Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?

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Introduction

The last few years have seen a reinvention of the economy through the growth of the "sharing economy" or the "new economy."[1] The modern sharing economy is diverse and is made up of various types of organizations and structures, including shared housing.[2] What ties these various components together is that they "generally facilitate community ownership, localized production, sharing, cooperation, [and] small scale enterprise."[3]

The rise of the new sharing economy has been a consequence of the latest assault on the old American Dream—the version in which one is "expected to grow up, get a good job, and make money to buy

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1. *See* Jenny Kassan and Janell Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 1–2, 5 (2012) (listing some of the names of the new economy, such as the "relationship economy," "cooperative economy," "access economy," "peer-to-peer (or p2p) economy," and the "grassroots economy").

2. *Id.* at 3 (noting that the sharing economy consists of "social enterprises, cooperatives, urban farms, cohousing communities, time banks, local currencies, and [a] vast array of other unique organizations").

3. *Id.*

all of the things [one] might need."[4] The realization of this dream, however, has been hampered by recent negative economic changes. One pair of commentators has opined that "[t]he sharing economy is not a top-down solution, meaning that it will not be imposed by a set of legislated policies . . . [Rather], it is being built from the ground up by every individual and group that chooses to begin consuming, transacting, or making a livelihood in a new way."[5]

The sharing economy has redefined consumption in the housing context in a manner that implicates the exclusivity of the use and enjoyment of real property. Consequently, just as with other aspects of use and access to goods, materials, and services in the sharing economy, housing sharing is predicated on two ideas working in tandem with one another: (1) that "we can have access to many things that we need without having to own them all by ourselves"[6] and (2) that by sharing some of the benefits of property ownership—namely use and enjoyment—we can also shift some of the (economic) burdens of ownership.

The number of online platforms designed to link property owners with potential short-term lessees has grown rapidly over the last few years. Airbnb, the most well known of these platforms, describes itself as "a trusted community marketplace for people to list, discover and book unique accommodations around the world."[7] Airbnb boasts that it has connected over twenty-five million guests with hosted properties in 34,000 cities in 190 countries since its founding in 2008.[8] Airbnb is not only the leading online platform for the exchange of short-term rentals, recently, it has been the most controversial as well.[9]

4. *Id.* The myth of the American Dream has taken on many forms. It includes that version mentioned in the text above, as well as the dream of unfettered reinvention and self-realization. *See, e.g.*, Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1112 (2002) ("American society is and has been a society of extreme mobility . . . People often moved from place to place; they shed an old life like a snake molting its skin. They took on new lives and new identities."). The common thread is one of upward social mobility, fueled by hard work and perseverance.

5. Kassan & Orsi, *supra* note 1, at 3–4.

6. *Id.* at 4.

7. AIRBNB, *About Us*, https://www.airbnb.com/about/about-us (last visited Feb. 28, 2015).

8. *Id.*

9. Airbnb has recently been locked in high-profile legal disputes in New York and San Francisco, and in smaller markets like Portland, Oregon. These disputes mirror

Recently, controversy erupted in New York City, Airbnb's largest United States market.[10] In October 2013, New York Attorney General Eric Schneiderman subpoenaed Airbnb's records, requesting data on its hosts[11] for the previous three years.[12] Schneiderman contended that Airbnb hosts in New York City were violating the New York Multiple Dwelling Law.[13] The New York Multiple Dwelling Law requires that certain multiple dwellings units only be occupied by "permanent occupants"—those residing in the unit for thirty or more consecutive days.[14] The Attorney General also asserted that Airbnb hosts in New York City were not complying with state and local tax registration and collection requirements.[15]

Many state and local governments rely on their inherent police powers to regulate short-term housing in residential areas. In particular, zoning laws—like New York's Multiple Dwelling Law—may overtly prohibit occupation by short-term renters.

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similar battles waged by cities against other new economy sharing platforms, especially those that are transportation-related.

10. Tom Slee, *Trust, Ratings and the Data Behind Airbnb's Host Turnover*, SKIFT.COM (June 12, 2014), http://skift.com/2014/06/12/trust-ratings-and-the-data-behind-airbnbs-host-turnover/ (last visited Feb. 28, 2015).

11. Airbnb refers to the property owners who use its platform as "Hosts" and the lessees as "Guests." AIRBNB, *supra* note 7.

12. Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9 (last visited Feb. 28, 2015); *see also* Stephanie Burnett, *Airbnb Hands Over Data on 124 Hosts in New York City to the Authorities*, TIME (Aug. 25, 2014), *available at* http://time.com/3180103/airbnb-hands-over-data-on-124-hosts-in-new-york-city-to-the-authorities/.

13. Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9.

