

EMBRACING THE SHARING ECONOMY: THE
MUTUAL BENEFITS OF WORKING TOGETHER
TO REGULATE SHORT-TERM RENTALS

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EMBRACING THE SHARING ECONOMY: THE MUTUAL BENEFITS OF WORKING TOGETHER TO REGULATE SHORT-TERM RENTALS

Kasey C. Tuttle *

INTRODUCTION

The explosion of peer-to-peer transactions, deemed the “sharing economy,”¹ has drastically altered the landscape of the service industry.² The ability to provide and receive services in this fast-paced new technological environment provides many benefits for both consumers and suppliers.³ Although peer-to-peer sharing has proven its importance within today’s economy, its unique characteristics demand different regulatory responses than those currently in place.⁴ This Note focuses on one facet of the sharing economy—property sharing, or short-term rentals. With online sharing platforms acting as intermediaries,⁵ it is now easier than ever for

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¹ The sharing economy may also be referred to as “collaborative consumption,” “on-demand economy,” and “access-based consumption” to name a few. See Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013), <http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition#8>.

² See Niam Yaraghi & Shamika Ravi, *The Current and Future State of the Sharing Economy*, BROOKINGS (Dec. 29, 2016), <https://www.brookings.edu/research/the-current-and-future-state-of-the-sharing-economy/>.

³ See Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 40–42 (2016); see also S. Kumar, *3 Reasons to Cheer Uber and the Sharing Economy*, FORTUNE (July 20, 2015), <http://fortune.com/2015/07/20/uber-and-the-sharing-economy/>.

⁴ See Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 151–53 (2016).

⁵ There are many online companies that act as intermediaries between homeowners and potential renters. See, e.g., AIRBNB, <https://www.airbnb.com/>; HOMEAWAY, <http://www.homeaway.com/>; HOMESTAY, <http://homestay.com/>; VRBO, <https://www.vrbo.com/>.

homeowners to connect with individuals who are seeking a place to stay. These platforms provide homeowners the ability to utilize their property to the fullest extent, renting out their entire home or simply a single spare bedroom.⁶ The ability to share one's primary dwelling by renting out spare space has been a hallmark of peer-to-peer property sharing.⁷ However, homeowners, as well as online platforms, have had an uphill battle thus far trying to comply with regulations that severely hinder the sharing economy.

Part I of this Note provides background on some of the current regulations that significantly interfere with property owners' ability to use their property to the fullest extent possible within the new economy. Part II discusses potential challenges to these regulations that fail to protect homeowners from strict regulatory schemes. Ultimately, this Note proposes in Part III that in order to protect homeowners' rights and ensure governmental interests are adequately protected, local governments should work together with online platforms to establish a suitable regulatory framework.

I. CURRENT SHORT-TERM RENTAL REGULATIONS AFFECTING THE SHARING ECONOMY

The current regulatory framework was designed without considering mass peer-to-peer sharing which has recently taken the service industry by storm. Although sharing is not a new concept, with online platforms playing match-maker, homeowners now have the ability to reach vast networks of individuals who are seeking temporary residence within their locale. These platforms make it effortless to connect customers with providers, leading to an astounding increase in home sharing.⁸ Although the economic landscape of the service market has shifted,

⁶ See Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 527–28 (2016) (“The economic driver of the sharing economy is what some have referred to as the commodification of ‘idle capacity,’ or the monetization of previously unused or underused assets.”).

⁷ See Steven Rosenbush, *Homeowners Tap the Income in Their Homes*, WALL ST. J. (Sept. 21, 2014, 4:56 PM), <https://www.wsj.com/articles/homeowners-tap-income-in-their-homes-by-renting-out-space-1411333004> (“It is becoming more and more prevalent for people to turn their homes into mixed-use properties. If you have a room over the garage or other unused real estate, you definitely can turn it into a source of revenue . . .”).

