must suffer for another market participant to prosper.<sup>75</sup> “Blue oceans,” on the other hand, represent the creation of new markets. These new markets are established by market competitors where they have a competitive advantage, allowing that competitor to enjoy the pleasures of the blue ocean market without the deleterious constraints and costs of red ocean markets.<sup>76</sup> At first blush, it may seem that the sharing economy is the archetypal platform for blue ocean markets, but considering the enduring growth of the sharing economy, it may not be so for long.

In a perverse manner, the illegality of the sharing economy may well be what preserves the new entrant’s sharing economy market rather than the technology itself. The illegality of home-sharing keeps the brick-and-mortar industries, such as hotels, from entering into the business because they have physical assets that can be closed or seized by regulators seeking to enjoin illegal action. However, it may soon be that major cities take action to legalize sharing economy uses and even ownership or operation of such units by corporations. If that time comes, it is very likely that the established market participants, such as hotels, would seek to enter into the short-term rental market. For instance, perhaps Marriott would spin-off a unit that specialized in high-end, longer-term rentals of two or three weeks in nicer homes, providing a cleaning service, routinizing the collection and payment of taxes, and providing forms at tax time. In other words, once the “sharing economy” emerges from the shadows of its illegality, the established market participants will seek to grab the new market. The barrier to entry is not high: the web platforms of many sharing economy sites are typically relatively

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<sup>73</sup> See *supra* notes 50–58 and accompanying text.

<sup>74</sup> See generally W. CHAN KIM & RENEE MAUBORGNE, *BLUE OCEAN STRATEGY: HOW TO CREATE UNCONTESTED MARKET SPACE AND MAKE THE COMPETITION IRRELEVANT* (2015).

<sup>75</sup> Zoran Janevski, *Blue Ocean Strategy in E-commerce Businesses*, 1 *ECON. DEV.* 123, 124 (2012).

<sup>76</sup> *Id.*

mundane and already commodified technology. It would likely take months, a year at most, for an established market participant to hire the appropriate tech staff and build such a competitor platform. At least one scholar has already laid forth a business plan for this kind of transition.<sup>77</sup>

Established market participants are already entering into the new market created by the sharing economy. This phenomenon is perhaps most evident in the decision of New York City and Chicago officials to create an app for their established, medallion-bearing taxi fleet.<sup>78</sup> If they proceed to do so, the viability of a company like Uber or Lyft could lessen overnight in those jurisdictions, or else shift them toward other jurisdictions not typically served well by urban taxi systems. Further, a third-party could almost certainly commodify the municipal app for taxis and roll it out in other cities with taxi regulations. In the end, the new markets created by the sharing economy will likely look a lot like the red oceans of the established marketplace once the sharing economy is no longer illegal.

### G. *Principle 7: The Sharing Economy Disrupts and Reimagines Established Regulatory Structures*

For nearly one hundred years, American cities have pursued a “rational” land use policy, primarily through zoning.<sup>79</sup> The archetypal zoning district of the early twentieth century was the “single-use district,”<sup>80</sup> which was typically used in subsequent decades to build out suburban single-family residential communities that sought to zone out “lesser” uses, such as multi-family housing units (thought to be associated with low income or minority communities<sup>81</sup>) or nuisance-causing industrial uses.<sup>82</sup> In subsequent

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<sup>77</sup> Cusumano, *supra* note 51, at 54 (arguing that established firms should compete in the sharing economy); Joan Voight, *Marketers Need to Embrace Peer-to-Peer Activities: The Sharing Economy*, ADWEEK (May 27, 2013), <http://www.adweek.com/news/advertising-branding/marketers-need-embrace-peer-peer-activities-149783> [<http://perma.cc/36YA-NQ28>].

<sup>78</sup> Mike Isaac, *Chicago and New York Officials Look to Build Uber-Like Apps for Taxis*, N.Y. TIMES: BITS (Dec. 11, 2014, 6:14 PM), <http://bits.blogs.nytimes.com/2014/12/11/chicago-and-new-york-officials-look-to-build-uber-like-apps-for-taxis/> [<http://perma.cc/CFE2-EW63>].

<sup>79</sup> See JOHN R. NOLON, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 1–8 (2014) (discussing last 100 years of zoning regulations); Darwin G. Stuart, *Rational Urban Planning: Problems and Prospects*, 5 URB. AFF. REV. 151, 151 (1969) (“According to the rational planning process, the most appropriate and direct means for evaluating alternative urban plans is through a comparison of their relative levels of goal achievement. That plan which contributes most to achieving the goals and values of a given urban area is preferable.”).

<sup>80</sup> See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (validating single-use district zoning).

<sup>81</sup> 12 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 1:5 (4th ed. 2004) (“Residential use, being considered to be the ‘highest use’ in that it was the use to be protected from the intrusion of commerce or the pollution of industry, was the use to which the as-yet-unspoiled areas of the community were restricted.”).

<sup>82</sup> See generally Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994).

decades, the strict single-use district has all but disappeared. Most zoning districts permit some deviation from the “as of right” permitted use through conditional use permits, or some other discretionary permitting scheme.<sup>83</sup> This hybrid approach allows the local government to impose conditions of approval that could ameliorate the conditional use’s effects on the district.<sup>84</sup>

Even with the flexibility such single-use zones have come to exhibit, the system still prioritizes single uses, and the segregation of uses is still especially prominent in the zoning of single-family residential districts. For instance, churches and neighborhood-scale retail are still effectively zoned out of most residential neighborhoods.<sup>85</sup> Churches, once a key community center for neighborhoods, now are typically located in commercial districts next to strip malls, a rationalism of urban space derived from traffic patterns rather than nihilism.<sup>86</sup>

This history, and in particular the intransigence of the single-family residential zone, is an example of the kind of deep-seated regulation that the sharing economy challenges. Many of the STR Market home-sharing units are located in single-family residential zones that explicitly do not permit hotels, much less bed and breakfasts, and often do not permit even de minimis home business uses that may result in increased traffic or business-related vans parked on the street.<sup>87</sup>

In this way, these districts do not discriminate specifically against the STR Market, but against all business activity, with the goal of maintaining a particular vision of residential life. Whether the structures of such zones are socially beneficial is debatable. As the *Cleburne* court<sup>88</sup> noted several decades ago, the primacy of the residential single-family zone can burden indi-

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<sup>83</sup> RATHKOPF & RATHKOPF, *supra* note 81, at § 1:14 (“Perhaps the most significant changes in zoning concept and function are those which have greatly expanded the flexibility of zoning as a land use control device and which have significantly enhanced the discretion of local officials in the operation and administration of zoning code.”).

<sup>84</sup> *Id.*

<sup>85</sup> These problems are almost as old as zoning itself. See generally Paul Brindel, *Zoning Out Religious Institutions*, 32 NOTRE DAME L. REV. 627 (1956).

<sup>86</sup> See Jess Bravin, *Church Turns to Higher Authority in Zoning Battle*, WALL ST. J. (Nov. 16, 2011), <http://www.wsj.com/articles/SB10001424052970204450804576623053812974230> [<http://perma.cc/3T2T-356B>].

<sup>87</sup> See, e.g., S.F., CAL., PLANNING CODE § 202.1 (2015) (providing tables of permitted and conditional uses in residential districts).

<sup>88</sup> See *Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (“In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood. The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.”).

viduals—such as those with developmental disabilities or the elderly who need to live communally—by forcing them out of residential areas and into more institutional settings.<sup>89</sup> The STR Market once again invites a long overdue reconsideration of the viability—and desirability—of the single-family residential zoning district.

Although the STR Market is most threatening to the viability of the single-use residential zone, it is worth noting that the STR Market may also challenge other zoning districts' viability, as well. For instance, the STR Market may well challenge the hotel and tourist districts, now thought to be primarily places of transient occupancy. However, the STR Market could help to reimagine traditional hotels as the loci of longer stays; this change would not be without precedent and, in fact, could resemble how hotels operated a century ago.<sup>90</sup> The STR Market may, in fact, usher in a new era in which extended stays become a part of the hotel districts. This would likely require further amendment of existing laws, such as rent control provisions that currently apply to long-term stays at hotels, but it is indicative of kinds of changes to existing regulatory structures that the STR Market could challenge in the future.

#### *H. Principle 8: The Sharing Economy Requires a Response beyond Traditional Regulation*

The STR Market illustrates how the sharing economy, by reimagining the nature of commercial transactions, requires a regulatory response that transcends established codes that were written to regulate established industries. Established markets—such as hotels—exist primarily as brick-and-mortar commercial institutions working within the confines of business regulation. This principle is true both in the physical environment—such as zoning and building codes—and in the administrative environment—such as business licensing and taxation. On the other hand, most STR Market uses are located in non-commercial spaces that are quite often the most intimate of private spaces: homes and apartments located in neighborhoods.<sup>91</sup> Further, many hosts and travelers engaged in the STR Market often have no experience with the regulatory structures businesses face in either the physical or

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<sup>89</sup> See ROBIN PAUL MALLOY, *LAND USE LAW AND DISABILITY* 239 (2014); Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 *ELDER L.J.* 187, 201 (2002).

<sup>90</sup> PAUL GROTH, *LIVING DOWNTOWN: THE HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES 19–20* (1994) (“A 1930 survey of the more expensive American hotels showed that about a third of guests were mainly transient and about a sixth were mainly permanent. Managers of the remainder called their businesses ‘mixed transient and permanent.’ The degree to which hotels of that era catered to permanent residents varied by the type of hotel: ‘permanent residents lived in an average of 20 percent of the rooms in the most expensive third of American hotels and at least 7.5 percent of the rooms in the remaining cheaper hotels,’ a pattern that was likely seasonally the case in most American cities, if not year round.”).

<sup>91</sup> See *infra* Part III and notes 150–154.

administrative environments.<sup>92</sup> Moreover, most business regulation did not anticipate the rise of the STR Market and the sharing economy, and thus typically does not have de minimis exceptions or easy compliance structures for small uses. These business regulations also do not contemplate regulatory structures for considering how small uses, in aggregate, might produce sizable externalities. It can seem desirable to simply find a way to expand the existing regulations and make them amenable to smaller uses. However, the unique intimacy and informality of the sharing economy make traditional regulation unlikely to succeed.

In the STR Market, traditional command-and-control regulation has three real options: a ban, a regulatory structure that creates a de minimis exception within existing regulations that permits reduced compliance standards, or seemingly over-invasive enforcement.<sup>93</sup> Bans and de minimis exceptions are unlikely to produce compliance, however, because the intimacy and informality of the STR Market mean that most participating in the market would likely take the chance of getting caught.<sup>94</sup> Attempts to crack down on a particular site would likely simply lead to other sites emerging to perform the same service, just as closing down Napster did not eliminate illegal music-sharing in the Nineties and thereafter.<sup>95</sup> Finally, an effort to force compliance would seemingly require intimate enforcement: imagine a special police force unit dragging out STR Market renters on vacation, or liens placed on homes owned by those participating in the STR Market. Such remedies do not seem politically plausible for any but the most active STR Market participants.

Whatever response a city takes, it will likely require some regulatory structure, especially to address the few bad actors that will inevitably participate in the sharing economy, but a command-and-control regulatory response alone is unlikely to have success in controlling the externalities that arise from a sharing economy sector like the STR Market. Instead, the city response will likely require alternative approaches that rely on markets, information, and perhaps even regulatory structures that model the sharing economy more directly.

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<sup>92</sup> See, e.g., *Inspections, Permitting and Licensing: Hotels*, CITY OF CHI., <http://www.cityofchicago.org/city/en/progs/inspectionspermitting/hotels.html> [http://perma.cc/Y7E5-8LNS] (listing numerous permits and zoning requirements necessary to operating a hotel).

<sup>93</sup> See *infra* Part III.

<sup>94</sup> See *infra* Part III and notes 158–160.

<sup>95</sup> See Stephen Witt, *Goodbye to Piracy*, SLATE (June 24, 2015), [http://www.slate.com/articles/arts/music\\_box/2015/06/illegal\\_music\\_sharing\\_is\\_ending\\_how\\_the\\_internet\\_finally\\_grew\\_up\\_and\\_learned.html](http://www.slate.com/articles/arts/music_box/2015/06/illegal_music_sharing_is_ending_how_the_internet_finally_grew_up_and_learned.html) [http://perma.cc/KBH7-LJPK] (detailing broad extent of post-Napster music piracy and how its end arose from the ease and low-cost of music-streaming services rather than regulation).

*I. Principle 9: The Harm and the Remedy Are Uniquely Challenging To Determine in the Sharing Economy*

In many cases of industrial externalities, the harm is easy to identify: an oil tanker runs aground and destroys an ecosystem killing fish and birds; sulphur dioxide creates acid rain, which kills trees; particulate matter emissions from diesel engines lead to increased cancer in the surrounding community. A remedy for such externalities is often also easy to propose: double-hulled tankers;<sup>96</sup> a sulphur-dioxide trading system;<sup>97</sup> or a pollution trap that limits emissions.<sup>98</sup> In such cases, the difficulty often arises in trying to monetize the harm, or finding a remedy where the benefits justify the costs.

