



Municipal Regulation of Short-Term Rentals

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I. Why should my town care about short-term rentals?

Everyone knows that the short-term rental business has exploded in the last decade. The temptation to get into the business is strong; there probably are few people who haven't thought at least briefly about whether they could make a few extra dollars from renting out a room in their home a few days, or a few weekends, a year—or perhaps 365 days a year.

Although there are plenty of good things about short-term rentals, they can bring problems. Among the negative effects that many municipalities have experienced are increases in noise, littering, traffic, illegal parking, and disorderly conduct. In some cities around the country, the conversion of residential housing into short-term rental properties has exacerbated existing housing shortages and an affordable housing crisis.

Most New Hampshire municipalities have not yet expressed significant concerns about short-term rentals. Reported problems have come primarily from areas with heavy tourist traffic, like the seacoast and the White Mountains. But short-term rentals are likely to come to your town if you have, or are close to, any of these: the ocean, a lake, a ski area, a college, a hospital, a racetrack, a hiking destination, an ATV or snowmobile trail, a popular hunting area, a large business, or leaves that change colors in the fall.

There is a good chance that one or more properties in your municipality are already being operated as short-term rentals. And there is a reasonable chance that they are not in compliance with your zoning ordinance.

II. What is a short-term rental?

A. No controlling definition. Statutes and local ordinances in other states typically define a short-term rental as the rental of a residential unit, for a fee, for occupancy for less than 30 days, or less than one month, or similar language.

There is no firm definition of “short-term rental” in New Hampshire land use law, but there are two tangential statutes that define the term.

- RSA 48-A, the housing standards statute, defines “short-term rental” or “vacation rental” as “any individually or collectively owned single-family house or dwelling unit or any unit or group of units in a condominium, cooperative, or timeshare, or owner occupied residential home, that is offered for a fee and for less than 30 consecutive days.” See RSA 48-A:1, V.
- RSA 78-A, the meals and rooms tax statute, defines “short-term rental” as “the rental of one or more rooms in a residential unit for occupancy for tourist or transient use for less than 185 consecutive days.” See RSA 78-A:3, XX.

The 185-day standard in the meals and rooms tax statute is an aberration. (The relevance of the definition to that statute is that the meals and rooms tax is imposed on rentals of sleeping accommodations other than to “permanent residents,” defined as someone who occupies a room for at least 185 consecutive days.) A rental for less than a month is considered the standard definition.

B. Municipality may adopt its own definition. However, a municipal zoning ordinance may define terms however the municipality’s legislative body decides (with some exceptions). The definitions in RSA 48-A and RSA 78-A apply only for purposes of those chapters. A one-month or 30-day limit is not required. If a municipality chooses to regulate short-term rentals through its zoning ordinance, it may define the term however it chooses.

III. Do municipalities have zoning authority to limit or prohibit short-term rentals?

The short answer is YES.

A. Statutory authority. RSA 674:16, the zoning enabling statute, states that a zoning ordinance “shall be designed to regulate and restrict,” among other things, “the location and **use of buildings, structures and land used for business, industrial, residential, or other purposes.**”

That is quite clear. The zoning ordinance may regulate the use of buildings for “business, industrial, residential, or other purposes”—that is, for any purpose. Various statutes and court decisions impose limits on municipal authority to regulate property uses through zoning, but there is nothing that prohibits regulation of short-term rentals.

B. The argument against allowing regulation: “It’s a residential use.” In New Hampshire, a standard argument used by those who want to prohibit municipalities from regulating short-term rentals goes something like this:

- 1) Short-term rental is a residential use; and
- 2) A municipality may not treat rental residential property differently from owner-occupied residential property. "If I have a right to live in a house that I own, I have a right to rent the house to someone else."

Answer: It's not a residential use. A room rented for a weekend does not become the temporary occupant's residence. Renting a room to a continuing sequence of guests for a weekend or a week at a time is not the same as renting it to a tenant who resides there on a long-term basis. This is the difference between a hotel room and an apartment.

Nor does the owner's residing on the property keep it within the definition of a residential use. If you buy a house and live in half of it, but convert the other half into a convenience store, or a bar, or a gunpowder factory, it is no longer a purely residential use. Similarly, if you use it as a hotel or a bed and breakfast, it is no longer purely a residential use.

Note: New Hampshire law (RSA 21:6-a) defines "residence" as "a person's place of abode or domicile. The place of abode or domicile is that designated by a person as his or her principal place of physical presence to the exclusion of all others." When a person rents a room or a house for a weekend or a week and then goes home, that rental is clearly not within the definition of "residence." Further, the meals and rooms tax statute (RSA 78-A), the hotel statute (RSA 353), and the landlord-tenant statute (RSA 540) all recognize a difference between long-term and short-term rentals, treating the former as residential and the latter as commercial (although they draw the line at different places—185 days, one month, and 90 days, respectively). These statutes are not controlling for zoning purposes, but they reflect a general recognition that a short-term rental is significantly different from a residence.

C. Limitation on authority: RSA 48-A. There is one statutory limitation on municipal authority to regulate short-term rentals. Section 2 of the housing standards statute, which authorizes municipalities to adopt codes to remedy substandard housing, states, "The power conferred by this section shall not be used to impose any additional ordinances, codes, bylaws, licenses, certificates, or other restrictions on dwellings used as a vacation rental or short-term rental." RSA 48-A:2. (That statute also states that, ***only for purposes of RSA 48-A***, "vacation rental and short-term rental are residential uses of the property and do not include a unit that is used for any nonresidential use, including retail, restaurant, banquet space, event center, or another similar use.")

This limitation clearly applies only to regulation under the housing standards statute. It was enacted in 2017 specifically to prevent municipalities from using their housing codes—not their zoning ordinances—to regulate short-term rentals. In fact, the original language of the bill that led to this enactment, HB 654 from the 2017 session, *would* have severely restricted municipalities' authority to regulate short-term rentals through their zoning ordinances, but that language was rejected in favor of the provisions that merely restrict the use of housing codes.