14. *See id.* Article 1, Section 4.8(a) of the New York Multiple Dwelling Law provides that "[a] Class A multiple dwelling shall only be used for permanent residence purposes" and defines "Class A dwelling" as including tenements, apartment houses, studio apartments, duplex apartments, and kitchenette apartments. It further provides that "[f]or purposes of this definition, 'permanent residence purposes' shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit."

15. *See* Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9; Affidavit of Sumanta Ray in Opposition to Airbnb, Inc's Motion to Quash and in Support of the Attorney General's Cross-Motion to Compel Responses to an Investigatory Subpoena, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1145999-new-york-attorney-general-analysis-of-airbnb.html#document/p3.

Historically, governments have used their police powers to create and enforce zoning restrictions of this nature for the purpose of preserving or improving public safety, property values, and the "character" of residential neighborhoods. These policies are of a bygone era and are ill-suited to address the modern sharing economy. Moreover, local governments do themselves a disservice when they prohibit housing exchanges. Rather than frustrating the goals and purposes for which old economy regulations were designed (e.g., the preservation of property values and neighborhood character), such exchanges may aid in achieving these aims. Additionally, these restrictions may constitute a regulatory taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments.[16]

The sharing economy has positively impacted many individuals and communities, but there is also a brewing conflict between this genesis and the realities of economic regulation—a conflict of which the New York Airbnb subpoena controversy is emblematic. Thus, in the housing context, we see this conflict playing out in the tension between growing patterns of home sharing and existing regulations that prohibit such sharing.

This Article focuses on the question of whether municipal restrictions on short-term leasing constitute unconstitutional takings of private property without just compensation. Part I gives an overview of home sharing in the new economy via short-term leasing. In doing so, it not only examines the controversy in New York, but also provides a historical perspective on home sharing in the United States, focusing particularly on the proliferation of boarding houses in the nineteenth century as a corollary to today's home sharing market. The examination of this topic is couched in the historical context of minority, immigrant, and women homeowners' "taking in boarders" in lean times in an effort to make ends meet and maintain ownership of their homes. Part II analyzes short-term leasing restrictions under the Takings Clause. In doing so, it examines the nature of short-term leasing restrictions and the reasons employed by municipalities to justify these regulations. Part III discusses the New York Airbnb controversy. Finally, Part IV argues that such facilitation is desirable

16. The Takings Clause of the Fifth Amendment provides, "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . property, without due process of law.").

because municipalities actually do themselves a disservice when they prohibit these new economy housing exchanges. Such exchanges can help to preserve property values by providing income to homeowners that can be used to offset mortgage and maintenance costs—in other words, *sharing* the burden of ownership. If homeowners are able to do so, they are more likely to be able to maintain their homes in the short-term and, in the long-term to maintain ownership. Moreover, municipalities may also reap economic benefits from permitting such exchanges.

I. Housing in the Sharing Economy

A. The Rise of the Housing Segment of the Sharing Economy

Sharing and bartering housing resources is not new. Historically, the concept has long existed in the context of lodging purchased on a time- or space-limited basis in inns and boarding houses, rooms for rent, housing cooperatives, and informal arrangements.[17] The catalyst for such sharing has often been the quest for affordability, coupled with housing scarcity. In the contemporary context, we see a home sharing proliferation, the catalyst of which is also the scarcity of resources—both affordable housing itself and the monetary resources to maintain home ownership. What is unique to home sharing in the new economy is not the sharing, but rather the way in which such sharing is facilitated by technology and how the use of such technology is causing innovation in sharing to outpace changes in housing regulation.[18]

Housing exchanges in the sharing economy often "[s]traddle the line between personal and commercial" activity—a personal activity being one for non-pecuniary gain.[19] In the new economy, renting lodging space—through platforms such as Airbnb—has become a "sharing enterprise"—"one [that ideally is] aimed at sharing and offsetting the cost of ownership and maintenance"—rather than solely a for-profit enterprise, as is common in traditional lodging

17. *See* DAVID FAFLIK, BOARDING OUT: INHABITING THE AMERICAN LITERARY IMAGINATION, 1804–1860 39–41 (2012) (noting that "Dutch merchants [in the New World] enjoyed the temporary shelter afforded them by boarding as early as the seventeenth century," acknowledging the long-standing existence of such arrangement in Europe, and charting its development in America).

18. *See* Kassan & Orsi, *supra* note 1, at 5; Molly Cohen and Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J. 26 (2014) (noting that the sharing economy is "[a]n old concept made new through internet-based sharing").