In the sharing economy, however, the harm is often uniquely challenging to determine. For instance, in the STR Market, who is harmed by a resident renting his or her home for the weekend to a stranger? Is the neighbor harmed by having a stranger next door even if, as in most cases, the stranger behaves and causes no actionable nuisance behavior? Perhaps the resident of the neighborhood is harmed because the resident's child is scared by sharing a public playground with the stranger's child. Perhaps the character of the neighborhood changes as more residents participate in the STR Market. Perhaps the cumulative effects of multiple STR Market rentals cause market rents to rise, as landlords start to incorporate STR Market rentals into the market rent of residential apartments. Perhaps it could be argued that the community is harmed because its collective regulations, those intended to protect the public health and safety, face a challenge to their integrity through flagrant violation. All of these are plausible harms of the STR Mar-

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<sup>96</sup> See *A Final Farewell to Oil Tankers with Single Hulls*, NAT'L OCEANIC & ATMOSPHERIC ASS'N OFFICE OF RESPONSE & RESTORATION (Dec. 11, 2014), <http://response.restoration.noaa.gov/about/media/final-farewell-oil-tankers-single-hulls.html> [<http://perma.cc/F3QZ-ULUU>] ("January 1, 2015 marks a major milestone in preventing oil spills. That date is the deadline which the landmark Oil Pollution Act of 1990 (OPA-90) specifies for phasing out single-hull tankers in U.S. waters. That act, passed after the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska, required that all new tankers and tank-barges be built with double hulls.").

<sup>97</sup> See *Acid Rain Program*, ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/airmarkets/acid-rain-program> [<http://perma.cc/MG47-GXHR>] ("The ARP was the first national cap and trade program in the country, and it introduced a system of allowance trading that uses market-based incentives to reduce pollution. Reducing emissions using a market-based system provides regulated sources with the flexibility to select the most cost-effective approach to reduce emissions, and has proven to be a highly effective way to achieve emission reductions, meet environmental goals, and improve human health.").

<sup>98</sup> See *Vehicle Emissions Research*, CAL. ENVTL. PROTECTION AGENCY: AIR RESOURCES BOARD, <http://www.arb.ca.gov/research/veh-emissions/veh-emissions.htm> [<http://perma.cc/M2PD-MUEV>] (describing numerous programs intended to reduce particulate matter from diesel engines); Ghassan B. Hamra et al., *Outdoor Particulate Matter Exposure and Lung Cancer: A Systematic Review and Meta-Analysis*, 122 ENVTL. HEALTH PERSP. 906, 906 (2014), <http://ehp.niehs.nih.gov/wp-content/uploads/122/9/ehp.1408092.pdf> [<http://perma.cc/LA4W-8E8A>] ("The results of these analyses, and the decision of the IARC Working Group to classify PM and outdoor air pollution as carcinogenic (Group 1), further justify efforts to reduce exposures to air pollutants that can arise from many sources.").



ket, but all of them ring—at least at this stage in the evolution of the STR Market—as alarmist, the causation highly attenuated, and what harms are describable are primarily based upon psychological harm.<sup>99</sup>

Just as the harm in the sharing economy can be difficult to locate, so, too, is the remedy for the harm difficult to imagine. As noted above, typical regulatory structures do not seem to graft well onto sharing economy uses, such as the STR Market. That does not mean command-and-control regulation is not necessary; it does mean, however, that efforts to remedy whatever harms the sharing economy may place upon others will almost certainly challenge existing regulatory norms.

As local governments begin to develop a regulatory response to the sharing economy, they should consider the nature of the remedy they seek. For instance, in contracts, in some instances the appropriate remedy is to put the non-breaching party back into its position prior to the breach.<sup>100</sup> In this case, it is hard to imagine what that would mean for the STR Market. Arguably it might mean something like making sure the city receives the same amount of transient occupancy tax it was receiving prior to the STR market's entrance into the city. However, because the STR Market not only competes in the existing market but also creates new markets for transient occupancy, simply placing the city back in the same position as it was in prior to the STR Market's arrival may mean the city was receiving less money on each night's stay. On the other hand, if the STR Market were legalized and the city received transient occupancy tax on both the existing market and the new market shares, it would actually be better off than the position it was in prior to the arrival of the STR Market. For these reasons, any remedy that

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<sup>99</sup> Of course, there have been some terrible occurrences associated with short-term rentals, especially as relating to individuals. *See, e.g.*, Ron Lieber, *Airbnb Horror Story Points to Need for Precautions*, N.Y. TIMES (Aug. 14, 2015), <http://www.nytimes.com/2015/08/15/your-money/airbnb-horror-story-points-to-need-for-precautions.html> [<http://perma.cc/AG35-TPG2>] (describing alleged rape of Airbnb guest in shared rental and Airbnb's unwillingness to give exact location of unit during attack). Still, in light of the broad number of rentals occurring on any given day—some 375,000 rentals per day on Airbnb—the stories of bad actors are few and far between and concerns about loss of neighborhood character appear to be limited to a few jurisdictions. *Cf.* Sam Sanders, *Santa Monica Cracks Down On Airbnb, Bans 'Vacation Rentals' Under A Month*, NAT'L PUB. RADIO (May 13, 2015), <http://www.npr.org/sections/thetwo-way/2015/05/13/406587575/santa-monica-cracks-down-on-airbnb-bans-vacation-rentals-under-a-month> [<http://perma.cc/34GC-RG5X>] (quoting mayor as stating: "When a landlord or other property owner takes a unit off the housing market and uses it for vacation rental, there is no permanent resident on the site, we've lost that part of the fabric of our community. . . . And the people who are coming to stay are not directly supervised, so they, being on vacation may, in total innocence, may be coming and going at two or three in the morning. They may be not aware of the noise they're making for the neighbors. The neighbors aren't sure who the people are. You end up with somebody you don't know who has the keys to the building, to the parking garage. You don't know who they're going to bring in with them. And you don't have that connection.").

<sup>100</sup> Richard A. Lord, 24 WILLISTON ON CONTRACTS § 64:1 (4th ed. 2015) ("This goal of compensating the promisee following a breach of contract by the promisor is, to the extent possible through an award of money damages, to place the plaintiff-promisee in as good a position as he or she would have occupied had the defendant-promisor not breached the contract.").

seeks to return the city to a perceived equilibrium prior to the arrival of the disruptive sharing economy use is likely to obscure the role of the sharing economy in city finances and other aspects of city life.

Instead, a more promising approach would be to consider a model of harm and remedy modeled upon the relationship between sharing economy companies and those that use them. This model would be one of shared risk and shared reward. A company like Airbnb needs people to trust that they will match the homeowners with reliable individuals and will ensure that the homeowner gets paid. On the flipside, Airbnb needs to trust that the pictures posted by the homeowner are accurate; otherwise, they will need to expend tremendous energy and money to regulate their postings, a feat that might make the business untenable or at least significantly impede its rapid growth. This mutual trust between the private parties and the sharing economy platform might have seemed almost unimaginable a decade ago, but cultural customs have so radically shifted that now house-sharing is not unusual in the least.

The best form of local government regulation of the sharing economy also may be one that uses as its measure a shared risk and shared reward. Of course, this type of regulation is antithetical to traditional police power regulation,<sup>101</sup> which is not directly based on risk tolerance, but instead upon establishing limits of health and safety that are typically bright lines of compliance. If, instead, the city were to adopt a more flexible approach to regulation, one that responded to risk tolerance for the sharing of private, and even private-seeming public spaces like neighborhoods, the city and its citizens could also become partners in sharing the rewards of this risk tolerance.

Finally, it is also important to note that the difficulty of determining harm and remedy in the sharing economy is a reason why insurance is especially important to the evolution of these new sharing sectors.<sup>102</sup> Certainly harms will arise from time to time—a traveler will break a lamp or, worse, steal expensive jewelry from a host. While mandating insurance on STR Market rentals does not eliminate that harm or make it easier to predict, it does make it easier to remedy the harm. For these reasons, it is worth noting that many of the STR Market web platforms already provide a “homeowner’s guarantee”—though Airbnb is clear that they are not providing insurance, per se—on their rentals, which help to alleviate this concern.<sup>103</sup>

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<sup>101</sup> See generally Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 679–701 (2015) (providing concise history of police regulatory power’s evolution).

<sup>102</sup> See Jason Tanz, *What Makes or Breaks Startups in the Sharing Economy? Insurance Rates*, WIRED (Apr. 28, 2014), <http://www.wired.com/2014/04/sharing-economy-insurance/> [<http://perma.cc/5QQC-NULV>] (“Insurance represents both the lifeblood and the biggest threat to the sharing economy.”).

<sup>103</sup> *Airbnb’s \$1,000,000 Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee> [<https://perma.cc/4CDP-4ZSD>].

*J. Principle 10: The Sharing Economy Implicates Diverse Parties, Each of Whom Should Be Considered in Establishing a Regulatory Response*

Most popular commentary on the sharing economy focuses on two parties: the government as regulator and the disruptive sharing economy company. Depending on a commentator's view, typically one party or the other is a scoundrel. Either the government entity is crippling creativity and innovation with regulations, or the sharing economy use is ruining neighborhoods and driving up rents. This argument misses the larger picture. If the government and the disrupting sharing economy company were the only parties involved, the issue would have been solved a long time ago. Indeed, the only way that the sharing economy will ever find resolution as a viable, legal business venture will be to engage the whole panoply of parties with an interest in the sharing economy and how it changes communities. This section provides an overview of these parties and their relative concerns. The goal here is to be inclusive of potential interests primarily to illustrate that any conception of how the sharing economy is affecting society that focuses solely on regulators and the disruptive market participant will fail to resolve the issue. An approach that acknowledges the legitimate concerns of all of the affected parties is far more likely to yield a result that seems fair to all and has lasting, broad-based community benefits.

*1. State and Local Governments*

State and local governments are often painted as adversaries to the sharing economy, most often cast by those in the sharing economy camp as "regulators" seeking to destroy a burgeoning business.<sup>104</sup> As noted previously, the reality is that most state and local governments would naturally seek to encourage the sharing economy because it permits jurisdictionally-bound entities to grow their economies while adding little in the way of infrastructure costs or annexation battles.<sup>105</sup> The adversarial relationship between state and local governments and the sharing economy arises, however, because of several points of conflict where the sharing economy violates provisions that are generally applicable to all residents and corporations in the city. If the state and local governments were to permit the sharing economy uses to enjoy a holiday from such generally applicable regulations, it would become hard to justify why other uses might not parse their way out

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<sup>104</sup> See, e.g., Stephen J.K. Walters, *Millennials Can Rescue Cities from Their Leftist Rulers*, NAT'L REV. (Aug 3, 2015, 4:00 AM), <http://www.nationalreview.com/article/421897/millennials-can-rescue-cities-their-leftist-rulers-stephen-j-k-walters> [<http://perma.cc/M5N8-3DAL>] ("The nature of firms like Uber and others in the Sharing Economy is disruptive, entrepreneurial, competitive, and non-bureaucratic. It is antithetical to the Soviet-style economic thinking that prevails on the left.")

<sup>105</sup> See *supra* Part II and notes 40–49.

of compliance, as well. Several examples from the STR Market serve to prove the general rule.

First, one of the most obvious concerns for state and local governments is loss of tax revenue. Hotels generate a special type of tax revenue for cities, often referred to as a transient occupancy tax, which can be a major source of revenue for many jurisdictions.<sup>106</sup> This is especially true in states that have adopted some version of property tax caps on residential uses, such as California's Proposition 13, which have resulted in the "fiscalization of land use."<sup>107</sup> For many cities, hotels have become a necessary land use because they permit the city to obtain taxes from non-residents and at a rate that far exceeds typical sales taxes.<sup>108</sup> Further, these transient occupancy taxes are often specifically earmarked for specific traveler-related economic development, such as assistance with convention center maintenance and expansion, and the broader "convention complex" of uses that help cities lure travelers.<sup>109</sup> To the extent that the STR Market is replacing the existing hotel stays, the STR Market is reducing the city's access to this valuable source of taxation, which thus also challenges the ability of cities to continue providing the convention-related infrastructure on which tourist-based cities depend. For instance, San Francisco expects to receive \$11 million a year from Airbnb collecting the city's 14% transient occupancy tax, which is collected in addition to other state taxes.<sup>110</sup> It is not surprising, then, that efforts of cities and states where tourism is a major business have sought to resolve this taxation issue first.

One approach is to have the unit owner calculate and pay the tax. A second approach is to require the sharing economy website, such as Airbnb or VRBO,<sup>111</sup> to calculate and to pay the tax for all of the units rented within the jurisdiction and then remit that payment to the city in one lump sum.<sup>112</sup> An argument against either approach is that the transient occupancy tax structures are aimed at traditional hotels while the de minimis use by a unit

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<sup>106</sup> See *supra* Part II.E and note 68.

<sup>107</sup> See generally Kirk J. Stark, *The Right to Vote on Taxes*, 96 Nw. U. L. REV. 191 (2001) (discussing proliferation of such taxes in California after Proposition 13 and its companion legislation Proposition 218).

<sup>108</sup> See, e.g., Cory Biggs, *Who Runs San Diego: The Use and Abuse of the Transient Occupancy Tax*, SAN DIEGO FREE PRESS (Sept. 3, 2014), <http://sandiegofreepress.org/2014/09/who-runs-san-diego-the-use-and-abuse-of-the-transient-occupancy-tax/> [<http://perma.cc/GZ3K-TPQN>].