IV. Other challenges to regulation of short-term rentals

A. Constitutional challenges. Property owners in New Hampshire and elsewhere have claimed that restrictions on short-term rentals are unconstitutional on various grounds, including equal protection, due process, and even the federal constitution's commerce clause and privileges and immunities clause. These claims have been mostly unsuccessful, as they should be.

A full analysis of these constitutional claims is beyond the scope of this presentation. Suffice it to say that if the municipality does not do anything outrageous, such as openly discriminate against some property owners and in favor of others, it is highly unlikely that any constitutional challenge could succeed.

B. *Federal Communications Decency Act.* Some cities (not in New Hampshire) have enacted ordinances requiring on-line short-term rental platforms (like Airbnb and HomeAway) to provide information about hosts, listings, and guests, or otherwise assist in compliance with local zoning requirements. Those companies have challenged these ordinances based on, among other things, the federal Communications Decency Act.

Although its title doesn't sound like something that would affect land use law, the Communications Decency Act essentially says (in part) that companies that host websites cannot be held legally accountable for content published on the websites by third-party users. The claim is that this precludes a municipality from requiring the website host to enforce compliance by rental property owners. The companies have also claimed that these ordinances violate their First Amendment rights.

There may be merit to these claims. The problem can be avoided by keeping the on-line company out of it. Municipal regulation of short-term rentals (like any property) should be directed at the property and those who are using it, not at those who may be assisting in advertising its use. A short-term rental provision should not seek to obtain information from, or compel compliance by, a company that serves only as a broker.

C. *Selective enforcement.* Some short-term rental property owners have challenged municipal enforcement efforts by claiming "selective enforcement"—*i.e.*, that the municipality is enforcing its ordinance only against one or a few property owners, while others are allowed to ignore the ordinance with impunity.

Selective enforcement is a legitimate claim, but the property owner "must show more than that the enforcement was merely historically lax." It must be shown that "the selective enforcement was a conscious, intentional discrimination." *Anderson v. Motorsports Holdings*, 155 N.H. 491, 499 (2007).

A municipality's historical failure to enforce its zoning ordinance against short-term rental property owners does not prevent it from initiating enforcement now—so long as it does so consistently. Nor is it required to perform detective work to find every single violator; zoning violations often come to a municipality's attention only because a neighbor has complained. If the municipality undertakes enforcement as it becomes aware of potential violations, and does so fairly, that is sufficient to avoid a claim of selective enforcement.

V. Regulation of short-term rentals in the zoning ordinance

A. *Does your ordinance already regulate short-term rentals?* For municipal officials who want to regulate short-term rentals, it may seem that the obvious route is to draft a zoning amendment that directly addresses the subject. That may work, but it may not be necessary. Before embarking on a zoning amendment effort, it is suggested that the planning board review the existing ordinance to see whether it already addresses short-term rentals.

1. Is your ordinance permissive or prohibitory? There are two kinds of zoning ordinances, and each is the opposite of what it sounds like:

- a) Permissive ordinances. A permissive ordinance generally **prohibits** all uses that are not **expressly permitted** in the ordinance. If a particular use is not mentioned in the ordinance, it is not allowed in the municipality, unless it can be deemed an accessory use to a permitted use. The ordinance typically lists all the permitted uses and contains a statement saying something to the effect of "Any use of a building, structure, or land not expressly permitted in this ordinance shall be prohibited."
- b) Prohibitory ordinances. A prohibitory ordinance **permits** all uses that are not expressly **prohibited**.

The majority of zoning ordinances in New Hampshire are of the permissive variety.

Under a permissive ordinance, short-term rentals are prohibited unless the ordinance expressly permits them. Under a prohibitory ordinance, short-term rentals are permitted unless the ordinance expressly prohibits them.

2. Are short-term rentals covered? Once you determine whether your ordinance is permissive or prohibitory, it is not enough just to look for the term "short-term rental" in the ordinance and see whether it is expressly permitted or prohibited. Unless it was recently added, the term probably does not appear, but there may other defined uses in the ordinance that could be interpreted to include short-term rentals. Some examples of defined uses that **could** include short-term rentals, depending on how they are defined in the ordinance, are:

- Bed and breakfast
- Rooming house
- Hotel
- Home rental
- Home business
- Apartment

For example, one randomly selected zoning ordinance defines "hotel" as "any building, or any part thereof, which contains one or more lodging units devoted to transient or semi-transient rental occupancy and which has a common entrance or entrances, including an inn, motel, motor inn, tourist court, boarding house, lodging house or rooming house, but specifically excepting a Bed and Breakfast Home." The definition of "bed and breakfast home" is similar, but it has a limit of three lodging units and a requirement that the building be owner-occupied. The ordinance expressly permits both uses, but only in certain districts. If this is a "permissive" zoning ordinance (it is), and if there is no other definition that encompasses short-term rentals, then a property owner could operate a short-term rental only under the authority, and in the permitted district, for a hotel or bed and breakfast.

The planning board ought to perform a thorough review of its zoning ordinance to determine whether short-term rentals are covered, and if so under what classification. If there is a desire to have looser regulation of short-term rentals by homeowners than the existing regulations of hotels or bed

and breakfasts, an amendment to the ordinance may be necessary. In any event, the board needs to understand whether, and to what extent, short-term rentals may already be permitted or prohibited (or whether, as is certainly possible, the ordinance is too ambiguous to provide a clear answer) and determine whether it wants to change that treatment.

3. Accessory use. If the zoning ordinance cannot be interpreted to expressly permit short-term rentals, an owner could still claim that a short-term rental must be allowed as an accessory use to a residential dwelling. An accessory use is one that is “subordinate and customarily incidental to the main use on the same lot.” *Forster v. Town of Henniker*, 167 N.H. 745, 758 (2015). A common example of an accessory use is a garage on a residential lot. If residential dwellings are permitted and garages are not expressly prohibited, a garage ordinarily will be allowed as an accessory use to the house.