19. *See* Kassan & Orsi, *supra* note 1, at 7.

exchanges (whether long-term such as leasing or short-term such as hotel room lodging).[20] However, "[o]ur laws were designed to regulate relationships in a competitive economy, not a collaborative one."[21] This poses a challenge: The relationships in the sharing economy are often horizontal—involving peers—rather than vertical—involving a relatively powerful participant and a measurably weaker one.[22] Because of this relational shift, old regulations are often ill-fitted at best and in many cases, are "unduly burdensome given that they are designed to protect the powerless against the powerful and such protections are often unnecessary when relationships are horizontal."[23]

B. Nineteenth Century "Boarding Out" as a Corollary to Today's Housing Sharing

When viewed in its historical context, modern home sharing is a predictable phenomenon. Prior to the Civil War, the United States saw tremendous growth in the number of individuals "boarding out,"[24] as the practice was known. By the mid-1800s, three-quarters of the adults in Manhattan were boardinghouse guests.[25] This phenomenon was spurred by the migration of citizens to urban

20. *Id.*

21. *Id.* at 13.

22. *See id.* at 14.

23. *Id.*

24. Social historian Wendy Gamber notes that although "there was considerable overlap between [the] various sorts of nineteenth-century housing institutions, and nineteenth-century observers did not always make hard and fast distinctions," there were distinctions to be made:

> Boardinghouses differed from mere lodging houses in that they provided meals—usually served at a common table—and housekeeping services in addition to shelter. Hotels served food and drink to passersby as well as to occupants; they tended to be more luxurious, expensive, and architecturally elaborate than boardinghouses. Hotels were usually built for that express purpose, and almost all hotels were run by men. Boardinghouses on the other hand, most often were converted dwellings or simply "homes" with extra rooms to let."

Wendy Gamber, *Tarnished Labor: The Home, the Market, and the Boardinghouse in Antebellum America*, *in* 22 J. EARLY REPUBLIC 177, 181 (Summer 2002).

25. FAFLIK, *supra* note 17, at 36, 41, 43; *see also* WALT WHITMAN OF THE NEW YORK AURORA, EDITOR AT TWENTY-TWO: A COLLECTION OF RECENTLY DISCOVERED WRITINGS (Joseph Jay Rubin & Charles H. Brown eds. 1972).

centers from the towns and rural areas and by the ever-growing population of new immigrant arrivals from Europe:

> America's . . . metropolitan industrialization . . . expose[d] . . . the severe housing shortages attendant on the rapid growth of the urban-industrial showplaces that were then on offer in the United States. American manufacturers required workers en masse. Migrants from the countryside and immigrants from abroad were ready to oblige. During the 1840s alone, the two groups together raised the rate of urban population growth by three times what it was for rural areas by pouring into the nation's largest cities.[26]

As these urban centers became increasingly crowded, and the commodity of affordable housing more scarce, this species of housing sharing grew. "Housing starts lagged far behind the resultant increased demand for, and escalating price of, urban domestic quarters. Only by squeezing more and more bodies into already crowded home space did antebellum citizens avert an outright housing crisis."[27]

Historians estimate that one in five to one in three nineteenth century American households took in boarders.[28] The practice of "taking in boarders" was widespread and crossed class boundaries.[29] "A respectable widow, fallen on hard times, could easily transform her home into a boardinghouse."[30] "Whether they sheltered one lodger or ten, boardinghouses were remarkably diverse establishments that often catered to residents of particular class, gender, racial, ethnic, occupational, regional, political moral, or

26. FAFLIK, *supra* note 17, at 42; *see also* Gamber, *supra* note 24, at 178 ("[D]uring periods of massive urban growth, city dwellers of all classes more likely lived in boardinghouses than in "homes... Numbering in the thousands, providing "homes for rural migrants and European immigrants, boarding houses literally underwrote the growth of urban industry and commerce.").

27. FAFLIK, *supra* note 17, at 42–43.

28. *See* Gamber, *supra* note 24, at 184 ("Social historians who have found that up to thirty percent of all nineteenth-century households took in boarders may well provide the closest approximations"); FAFLIK, *supra* note 17, at 36, 41, 43; *see also* WALT WHITMAN OF THE NEW YORK AURORA, *supra* note 25.

29. Gamber, *supra* note 24, at 189.

30. *Id.*

religious identities."[31] Boarding houses were invariably owned and operated by members of those same communities—including women, minorities and immigrants.

II. Short-Term Rental Restrictions As Regulatory Takings

A. The *Penn Central* Multi-Factor Balancing Test

In an attempt to answer the question of when a regulation goes too far, the Supreme Court in *Penn Central Transportation Co. v. City of New York*[32] offered a three-part balancing test, holding that courts must focus on: (1) the character of the regulation; (2) the extent of the law's interference with distinct investment-backed expectations; and (3) the diminution in value of the property resulting from the regulation.[33] This same three-factor balancing test can be applied to short-term rental restrictions.