<sup>109</sup> See *supra* Part II.E and notes 65–69.

<sup>110</sup> Carolyn Said, *S.F. Could Get \$11 Million a Year When Airbnb Collects Hotel Tax*, S.F.GATE (Sept. 18, 2014, 7:42 AM), <http://www.sfgate.com/business/article/S-F-could-get-11-million-a-year-when-Airbnb-5762838.php> [<http://perma.cc/F8N9-WTNU>].

<sup>111</sup> VRBO.com is another popular site, similar to Airbnb.com, which provides an online platform for on-demand short-term rentals. VRBO.com is owned by HomeAway, which owns numerous brands of on-demand short-term rental platforms targeted at niche markets. See *About Us*, HOMEAWAY, <http://www.homeaway.com/info/about-us> [<http://perma.cc/LF6L-HEKS>] (claiming HomeAway sites offer "over one million live vacation rental listings in 190 countries").

<sup>112</sup> See *infra* Part III.H and note 204–208.

owner “sharing” an apartment for a night is hardly engaged in the tourism trade.<sup>113</sup> However, that argument likely fails when the broader purpose of transient occupancy taxes—collecting revenue on tourism that shifts costs of city services to non-residents—is considered. Even if an STR unit were held to not be within the scope of a transient occupancy tax, it is almost certain that affected local governments would soon revise such laws to bring STR Market uses within their scope.

The issues for state and local government raised by the sharing economy go far beyond taxes, even if taxes remain the most obvious and pressing concern. Among the other concerns for local governments are maintaining the integrity of their zoning and building codes, as well as their licensing procedures, all of which apply generally to those properties in a particular neighborhood or engaging in a particular business.<sup>114</sup> If cities were to decide not to enforce these regulations against sharing economy uses that flagrantly skirt them—New York estimates that 72 percent of Airbnb rentals are illegal<sup>115</sup>—then the general applicability of those laws becomes suspect. Cities would face the problems associated with weak enforcement of the rule of law, most notably, selective enforcement, real or perceived.

There are also deeper considerations cities have that are seldom discussed. For instance, if an STR unit is routinely shared, should the unit be assessed, for tax collection purposes, to reflect that new quasi-commercial use? This question becomes particularly problematic where it is clear that a home is no longer being used primarily as a dwelling unit, but instead primarily as a short-term rental use.

Cities also have concerns about the viability and integrity of their affordable housing policies. Many affordable housing units, or rent-controlled units, provide renters the opportunity to live in below-market rent apartments in areas of the city they could not otherwise afford. If those units are then used either substantively, or even in part, as a part of the STR Market, that could jeopardize the integrity of a number of affordable housing policies.<sup>116</sup>

A related housing concern is anti-eviction statutes and ordinances, which typically pertain to those who rent for more than a certain number of days, normally around 30 days.<sup>117</sup> These laws are intended to protect tenants; however, as has been publicized through an infamous California example, travelers in the STR Market may seek to obtain access to a dwelling unit through the STR Market, pay for the apartment for longer than the time necessary for the tenant policy to apply, and then refuse to pay any more and

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<sup>113</sup> See *infra* Part III.S and note 241.

<sup>114</sup> See *infra* Part III.D.

<sup>115</sup> See N.Y. STATE OFFICE OF THE ATT'Y GEN., AIRBNB IN THE CITY (2014).

<sup>116</sup> See Carolyn Said, *S.F. Cracks Down on Airbnb Rentals*, S.F.GATE (Apr. 7, 2014, 2:26 PM), <http://www.sfgate.com/bayarea/article/S-F-cracks-down-on-Airbnb-rentals-5381237.php> [<http://perma.cc/ZH6A-T943>].

<sup>117</sup> See *infra* Part III.G and note 203.

“squat” the property until the unit owner goes through expensive and time-consuming tenant eviction proceedings.<sup>118</sup> Clearly, cities also have an interest in protecting their citizens from abuse of the STR Market in this way.

This brief analysis indicates that while taxes remain the most important issue for many states and cities with regard to the sharing economy, these governments justifiably have a significant number of regulatory issues that must be thought through to effectively integrate the STR Market, much less sharing economy uses generally, into the legal markets with which these uses compete.

## 2. *Disrupted, Established Market Participant*

Almost every “sharing economy” business has a non-sharing economy equivalent. While the sharing economy revolutionized access to commerce for underutilized goods, the sharing economy seldom invents needs or markets out of whole cloth. Most sharing economy businesses replicate services already offered, in some fashion, by a non-sharing economy business.<sup>119</sup>

On the other hand, the sharing economy web platforms often have substantial differences from their non-sharing economy counterparts. A common distinction at this time is that the sharing economy permits individuals, through intermediary sites like Airbnb, to compete against major corporations in well-established hotel markets that might otherwise shut out small market participants. The theory of incumbency includes the notion that the established market participant may use governmental regulatory structures—codes, licenses, and so on—as a way to keep out competition or to otherwise limit it to a small group of companies that work together to maintain a high barrier to entry.<sup>120</sup> For instance, the hotel trade is highly regulated, which at first would appear to be for health and safety purposes of a transient population that cannot otherwise gain access to the political process to ensure that they have a safe place to sleep for the night. Others, however, would note that the very same set of regulations makes it difficult for individuals, or even small companies, to start hotels: the costs of regulatory compliance for a small company might be crushing or prohibitive, whereas a large company

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<sup>118</sup> Julie Bort, *Airbnb Host: A Guest Is Squatting In My Condo and I Can't Get Him to Leave*, BUSINESS INSIDER (July 21, 2014), <http://www.businessinsider.com/airbnb-host-cant-get-squatter-to-leave-2014-7#ixzz3S4Kbui4t> [<http://perma.cc/82ZL-4PW9>].

<sup>119</sup> See *supra* Part II.E.

<sup>120</sup> Even those that favor government regulation have worried over the rise of licensure as a means of protecting established business interests. See DEP'T OF THE TREASURY OFFICE OF ECON. POLICY, COUNCIL OF ECON. ADVISERS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 3 (July 2015) [hereinafter OCCUPATIONAL LICENSING], [https://www.whitehouse.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) [<https://perma.cc/3H9L-TZNA>] (“More than one-quarter of U.S. workers now require a license to do their jobs, with most of these workers licensed by the States. The share of workers licensed at the State level has risen five-fold since the 1950s.”).

can easily absorb the “cost of doing business.”<sup>121</sup> To those that see a plot in such regulatory structures and are cynical as to the health and safety aims, there is delight in the sharing economies’ flagrant violation of these regulatory structures.

There is, however, a problem with the narrative. The term incumbency is as misleading as the term “the sharing economy” is in understanding the revolution underway. As several scholars and businesses are starting to realize, the “incumbent” market is just as interested in participating in the “sharing economy” as the “sharing economy” is in taking away market share from the incumbent market.<sup>122</sup> Therefore, while it might be easy to view the situation as a David and Goliath tale of fighting for a defined market share, the truth is likely more complicated. The inevitability of the established market’s entrance into the sharing economy will be discussed more later; however, there is perhaps no better way to illustrate an incumbent’s entrance into the sharing economy than to note that New York City and Chicago have already begun work on apps that would allow their medallion-bearing taxis to e-hail taxis just like Uber or Lyft users do;<sup>123</sup> similarly, theorists of hotel management are already contemplating market strategies for how hotels can enter the neighborhood-based STR Market as it becomes legalized.<sup>124</sup>

It is also worth noting that, in some cases, a major concern for established industries is how the sharing economy maintains a competitive advantage through its illegality. For instance, a high-end hotel appealing to a couple visiting a city for a weekend might compete with an STR Market in a fashionable neighborhood. Assuming the hotel and the STR Market units are equally attractive and equally priced, the STR Market still maintains a market advantage in most locations where transient occupancy taxes are not collected on the STR unit. In cities like San Francisco or New York where transient occupancy taxes (often up to 15%), when coupled with other state and local taxes (often up to 10%), can approach a total taxation rate of 25%,<sup>125</sup> that means the equally attractive, equally priced STR unit maintains

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<sup>121</sup> This phenomenon, in which up-front fees of development become part of the price of real estate product, have been especially well researched and heavily discussed in the residential development area. See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 212 (2006) (“The explanation of why developers are able to pass on the impact fee cost plus an additional increment appears to rest upon consumer willingness to pay for established, in-place services that will benefit them immediately in a predictable way.”). The same is applicable to other development fees.

<sup>122</sup> See *supra* Part II.F and note 77.

<sup>123</sup> See Isaac, *supra* note 78.

<sup>124</sup> Cusumano, *supra* note 51, at 34 (“There is also nothing to stop traditional companies from becoming more like their sharing-economy counterparts.”).

<sup>125</sup> See Said, *supra* note 110 (discussing rates of transient occupancy tax collected by Airbnb for several local governments); *Hotel Room Tax*, CITY & CNTY. S.F., CAL. CONTROLLER’S OFF., <http://www.sfcontroller.org/Modules/ShowDocument.aspx?documentid=242> [<http://perma.cc/RJ2U-DTAA>] (noting receipts of transient occupancy tax in recent years in excess of \$240 million).

a 25% cost advantage simply because of failure to collect the tax. A recent study of the price of Airbnb rentals compared to hotels found that an Airbnb rental for an entire apartment cost, on average, 21% less than a hotel room; with the 25% taxes not paid on an STR unit, the differential could approach 50%.<sup>126</sup> Thus, the established market has an interest in ensuring that the results of such illegal behavior do not alter the market in a way that disfavors the established market's product.

It is sufficient here to make these several, simple observations. The sharing economy competes with established markets. The sharing economy is unlikely to wholly eliminate the established market; for instance, the elite business traveler hotel is unlikely to see pressure from the STR Market any time soon, even if the budget hotels feel a greater share of that market competition. These principles are illustrated by a recent study, noted earlier, which found that a 1% increase in Airbnb listings in Texas results in a 0.05% decrease in quarterly hotel revenues, and that the impacts are distributed unevenly across the industry, with lower-end hotels and hotels not catering to business travelers being the most affected.<sup>127</sup> Finally, the established market participant is just as interested in participating in the sharing economy market space as the sharing economy is in participating in the market space of the established market.

### 3. *The Economic Development Machine*

Another reason that the sharing economy has encountered resistance is that there is, in many cities, a coalescence of business and civic interests that seek to promote a coherent image of the city.<sup>128</sup> This is especially true in the tourism sector and the overlapping economic development sectors of civic life, both of which share the job of selling an image of the city that requires a certain discipline among an array of retailers, merchants, and city officials. As noted previously, this alignment is particularly prevalent in those cities that compete for conventions that demand a unique infrastructure able to routinely accommodate and please large numbers of people at a time.<sup>129</sup> Thus, it is notable that the founding myth of Airbnb involves a convention. Purportedly, the founders were two young architects living in San Francisco when a major convention came to town; they needed help paying the rent and decided to try hosting people for the convention.<sup>130</sup>

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<sup>126</sup> *Airbnb vs Hotels: A Price Comparison*, PRICEECONOMICS.COM (June 27, 2013), <http://priceeconomics.com/hotels/> [<http://perma.cc/F56H-EK57>].

<sup>127</sup> See Zervas, Proserpio & Byers, *supra* note 3, at 1.

<sup>128</sup> See generally CHESTER HARTMAN, CITY FOR SALE: THE TRANSFORMATION OF SAN FRANCISCO (2002) (describing how the business council effectively determined the future of major infrastructure in the Bay Area after World War II).

<sup>129</sup> See *supra* Part II.E and notes 65–70.

<sup>130</sup> See Jessica Salter, *Airbnb: The story behind the \$1.3bn room-letting website*, TELEGRAPH (Sept. 7, 2012), <http://www.telegraph.co.uk/technology/news/9525267/Airbnb-The-story-behind-the-1.3bn-room-letting-website.html> [<http://perma.cc/9PEK-BASF>] (“Airbnb



These coalitions often also include labor unions, which in the more liberal cities have workers in hotels and other parts of the convention complex.<sup>131</sup> Those unions take a strong interest in anything that would reduce the number of rooms at unionized hotels because of its commensurate effect on union members; for instance, unions have taken positions on older, landmark hotels' efforts to modernize their often-smaller-than-current-market rooms.<sup>132</sup> Thus, labor supports the hotels that face pressure and opposes loss of hotel night stays from sharing economy companies facilitating the STR Market, which do not provide union jobs.<sup>133</sup>

Some invested in the David and Goliath myth of the sharing economy versus incumbent industries may view the only answer for the sharing economy to be one that breaks up these coalitions. That would be naïve. Most of these coalitions are based around very practical, non-ideological pursuits of common success.<sup>134</sup> In many cases, it might well be easy for sharing economy uses to position themselves as part of economic development, and even a convention-oriented vision of a city. While some hoteliers might scoff at the STR Market and its inclusion, the broader civic and retail coalition would almost certainly welcome it as a participant given the sharing economies' popularity and ability to open up new markets throughout the city.