The “subordinate” and “incidental” criteria require that the accessory use be “minor in relation to the permitted use and . . . bear a reasonable relationship to the primary use.” The “customarily” requirement is an important one. It requires evidence that the accessory use “has commonly, habitually and by long practice been established as reasonably associated with the primary residential use in the town.” *Becker v. Town of Hampton Falls*, 117 N.H. 437, 440-41 (1977).

A homeowner might claim that renting out a room in his or her home is an accessory use to the primary use as a residence. There is no clear, uniform answer to this, but there are some obvious cases: if the homeowner does not actually live there, but merely rents individual rooms or the entire house to short-term occupants, then the rental is not “subordinate”—it is the primary use. Similarly, if the owner occupies just one or two rooms and rents several units to short-term occupants, the rental business is not subordinate and not an accessory use.

A more difficult case is where the owners legitimately occupy the house as their primary residence and merely rent one or two rooms on a short-term basis. That may satisfy the “subordinate” requirement, but the owner would still need to establish that homeowners in the municipality have “customarily” rented rooms to short-term occupants as an incident to their use of the property as a residential dwelling. This seems unlikely in most cases; but these questions need to be resolved on a case-by-case basis. Consultation with the municipality’s legal counsel is strongly encouraged before any conclusions are drawn on whether a short-term rental is an accessory use.

4. Variance. If short-term rentals are not allowed under the ordinance, or not allowed in the district where the subject property is located, requesting a variance is always an option. As with any variance, the applicant will need to satisfy the criteria in RSA 674:33, I. Every case depends on its specific facts, of course, but it seems unlikely that many cases would be able to satisfy the “unnecessary hardship” requirement if it is applied conscientiously.

B. Amending the ordinance. If a municipality chooses to address short-term rentals directly in its zoning ordinance, it has the same options it has with respect to most other types of use: it may permit them without limitation, it can restrict their location, it can restrict their size or other attributes, or it can prohibit them altogether. (At least one New Hampshire town has prohibited them in all districts.)

Of critical importance is that the ordinance be clear, starting with the definition of “short-term rental.” The ordinance might establish a separate definition specifically for short-term rentals, or it might fold it into an existing definition of hotel, bed and breakfast, or something else.

If the ordinance is going to allow short-term rentals, the following are some of the issues that should be considered. (There are most likely several others):

- Limit on number of units per property
- Limit on number of guests per unit
- Limit on number of days per year units may be rented
- Owner occupancy requirement
- Allowance only by special exception
- Restriction to specific zoning districts
- Periodic safety inspections

Assuming the planning board has site plan review authority, other matters, such as noise, trash, parking, and hours of check-in and check-out, can be addressed there. Otherwise, they should be considered for inclusion in the ordinance. It is impossible to address every imaginable situation in a zoning ordinance, but an effort should be made to anticipate and answer as many questions as possible.

If the ordinance is going to prohibit short-term rentals, clarity is equally important. The ordinance should be very specific about what constitutes a short-term rental so there is no question about what is and is not prohibited. A statement that “short-term rentals of residential property are prohibited” will raise more questions than it answers.

Any amendment will need to be tailored to accommodate the municipality’s specific needs and to fit with the existing ordinance. ***Consultation with the municipality’s attorney and/or a professional planner is strongly recommended.***

C. Don’t forget site plan review! Some may be inclined to look at the zoning ordinance, conclude that it allows short-term rentals, and figure that’s the end of the story. It’s not. If the planning board has site plan review authority, it should apply to short-term rentals. RSA 674:43 provides for review of “site plans for the development or change or expansion of use of tracts for nonresidential uses.” Unless one accepts the shaky argument that short-term rentals are residential uses, site plan review would apply.

As mentioned above, site plan review is where the planning board can address issues like noise, trash, parking, hours of check-in and check-out. No doubt the neighbors will have something to say about these matters.



New Hampshire cases on short-term rentals

Working Stiff Properties v. City of Portsmouth (Rockingham Co. Super. Ct. 6/21/18)

The ordinance: Portsmouth has a “permissive” zoning ordinance: “No building, structure, or land shall be used for any purpose or in any manner other than that which is permitted in the district in which it is located,”

With a few inapplicable exceptions, only “dwellings” and accessory uses are allowed in Portsmouth’s General Residence A (GRA) district.

“Dwelling” is defined as “a building or portion thereof containing one or more dwelling units.”

“Dwelling unit” is defined as “a building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. ***This use shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses.***”

Facts: Plaintiffs are a married couple who live in the GRA district and own a second house on the adjoining lot. Although the plaintiffs have made the second house available to friends and family for occasional visits, no one resides in the house.

Plaintiffs renovated the house for the specific purpose of renting it out as a short-term rental via Airbnb and/or other web-based booking agencies. Neighbors complained. Code enforcement officer notified plaintiffs that short-term rental use was not permitted in that district. Plaintiffs did not respond, and CEO issued a cease and desist letter.

Plaintiffs appealed to ZBA. After hearing, ZBA affirmed the cease and desist order, finding that the use was a prohibited “transient occupancy.” Plaintiffs appealed to superior court.

Argument: Plaintiffs argued that short-term rentals are no different from month-to-month tenancies and long-term leases. Court disagreed, agreeing with the ZBA that it was a “transient occupancy”:

Although reasonable minds can debate how long an occupancy must be before it is no longer “transient,” the references on plaintiff’s Airbnb listing to “family parties” and “wedding parties” clearly suggest a use short enough to qualify. To be sure, plaintiff’s listing also references “corporate stays,” which could be lengthier, but the Airbnb rental is by the day and at short term/vacation rental rates.

Plaintiffs also argued that the prohibition on “transitory occupancies” is unconstitutionally vague. Court disagreed. The ordinance is “sufficiently clear and definite to allow the average person to understand what is required”; and “there is no risk of arbitrary or discriminatory enforcement based on the text of the ordinance.”

Finally, plaintiffs claimed selective enforcement, because city had enforced prohibition on short-term rentals only in response to neighbor complaints. Court dismissed the argument, stating that a landowner cannot complain about being singled out in the absence of either (a) intentional and unlawful discrimination or (b) a pattern of nonenforcement that is so systematic as to constitute ratification of a policy of nonenforcement.