1. The Character of Short-Term Rental Restrictions

Short-term rental restriction can be divided into five types: (1) full prohibitions; (2) quantitative restrictions; (3) proximity restrictions; (4) operational restrictions; and (5) licensing requirements.[34]

First, those localities that fully prohibit short-term rentals do so on a community-wide basis.[35] However, some municipalities also enact such full prohibitions only in certain geographical locations, such as particular zoning districts or neighborhoods.[36]

Second, municipalities that have enacted quantitative restrictions allow short-term rentals throughout the community, but limit the number of such rentals.[37] Often, these communities take the

31. *Id.* at 182.

32. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

33. *Id.* at 124–25.

34. Rental restrictions may also be organized with respect to the entity that imposes them—such entities being local governments, residents, developers or a combination of these entities. Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability* 29 ST. LOUIS U. PUB. L. REV. 41, 47 (2009).

35. *See, e.g.*, N.Y. MULTIPLE DWELLING LAW, Article 1, §4.8(a) ("[a] Class A multiple dwelling shall only be used for permanent residence purposes").

36. *See, e.g.*, MAUI, HAW., COUNTY CODE § 19.37.010 (2014) (Maui County, Hawaii ordinance limiting "transient vacation rentals" to "destination resort areas" and certain other business zoning districts).

37. *See, e.g.*, SANTA FE, N.M., CITY CODE §14-6.2(A)(6)(a)(i5)(b)(v) (2009) (limiting the number of short-term rental permits to 350, unless the dwelling unit in question

approach of issuing short-term rental permits to property owners, but capping the number of such permits that may be issued.[38] As an alternative to an absolute cap, some municipalities mandate that a certain ratio of long-term to short-term residential use be maintained throughout the community or within certain designated zoning areas.[39] The impact of either approach is that owners who may want to enter the short-term rental market may be prohibited from doing so if the permitting cap has already been reached or if the mandated ratio cannot be maintained.

Third, in contrast to the quantitative restrictions, some municipalities restrict new short-term rentals from being located within a certain distance of an existing short-term rental property.[40] Again, the manner of restriction may have the effect of preventing new entrants into the short-term market.

Fourth, many regulations restricting short-term rentals focus on the operational aspects of renting.[41] These restrictions are also designed to prevent new entrants into the short-term rental market. For example, a municipality may limit the maximum overnight occupancy of short-term rental properties. Such restrictions may be based on the number of bedrooms[42] in the property or on some other quantitative aspect of the property.[43] Alternatively, rental period regulations that limit the number of times that a property may be rented may be enacted.[44] These types of operational restrictions increase the cost of providing short-term rentals and, therefore,

qualifies for a permit as an "accessory dwelling unit, owner-occupied unit, or unit located within a 'development containing resort facilities'").

38. *See id.*

39. *See, e.g.*, MENDOCINO CNTY, CAL., ZONING CODE § 20.748.020(A) (1995) (mandating that a ratio of thirteen long-term to one short-term dwelling units be maintained throughout the county).

40. *See, e.g.*, SAN LUIS OBISPO CNTY, CAL., COUNTY CODE § 23.08.165(c) (2012) (prohibiting residential vacation rentals from being established within 200 feet on the same block of any existing residential vacation rental or "visitor-servicing accommodation").

41. *See, e.g.*, TILLAMOOK CNTY, OREGON ORDINANCE 69 ("Short Term Rental Ordinance"), Section 6 (Standards)

42. *See, e.g.*, ISLE OF PALMS, S.C., CITY CODE § 5-4-202(a)(1) (2007) (limiting overnight occupancy to two persons per bedroom, plus an additional two persons).

43. *See, e.g.*, SONOMA CNTY, CAL., CODE OF ORDINANCES § 26-88-120(f)(2) (limiting maximum overnight occupancy by the design load of the septic system).

44. *See, e.g.*, SANTA FE, N.M., CITY CODE §14-6.2(A)(6)(a)(5)(c)(i)-(ii) (2009) (limiting short-term rental units to a maximum of seventeen rental periods per calendar year and limiting properties to one rental per consecutive seven-day period).

frustrate the very aim of owners, i.e. generating revenue and shifting (or "sharing") some of the burden of the cost of ownership.

Finally, some local government entities require that property owners seeking to use their properties for short-term rentals obtain a license to do so. Such licensing is often conditioned upon the property's passing various inspections.[45] Moreover, licensees may be subject to the payment of licensing fees and periodic renewals and, thus, additional fees.

2. The Owner's Investment-Backed Expectations

An owner's investment-backed expectations as envisioned by the *Penn Central* Court must be "distinct," rather than merely hypothetical.[46] For this reason, property owners must be able to show that they have more than just the potential to share their home on the short-term market. Rather, they must be able to show that specific steps have been made toward home sharing. Owners who have rented their properties on a short-term basis in the past may be best positioned to fulfill this requirement.