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started in 2007 when Joe Gebbia and Brian Chesky, then both 27, who had met five years earlier at Rhode Island School of Design, were struggling to pay their rent. There was a design conference coming to San Francisco and the city's hotels were fully booked, so they came up with the idea of renting out three airbeds on their living-room floor and cooking their guests breakfast. The next day they created a website, [airbedandbreakfast.com](http://airbedandbreakfast.com); six days later they had a 30-year-old Indian man, a 35-year-old woman from Boston and a 45-year-old father of four from Utah sleeping on their floor. They charged \$80 each a night. [According to founder Brian Chesky,] '[a]s we were waving these people goodbye Joe and I looked at each other and thought, there's got to be a bigger idea here.'").

<sup>131</sup> See *Hotel Workers Win \$15.37 Hotel Minimum Wage in Los Angeles*, UNITE HERE! (Oct. 14, 2014), <http://unitehere.org/unite-here-helps-win-15-37-hotel-minimum-wage-in-los-angeles/> [<http://perma.cc/Y6JB-ME67>] ("In September 2014, the Los Angeles City Council voted 12-3 in favor of a historic new law creating a \$15.37 per hour minimum wage for people working in big hotels in Los Angeles.").

<sup>132</sup> See generally Stuart R. Korshak, *Negotiating Trust in the San Francisco Hotel Industry*, KORSHAK, KRACOFF, KONG & SUGANO, LLP, <http://www.kkks.com/articles/Negotiating%20Trust%20in%20the%20SF%20Hotel%20Industry.pdf> [<http://perma.cc/8T6N-MA8A>].

<sup>133</sup> See *EXCLUSIVE: Airbnb Wants to Pay Taxes and Become a Legal Hotel, but Faces Opposition from an Affordable Housing Group*, N.Y. DAILY NEWS (Apr. 21, 2014, 2:30 AM), <http://www.nydailynews.com/new-york/airbnb-bids-pay-taxes-faces-opposition-article-1.1763073> [<http://perma.cc/8WAG-XHM4>] ("The Real Affordability for All Coalition—made up of 50 tenant advocate and labor union groups—is accusing Airbnb of 'throwing gasoline on a fire' by contributing to a growing affordable housing crisis.").

<sup>134</sup> See, e.g., *About Us*, BAY AREA COUNCIL, <http://www.bayareacouncil.org/about-us/> [<http://perma.cc/5M8L-JG8S>] ("Founded in 1945, as a way for the region's business community and like-minded individuals to concentrate and coordinate their efforts, the Bay Area Council is widely respected by elected officials, policy makers and other civic leaders as the regional voice of business in the Bay Area.").

#### 4. *Disrupting Market Participant*

The disruptive market participant, such as Airbnb, has an obvious interest: to make money. However, the sharing economy's relation to and participation in the market has several other important elements that should be noted.

First, the sharing economy companies—typically web platforms with mobile phone app components—are to be commended for the use of technology to radically open up new markets and provide access to underutilized resources. In the case of Airbnb and the STR Market, such uses were able to, in a short time, provide a trusted platform with which millions of people around the world chose to open up their private spaces and trust them to strangers in ways previously inconceivable.<sup>135</sup> That said, the technology these sites utilize is, ultimately, not complicated. Indeed, numerous competitors now crowd the STR Market, just as numerous competitors crowd all of the sharing economy spaces. For the STR Market in particular, there are few hard costs beyond the maintenance of the website and customer relations.<sup>136</sup> That low barrier to entry helped with the stratospheric rise of sharing economy sites, such as Airbnb; however, it also means that other companies that want to join the space similarly do not face high barriers to entry. This means that sharing economy companies face a real threat of commodification. There is little to differentiate Airbnb from VRBO or any other travel-related sharing website other than branding. Indeed, a recent article noted eight competitors already offer an identical web platform to Airbnb, most of which are targeted to a specific segment of the STR Market.<sup>137</sup> Among these competitors has arisen an aggregator site, AlltheRooms.com, which searches all of the sites and displays them in one viewing the way that Kayak.com aggregates airline tickets.<sup>138</sup>

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<sup>135</sup> Cf. Transcript, *Episode 533: It's Not the Product, It's the Person*, THIS AMERICAN LIFE (Sept. 5, 2014), <http://www.thisamericanlife.org/radio-archives/episode/533/transcript> [<http://perma.cc/F3XZ-QQZR>] (quoting Silicon Valley investor Chris Sacca telling story of first hearing the Airbnb pitch: "Airbnb, multi-billion-dollar business, right? I was one of the first people to see the Airbnb page. And I pulled them aside and said, guys, this is super dangerous. You're renting out a room in somebody's house while they're still there? Somebody's going to get raped or murdered, and the blood is gonna be on your hands. There's no way this'll succeed. That's a \$10 billion business today that I'm not an investor in.")

<sup>136</sup> See Barry Libert, Yoram (Jerry) Wind & Megan Beck Fenley, *What Airbnb, Uber and Alibaba Have in Common*, HARV. BUS. REV.: STRATEGY (Nov. 20, 2014), <https://hbr.org/2014/11/what-airbnb-uber-and-alibaba-have-in-common> [<https://perma.cc/7PJ4-2DA3>] ("[Airbnb, Uber, and Alibaba] represent a new trend in the types of business that investors prefer. Leaders of more traditional companies are left wondering why these upstarts merit such high valuations. Are they more profitable? Do they see faster growth? Do they have higher return on assets and lower marginal costs? Our answer is yes—to all of the above.")

<sup>137</sup> See Stephanie Rosenbloom, *Giving Airbnb a Run for Its Money*, N.Y. TIMES (Feb. 10, 2015), <http://www.nytimes.com/2015/02/15/travel/giving-airbnb-a-run-for-its-money.html?ref=travel&r=0> [<http://perma.cc/7LLK-HDRN>].

<sup>138</sup> *Id.*

Second, because of that low barrier to entry for competitors, sharing economy uses can grow primarily through increasing the number of units available for rent. As such, market growth for such companies depends upon either more people choosing to share their units or, if that natural market does not exist, then upon the STR Market getting into the world of real estate. The web platforms could enter the brick-and-mortar world in one of two ways: either the web platform begins to purchase or build new STR Market units, or they indirectly convince the market to build units, owned by private developers or speculators, that are primarily used for the STR Market. Both of these choices are precarious for the STR Market in particular because they challenge the narrative of “sharing” and begin to make the STR Market look more like ordinary real estate speculation.<sup>139</sup>

Third, the commodification pressure of the industry means that the various sharing economy businesses are essentially competing on price. To maximize profits, they have incentives to keep their operations as simple as possible. For instance, even though it is conceivably simple for an operation like Airbnb to collect taxes on rentals, just as a parking company collects taxes on downtown parking spaces,<sup>140</sup> the market in which Airbnb and its competitors engage is fiercely price-conscious.<sup>141</sup> Because of that, unless Airbnb can be assured that all others in the STR Market will participate in the collection of taxes, they will not want to do so because it makes their rentals substantially higher in total cost. The only exception to this result might be in the case where a company like Airbnb would be able to gain some market advantage by being the easiest method for an STR Market rental to achieve compliance in a highly regulated market. For instance, an aggressive regulatory approach going after those in the STR Market not paying transient occupancy taxes in a city would likely encourage participants to seek out a company that eased compliance headaches.

Finally, in some cases, sharing economy uses have a substantial market opportunity, in large part because of—not in spite of—the illegality of their product. For instance, in the STR Market, Airbnb and its competitors were able to assert dominance because of the illegality of what they offer: transient occupancy primarily in residential neighborhoods that do not pay transient occupancy taxes.<sup>142</sup> This is a market in which major hoteliers would

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<sup>139</sup> See *infra* Part V (describing use of Airbnb site by commercial operators to run de facto hotels in residential neighborhoods).

<sup>140</sup> See S.F., CAL., BUS. & TAX REG. CODE § 6.6-1(f) (2015) (requiring operators of parking garages to collect, report, and remit any tax imposed to city).

<sup>141</sup> Carolyn Said, *Airbnb Spawns Array of Companies to Aid Hosts*, S.F.GATE (Mar. 2, 2014, 4:58 PM), <http://www.sfgate.com/business/article/Airbnb-spawns-array-of-companies-to-aid-hosts-5282838.php> [<http://perma.cc/S54N-KAMD>] (discussing companies emerging to add value to commodified listings).

<sup>142</sup> See S.F., CAL., BUS. & TAX REG. CODE art. 7 (2015); *Tax on Transient Occupancy of Hotel Rooms*, CITY & COUNTY OF S.F., TREASURER & TAX COLLECTOR, <http://sftreasurer.org/tax-transient-occupancy-hotel-rooms> [<http://perma.cc/D533-ZKL4>] (interpreting code provisions).

love to compete; however, publicly-traded companies have never sought to engage in such a business because publicly traded companies would face substantial local regulatory issues, as well as potential securities violations for engaging in illegal behavior.<sup>143</sup> As a result, the illegality of the sharing economy uses, in fact, provides a shield for these companies from their more established counterparts that participate in, and dominate, the legal markets like hoteliers.

### 5. *Residential Property Owners and Renters*

The sharing economy raises a number of important issues with regard to established personal and real property relationships. Because this Article focuses on the STR Market, this section will focus on several aspects of how the sharing economy can require owners of real property to renegotiate well-established relationships that, most likely, did not contemplate sharing economy uses at the time of their creation. In addition, such issues provide a road map for future real property transactions because all such transactions must expect that sharing uses are reasonably foreseeable within the general population in the future.<sup>144</sup>

One place where sharing economy uses especially rise to the fore is in multi-unit buildings. Most multi-unit buildings have some sort of document that governs, at a minimum, how common areas—swimming pools, common hallways, foyers, laundry rooms, elevators, and so on—will be managed.<sup>145</sup> Such documents also typically provide some mechanism for negotiating the common quiet enjoyment of such units. Further, such documents tend to have requirements related to subletting of a unit.<sup>146</sup> Violation of all of these terms, among others, could be implicated by rental of a unit in the STR Market, and thus subject a unit owner to potential fines by the boards that oversee the community rules. Because the STR Market has focused upon dense, urban areas, these types of issues have tended to arise primarily within the multi-unit building context. However, they might also just as easily apply in suburban neighborhoods that are governed by CC&Rs that are overseen by a homeowner's association. Documents governing common spaces in multi-unit buildings, as well as CC&Rs for homeowner's as-

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<sup>143</sup> See *supra* Part II and note 20 (describing applicable securities regulations related to reporting of illegal activity).

<sup>144</sup> In many states, realtor groups maintain standardized forms that, typically, inure to the benefit of the landlord and are maintained on a regular basis to keep up with changes in state statutory and case law. Although these model forms may be considered to address sharing economy uses through broad provisions covering things such as subletting, it is also worth considering the amendment of these model forms to explicitly reference short-term rentals.

<sup>145</sup> JOHN PAUL HANNA & DAVID VAN ATTA, CALIFORNIA COMMON INTEREST DEVELOPMENT LAW & PRACTICE § 1:33 (2014) (“Most declarations for common interest developments contain use restrictions relative to the lot or unit owners’ use of project common areas and, often, their separate interests.”).

<sup>146</sup> *Id.* at § 5:10 (describing subletting as a default condition of common provisions).

sociations, will almost certainly need to be re-written to address, and to anticipate, the growth of the STR Market.

The STR Market can also cause problems in the context of residential leases. For instance, most standard residential leases either forbid subletting, or otherwise require notification of guests staying longer than a stated period of time.<sup>147</sup> Many lessees are unaware that short-term rentals may violate such terms and that such a violation could permit the landlord to terminate the lease.<sup>148</sup> Such termination could be especially traumatic for those tenants in rent-controlled or rent-subsidized units that are paying below market rent and could not afford to live in that location at market prices.<sup>149</sup>

Another issue arising with the STR Market is whether the potential for sharing economy uses is, in fact, driving up the cost of rental units. These theories proffer several potential rationales. Among them is that landlords in areas where the STR Market is booming expect that the unit will be shared and thus charge accordingly, and that landlords are taking units off the rental market and instead placing them on the STR Market because it generates more revenue. While there is evidence that both may be occurring in isolated instances, several robust studies have found that, at this time, the STR Market has not had an appreciable difference on real estate purchase prices or rents in American cities.<sup>150</sup>

## 6. Neighborhoods

Many of the units in the STR Markets are in residential neighborhoods; these units are, after all, typically someone's home that he or she uses most of the year.<sup>151</sup> The market pressure for this kind of experience is immense;

<sup>147</sup> See, e.g., CALIFORNIA ASS'N OF REALTORS, FORM LR: RESIDENTIAL LEASE OR MONTH-TO-MONTH RENTAL AGREEMENT § 21 (2012), <http://tmdgi.com/wp-content/uploads/2013/01/lease.pdf> [<http://perma.cc/7F2X-SKZ6>] (restricting subletting).

<sup>148</sup> Carolyn Said, *Airbnb Sublets in S.F. Land Some Renters in the Doghouse*, S.F.GATE (Mar. 18, 2014, 9:38 PM), <http://www.sfgate.com/realestate/article/Airbnb-sublets-in-S-F-land-some-renters-in-the-5326019.php> [<http://perma.cc/WA7N-FWAM>].