Current status: Plaintiff appealed to New Hampshire Supreme Court. Briefs have been filed.

Andrews v. Kearsarge Lighting Precinct (Carroll County Super. Ct.—pending)

The ordinance: Kearsarge Lighting Precinct's (KLP) zoning ordinance contains the following requirement: "All residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated."

Facts: Plaintiffs (two separate parties) own properties in the precinct. Both use their properties occasionally, but do not claim them as their full-time residences. KLP's commissioners sent notices of violation to both plaintiffs stating that properties were "being offered for sleeping accommodations to transient guests without being owner occupied and operated." Notices stated that they were based on "numerous complaints from neighbors."

Plaintiffs appealed to ZBA. After hearings, ZBA upheld the commissioners' notices of violation. Plaintiffs appealed to superior court.

Argument: Plaintiffs make several claims, including:

- the words "transient," "guest," and "owner occupied" are ambiguous;
- KLP has selectively enforced the prohibition;
- procedural violations not specific to the short-term rental issue; and
- numerous creative constitutional arguments not worth discussing.

Current status: KLP has filed motion for summary judgment; no decision yet.

SB 69 - AS INTRODUCED

2019 SESSION

19-1027
05/10

SENATE BILL

69

AN ACT

relative to short-term rentals.

SPONSORS:

Sen. Fuller Clark, Dist 21; Rep. Cushing, Rock. 21; Rep. Edgar, Rock. 21

COMMITTEE:

Election Law and Municipal Affairs

ANALYSIS

This bill defines, and enables towns to license and regulate, short-term rentals.

Explanation:

Matter added to current law appears in ***bold italics***.

Matter removed from current law appears ~~[in brackets and struck through.]~~

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

This bill has not been enacted into law.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT relative to short-term rentals.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Section: Local Regulation of Short-Term Rentals. Amend RSA 31 by inserting after
2 section 103-a the following new section:

3 31:103-b Regulation of Short-Term Rentals. The governing body of a town may adopt, by
4 ordinance or regulation, provisions for the licensing of short-term rentals, and may charge a fee to
5 defray the cost of licensing, subject to RSA 41:9-a. For purposes of this section, "short-term rental"
6 means the rental of one or more rooms in a residential unit for occupancy for tourist or transient
7 use for less than 185 consecutive days. This section shall not be interpreted to limit a municipality's
8 authority to regulate such uses under local zoning ordinances or other local authority.

9 2 Fire Safety Measures; Inspection of Short-Term Rentals. Amend RSA 153:14, II(a) to read as
10 follows:

11 II.(a) The state fire marshal, the state fire marshal's authorized officers, or fire chief upon
12 complaint or whenever the state fire marshal, such authorized officers, or fire chief shall deem it
13 necessary, may inspect all buildings, excluding single family dwellings and multi-unit dwellings
14 containing 2 units, and premises within their jurisdiction and, if consent for such inspection is
15 denied or unobtainable, may obtain an administrative inspection warrant under RSA 595-B. ***The***
16 ***exclusion in the preceding sentence shall not apply to that part of any dwelling that is***
17 ***used as a short-term rental as defined in RSA 31:103-b.*** Whenever any of the said officers
18 shall find any condition that such officer deems to be hazardous to life or property, the officer shall
19 order the hazardous condition to be removed or remedied by written order. If such order requires a
20 structural change or alteration, it shall be approved by the state fire marshal or fire chief before it is
21 effective. Such order shall be complied with by the owner of such premises or buildings within the
22 time limit specified in such order, provided, however, that any such owner, who is aggrieved by any
23 such order, may, within 14 days after the service of such order as hereinafter provided, file a
24 petition with the superior court, praying for a review of such order. It shall be the duty of such
25 court to hear the same at the first convenient day, and to make such order in the premises as right
26 and justice may require.

27 3 Town Health Officers; Entry of Short-Term Rentals for Inspection. Amend RSA 128:5-a, II to
28 read as follows:

29 II. The authority to enter private property without the consent of the owner for
30 investigation of sanitary conditions does not include the right to enter into any living quarters
31 situated on private property. ***For purposes of this section and RSA 128:5, living quarters***