⁸ See generally Regina Garcia Cano, *Over 340,000 Visitors Stayed With Nevadans Through Airbnb*, U.S. NEWS & WORLD REP. (Feb. 16, 2017, 8:38 PM), <https://www.usnews.com/news/nevada/articles/2017-02-16/over-340-000-visitors-stayed-with-nevadans-through-airbnb> (“More than 340,000 people passed on Nevada’s hotel rooms last year and opted instead to book a place to stay using the home-sharing service Airbnb. . . . The number of guest arrivals represents a 151 percent year-over-year growth.”).

providers and platforms are still being governed under laws tailored to traditional service providers.⁹ With uncertainty and gaps within the law, many providers and platforms are struggling to comply with local regulations.¹⁰

There has been significant debate as to whether the peer-to-peer market is so novel that current regulations do not adequately encompass these transactions.¹¹ What is unique about the current peer-to-peer market is the use of online intermediaries acting as match-makers between the provider and user.¹² A major issue creating tension between current laws and the new economic environment stems from the fact that intermediaries hold themselves out only as a tool to connect the consumer with the providers. Once the connection is made, these companies claim they are not responsible if users do not abide by local laws.¹³ Where traditionally companies were the service providers and individuals were the consumers, everyone can be both consumer and provider within the sharing economy.¹⁴ Although the sharing economy and the traditional service industry have similar characteristics, minor differences have led to the explosion of peer-to-peer transactions creating tension with current regulations.¹⁵

⁹ See Robert T. Shannon, *Disruptive Innovation Demands Delicate Regulation*, LAW360 (Nov. 12, 2014), <https://www.law360.com/articles/595081/disruptive-%20innovation-demands-delicate-regulation> (“There is growing tension between emerging and traditional industries. . . . This tension highlights the need for regulatory statesmanship as public policy officials are asked to create new and comprehensive regulatory schemes that balance the concerns of old and new industries. It is a balance that can be struck.”).

¹⁰ See, e.g., Joshua Sabatini, *SF Still Struggling to Enforce Short-term Rentals*, S.F. EXAMINER (Nov. 3, 2016), <http://www.sfexaminer.com/sf-still-struggling-enforce-short-term-rentals/>.

¹¹ See, e.g., Zale, *supra* note 6, at 503.

¹² Individuals use these platforms in order to connect to a vast network of providers, making services available nearly instantaneously. They are “users” within the sense of the online platform, yet consumers within the marketplace.

¹³ See Johanna Interian, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT’L & COMP. L. REV. 129, 132 (2016).

¹⁴ Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013), <https://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/#319529b8aae3>.

¹⁵ See, e.g., *The Power of Connection: Peer-to-Peer Business Before the H. Comm. on Small Business*, 113th Cong. 35 (2014) (written testimony of Philip Aeurswald, Associate Professor, School of Public Policy, George Mason University, Arlington, VA) (“The question is . . . whether there is anything fundamentally new about the sorts of peer-to-peer businesses that have been proliferating in the past five years. The answer is yes. The difference between the past and the present is the platforms over which people find one another, conclude transactions, and establish reputations.”).

A. Bans

There have been many attempts to regulate peer-to-peer home sharing platforms and providers, which have drastically encroached upon homeowners' abilities to use their property. One of the most burdensome regulations¹⁶ was recently amended in New Orleans.¹⁷ The New Orleans ordinance intended to completely ban short-term rentals.¹⁸ All rentals for periods fewer than thirty days¹⁹ were illegal, but the city faced significant difficulties attempting to police the ban on the short-term market.²⁰ The city eliminated the ban, adopting a series of ordinances which amended both the city's comprehensive zoning ordinance and the city code to define and permit short-term rentals as well as implement a licensing process for renters.²¹

New York has also struggled to police its ban on rentals of less than thirty days in multiple-unit buildings where the tenant is not present. The city's ban seeks to eliminate properties which are being operated as illegal hotels. In order to crack down on this activity, the law imposes fines on homeowners who illegally advertise their property on major home sharing platforms.²² Lawmakers argue that these types of short-term rental units compromise affordable housing and deny communities significant revenue from uncollected taxes, which is eventually borne by the local taxpayers.²³ Opponents believe the law is merely an attempt to shield the local hotel industry from new competition, ignoring the voices and rights of New Yorkers.²⁴

¹⁶ NEW ORLEANS, LA., CODE OF ORDINANCES § 54-491.1 (2004).

¹⁷ See *Short Term Rental Administration*, CITY OF NEW ORLEANS, <http://www.nola.gov/short-term-rentals/>.