3. Diminution in Value

Diminution in value is determined by comparing the value of the subject property prior to the regulation with its post-regulation value.[47] However, the *Penn Central* Court held that diminution in the value of property does not, by itself, constitute a taking.[48] Rather, it must be analyzed in conjunction with the owner's distinct investment-backed expectations.[49] Thus, property owners in a given market may

45. *See, e.g.*, TILLAMOOK CNTY, OREGON ORDINANCE 69 ("Short Term Rental Ordinance"), Section 6 (Standards) and 9(a)(B) (Short Term Rental Permit Application Requirements) (2009) (requiring that short-term rental properties be certified by a building inspector with regard to minimum fire extinguishers and smoke detectors and emergency escape standards, as well as structural requirements).

46. *Penn Cent.*, 438 U.S. at 124; *see also id.* at 130 (finding no taking where owner merely believed it would have the future ability to exploit a property interest in its building's airspace). The Court relied heavily upon Frank Michelman's influential work on takings in which he intimated that such investment-backed expectation must be "distinctly perceived [and] sharply crystallized." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967).

47. *See* Michelman, *supra* note 46, at 1232–33 (describing the "fraction of value destroyed" test).

48. *Penn Cent.*, 438 U.S. 104 at 131.

49. *See* Michelman, *supra* note 46, at 1233 (arguing that the diminution in value test queries "whether or not the measure in question can easily be seen to have practically

be able to use comparable short-term rental statistics to determine the pre-regulation value of their property's rental potential. Owners may possibly even be able to extrapolate value using long-term rental comparables.

B. Exactions and the Unconstitutional Conditions Doctrine

In addition to applying the *Penn Central* multi-factor balancing test in its analysis of a property owner's takings claim, a court may also find the unconstitutional conditions doctrine to be instructive in instances where short-term rental permits are required. This doctrine was initially introduced in *Nollan v. California Coastal Commission*[50] and has been applied in the context where the state has placed a condition on the development of property.[51] The doctrine was further refined by the Court in its decision in *Dolan v. City of Tigard*.[52] The Court's analysis of unconstitutional conditions includes: (1) whether an "essential nexus" exists between the proposed condition and the legitimate interest of the state[53] and, if such an "essential nexus" does exist, (2) whether there is a "rough proportionality" between the state's justification for the condition and the condition itself.[54]

1. Essential Nexus

In *Nollan*, property owners brought an action against the California Coastal Commission because it had conditioned their rebuilding permit on a requirement that the owners provide an easement across their beachfront property.[55] The purpose of the easement was to permit the public to access the two adjacent public beaches on either side of the Nollans' property.[56] The Commission claimed that the condition was necessary in order to "protect the

deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation").

50. Nollan v. Cal. Coastal Comm., 483 U.S. 825 (1987).

51. *See id.*

52. Dolan v. City of Tigard, 512 U.S. 374 (1994). Even more recently, the Court noted that the unconstitutional conditions doctrine applies both when permission to develop property has been denied and when the exaction involved is monetary. Koontz v. St. Johns River Water Mgmt. Dist., 113 S. Ct. 2586 (2013). In *Koontz*, the Court discussed the policy behind the unconditional conditions doctrine, which included the prevention of coercion between the state and the individual property owner, as well as a balancing of costs and harm between the public and individual property owners. *Id.*

53. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386.

54. *Dolan*, 512 U.S. at 386.

55. *Nollan*, 483 U.S. at 827.

56. *Id.*

public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches."[57] The Court did not find there to be an essential nexus between the condition and the state's interest.[58] The Court, therefore, held that the Commission could not, without paying just compensation, condition the grant of the permit on such a requirement.[59] Because the Commission failed to meet the "essential nexus" requirement, the Court did not reach the second question of the unconstitutional conditions analysis.[60]

2. Rough Proportionality

The second analytical prong of the unconditional conditions doctrine was addressed by the Court in *Dolan.* In *Dolan*, the Planning Commission of the City of Tigard, Oregon conditioned the approval of a landowner's application to expand her store and pave her parking lot upon her agreeing to dedicate land for (1) a public greenway along an adjacent creek and (2) a public pedestrian/bicycle pathway.[61] The Planning Commission claimed (1) that the purpose of the greenway was to minimize flooding associated with the paving and the resulting increase in impervious surfaces and (2) that the public pathway was needed to minimize traffic and congestion.[62] The Supreme Court found that both dedication requirements constituted an uncompensated taking of property despite the fact that there did exist an essential nexus between the state's interest and the conditions imposed.[63] Rather, the court found that the burden imposed on the property owner by the condition was not roughly proportional when balanced against the state's interest, but was, rather, unduly cumbersome.[64] Likewise, owners of potential and existing short-term rentals may be able to show that operational, licensing and permitting requirements, though they meet the *Nollan* "essential nexus" requirement, are unduly burdensome because they shift the entire

57. *Id.* at 825.