SB 69 - AS INTRODUCED

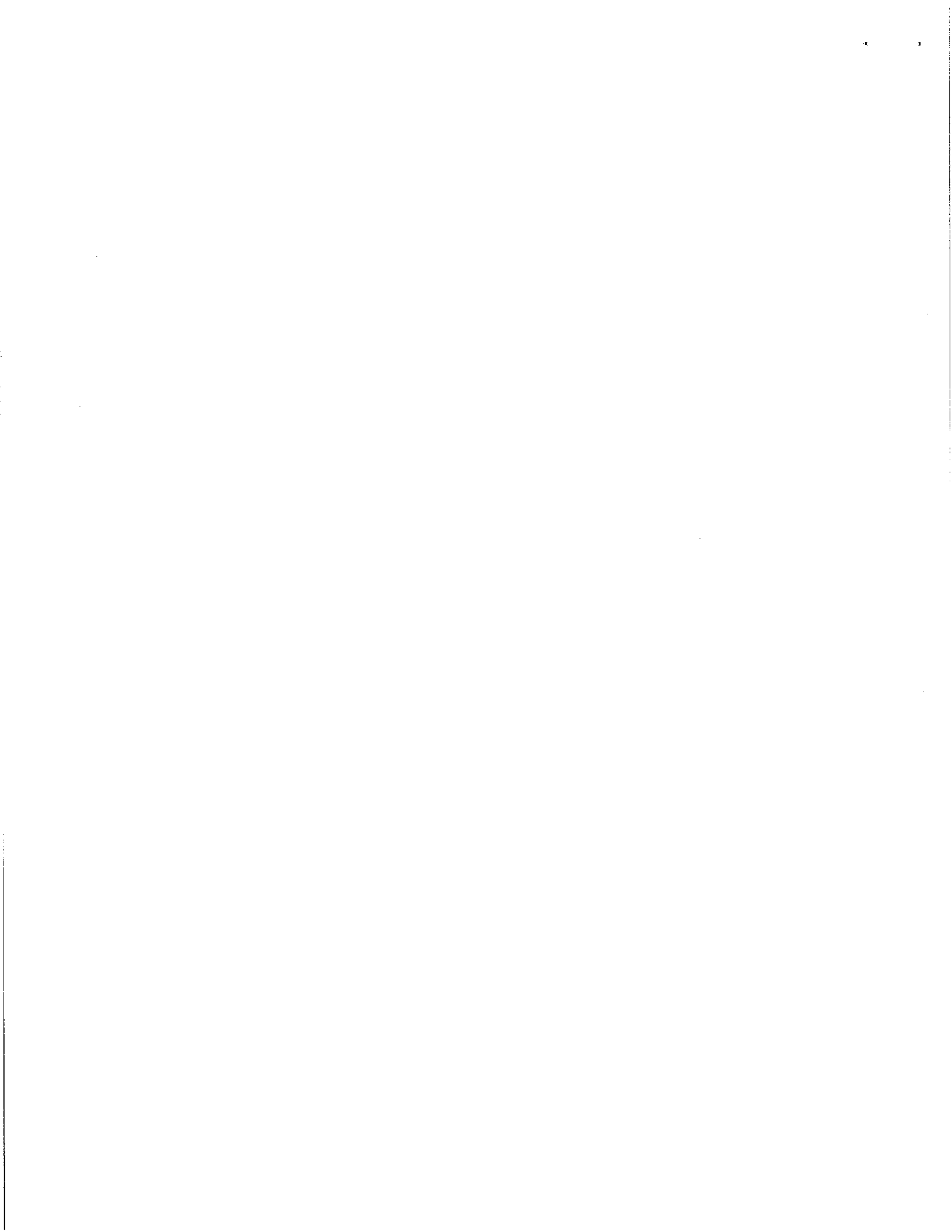
- Page 2 -

- 1 *shall not include any part of a property that is used as a short-term rental as defined in*
- 2 *RSA 31:103-b.*
- 3 4 Effective Date. This act shall take effect 60 days after its passage.