<sup>149</sup> San Francisco listed this as one of the three major reasons for enacting its ordinance. See S.F., CAL. ORD. no. 218-14, General Findings § 1(c)(1) (2014) ("The goal of regulation is to ensure compliance with all requirements of the Municipal Code, including but not limited to the Business and Tax Regulations Code and the Residential Rent Stabilization and Arbitration Ordinance, and accountability for neighborhood quality of life.").

<sup>150</sup> Compare Kenneth Rosen, *Short-Term Rentals and the Housing Market*, URBAN LAND (Nov. 22, 2013), <http://urbanland.uli.org/news/short-term-rentals-and-the-housing-market/> [<http://perma.cc/F6F6-RPCS>] ("One of the latest theories posits that the 'sharing economy' and short-term rentals are to blame for high rents. But not only is there no evidence to suggest that short-term rentals are making homes less affordable, our research and analysis indicate that home sharing has the potential to make urban housing more affordable for more families."), with Rachel Monroe, *More Guests, Empty Houses*, SLATE (Feb. 13, 2014, 8:08 AM), [http://www.slate.com/articles/business/moneybox/2014/02/airbnb\\_gentrification\\_how\\_the\\_sharing\\_economy\\_drives\\_up\\_housing\\_prices.html](http://www.slate.com/articles/business/moneybox/2014/02/airbnb_gentrification_how_the_sharing_economy_drives_up_housing_prices.html) [<http://perma.cc/9UT4-KES6>] (describing rise of commercial Airbnb operators in small tourist town of Marfa, Texas).

<sup>151</sup> See, e.g., *Study: Airbnb Pushing Renters Out of Hot Neighborhoods*, THE REAL DEAL (July 29, 2015, 9:10 AM), <http://therealdeal.com/blog/2015/07/29/study-airbnb-pushing-renters-out-of-hot-neighborhoods/#sthash.S8F17UPk.dpuf> [<http://perma.cc/F3Q2-PNMT>] ("The

Airbnb notes that, “[t]o date, hosts have welcomed over 11 million travelers who wanted to experience cities not as tourists, but as locals. 76% of Airbnb travelers want to explore a specific neighborhood, and 89% want to ‘live like a local.’”<sup>152</sup> Even the CEO of Marriott, Arne Sorenson, noted that the benefit of Airbnb is that it gives tourists access to neighborhoods that hotels cannot.<sup>153</sup>

In larger cities, the neighborhoods tourists want to explore are often considered quiet redoubts of space away from the hurly burly of the commercial districts. Even in smaller cities, neighborhoods are defined by the nature of how public space interplays with private living. In urban areas, a sense of safety is often defined by expectations about the urban fabric, and people choose neighborhoods in some cases on expectations about its residents: it is a “gay” neighborhood; a “hip” neighborhood; a “family” neighborhood; a “safe” neighborhood.<sup>154</sup> In suburban areas, children ride bikes on sidewalks and parents grant liberties to their children based upon expectations of what that neighborhood is. The rapid rise of the STR Market can change all of that. The sudden influx of tourists into such neighborhoods could disrupt the environment that locals strive to build. This disruption may be the STR Market’s Achilles’ heel, making cities sit up, take notice, and consider aggressive regulations like bans. For instance, two Los Angeles councilmen recently introduced a resolution that would begin investigating the regulation of the STR Market. So many homes have been converted to short-term rentals they have, according to the councilmen, “begun to change the stable and familiar feel of many residential neighborhoods.”<sup>155</sup>

This issue of neighborhood effects is exacerbated in certain areas, typically fashionable areas of town, where tourists often desire to spend time. These “hot spots” require special attention because they often define a city’s character. Losing the people in those neighborhoods that make them unique could prove a tremendous loss to the sense of place that drives both high-value knowledge workers and tourists to the area.

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most popular neighborhood for Airbnb rentals [in New York City], the East Village, saw 28 percent of rental units converted into illegal hotel rooms, according to the analysis by the New York Communities for Change and Real Affordability For All. The 20 most popular neighborhoods as a whole lost about 10 percent of their units, the New York Daily News reported.”)

<sup>152</sup> David Hantman, *Airbnb Economic Impact Around the World*, AIRBNB (Mar. 25, 2014), <http://publicpolicy.airbnb.com/airbnb-economic-impact-around-the-world/> [<http://perma.cc/2DQG-CD72>].

<sup>153</sup> Brad Tuttle, *Marriott’s CEO Just Made a Pretty Good Sales Pitch for . . . Airbnb?*, MONEY (July 9, 2014), <http://time.com/money/2964290/marriott-airbnb-arne-sorenson-neighborhoods/> [<http://perma.cc/B9JF-J6PW>] (quoting Marriott’s CEO comment that “I want to experience a neighborhood, even if I’m on vacation”).

<sup>154</sup> See generally Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. 105 (2013) (discussing numerous sociological, jurisdictional, and legal conceptions of the neighborhood).

<sup>155</sup> Hugo Martin, *L.A. to Consider Regulating Airbnb and Other Short-term Home Rentals*, L.A. TIMES (Dec. 2, 2014), <http://www.latimes.com/business/la-fi-regulating-short-term-home-rentals-20141202-story.html> [<http://perma.cc/B6F9-9HFQ>] (quoting Mike Bonin and Herb Wesson, two Los Angeles councilmen).

While giving ample consideration to these concerns, cities must also try to divine the long-term relationship a particular city will have with sharing economy uses. It may be that the sharing economy reimagines the nature of our relationships, our sense of place, and our neighborhoods. For instance, right now, we tend to imagine the person who comes to our neighborhood in an STR Market rental as a stranger; however, it may not be long until we view these “strangers” as potential weak ties: people from around the country, maybe even the world, who have come into our backyard and are looking for engagement.<sup>156</sup> That engagement, in time, may yield a type of friendship and relationship—the sharing economy friendship—similar to the kinds of weak ties people used to establish only when backpacking through Europe and staying in hostels. Perhaps such place-bound, temporary friendships will prove more real and lasting than any Facebook “friend” ever was. Indeed, Airbnb has noted the possibility of changing this dynamic, even donating \$1 million to a fund called “one less stranger” to encourage its visitors to engage the strangers in host communities.<sup>157</sup> If this change occurs, it will require a redefinition of what constitutes a neighborhood that will take time to reinvent itself.

### III. EXISTING APPROACHES TO REGULATING THE SHARING ECONOMY

This section seeks to create the beginning of a taxonomy of existing regulatory approaches to the sharing economy, especially as related to the STR Market. As this is a fast-changing area of regulation, the variety of tools used to regulate such uses is likely to swell and become more nuanced. In addition, the variety of tools used at this point largely fall into several categories that are used throughout the country, and even the world. While this section attempts to be representative of the regulatory tools being used now, the intent is not to be exhaustive of all uses of a given tool. As a guide to regulation, this section relies most heavily upon recent ordinances passed by San Francisco and Portland to regulate the STR Market, both of which are regarded as at the forefront of the regulatory response, as well as several other ordinances from across the country.

#### A. Bans

The traditional command-and-control approach to addressing real or perceived threats posed by sharing economy uses such as the STR Market is

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<sup>156</sup> See, e.g., Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOC. 1360, 1371 (1973).

<sup>157</sup> *Creating #Onelessstranger: Stories of Belonging*, AIRBNB, <http://blog.airbnb.com/creating-onelessstranger-stories-belonging/> [<http://perma.cc/L68T-EDFJ>] (“Our mission is to create a world where all 7 Billion people can Belong Anywhere. So, in 2015, we are taking steps toward making that happen by creating a global, social experiment, #OneLessStranger at a time.”).

to ban the use altogether. In practice, a ban has several major problems. First, it is likely to simply drive the STR Market underground. While such regulation may succeed in eliminating listings of sites on major websites, such as Airbnb, it would be almost impossible to guard all possible websites from engaging in the type of peer-to-peer sharing that now occurs. Second, in the long-term, such an approach is likely to appear heavy-handed even to those in neighborhoods that see the most negative effects of the STR Market. While some may wish to have no STR Market, part of the population would likely want to engage in the STR Market. Third, if a ban cannot be effectively conducted at the web platform level, then the ban would likely require an invasive use of force to prove that a home was rented on the STR Market, which would seemingly prove too draconian for the violation committed in most cases. If there was a failure to adequately enforce such a ban, then the city risks being perceived as ineffective and also loses significant bargaining power with the STR Market. For these reasons, among others, bans on the STR Market are almost certain to fail in the long-term.

On the other hand, bans might also be conceived of as *de facto* moratoria on the STR Market while planning processes catch up with such uses. Although moratoria have the same enforcement problems discussed above, they can also lead to a period of intense negotiation between the STR Market websites and the regulatory body.

Perhaps the best-known ban in the United States, at present, is in New Orleans, Louisiana.<sup>158</sup> New Orleans' ordinance: defines illegal short-term rentals as any rental for a period of fewer than thirty days (sixty days in the Vieux Carré) for which there is no license or permit; notes that advertising and solicitation for illegal short-term rentals is a violation; and states that periodicals advertising such rentals, and those who rent such properties from the owners, are not in violation.<sup>159</sup> However, the city has found the ban difficult to enforce for many of the reasons outlined above.<sup>160</sup>

### B. *Use Definitions*

The regulatory response to the STR Market begins with the language that defines a unit in the STR Market, as well as language clarifying whether a legal STR Market rental changes the use of a building. In San Francisco, for instance, the city's STR market legislation is based around the definition

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<sup>158</sup> See Tania Dall, *Councilwoman Head Looks to Regulate Short-Term Rentals, Groups Respond*, WWLTV.COM (Jan. 23, 2015, 10:45 PM), <http://www.wwtv.com/story/news/2015/01/23/new-orleans-city-council-pres-stacy-head-looks-to-regulate-short-term-rentals-groups-respond/22260363/> [<http://perma.cc/B7TG-9YAA>].

<sup>159</sup> NEW ORLEANS, LA., CODE OF ORDINANCES § 54-491.1 (2004), [https://www.municode.com/library/la/new\\_orleans/codes/code\\_of\\_ordinances?nodeId=PTIICO\\_CH54CRCO\\_ART\\_VIIIOGE\\_S54-491.1PROFREPR](https://www.municode.com/library/la/new_orleans/codes/code_of_ordinances?nodeId=PTIICO_CH54CRCO_ART_VIIIOGE_S54-491.1PROFREPR) [<https://perma.cc/M8AL-47CV>].

<sup>160</sup> Nina Feldman, *Short-Term Rental Stakeholders All Agree on One Thing: Current Law Inadequate*, WWNO.COM (July 18, 2014), <http://wwno.org/post/short-term-rental-stakeholders-all-agree-one-thing-current-law-inadequate> [<http://perma.cc/5UB9-8UWL>].



of a “short-term residential rental.” Under the San Francisco definition, a short-term residential rental is any residential unit occupied for less than thirty days where the residential unit is offered for tourist or transient use by a “permanent resident.”<sup>161</sup> A permanent resident is defined as an owner or lessee who has occupied the residential unit for at least sixty consecutive days with the intent to establish that unit as a permanent residence.<sup>162</sup> The permanent resident must also be a natural person, which limits commercial enterprises from entering into the short-term rental market.<sup>163</sup> The unit must also be registered with a registry,<sup>164</sup> and must not be a part of any of the city’s affordable housing programs.<sup>165</sup> San Francisco has also amended its definitions of what constitutes a “dwelling unit,” a “live/work unit,” and a “residential use” to explicitly state that compliant short-term rentals “do not alter the use type” of the respective uses.<sup>166</sup>

The Portland ordinance defines the STR market as an “accessory use” to a primary use,<sup>167</sup> and also eliminated the “bed and breakfast” use category replacing it with the “accessory short-term rentals” use.<sup>168</sup> The Portland ordinance defines an “accessory short-term rental” and one where “an individual or family resides in a dwelling unit and rents bedrooms to overnight guests for fewer than 30 days.”<sup>169</sup> Further, such units are divided into two types; “Type A” accessory short-term rentals are “where no more than 2 bedrooms are rented to overnight guests,”<sup>170</sup> while “Type B” accessory short-term rentals are “where 3 or more bedrooms are rented to overnight guests.”<sup>171</sup> Both Type A and Type B accessory short-term rentals are only allowed “when accessory to a Household Living use.”<sup>172</sup>

The Portland ordinance also distinguishes between a “resident,” which is defined as “the individual or family who resides in the dwelling unit,” which can be “the owner or a long-term renter,” and an “operator,” which is defined as “the resident or a person or entity that is designated by the resident to manage the accessory short-term rental.”<sup>173</sup>

### C. Day Limits on STR Market Use

The San Francisco short-term rental ordinance requires that the resident occupy the residential unit for no fewer than 275 days out of a calendar

<sup>161</sup> S.F., CAL., ADMIN. CODE § 41A.4 (2015).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> S.F., CAL., PLANNING CODE §§ 102.7, 102.13, 790.88 (2015).

<sup>167</sup> PORTLAND, OR., ZONING CODE §§ 33.120.100, 33.120.110, 33.110.110 (2015).

<sup>168</sup> *Id.* § 33.270.070.

<sup>169</sup> *Id.* § 33.207.020(A).

<sup>170</sup> *Id.* § 33.207.020(A)(1).

<sup>171</sup> *Id.* § 33.207.020(A)(2).