58. *Id.* at 841.

59. *Id.* at 841–42.

60. *See Dolan*, 512 U.S. at 386 ("We addressed the essential nexus question in *Nollan*").

61. *Id.* at 380–82.

62. *Id.*

63. *Id.*

64. *Id.* at 391.

burden identified by local communities as justifications for short-term rental restrictions to individual owners.[65]

C. Short-Term Rental Restrictions as Inverse Condemnations

Local government regulations restricting the use of real property for short-term rentals may constitute a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution.[66] Governmental restrictions on the use of real property for the purpose of short-term rentals may be classed as "inverse condemnation"—an instance where the government has taken property or impacted property rights without utilizing the condemnation process and, therefore, without providing just compensation for the taking.[67] Inverse condemnation applies both to physical invasions of private property and to so-called "regulatory takings"—those instances in which the government has regulated the use of property in a manner so as to constitute a constructive taking thereof.[68] The genesis of the

65. *Dolan*, 512 U.S. at 384 (noting that "[o]ne of the principal purposes of the Takings Clause is to bar Government from forcing some people to bear public burden which in all fairness and justice should be borne by the public alone").

66. The Takings Clause of the Fifth Amendment provides, "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . property, without due process of law."); *see also Nollan*, 483 U.S. at 827 (noting the Takings Clause of the Fifth Amendment is made applicable to the states via the Fourteenth Amendment). A property owner who is seeking to establish a claim pursuant to the Takings Clause must identify (1) the property taken; (2) the governmental conduct that resulted in the taking; and (3) the just compensation that would remedy the taking. *See generally* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH §16.53.20 (2000).

67. First English Evangelical Lutheran Church of Glendale v. L.A. Cnty., 482 U.S. 304, 317 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that the taking may occur without such formal proceedings."). If the government would like to acquire private property for public use, it must usually commence by attempting to negotiate a purchase agreement with the owner. If its attempts at negotiation fail, it will begin the condemnation process via the courts. At trial the government has to establish authority to condemn, which may require it show that the proposed taking is "necessary," thus establishing its authority to condemn the property. If successful, the government will be required to pay just compensation to the owner for the taking. *See* JESSIE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 1081 (2010) (7th ed. 2010).

68. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at lest is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

idea of the "regulatory taking" can be found in *Pennsylvania Coal Co. v. Mahon*,[69] wherein Justice Oliver Wendell Holmes, Jr., writing for the Court, famously concluded that, with regard to government regulation of property rights, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[70]

III. The New York Airbnb Controversy

As noted in the Introduction, New York's Attorney General subpoenaed Airbnb's records on its New York City hosts, contending that some of those hosts were in violation of the New York Multiple Dwelling Law and were not complying with state and local tax registration and collection requirements.[71] Airbnb moved to quash the subpoena, arguing that:

> (i) there is no reasonable, articulable basis to warrant such an investigation and the subpoena constitutes an unfounded "fishing expedition"; (ii) any investigation is based upon laws that are unconstitutionally vague; (iii) the psubpoena is overbroad and burdensome; and (iv) the subpoena seeks confidential, private information from petitioner's [Airbnb's] users.[72]

Judge Gerald W. Connolly of the Supreme Court of New York, Albany County held that the subpoena must be quashed because the requests contained therein were overly broad.[73] The court made this

69. 260 U.S. 393 (1922).

70. *Id.* at 415. The issue in *Pennsylvania Coal* was whether the effect of the Kohler Act—which prohibited the mining of anthracite coal in a manner that, among other things, would cause subsidence to any residential structure—amounted to a taking. The Court held that "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

71. *See* Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9 (last visited Feb. 28, 2015); Affidavit of Sumanta Ray in Opposition to Airbnb, Inc's Motion to Quash and in Support of the Attorney General's Cross-Motion to Compel Responses to an Investigatory Subpoena, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1145999-new-york-attorney-general-analysis-of-airbnb.html#document/p3.

72. Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9 (last visited Feb. 28, 2015).