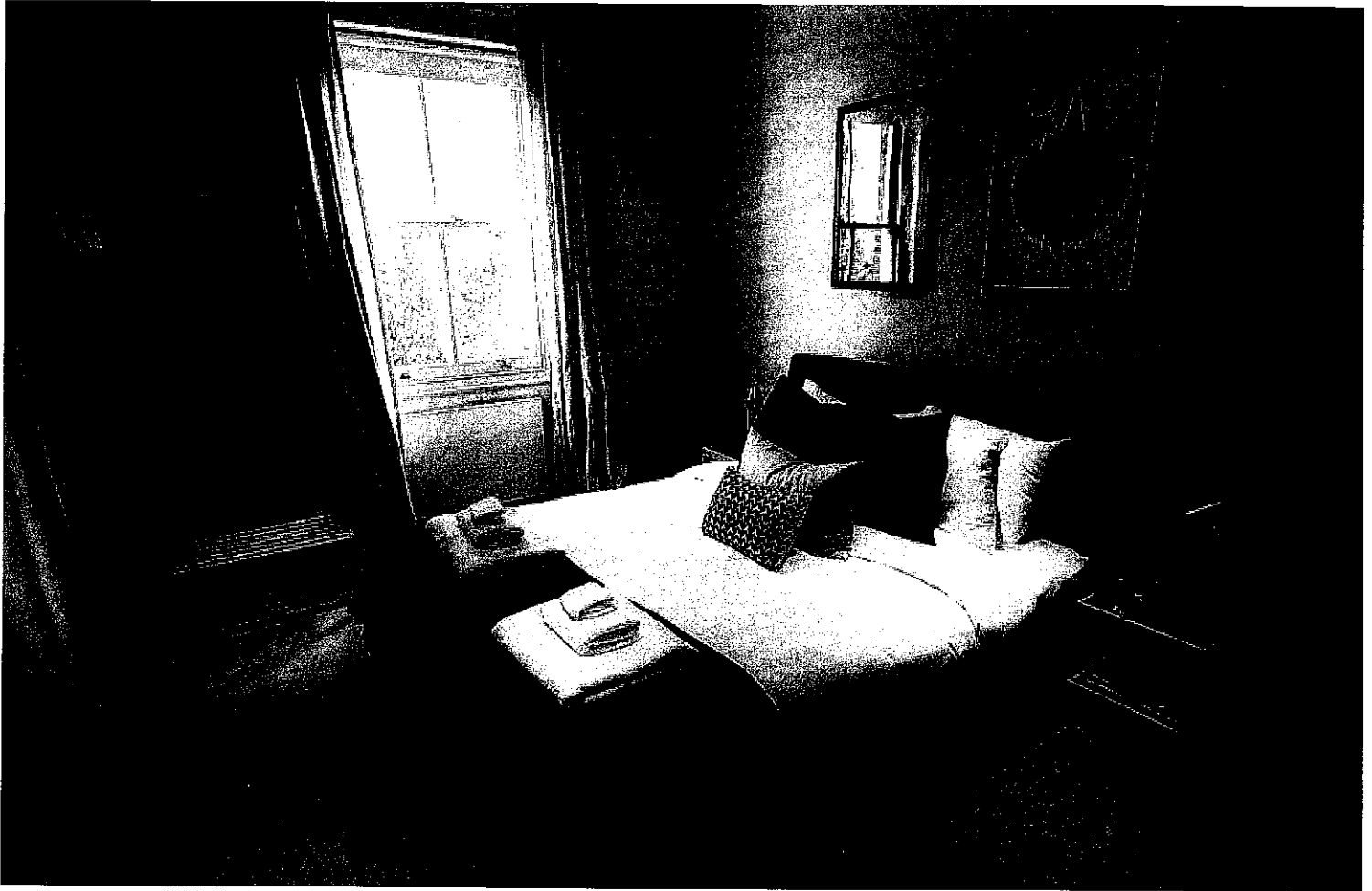


A few considerations in regulating short-term rentals

1. Don't let anyone tell you that short-term rentals are a residential use.
2. Review your zoning ordinance carefully to determine whether short-term rentals are already prohibited or restricted.
3. In reviewing your ordinance, consider whether other definitions, such as "hotel" or "bed and breakfast," are broad enough to include all short-term rentals.
4. Consider whether the municipality has historically allowed short-term rentals. Are some properties "grandfathered"? Distinguish between lawful nonconforming uses and illegal uses that have evaded enforcement.
5. Consult with your municipality's attorney and/or a professional planner before amending the ordinance.
6. Make sure all definitions, restrictions, and prohibitions are stated very clearly.
7. If short-term rentals are prohibited or restricted, enforce the ordinance consistently.
8. Do not try to regulate Airbnb, HomeAway, VRBO, or any other broker. Regulate only the property and the use of it.
9. Remember that short-term rentals, if permitted, are subject to site plan review.
10. Don't evict guests, especially in the middle of the night—unless they're causing trouble. Enforce the ordinance against the property owners, not their customers.



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The vacation rental industry is mired in claims that it harms neighborhoods and housing markets. Can a nonprofit co-op make the tourist trend a community asset?

In recent years, Airbnb and its competitors have been accused of making housing unaffordable, of draining homes from the long-term rental market, and of eviscerating the character of popular neighborhoods through displacement and overexploitation. In an era punctuated by the effects of a housing shortage, it can seem that vacation rentals stand at odds with the solutions cities and residents are searching for.

But does the business of short-stay rentals have to be so ethically fraught? An ambitious project based in Amsterdam says no.

It's called Fairbnb, and it's trying to refashion the home-sharing model so that short-stay apartment rentals can enrich the amenities and housing choices of the communities that host them.

“For a long time, the social impact of traveling was rarely taken into consideration—because at first with vacation apartments, people didn’t feel it,” Sito Veracruz, a co-founder of Fairbnb, tells CityLab. “We are now reckoning with the damaging impact of tourism on communities, not just because of the industry’s growth, but because of its huge expansion into residential areas.”

The project, if successful, could provide a sustainable alternative in a sector where, as Fairbnb’s own promotional material notes, “the promise of ‘home-sharing’ has turned into ‘home-stripping.’”

Fairbnb has been building this alternative for three years now. It already has co-op members in Italy, Spain, the Netherlands, and Lithuania, and has spent time consulting with communities in cities across Europe, including Venice, Bologna, and Barcelona.

While it is only just preparing to accept registrations from hosts, its community-building exercises have attracted more than 700 people who are ready to list their homes. As its launch date nears, Fairbnb is now going through a crowdfunding push, mainly to fast-track technology development, such as a mobile counterpart to its upcoming online site.

It comes at a moment when people are hungry for an alternative.

Fairbnb’s model diverges from the standard model in several key ways. Like other home-share sites, it plans to levy a commission on bookings (in Fairbnb’s case, of 15 percent, which is broadly similar to Airbnb). Half of this money would be fed back into the local community where a unit is rented out.

That money would be used to fund projects chosen in consultation with the community itself. These might include non-commercial meeting spaces, community centers, or (if the network can generate enough money) social housing. Fairbnb guests would be able to choose the community project that would benefit from their stay. All of those projects will have applied to, and been vetted by, Fairbnb. Guests may even be able to visit their choice of project during their stay.

Neighborhoods that host listings could thus see home-sharing feed investment directly back into their communities, instead of seeing the profits siphoned off by absentee landlords and a distant corporation.

Fairbnb sees a great appetite for this kind of alternative.

“Three years ago when we started, the need for our concept was something we had to explain a lot,” Veracruz said. “With every passing day, as public opinion changes, we have to explain the ‘why’ of our project less and less.”

The change is needed, Veracruz said, because the current home-sharing model has a smash-and-grab approach to communities:

“It’s very important to have a [home-sharing] platform that is accountable and responsible, that is about including social sustainability in the economic sustainability equation,” he said

This sounds promising. Even this more sustainable model could do cities harm, however, if the cities themselves can’t properly control where and in what volume short-stay apartments are allowed to operate. Aware of this, Fairbnb is making a public commitment to follow every local law on vacation apartments to the letter, and to share all relevant data with local authorities. This would also mean a degree of self-policing in places where local monitoring is underpowered.

“We only have legal apartments,” Veracruz said, “and in places where laws are lax, we ourselves have to check the potential impact of a listing. In places with no regulation, we as experts will suggest some rules, but neighbors will also be able to suggest some policies—as has happened during our consultation in Venice, where our policy [for future rentals] is stricter than the municipality requires.”

This approach in itself would make a huge difference, as Airbnb’s current procedures seem to do little to prevent abuse. A recent [Dutch report](#) found that 41 percent of Amsterdam’s Airbnb listings hosted guests for more than 60 nights, breaching the citywide cap in place last year (which has since fallen to 30 nights). Barcelona, meanwhile, has had some success [reining in the home-sharing sector](#) with a licensing system and action taken against illegal lettings, but only got Airbnb to share its data fully after several years of [levying ever-higher fines](#) against the company. For an operator to fully cooperate from the start in sharing data would make things far easier for municipalities to control.

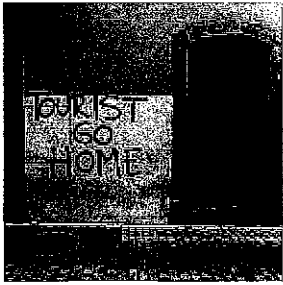
There is of course the risk that, as many cities mobilize against Airbnb, a sustainable alternative could find itself caught in the crossfire. Veracruz is cautiously optimistic that tight restrictions on Airbnb wouldn’t stand in his way.

“We don’t ask cities for any special preference or favor, but so far governments are fine with us, and we are already signing agreements with municipalities in Amsterdam, Venice, and Barcelona,” he said. “We are complying with the regulations, and are being as transparent as they require. I understand that they can’t or won’t promote us, but, frankly, we are the best guys they have seen in ages.”