<sup>172</sup> *Id.* §§ 33.207.040(A)(3), 33.207.050(A)(3).

<sup>173</sup> *Id.* § 33.207.020(B).

year.<sup>174</sup> Similarly, the Portland ordinance requires both Type A and Type B accessory short-term rental residents to occupy the dwelling unit for at least 270 days during each calendar year.<sup>175</sup>

#### D. Licenses and Permits

Almost all business uses within a city require a basic business license, which is typically a nominal fee for small businesses.<sup>176</sup> In most cases, the justification for a business license is largely informational: it permits the city to obtain data about the nature of commerce within the city.<sup>177</sup> Licenses and permits also allow a city to easily remedy the impacts of bad actors.

Opponents of licensure point to situations where licensing is used by dominant market forces as a way to impose costs on small operators that drive out such competition.<sup>178</sup> This rebuttal speaks primarily to the importance of limiting licensure as a barrier to entry and preventing agency capture, while still allowing licensure to serve its function of collecting information and, in extreme cases, regulating bad actors.

In the two examples of STR Market regulations evaluated in-depth here, San Francisco's ordinance requires residential units to maintain a valid business registration certificate,<sup>179</sup> while Portland's ordinance maintains a more complex regulatory structure.<sup>180</sup> Portland requires that Type A accessory short-term rentals obtain a permit while Type B accessory short-term rentals must obtain a conditional use permit.<sup>181</sup> The Type A permit must be obtained every two years and requires the resident or operator to abide by certain requirements.<sup>182</sup> These requirements include: a "notification letter" describing the "operation";<sup>183</sup> the number of bedrooms that will be rented to overnight guests;<sup>184</sup> information on how to contact the resident or operator

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<sup>174</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(A) (2015).

<sup>175</sup> PORTLAND, OR., ZONING CODE § 33.207.040(A)(1) (2015).

<sup>176</sup> See, e.g., *New Business Registration*, CITY & COUNTY OF S.F., TREASURER & TAX COLLECTOR, <http://sftreasurer.org/registration#RateSchedule/FeeCalculation> [<http://perma.cc/V8AB-GQYY>] (putting forth rate structure for business licenses beginning at \$75).

<sup>177</sup> See, e.g., OCCUPATIONAL LICENSING, *supra* note 120, at 3 ("[L]icensing helps to ensure high-quality services, safeguard against serious harms, and offer workers clear guidelines around professional development and training.").

<sup>178</sup> See OCCUPATIONAL LICENSING, *supra* note 120, at 56 ("[T]he practice of licensing can impose substantial costs on job seekers, consumers, and the economy more generally. This is particularly true when licensing regulations are poorly aligned toward consumer protection and when they are not updated to reflect a changing economy."); cf. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (recognizing that pecuniary incentives were sufficiently powerful to prohibit members of the Alabama Board of Optometry from participating in license revocation proceedings of optometrists practicing in a competing branch of the profession).

<sup>179</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(2)(C) (2015).

<sup>180</sup> See PORTLAND, OR., ZONING CODE §§ 33.207.010–33.207.070 (2015).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* § 33.207.040(C).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* § 33.207.040(C)(1).

by phone;<sup>185</sup> and how the relevant standards of the code are met.<sup>186</sup> The notification letter must be mailed or delivered to “all . . . recognized organizations” that share property boundaries, including that property where the accessory short-term rental is located, and all owners of property abutting or across the street from the accessory short-term rental.<sup>187</sup> The permit application has to include an application, a copy of the notification letter and addresses and organizations that received the notice.<sup>188</sup> The permit can be revoked for failure to comply with the code sections, in which case no new Type A permit will be issued to that resident for two years at the site.<sup>189</sup> The Type B accessory short-term rental requires a conditional use review typical of most cities.<sup>190</sup>

### E. Registries and Information Sharing

San Francisco has adopted one of the most detailed registry requirements in the country. Under the San Francisco registry, a unit must complete an application that is good for a two-year term if accepted.<sup>191</sup> In some zoning districts, the city also notifies any homeowner association that has requested notice of such applications.<sup>192</sup> The application requires prospective hosts to make an affirmative showing that, in general, the applicant lives in the unit and maintains the required insurance and business insurance.<sup>193</sup> A renewal application is required to provide evidence that the applicant has occupied the unit for at least 275 days of each of the two preceding calendar years.<sup>194</sup> The application fee is currently \$50, but can be adjusted later to cover the costs of the registry.<sup>195</sup> The registry requires that the host remain in “good standing” by submitting a quarterly report to the Planning Department starting on January 1 of each year stating the number of days the unit, or any portion thereof, was rented in the STR Market.<sup>196</sup>

Portland requires all accessory short-term rentals to maintain a “guest log book,” which must include the names and home addresses of guests, guest’s license plate numbers if traveling by car, dates of stay, and the room assigned to each guest.<sup>197</sup> The log must be available for inspection by city staff upon request.<sup>198</sup>

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<sup>185</sup> *Id.* § 33.207.040(C)(2).

<sup>186</sup> *Id.* § 33.207.040(C)(3).

<sup>187</sup> *Id.* § 33.207.040(C)(1)(b)(1).

<sup>188</sup> *Id.* § 33.207.040(C)(2).

<sup>189</sup> *Id.* § 33.207.040(D).

<sup>190</sup> *Id.* § 33.207.050(A)(2).

<sup>191</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(3)(A) (2015).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* § 41A.5(g)(3)(B).

<sup>196</sup> *Id.* § 41A.5(g)(3)(C).

<sup>197</sup> PORTLAND, OR., ZONING CODE § 33.207.060 (2015).

<sup>198</sup> *Id.*

*F. Hosting Platform Required to Inform Posting Host of Applicable Law*

The San Francisco ordinance requires any web platform hosting an STR Market rental to first inform the posting host of the applicable legal provisions governing the transaction.<sup>199</sup> Failure to comply with this provision subjects the hosting platform to a potential penalty of \$1,000 per day.<sup>200</sup> Portland also requires that the Type A permit number or Type B conditional use case file number be included in all advertising and other listing services, and must further be prominently displayed in the rental unit so as to be seen by all short-term occupants.<sup>201</sup>

*G. Rent Control and the STR Market*

A major concern for cities with rent control ordinances, which typically require a landlord to limit rent increases on a tenant so long as the tenant abides by the terms of the lease, is that tenants engaging in the STR Market almost certainly violate general rental agreement policies on subletting. Landlords anxious for higher rents have seized on this as a reason to evict such rent-controlled tenants.<sup>202</sup> To address this concern, some cities, such as San Francisco, have amended their rent control ordinances to prevent landlords from trying to evict the resident of a rent controlled unit “solely as a result of a first violation” of the rent control ordinance “that has been cured within 30 days written notice to the tenant.”<sup>203</sup>

*H. Taxes, Impact Fees, and Exactions*

A major issue for many cities is the collection of taxes and, in particular, the transient occupancy taxes and fees. In some cities, the STR Market web platforms have agreed to begin collecting these taxes and remitting them to the city. San Francisco’s ordinance requires the hosting platform to collect and remit the city’s transient occupancy taxes, as well as maintain a record that illustrates that the taxes remitted accurately correspond to rentals associated with that hosting platform.<sup>204</sup> Airbnb is currently collecting the 14% transient occupancy tax for San Francisco.<sup>205</sup> Similarly, in Portland, Airbnb pays the Oregon transient lodging tax (1%); the Multnomah County Transient Lodging Tax (11.5%); and the Portland transient lodging tax (6%).<sup>206</sup> As of August 2015, Airbnb also collects transient occupancy taxes

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<sup>199</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(4)(A) (2015).

<sup>200</sup> *Id.* § 41A.5(g)(4)(C).

<sup>201</sup> PORTLAND, OR., ADMIN. CODE § 6.04.060(d) (2015).

<sup>202</sup> *See supra* Part II.J.5 and note 148.

<sup>203</sup> S.F., CAL., ADMIN. CODE § 37.9(a)(4) (2015).

<sup>204</sup> *Id.* § 41A.5(g)(4)(B).

<sup>205</sup> *What Local Taxes Apply to My Listing and How Do I Collect Them?*, AIRBNB, <https://www.airbnb.com/help/article/653> [<http://perma.cc/E6EC-CZF6>].

<sup>206</sup> *Id.*

for Chicago, the District of Columbia, Malibu, Oakland, Palo Alto, Philadelphia, Phoenix, San Diego, San Jose, and the States of North Carolina and Rhode Island.<sup>207</sup> Internationally, Airbnb collects a “tourist tax” for Amsterdam, The Netherlands, and the Chamonix-Mont-Blanc region of France, as well as a “service tax” in the country of India.<sup>208</sup>

In addition to the transient occupancy tax, however, cities in areas where property taxes are not easily adjusted in accordance with real estate market prices, such as California post-Proposition 13, also depend heavily on impact fees and exactions from new development to pay for infrastructure.<sup>209</sup> Thus far, no regulation is known to address how sharing economy uses and cities will address whether impact fees and exactions should be collected, much less assessed, for these de minimis uses that might, in aggregate, yield substantial impacts on cities.

### I. Tax Evasion by Hosts

Another approach that some cities are considering is pursuing tax evasion prosecution against the STR Market host. Although San Francisco’s ordinance places the burden of collecting and remitting transient occupancy taxes on the web platform, it also places liability on the host in the case that the web platform does not collect and remit the taxes.<sup>210</sup>

In addition, the registry required by San Francisco establishes a record of commercial transactions that federal and state tax officials can now use to track and tax STR Market revenue, which likely went unreported previously.

### J. Minimum Standards for Rentals

Portland’s ordinance provides detailed standards that apply to both types of accessory short-term rentals under its ordinances. For Type A accessory short-term rentals, the rental is limited to a maximum of 2 bedrooms to overnight guests<sup>211</sup> while a Type B accessory short-term rental is limited to a maximum of 5 bedrooms.<sup>212</sup> For both Type A uses, in sites with an accessory dwelling unit, such as an “in-law” or “granny” unit, the resident can live in the primary or accessory dwelling unit and rent bedrooms in either dwelling unit, so long as the maximum number of bedrooms rented on the site to overnight guests is two.<sup>213</sup> Similarly, for both Type A and Type B uses, a bedroom in a detached accessory structure can be rented overnight and

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See LEAGUE OF CAL. CITIES, A PRIMER ON CALIFORNIA CITY FINANCE 5 (2005) (“Among cities that impose a [transient occupancy tax], it provides 7 percent of a city’s general revenues on average and often as much as 17 percent.”).

<sup>210</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(4)(B) (2015).

<sup>211</sup> PORTLAND, OR., ZONING CODE § 33.207.040(B)(1) (2015).

<sup>212</sup> *Id.* § 33.207.050(B)(1).

<sup>213</sup> *Id.* § 33.207.040(B)(2).

counts toward the maximum site limit.<sup>214</sup> In both Type A and Type B uses, Portland's building department is required to verify that each bedroom rented to overnight guests meets the building code requirements for a sleeping room at the time it was created or converted,<sup>215</sup> has a smoke detector that is interconnected with a smoke detector in an adjacent hallway,<sup>216</sup> and is located on a floor of a dwelling unit equipped with a functioning carbon monoxide alarm, if there is a source of carbon monoxide onsite.<sup>217</sup> For a Type A use, the number of guests in the house may not exceed the relevant "household" definition for that zoning area,<sup>218</sup> while for a Type B use the number of guests can be limited by the conditional use permit.<sup>219</sup>

For a Type A use, nonresident employees are prohibited, though typical household repair services are allowed,<sup>220</sup> while a Type B use may permit nonresident employees for activities such as booking rooms and food preparation as part of the conditional use review, and hired service for normal maintenance is allowed.<sup>221</sup> The number of employees and the frequency of employee auto trips to the facility may be limited or monitored as part of a conditional use approval.<sup>222</sup>

Serving alcohol and food to overnight guests and visitors is allowed under both Type A and Type B uses.<sup>223</sup> Commercial meetings, such as luncheons, banquets, parties, weddings, meetings, charitable fund raising, and commercial or advertising activities are prohibited with a Type A accessory short-term rental.<sup>224</sup> With a Type B use, commercial meetings are similarly prohibited in single-dwelling zones and, in all other zones, they are limited to up to twenty-four commercial meetings per year as part of a conditional use review, with the maximum number of visitors or guests per event determined through the conditional use review.<sup>225</sup> A "meeting log" of all commercial meetings held must be kept, including the number of visitors or guests at each event, and must be available for inspection by city staff upon request.<sup>226</sup> Type B uses are additionally prohibited from structural alterations that would alter their future use as a residence, including alterations with a non-residential appearance, such as the installation of more than three parking spaces, paving of required setbacks, and commercial-type exterior lighting.<sup>227</sup>

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<sup>214</sup> *Id.* §§ 33.207.040(B)(3), 33.207.050(B)(3).

<sup>215</sup> *Id.* §§ 33.207.040(B)(4)(a), 33.207.050(B)(4)(a).

<sup>216</sup> *Id.* §§ 33.207.040(B)(4)(b), 3.207.050(B)(4)(b).

<sup>217</sup> *Id.* §§ 33.207.040(B)(4)(c), 33.207.050(B)(4)(c).

<sup>218</sup> *Id.* § 33.207.040(B)(5).