¹⁸ NEW ORLEANS, LA., CODE OF ORDINANCES § 54-491.1 (2004).

¹⁹ *Id.* Sixty days in the case of premises located in the Vieux Carré District.

²⁰ See Nina Feldman, *Short-Term Rental Stakeholders All Agree on One Thing: Current Law Inadequate*, NEW ORLEANS PUB. RADIO (July 18, 2014), <http://wwno.org/post/short-term-rental-stakeholders-all-agree-one-thing-current-law-inadequate> ("Unlicensed, short-term rentals are illegal in New Orleans, but there aren't a lot of people getting busted for renting out their house on websites like Airbnb or VRBO. That's because the law that bans vacation rentals is almost impossible for the city to enforce.").

²¹ See *Short Term Rental Administration*, *supra* note 17.

²² N.Y. MULT. DWELL. LAW § 121 (McKinney 2016).

²³ Kenneth Lovett, *Airbnb to File Suit After Cuomo Signs Threatening Bill*, DAILY NEWS (Oct. 21, 2016), <http://www.nydailynews.com/news/politics/airbnb-file-suit-cuomo-signs-threatening-bill-article-1.2839977>.

²⁴ See J.D. Tuccille, *When the Hotel Industry Places a Hit on Airbnb, Politicians Happily Take the Contract*, REASON (Feb. 14, 2017), <https://reason.com/archives/2017/02/14/when-the-hotel-industry-places-a-hit-on/print>; Nathan Ingrahm, *New York Passes Law Making it Illegal to List Short-term Rentals*

One of the major home sharing platforms, Airbnb, took action claiming New York's Multiple Dwelling Law was unconstitutional; however the lawsuit was ultimately dropped.²⁵

B. Licenses and Permits

Licenses and permits are becoming a common requirement which allow homeowners to take part in peer-to-peer sharing while ensuring governmental interests are protected. Most states demand business licenses for short-term rentals.²⁶ By requiring short-term renters to acquire business licenses, the state, city, and county can easily track the taxable income homeowners earn from renting their property.²⁷ Although these requirements may increase the burden homeowners face when renting their property,²⁸ requiring short-term renters to license and register provides local governments with the ability to police the market.²⁹

Under Denver's new short-term rental ordinance, renters who fail to abide by licensing requirements are subject to fines.³⁰ Requiring homeowners to obtain licenses will aid Denver's licensing officials in their attempt to eliminate illegal rentals and prevent individuals from evading lodging taxes. The city is giving hosts time to adapt to the new ordinance, providing warnings to those who fail to acquire a license, and mailing out licensing instructions.³¹ With the explosion of peer-to-peer

on Airbnb, ENGADGET (Oct. 21, 2016), <https://www.engadget.com/2016/10/21/new-york-passes-law-making-it-illegal-to-list-short-term-rentals/>.

²⁵ *Airbnb, Inc. v. Schneiderman et al.*, No. 16-cv-8239 (S.D.N.Y. Oct. 21, 2016).

²⁶ Lisa Mercer, *Business Licensing Laws for Short-Term Vacation Rentals*, USA TODAY, <http://traveltips.usatoday.com/business-licensing-laws-shortterm-vacation-rentals-101455.html>.

²⁷ *Id.*

²⁸ Jon Murray, *Fines Soon Possible as Denver Gears Up to Enforce Short-term Vacation Renter Rules*, DENVER POST (Dec. 25, 2016), <http://www.denverpost.com/2016/12/25/fines-denver-short-term-vacation-rental/>. In order to get licensed, hosts start by getting a lodger's tax ID, which costs \$50 every two years, and an occupational privilege tax ID, which costs \$48 a year. Then hosts are able to apply for a short-term rental license, which costs \$25 a year, <http://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/business-licenses/short-term-rentals.html>.

²⁹ Murray, *supra* note 28. The new licensing requirement has already begun to force individuals who have been illegally renting second homes to convert these properties into traditional long term rentals.

³⁰ DENVER, CO., REVISED MUNICIPAL CODE ch. 33, art. III (2016).