To assume that a private company would adopt and stick to this kind of good conduct simply for the public good might seem naïve, but Fairbnb isn’t strictly a private company. It’s a nonprofit co-operative, owned and run by workers on capped salaries, with ready-to-go plans for a co-governance system—one developed over three years of community consultation across European cities—in which local communities co-pilot its running, written into its DNA.

So will the model work? It certainly has some advantages, even if the closeness of the network's name to its main competitor might raise eyebrows, not to mention legal challenges. While Fairbnb could attract sustainability-conscious travelers, there is nothing in its model (beyond, perhaps, obeying the law) that would cut into the profits to be gained by hosts. At the very least, it could provide a tool to pressure Airbnb into more sustainable practices, highlighting the fig-leaf tokenism of such efforts as a new scheme inviting hosts—not Airbnb itself—to donate some earnings to charity.

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Above all, it comes at a moment when people are hungry for an alternative, at a time when even an official body like the Netherlands' tourism board admits it is giving up on promoting its country and moving to simply try to manage the negative effects of the tourism industry. Under these circumstances, many travelers would be delighted to book a vacation apartment without fearing that their very interest in a city risks sapping it of its lifeblood.

About the Author



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Feargus O'Sullivan is a contributing writer to CityLab, covering Europe. His writing focuses on housing, gentrification and social change, infrastructure, urban policy, and national cultures. He has previously contributed to *The Guardian*, *The Times*, *The Financial Times*, and *Next City*, among other publications.

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Airbnb and Miami Beach Are at War. Travelers Are Caught in the Crossfire.

The Florida city, like others around the country, is trying to control the home sharing market. Renters often find out their weekend home is illegal when they get a knock on the door.

Tariro Mzezewa

March 9, 2019

On a recent Friday evening, David Igbokwe and his friends were relaxing in their Miami Beach Airbnb, listening to music and getting ready to go out to dinner.

Their plans were interrupted by a knock at the door.

“City of Miami Beach,” said Jackie Caicedo, a code compliance officer who works for the city.

Mr. Igbokwe opened the door and began answering questions: Was he from Miami Beach?

No.

Was he on vacation?

Yes.

Did he find the apartment on Airbnb?

Yes.

Ms. Caicedo had some bad news. “I’m here because, basically, this is an illegal short-term rental,” she said. “It’s in a residential area. It’s zoned in a residential area, so it’s prohibited for anyone to rent a unit for less than six months and a day.”

That same night, within a 45-minute period, Ms. Caicedo knocked on the doors of five other apartments in the building at 1300 15th Street, a two-story, eight-unit white structure. Apt. 101 had two older men who wouldn’t reveal their plans. In Apt. 103, two men in their 20s were visiting from New York City for the weekend. Apt. 104 had an

Argentine family of four. Apt. 201 had an older Chilean couple on vacation for the week. In Apt. 204, a young man and woman were visiting from the nearby town of Hallandale, Fla.

All of the apartments had been illegally rented out. The property manager of an apartment building next door had called in a complaint.

Typically, when the city's code compliance officers come across illegal short-term rentals, they ask renters to contact their hosts and ask to be relocated. In situations where the hosts won't cooperate, guests still have to leave. On occasion, the city helps them find a new place to stay. But since Mr. Igbokwe and his friends were cooperative and leaving after just two nights, Ms. Caicedo said she would recommend that they be allowed to stay in the apartment.

But when another officer arrived the following day, the friends became annoyed. They contacted the man who had rented them the apartment on Airbnb, who went by the name of Jason, to ask for a refund, and contacted Airbnb as well. They were told that, because they did not notify anyone immediately after Ms. Caicedo's visit on Friday evening, they could not get their money back. Mr. Igbokwe said that Jason, who was friendly on the first day, seemed angry with his guests when they complained about the officers coming by. The owner of the building was fined \$40,000.

Mr. Igbokwe's rental was on the edge of a neighborhood known as Flamingo Park that has become a flash point in the battle between residents and companies that offer short-term rentals in Miami Beach, including Booking.com, VRBO, HomeAway, FlipKey and, in particular, Airbnb. Save for a few properties that have been grandfathered in, and in the City's overlay district where short-term transient rentals are allowed, the city prohibits rentals of less than six months and a day in many residential neighborhoods.

"We have residential areas in our community and we have zoned them so when people purchase a home they know they are in a residential community," said Mayor Dan Gelber of Miami Beach, saying that Airbnb was knowingly flouting the law.

Airbnb, for its part, is currently suing the city, saying that its regulations are overly burdensome. "Nobody benefits when cities impose laws written with the sole intent of punishing both residents and consumers," wrote Benjamin Breit, a spokesman for the company, in an email.

In the increasingly heated war between the rental companies and communities, renters like Mr. Igbokwe and his friends, who unwittingly book rooms that are being offered illegally, are the collateral damage. They can end up out on the street, out hundreds of dollars and in need of a new place to stay, sometimes in the middle of the night.

"We 100 percent would have rented elsewhere if we'd known we couldn't stay there," Mr. Igbokwe said. "The whole thing was out of our hands, which is frustrating."

A 'Postcard Perfect' Neighborhood

It's easy to understand why tourists want to stay in Flamingo Park. It's close to the beach. It's surrounded by popular restaurants. As one tourist who didn't want to be named because she was staying in an illegal rental said while rolling her bag down the street, Flamingo Park is "postcard perfect."

An outsider might not notice, but locals walking through Flamingo Park point out the signs that homes are being rented out. There are the lockboxes on the sides of buildings, attached to bike racks or slightly hidden behind hedges. These boxes are where renters pick up the keys to their vacation homes. Sometimes these are the people wandering through the neighborhood looking a little lost, or the ones who ring the wrong buzzer because they aren't quite sure where to go.

"You get to a point where you feel like you're living in a hotel room," said Kathaleen Smarsh, a resident of Flamingo Park. "You don't know who is coming and going at all hours."