<sup>219</sup> *Id.* § 33.207.050(B)(5).

<sup>220</sup> *Id.* § 33.207.040(B)(6).

<sup>221</sup> *Id.* § 33.207.050(B)(6).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* §§ 33.207.040(B)(7), 33.207.050(B)(7).

<sup>224</sup> *Id.* § 33.207.040(B)(8).

<sup>225</sup> *Id.* § 33.207.050(B)(8).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* § 33.207.040(B)(9).

### K. *On-site Property Manager*

In some locations, the cities are requiring an on-site property manager, a style of vacation rental management that is typical of resort destinations. In Moses Lake, Washington, short-term rentals must have an on-site property manager within thirty minutes of the site.<sup>228</sup>

### L. *Minimum Age*

A few cities have had concerns with the possibility that minors might be renting units in STR Markets and thus are seeking to impose a minimum age for rentals. For instance, Indio, California, in the Coachella Valley, recently raised the minimum age limit for short-term rentals from eighteen to twenty-one.<sup>229</sup>

### M. *Liability Insurance*

Some cities are requiring that the STR Market website provide liability insurance for the rental. Most of the major market participants have already implemented liability insurance that applies to all rentals, even those rentals in jurisdictions where the requirement does not apply. San Francisco's ordinance requires that the host, or the website platform through which they rent their unit, must provide insurance of at least \$500,000 that defends and indemnifies the unit owner as an insured, as well as any tenant in the building, for bodily injury and property damage arising from short-term rental.<sup>230</sup>

### N. *Good Neighbor Regulations: Noise, Parking, Trash*

Some cities are also specifically requiring that STR Market units comply with those "good neighbor" regulations that are already typically applied in many residential zoning districts. Such regulations include: noise ordinances, which typically require a quiet time during the evening and also limit commercial activity during evening hours; parking regulations that govern things such as on-street parking and special parking permits that apply in residential zones; and trash guidelines that might be of particular concern in larger buildings. For instance, Saugatuck, Michigan, is considering a noise ordinance to deal with complaints of short-term rentals in residential neighborhoods. One proposal would include a "noise test" where "a police

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<sup>228</sup> Richard Byrd, *Moses Lake City Council to Regulate Vacation Rental Dwellings Within City*, COLUMBIA BASIN HERALD (Dec. 11, 2014), [http://www.columbiabasinherald.com/politics/article\\_5456f992-80cb-11e4-af13-4ff2e7c83258.html](http://www.columbiabasinherald.com/politics/article_5456f992-80cb-11e4-af13-4ff2e7c83258.html) [http://perma.cc/V2PD-XPKR].

<sup>229</sup> Tatiana Sanchez, *Indio Re-visits Vacation Rental Regulations*, DESERT SUN (Nov. 6, 2014, 7:55 AM), <http://www.desertsun.com/story/news/local/2014/11/06/indio-re-visits-vacation-rental-regulations/18578619/> [http://perma.cc/J3ZX-5F9X].

<sup>230</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(D) (2015).

officer or city staff would use a decibel meter to compare sound levels near the rental homes with levels in the general neighborhood.”<sup>231</sup> According to reports, the tests would be done ten times per night, for an undetermined time period.<sup>232</sup>

### *O. Compliance with Other Laws*

The San Francisco ordinance requires the unit owner to demonstrate that the property where the unit is located is not subject to any outstanding notices of violation or similar abatement orders or civil actions.<sup>233</sup>

### *P. Stakeholder Participation*

As the STR Market continues to grow, the cities will need to increasingly consider the role of stakeholders in how they craft their ordinances. Establishing a working committee for such regulations is a good idea. Such a committee should include representatives of the interest groups in the community, perhaps a group similar to the varied interests referenced in the discussion above. How such a group forms, and the work it does, will be unique to the particular community engaging the process. Nonetheless, the need for this discussion is clear because of the innovative and personal nature of the STR Market.

### *Q. Administrative Enforcement*

For violations of its ordinance, San Francisco also created an administrative enforcement process using its already established administrative hearing officer program, which is modeled on state and federal administrative law judges.<sup>234</sup> The process also establishes administrative penalties for violation of the ordinance. For the initial violation, the penalty is “not more than four times the standard hourly administrative rate of \$121.00” per day of non-compliance after a notice of violation is served for each unit, or for “each identified failure” of a hosting platform to comply with the requirements.<sup>235</sup> For a second violation, the penalty goes up to “not more than eight

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<sup>231</sup> Alex Shabad, *Saugatuck residents clash with tourists over noise*, WZZM.COM (Oct. 23, 2014, 7:30 PM), <http://www.wzzm13.com/story/news/local/2014/10/23/homeowners-clash-tourists-noise/17794697/> [<http://perma.cc/F6TR-4PPB>].

<sup>232</sup> *Id.*

<sup>233</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(H) (2015) (requiring unit owners to show no outstanding “Building, Electrical, Plumbing, Mechanical, Fire, Health, Housing, Police, or Planning Code enforcement, including any notices of violation, notices to cure, orders of abatement, cease and desist orders, or correction notices,” and warning “[t]he Department shall not include a property that is subject to any such outstanding violations in the Registry”).

<sup>234</sup> *Id.* §§ 41A.6(a)–(e) (2015).

<sup>235</sup> *Id.* § 41A.6(d)(1)(A).



times the standard hourly administrative rate of \$121.00” per day,<sup>236</sup> and for the third and subsequent violations the penalty goes up to “not more than twelve times the standard hourly administrative rate of \$121.00” per day.<sup>237</sup> Repeat violators are also removed from the required registry for one year.<sup>238</sup>

Portland also uses its administrative enforcement ordinance as a means of enforcing compliance.<sup>239</sup>

### R. Annual City Reporting Requirement on Regulation

San Francisco maintains an annual reporting requirement of the Planning Department’s STR Market regulation, which should assist in further facilitating and refining the regulatory program.<sup>240</sup>

### S. Existing Approaches and First Principles

This section sought to briefly analyze the collective existing regulatory strategies in light of the first principles announced in Part II. First, these regulations are generally in line with the principle that the sharing economy requires a differentiated response (Principle 1), because they specifically seek to address the STR Market.

Bans of the STR Market violate a number of the principles, especially daylighting (Principle 2) and implementing a response beyond traditional regulation (Principle 8). Perhaps more importantly, bans also fail to recognize how the STR Market is changing existing markets (Principle 5), creating new markets (Principle 6), and disrupting established regulatory structures (Principle 7). It is no wonder that most jurisdictions that have enacted bans are now considering alternative approaches.

The rest of the existing approaches to regulation presented here are gleaned primarily from San Francisco and Portland, two cities that have invested heavily in a strong land use-based regulatory response to the STR Market. These approaches have their benefits. First, both the San Francisco and Portland ordinances have informational components (Principle 3) to their programs—registries and conditional use permit applications—that will facilitate important data collection that can assist in further refining these programs in the future. Legalizing at least some STR Market activity has the effect of daylighting some of this activity (Principle 2); however, it may be that the ordinances are too complicated and challenging to implement for small participants in the market that the regulations end up driving such uses underground once more. This could be especially problematic. If

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<sup>236</sup> *Id.* § 41A.6(d)(1)(B).

<sup>237</sup> *Id.* § 41A.6(d)(1)(C).

<sup>238</sup> *Id.* § 41A.6(d)(2).

<sup>239</sup> PORTLAND, OR., ADMIN. CODE § 3.30.040(D)(5) (2015).

<sup>240</sup> S.F., CAL., ADMIN. CODE § 41A.5(g)(8) (2015).

legalized STR Market uses face complicated regulatory hurdles, while non-legalized STR Market uses continue unabated, the impetus to obey the rules diminishes substantially.

The San Francisco and Portland ordinances both recognize the potential for the corporatization of the STR Market (Principles 5, 6), an important provision that the market may soon challenge. These ordinances also try to use traditional command-and-control land use tools that will likely be difficult to implement or, if they are implemented, risk being seen as draconian when applied to an occasional host or traveler (Principles 7, 8, 9). The ordinances are most likely to be used to go after the “super-users” of the STR Market: those users that are hosting travelers more than they are living in their spaces. For those uses, the complexity of regulations may make sense. However, many de minimis users—those that host or travel using the STR Market just a few times a year—will likely find that these regulations do not respect their interests and demand a more nuanced response from their local governments. Thus, while the San Francisco and Portland options represent a first step towards effective STR Market regulation, they will likely need to be re-envisioned as the STR Market evolves and problems with these traditional regulatory approaches emerge. The possibility of altered regulations is especially likely given that these elaborate regulatory structures have largely been flouted since their implementation. A May 2015 study found that there were 5,459 short-term rentals in San Francisco advertised on Airbnb and related sites but only about 700 of the hosts had registered as required by the city and at least 350 of the listings were for full-time vacation rentals despite the ninety day per year limitation.<sup>241</sup> Portland faces a similar dilemma. Despite requiring permits for STRs since August 2014, only 135 hosts have requested permits even though 1,600 hosts are listed on Airbnb alone.<sup>242</sup>

#### IV. FUTURE OPTIONS FOR REGULATION

The legal literature has been largely silent on how to regulate the sharing economy, and what scant offerings there have been thus far<sup>243</sup> have not offered much detail on how a proposed scheme of regulation might seek to address the concerns announced above as “first principles” for regulating

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<sup>241</sup> John Tato, *Cities Grapple with the Challenges of Regulating Short-Term Rentals*, ECORONADO.COM (July 24, 2015), <http://ecoronado.com/news/2015/07/24/cities-grapple-with-the-challenges-of-regulating-short-term-rentals/> [<http://perma.cc/N5TT-HC3C>].

<sup>242</sup> *Id.*

<sup>243</sup> See, e.g., Emily Badger, *Why We Can't Figure Out How to Regulate Airbnb*, WASH. POST: WONKBLOG (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/23/why-we-cant-figure-out-how-to-regulate-airbnb/> [<http://perma.cc/9SV8-9955>]; Eric Biber & J.B. Ruhl, *Regulating the “Sharing Economy”*, REGBLOG.COM (July 28, 2014), <http://www.regblog.org/2014/07/28/28-biber-ruhl-regulating-the-sharing-economy/> [<http://perma.cc/4LBJ-PWBC>]; Shari Shapiro, *Firms in Sharing Economy Should be Regulated Under a Modified Framework*, REGBLOG.COM (Sept. 2, 2014), <http://www.regblog.org/2014/09/02/02-shapiro-regulating-sharing-economy-under-modified-framework/> [<http://perma.cc/6FZ9-4YHY>].

the sharing economy. The tentativeness with which the legal literature has approached regulating the sharing economy is understandable; the sharing economy is shifting so many of our assumptions about daily life that an attempt to lay down hard-and-fast rules would be a fool's errand. Nonetheless, it seems worthwhile to at least imagine a theoretical framework that might respond to the whole ambit of first principles announced in Part II. One attempt to do so is outlined below, in this section's proposal of a transferable sharing rights marketplace.

### A. A Proposal for the STR Market: Transferable Sharing Rights

The STR Market, which operates illegally in most cities,<sup>244</sup> is a disruptive technology that threatens long-standing business models of hotels as well as regulatory structures, tax bases, and constituencies of local governments. This section introduces a regulatory framework to legalize the short-term rental market, while also addressing its externalities, referred to here as "transferable sharing rights," or TSRs. Even if implementation of a TSR regime as proposed here proved politically or logistically impracticable, the proposal is intended to provoke and invite discussion on alternative methods for regulating the short-term rental market and other aspects of the sharing economy.

The TSR model is based on existing transfer of development rights ("TDR") regimes perfected over the last fifty years in commercial development contexts.<sup>245</sup> TDRs became popular after their explicit approval in *Penn Central Transportation Co. v. City of New York*<sup>246</sup> as a way to compensate property owners who were required to maintain a less intense use than otherwise permitted by code, such as the historic Grand Central Terminal in Manhattan. In TDR regimes, this down-zoned "sending" site is permitted to sell its unused development rights to a "receiving site" for a market price, which then permits the receiving site to develop more intensely than otherwise permitted by code by a prescribed amount. This proposal for TSRs follows the example of TDR regimes in their more successful iterations while also drawing on a variety of other land use tools, such as impact fees, already used extensively across the country.

A transferable sharing rights regime for the short-term rental market could be structured as follows:

*Allocating TSRs.* As with any artificial marketplace, designing the initial allocation of TSRs is of utmost concern. One easy approach would be to provide each dwelling unit within the city a redeemable transferable sharing

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<sup>244</sup> See, e.g., Leonard Greene, *Airbnb Nets \$40M in Illegal NY Listings: AG*, N.Y. Post (Oct. 16, 2014), <http://nypost.com/2014/10/16/airbnb-nets-40m-in-illegal-ny-listings-schneiderman/> [<http://perma.cc/D4QN-HJDG>].

<sup>245</sup> See generally ARTHUR C. NELSON ET AL., *THE TDR HANDBOOK* (2011).

<sup>246</sup> 438 U.S. 104, 114 (1978).

right, or TSR, which would permit the dwelling unit owner to engage in a short-term rental for a given period of time. The term of a TSR should vary depending upon the tourism market in each city, for example by limiting the number of persons or number of days allowed.