73. *Id.*

determination despite its finding that a predicate factual basis had been established with "evidence [supporting the assertion that a substantial number of Hosts may be in violation of the Multiple Dwelling Law and/or New York State and/or New York City tax provisions."[74]

The court also held that Airbnb's constitutional vagueness argument was not yet ripe for review because there was no actual controversy ongoing between the state and the hosts.[75] Additionally, the court held that Airbnb had failed to show that the information requested by the subpoena was confidential.[76]

The court noted that the subpoena demanded information on "all Hosts that rent Accommodation(s) in New York State." The Multiple Dwelling Law, however, applies only to "cities with a population of three hundred twenty-five thousand or more."[77] Moreover, the court found fault with the subpoena's not limiting its request to rentals of less than thirty days.[78]

With respect to the tax-related allegations made by the Attorney General, the court also took issue with the fact that the subpoena was not limited to New York City hosts and did not take into account the various exceptions to the state and city tax regulations.[79] In particular, the court noted that the Attorney General acknowledged the existence of exceptions to the hotel occupancy tax that exempted hosts who rented their properties "for less than 4 days, or for fewer than three occasions during the year (for any number of total days)."[80]

74. *Id.*; *see also* Affidavit of Sumanta Ray in Opposition to Airbnb, Inc's Motion to Quash and in Support of the Attorney General's Cross-Motion to Compel Responses to an Investigatory Subpoena, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1145999-new-york-attorney-general-analysis-of-airbnb.html#document/p3.

75. *See* Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9 (last visited Feb. 28, 2015).

76. *See id.* (last visited Feb. 28, 2015) (noting that petitioner's privacy policy provides that it will disclose hosts' information at its discretion).

77. N.Y. MULTIPLE DWELLING LAW § 3.

78. *See* Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9 (last visited Feb. 28, 2015).

79. *Id.*

80. *Id.* at 13 (quoting Respondent Memorandum in Opposition).

One day after the court's ruling, the Attorney General issued a second subpoena to Airbnb.[81] This second subpoena was revised to address the court's concerns about over breadth.[82] Less than one week after the issuance of the second subpoena, Airbnb and the Attorney General entered into an agreement whereby Airbnb would provide the Attorney General with anonymized data on its New York City hosts.[83] If after reviewing such data, the Attorney General or the New York City Office of Special Enforcement instituted an investigation of or undertook an enforcement action against a specific host, Airbnb agreed that it would provide non-anonymized information on that host.[84]

Five months later, in October 2014, Attorney General Schneiderman released *Airbnb in the City*, a report on the information that it had gathered from Airbnb as a result of the May 2014 agreement.[85] The report analyzed Airbnb bookings for "private stays"[86] in New York City from January 1, 2010 through June 2, 2014 (referred to in the report as the "Review Period").[87] According to the report, during the Review Period, "72 percent of units used as private short-term rentals on Airbnb appeared to violate [the Multiple Dwelling Law]."[88]

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81. *See* Benjamin Snyder, *New York Attorney General Issues New Subpoena in Airbnb Case*, FORTUNE (May 15, 2014), *available at* http://fortune.com/2014/05/15/new-york-attorney-general-issues-new-subpoena-in-airbnb-case/ (last visited Feb. 28, 2015); *see also* Letter from Attorney General Eric T. Schneiderman to Belinda Johnson, General Counsel, Airbnb, Inc. (May 20, 2014), *available at* http://www.ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf (last visited Feb. 28, 2015) (noting that a subpoena for records was issued on May 14, 2014).

82. *See* Snyder, *supra* note 81.

83. *See* Letter from Attorney General Eric T. Schneiderman to Belinda Johnson, *supra* note 81.

84. *See id.* Airbnb has so far complied with this agreement, supplying the Attorney General with anonymized information on approximately 16,000 hosts, and in August 2014, giving the Attorney General specific, non-anonymized information on 124 hosts. *See* Stephanie Burnett, *Airbnb Hands Over Data on 124 Hosts in New York City to the Authorities*, TIME (Aug. 25, 2014), *available at* http://time.com/3180103/airbnb-hands-over-data-on-124-hosts-in-new-york-city-to-the-authorities/.

85. New York State Office of the Attorney General, *Airbnb in the City* (Oct. 2014), *available at* http://ag.ny.gov/pdfs/Airbnb%20report.pdf (last visited Feb. 28, 2015).

86. A "private stay" is one in which the entire house or apartment is available to the guest and the host is not present in the unit during the stay. *Id.* at n.1.

87. *Id.* at 2.

88. *Id.* at 2, 8.

The New York Attorney General's earlier subpoena and eventual conclusions regarding Airbnb and its hosts is emblematic of the tension inherent in the current regulatory scheme. A revision of the underlying policies justifying the restricting of short-term rentals is necessary in order to align our legal framework with our new economic reality.