Another clue is usually heard before it's seen: The seemingly endless sound of suitcases rolling down the sidewalk, through a building's lobby or hallways, at all hours, residents said.

Then there's the loud music that residents said awakens them at night, typically blasting from Ubers, Lyfts and cabs depositing drunk young guests at their rentals, or from the homes themselves.

Increasingly, residents have filed noise complaints with the city, which brings out officers like Ms. Caicedo, who night after night knock on doors and tell renters that they're breaking the law. The code compliance department said that noise complaints are one way it finds out about illegal rentals.

"Young people often want to continue the party after they've left an actual party," Ms. Caicedo said. "Usually we only find out it's a short-term rental after we go to a place for another complaint like noise."

The department said it conducted 1,737 short-term rental investigations in the 2017-2018 fiscal year, up from 592 in 2013-2014; for the last two years any interactions have been captured on the body cameras code compliance officers wear when they're on duty.

Residents say they also have to deal with the trash left behind by renters.

"If these were mom-and-pop operations, with people renting out a room here and there, we wouldn't all notice," said Jeff Donnelly, who has lived in Flamingo Park with his wife since 1992. "We notice because these are inns without innkeeping, and the innkeeping falls on the neighbors."

Mr. Donnelly and Ms. Smarsh also said the short-term rentals are taking away long-term rentals for people who work in Miami's hotels and restaurants.

Ms. Smarsh said she and her neighbors were not motivated by renters' color or ethnic origins.

"We have neighbors from all over South America, from Europe and around this country, and we want them here," Ms. Smarsh said. "We want to see appreciation, development, growth, diversity, but it's still a neighborhood."

Fines starting at \$20,000

Short-term rentals are available on numerous sites, but with more than 5 million listings in more than 81,000 cities and 191 countries, Airbnb is the largest player in the market. The company has approximately 4,500 active listings in Miami Beach.

Airbnb has said it works with cities around the world to create reasonable regulation. It is currently suing the city of Miami Beach for a rule that went into effect in December that requires platforms only to allow posts from hosts with resort tax registration and business license numbers. The rule also requires home-sharing platforms to remove listings in neighborhoods that, like Flamingo Park, don't allow short-term rentals.

Airbnb chose to follow the second rule, which it refers to as "geofencing." The company is arguing that the city initially said it expected companies to follow either the first requirement or the second, not both.

"It came as a shock," Airbnb says in its lawsuit, that the city "expected home-sharing platforms to comply *both* with the registration-number display requirements *and* the geofencing provision." The company added that it does not review the listings that appear on its site and that it "also advises its hosts and guests to be aware of and comply with local laws."

The company declined to comment on the situation in Flamingo Park. Jason, the man who rented to Mr. Igbokwe, declined to be interviewed.

Emails and messages on booking platforms to 15 other hosts either went unanswered, or they declined to comment. The other apartments in the building Mr. Igbokwe stayed in were not listed for rent online. The guests in those apartments said they had booked at a

legal property through Booking.com, but were diverted to the 15th Street building by their host. The host did not respond to a request for an interview.

“That property has never been open on Booking.com for customers,” said Kimberly Soward, a spokeswoman for the company, who added, “Booking.com always abides by the applicable laws of the market we operate in.”

Natalie Nichols, a longtime Miami Beach resident, is one of the rare former Airbnb hosts willing to be interviewed. She is currently suing the city over the steep fines Miami Beach imposes on homeowners. Ms. Nichols said she began renting out space in her own home as well as in another building that she has owned since 2006. But it wasn't until the financial crisis in 2008 that she depended on rentals for income.

That year, she said, “I was laid off of a pharmaceutical sales job I had for 14 years. Long-term tenants of mine quit paying rent and broke leases.” Renting out her properties short term allowed her to make money and avoid foreclosure, she said, as well as to pay taxes, mortgage and insurance.

But complaints about short-term rentals grew and the city increasingly cracked down. Owners caught renting illegally are fined \$20,000 the first time they are caught, with the fine going up in \$20,000 increments for every subsequent time they are caught. On a second violation there can be an added \$25,000 enhanced fine if the home is 5,000 square feet or larger.

A \$20,000 fine was enough for Ms. Nichols, who said she sold one home and is living in the other without the income to sustain it.

“I am depleting my retirement savings, and the city has taken a business from me that should have produced income and carried me through retirement,” she said.

Rejecting a Suggested Ruse

In December, MerkAveli, an artist from Boston, traveled to Miami Beach for Art Basel. He reserved a shared room on Airbnb for a weekend but because of car trouble needed to extend his stay, which his host, a woman named Dina, welcomed. While Dina was out one morning, code compliance officers knocked on the door and told Mr. Aveli the rental was illegal and he had to leave. Dina returned to the house and tried to advise Mr. Aveli on what to say if the officers returned to ensure he'd left.

“The lady wanted me to tell housing I was her boyfriend,” Mr. Aveli said. “I did not. Instead I showed them my receipt and was sent from the spot.”

Had he known it was illegally listed, Mr. Aveli said, he would not have booked the room.

“Why was it even an option?” he asked. “It’s not right.”

Mr. Aveli ended up crashing on a friend’s couch for the remainder of his stay. Knowing that the rental had been illegal and upset about the experience, he tried to get a refund for the two nights he had stayed at the apartment.

“I contacted Airbnb and they refused to refund me,” he said. Mr. Aveli said he didn’t bother trying to get a refund from Dina directly because he was frustrated.

Mr. Breit would not comment on Mr. Aveli’s situation, but said the company wanted to “partner with Miami Beach to develop sensible and enforceable home-sharing regulations, which would help protect guests to the City against unfortunate incidents like this.”

The apartment and the host are no longer listed on Airbnb.

Even if that rental is no longer available, walking around Flamingo Park at midday, it’s clear that many other homes are: every few blocks there is a van parked on the street with its doors wide open. Inside are towels and bedding that smell freshly cleaned. When asked if the linens are for hotels, a man laughed and said, “You a reporter? I can’t talk to you, but lots of Airbnbs around here. Good for business.”

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