*Redeeming a TSR.* A TSR has no value, and conveys no right, unless redeemed pursuant to terms established by the city for TSRs. An owner of the dwelling unit would use an Internet platform controlled by the city to redeem a TSR.<sup>247</sup> Redeeming a TSR should have two components. First, it should require information that allows the city to further refine its response to the short-term rental market. This could include data such as: location of rental; length of stay; price charged; and number of visitors. Second, TSR redemption should require payment of a TSR Fee.

*The TSR Fee.* The TSR Fee is equal to a monetization of externalities arising from the operation of short-term rental markets. In this regard, the TSR Fee is no different from an impact fee that is applied to new development to pay for that project's externalities. The city would be required to conduct a nexus study, similar to an impact fee nexus study, to evaluate the impacts on the city of permitting the short-term rental market. Possible impacts may include increased police, health and safety, fire, building department, and TSR compliance enforcement services. In addition, the TSR Fee study could also evaluate foregone hotel occupancy taxes and any other costs or fees lost by the city to the short-term rental market. Collection of the TSR Fee would place the city in the same position it was in prior to the arrival of the short-term rental market.

*The right of a redeemed TSR.* Upon completing the TSR redemption, the TSR Owner could then engage in a short-term rental for the term of the TSR without regard to other limitations imposed by the city, including those that might otherwise prohibit the short-term rental market, such as zoning, building, or fire codes.

*TSR Fee passed on to consumer.* Impact fees imposed on developers of new construction can be passed on to the purchasers of the new units.<sup>248</sup> Here, the TSR Fee would most likely be passed on to the consumer through the rental rate for the short-term rental. In time, sites like Airbnb, would likely reflect the TSR Fee in the advertised price for the short-term rental.

*Alienability of TSRs.* TSRs would be alienable from the dwelling unit. TSRs must be alienable from the dwelling unit to which they are allocated in order to facilitate the creation of a market for the TSRs.

*The TSR Market.* A TSR Market would permit those that do not wish to use TSRs to sell them to others who want to engage in the short-term market beyond their initial allocation. Unredeemed TSRs could be sold through an

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<sup>247</sup> The site described here would likely utilize the same technology needed for the TSR Market described below.

<sup>248</sup> See, e.g., Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 161 (2005) (discussing this phenomenon in the context of home prices).

online marketplace, the TSR Market, controlled by the city. The city needs to have control over the TSR Market to ensure market transparency. It is especially important that the city retain control of the TSR Market in order to ensure (i) that proper records are maintained of the redemption of and sale of unredeemed TSRs, and (ii) that aggregators cannot manipulate the market, both of which have been problems in poorly designed TDR marketplaces. While it is important for the city to retain control of the TSR Market, it could also be operated on the back-end by existing Internet sites. For instance, a site like StubHub, which facilitates the resale of sporting event and concert tickets, already provides the type of market platform necessary to enable a TSR Market. Such companies could be incentivized to offer their technology to cities for free upfront by, in turn, receiving a small percentage of each redeemed TSR. Presumably, it would be easy for such third-party providers to quickly commodify the TSR Market software through deployment in major cities, which would then drive down the cost of implementation in smaller cities.

*Avoiding market manipulation.* Only dwelling unit owners should be permitted to purchase TSRs; otherwise, institutional players, such as hotels, might try to purchase TSRs to manipulate the market. Preventing market manipulation is another reason to limit the number of TSRs that any one dwelling unit can utilize.

*Necessity of scarcity.* If the TSR Market is designed properly, there will be scarcity in TSR “receiving” areas—locations where tourists want to stay—and a surplus in TSR “sending” areas—locations where tourists don’t want to stay. This is perhaps the most important part of designing a TSR Market: if there are too many TSRs allocated initially, no market will emerge, which eliminates the rest of the marketplace’s benefits in reducing externalities outlined below. It may be that scarcity necessitates multiple TSRs to permit one short-term rental, a calculus that could be performed with some precision given knowledge of a city’s typical tourism and dwelling unit data.

In addition, TSRs would also need to have an effective date; for instance, non-redeemed TSRs might be issued on January 1 of a given year and voided after December 31 of that same year. This is equally necessary to preserve market scarcity.

*The TSR Market Demand Fee.* The TSR Market is where TSR sending and receiving sites meet to determine the price of an alienable, unredeemed TSR. If designed correctly, the market price for TSRs on the TSR Market would be in excess of the TSR Fee. The TSR seller and the city would split the TSR Market Demand Fee.

*Neighborhood benefits from the TSR Market Demand Fee.* The portion of the TSR Market Demand Fee that is retained by the city should then be allocated in a manner that seeks to mitigate the externalities of the short-term rental market. One possibility is to give the city’s share of the TSR Market Demand Fee to neighborhood groups in those locations where the

bulk of TSRs are used. The money could be used at the discretion of neighborhood groups to permit them to improve their neighborhood and thereby reap some benefit from increased tourism.

*Preventing TSR hot-spots.* To prevent “hot-spots” of short-term rental markets from changing the character of a building or neighborhood, the city could limit the number of TSRs that a dwelling unit could use in a given period. In addition, the city could limit the number of TSRs that are used in a desirable neighborhood. This approach may also eliminate the concern of some that short-term rentals raise rents.<sup>249</sup> The limit on TSRs should be sufficiently high to permit the TSR Market to operate, but sufficiently low to retain residential character of city neighborhoods. This limit may vary by neighborhood. For instance, some neighborhoods may come to covet the financial gain that they would receive through their share of the TSR Market Demand Fee, and thus want a higher TSR threshold in that neighborhood, while other neighborhoods may not be incentivized by such financial reward.

*Economic development.* Once a TSR Market is properly established, the city could use the market as an economic development tool. For instance, the city could begin requiring multiple TSRs to stay in fashionable areas, while areas where the city seeks to encourage economic development would require fewer TSRs. Of course, the city would want to engage the community to ensure there was support for driving growth to an area, but such an incentive would flow both to individual dwelling unit owners and to the neighborhood at large through the neighborhood’s share of the TSR Market Demand Fee.

*Enforcement.* Enforcement of TSR compliance could take several approaches. First, the city could use its traditional nuisance abatement power to respond to citizen complaints of non-TSR-enabled short-term rentals. Residents could be empowered to assist nuisance abatement efforts by access to information about redeemed TSRs within a relevant area, such as 300-foot around a building or, more broadly, within a neighborhood. Such data on redeemed TSRs would need to be sufficiently specific to inform residents, but also sufficiently vague to protect the privacy and safety of the visitors. Second, monetary fines for non-compliance would be essential. The fine would need to be sufficiently high to discourage an “efficient breach” in which short-term rentals proceed without TSRs and simply pay the fine. In addition, the city could encourage enforcement by providing for citizen suits through the local city code that would reimburse attorney fees, costs, a portion of the monetary fine, and even a multiplier on attorney fees to reward the public benefit, where citizens bring to light TSR abuse.

However, there are three major problems with a TSR approach to the short-term rental market that should be resolved.

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<sup>249</sup> See *supra* Part II.I.

*Landlords and renters.* This proposal gives the TSR to the dwelling unit owner. Complications will emerge between landlords and renters. Cities should preemptively address these issues. For instance, a city ordinance could require landlords to permit renters to use TSRs allocated to the dwelling unit; if left to private negotiation, standard forms used in most rental agreements would likely eliminate renters' access to TSRs. A city ordinance could also state that use of TSRs by renters does not otherwise violate subletting or rent control provisions.

Large condominium buildings or homeowners associations would also likely revise their bylaws to address TSRs. Such private agreements could limit the use of TSRs within a building or neighborhood, just as such bylaws already provide additional restrictions on those communities today. If such limitations were pursued in large number, it could affect the market price of the TSR Fee and the TSR Market Demand Fee, which the city could then readjust from time-to-time, just as cities readjust their impact fee schedules.

*Labor unions.* Hotel-based labor unions are major opponents of the short-term rental market because such unions fear the loss of union jobs if the hotels in which they work go out of business. Cities with labor issues could consider using some portion of the TSR Market Demand Fee to provide worker training, or subsidize benefits, for those workers who would be affected by the rise of the short-term rental market.

*Jurisdictionality.* TSRs raise the cost of short-term rentals, and so those seeking bargains might choose to stay just over the city border in a neighboring city that does not charge a TSR. This result is a persistent problem in local government law and, incidentally, is currently a persistent issue with existing hotels and hotel occupancy taxes. Nonetheless, if a TSR Market becomes commodified by a third-party provider, as proposed above, then even small jurisdictions could charge TSRs. Absent transaction costs, all cities have an incentive to charge TSRs because, like hotel occupancy taxes, they would be paid by transient populations that do not vote. Thus, a TSR Fee is a valuable way to raise revenue without raising taxes on voters for all cities.

Overall, a transferable sharing rights regime appears uniquely capable of addressing many of the complexities, and externalities, arising from the short-term rental market. The implementation of such a regime may, at first, seem onerous. It should not. Existing Internet platforms already deploy the technologies needed to establish and maintain the TSR Market, which could be repurposed to this end.

## V. CONCLUSION: THE ESTABLISHED MARKETS' ENDGAME

The sharing economy is changing quickly, thus complicating a clear regulatory response. This section reviews several major trends occurring in the sharing economy right now, and then evaluates how those changes will affect the future of regulatory responses.

There is perhaps no bigger question in the sharing economy than how the established market participants will respond to the disrupting web platforms. In many industries, the importance of Internet platforms to established, brick-and-mortar businesses is now well understood.<sup>250</sup> These established market participants are now seeking ways to either retain existing market share by repositioning the purchase of their products through “sharing,” or are trying to find ways to enter the new markets created by the sharing economy platforms.

A recent study underscores the importance for established markets to adapt to sharing economies. First, the study found that most people share because of convenience and price, but they associate qualities like sustainability and community with sharing services more than they do with retail stores. Urban centers, where most wealth is located, “are more likely to contain people who have borrowed or lent vehicles and money,” and “more than 90% of sharers surveyed said they would recommend the service they most recently used.”<sup>251</sup> Another study by an arm of the consulting firm Deloitte found that venture capital firms have invested more than \$2 billion in over 500 collaborative economy ventures globally since 2012. The study also reported that “40 percent of North American adults used a collaborative commerce service in 2013” and that “dozens of major brands and tech firms have joined a ‘brand council’ to develop strategies for the collaborative economy.”<sup>252</sup> Sharing is no longer an idiosyncratic pursuit; it is now a mainstream manner of consumption.

The STR Market has seen a similar influx of large-scale efforts to infiltrate the new markets opened up in neighborhoods. In Los Angeles, a city council member recently noted that “commercial ventures have purchased large numbers of rental units or even entire apartment buildings and converted them into de facto hotels, reducing and threatening the city’s stock of rental housing and affordable housing, and that is wrong.”<sup>253</sup> In New York City, the State’s Attorney General found commercial enterprises were using Airbnb to operate multimillion-dollar businesses and, in one instance, a single commercial user made \$6.8 million in less than five years.<sup>254</sup>

The perception of sharing, however, has not caught up with the rapid corporatization of the pursuit in the STR Market or the sharing economy

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<sup>250</sup> Darrell Rigby, *Digital-Physical Mashups*, HARV. BUS. REV., Sept. 2014, at 86 (“[T]he greatest barrier to adopting fusion strategies [between physical stores and corporate web platforms] is not skepticism about their promise but inexperience with their execution.”).

<sup>251</sup> Ariel Schwartz, *The Collaborative Economy Is Exploding, And Brands That Ignore It Are Out Of Luck*, CO.EXIST (Mar. 3, 2014), <http://www.fastcoexist.com/3027062/the-collaborative-economy-is-exploding-and-brands-that-ignore-it-are-out-of-luck> [<http://perma.cc/NWU3-JDCS>].

<sup>252</sup> Vikram Mahidhar & David Schatsky, *Big Companies Now Have a Hand in the Collaborative Economy*, DELOITTE U. PRESS (May 5, 2014), <http://dupress.com/articles/collaborative-economy/> [<http://perma.cc/Y8E3-P5TU>].

<sup>253</sup> Martin, *supra* note 155.

<sup>254</sup> Press Release, N.Y. State Att’y Gen., *supra* note 16.



generally. Looking forward, those tasked with creating regulatory structures for the sharing economy face a daunting task: not only must they find regulations that comport with the first principles previously espoused in this Article, but they must also find a delicate balance between prioritizing individuals' desires to engage in the sharing economy and corporate interests in the sharing economy. The differences between individual and corporate interests are becoming increasingly difficult to distinguish as the sharing economy matures. Whether the seeming future coalescence of personal interests and corporate profits affects the nature of regulation remains to be seen. It is incumbent on regulators to understand the evolution of the industry and understand who and what it is they are regulating.

Is the future of the STR Market a couple of young roomies trying to earn a little extra cash to pay the rent, as Airbnb's founding mission purports, or is it Marriott trying to edge its way into cities' most treasured neighborhoods? Should it matter?

These questions do not have good answers today, but this Article has sought to at least announce a starting point from which to consider a regulatory response. The hope is that this beginning will lead to a more nuanced conversation on regulation that might, in time, provide a legal space for the sharing economy within our cities, while still protecting the sense of place that makes residents want to call a place home and travelers want to return.