IV. Justifications for Municipal Short-Term Rental Restrictions

Communities justify restrictions of short-term leasing using various lines of reasoning, the most prominent of which (1) relate to protecting property values and the character of the neighborhood; (2) focus on issues related to taxation and revenue; or (3) are public safety-based.[89]

A. Property Values and Character of the Neighborhood

Conventional thinking has been that short-term rental restrictions increase property values by causing owners to adhere to maintaining a gold standard of single-family ownership and occupancy.[90] However, it is possible that property values may increase as a result of the government allowing owners to enter into the short-term market, especially if, in the long-run, by doing so, the owner is able to alleviate some of the burden of ownership and thereby avoid deferring maintenance or, in the extreme, avoiding foreclosure.

The argument regarding the protection of the character of a particular residential neighborhood pits permanent residents against short-term residents and the owners that rent to them. Permanent residents may argue that short-term tenants do not have ties to the community and do not or cannot, therefore reflect the values of the community. These arguments conflate the length of stay in a community with the ability (or more precisely the inability) to be a good neighbor.

B. Revenue and Competition with Licensed Lodging

The hotel industry has lobbied for bans prohibiting short-term rentals, or at the very least, tougher regulations that would compel

89. *See generally* Pindell, *supra* note 34, at 46–48.

90. *See id.*

owners to pay the same sorts of occupancy taxes and other fees to which licensed hotels are subject.[91] By the same token, local governments have often couched their objections to prohibit short-term rentals in terms of lost hotel occupancy tax revenue.[92]

C. Public Safety

Local governments argue that the state is obliged to regulate the relationship between property owners and renters in order to protect the public from possibly unsafe lodging situations.[93] Thus, municipalities argue that occupancy limits and inspection requirements, for example, are not designed to prevent owners from entering the rental market, rather they are meant to ensure that the renting public remains safe.[94] As noted above, this reasoning is best suited for a regulatory scheme that is mediating vertical relationships, rather than horizontal peer-to-peer relationships that have the tendency to be self-regulating. Such burdensome requirements may have the unintended consequence of creating an "underground" market for short-term housing rentals. In essence, this is what is happening in municipalities with total bans as well. Although hosts are using a publicly accessible website to facilitate sort-term rental relationships, these hosts have often taken the calculated risk of disregarding bans or onerous regulation in order to shift a portion of their ownership burden, thus creating a "black market" in housing sharing.

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91. *See Airbnb Versus Hotels: Room for All, For Now,* THE ECONOMIST (April 26, 2014), *available at* http://www.economist.com/news/business/21601259-there-are-signs-sharing-site-starting-threaten-budget-hotels-room-all (last visited Mar. 6, 2015); Jim Edwards, *Why Hotel Industry Lobbyists Want a Global Crackdown on Airbnb,* BUSINESS INSIDER (May 27, 2015), *available at* http://www.businessinsider.com/why-hotel-industry-lobbyists-want-a-global-crackdown-on-airbnb-2013-5 (last visited Mar. 6, 2015).

92. *See, e.g.*, Decision and Order, Airbnb v. Schneiderman, 989 N.Y.S.2d 786 (Sup. Ct. 2014) (No. 5393-13), *available at* http://www.documentcloud.org/documents/1159527-airbnb-new-york-decision.html#document/p9.

93. *See* New York State Office of the Attorney General, *supra* note 85, at 20–27 (Affidavit of Thomas Jensen, Chief of Fire Prevention, New York City Fire Department); *id.* at 28–37 (Affidavit of Vladamir Pugach, Associate Inspector for New York City Department of Buildings).

94. *See* New York State Office of the Attorney General, *supra* note 85, at 20–27 (Affidavit of Thomas Jensen, Chief of Fire Prevention, New York City Fire Department); *id.* at 28–37 (Affidavit of Vladamir Pugach, Associate Inspector for New York City Department of Buildings).

Conclusion

Some who are actively studying the emergence of the sharing economy have proposed a new American Dream comprised of four platforms: (1) building relationships for casual, spontaneous, and one-time transactions; (2) building agreements; (3) building organizations; and (4) building larger-scale infrastructure.[95] Similar guidelines could be adopted in the short-term housing regulation context. It is possible that "[e]nvisioning the sharing economy in this way makes it easier to let go of the original American Dream."[96]

By providing short-term rentals, owners may shift and share the burden of homeownership. This shifting can help to defray mortgage and real estate tax costs. Moreover, the sharing of this burden, through the consequent sharing of the benefits of homeownership—use and enjoyment in particular—can help to avoid or at least mitigate instances of blight due to disrepair, distressed sales at below market rate sales prices, and even foreclosures. Thus, allowing owners to share homeownership can protect a community's property values by helping to insulate individual owners from the effects of negative housing market downturns.

95. *See* Kassan and Orsi, *supra* note 1, at 10–12.

96. Kassan and Orsi, *supra* note 1, at 12.

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