³¹ Jon Murray & Jason Blevins, *As Denver Starts Licensing Short-term Rentals, How Many Residents Will Comply?*, DENVER POST (July 14, 2016), <http://www.denverpost.com/2016/07/02/denver-starts-licensing-short-term-rentals/>. The city implemented a six month roll-out period before homeowners will be fined for failing to comply.

sharing, the city altered its regulations to provide for homeowners' rights and to protect the city from illegal short-term renting.³² Denver previously prohibited short-term rentals, but was willing to adapt to meet homeowners in the middle, requiring them to acquire licenses.³³ Although the city is now more lenient on short-term rentals, it only permits individuals to rent out their primary residence or separate dwelling units upon that same property.³⁴

Licensing requirements can vary drastically; unlike Denver's relatively simple process, which the city tailored to meet homeowners on mutual grounds, Tillamook County, Oregon has implemented a rather burdensome process to obtain a short-term renters permit.³⁵ Homeowners must fill out an application, notify their neighbors that they are seeking to use their property for short-term rentals, submit a site plan, provide proof of liability insurance, fill out a lodging tax registration form, and pay fees for an inspection and permit.³⁶ The county requires all short-term rental properties be certified by a building inspector to ensure the property meets all requirements.³⁷

Not only do homeowners have to struggle through the application process, which has proven to be rather tedious, some other municipalities limit the number of short-term rental permits which may be distributed.³⁸ Such municipalities seek to maintain a specific ratio of short-term to long-term rentals.³⁹ The result of both approaches significantly infringes upon a homeowner's ability to use their property in the manner in which they choose.

³² *See id.*

³³ *Id.* Denver is seeking to make it easier for homeowners to comply with regulations by creating an entirely online licensing process. Stacie Loucks, executive director of the Denver Department of Excise and Licenses, said, "We're trying to meet our customers on their terms"

³⁴ DENVER, CO., REVISED MUNICIPAL CODE ch. 33, art. III (2016).

³⁵ TILLAMOOK COUNTY, OR., ORDINANCE 69 (Oct. 28, 2009).

³⁶ *Id.*

³⁷ *Id.* at § 6(a) (listing the requirements for short-term rental inspections).

³⁸ *See, e.g.*, SANTA FE, N.M., CITY CODE § 14-6.2(A)(6)(a)(i5)(b)(v) (2009). Santa Fe places an absolute cap on the number of short-term rental permits (350) which will be distributed.

³⁹ *See, e.g.*, MENDOCINO COUNTY, CAL., ZONING CODE § 20.748.020(A) (1995). The county will grant one short-term rental permit for every thirteen long-term permits which have been granted. *Id.*

C. *Capping Rental Days*

Although some cities are beginning to provide the opportunity for homeowners to take advantage of peer-to-peer property sharing—legally renting their properties for less than thirty days—many cities still seek to regulate this market by limiting the number of days per year these properties may be rented out.⁴⁰ Cities like London and Amsterdam have noticed short-term rentals have negative effects on their housing market; however, they are seeking to compromise with homeowners, still providing the ability to gain additional revenue through the use of their property on a controlled and regulated basis.⁴¹

Setting a limit on the amount of days a homeowner may participate in the short-term market is a solution which balances the individuals' rights while preventing major inflation within the housing market. Although these regulations sharply encroach upon homeowners' abilities to rent and take full economic advantage of their property, cities are seeking to redress some of the major issues that come alongside property sharing, while not completely disregarding property owners' rights. One major problem has been a decrease in full-time housing because homeowners can charge more for short-term rentals than they can to renters looking to reside in the area on a more long-term basis.⁴²

D. *Information Sharing*

Some local ordinances require homeowners to share a vast amount of information with the city; for instance, Portland, Oregon requires short-term renters to log and save information about every guest.⁴³ The log must include the name and home addresses of guests, their license plate numbers if traveling by car, dates when they stayed, and the room assigned to each guest.⁴⁴ Additionally, homeowners must have these records available for inspection by city staff upon request.⁴⁵

⁴⁰ See Feargus O'Sullivan, *Now London and Amsterdam Are Capping Airbnb Apartment Rentals*, CITY LAB (Dec. 2, 2016), <http://www.citylab.com/housing/2016/12/airbnb-london-amsterdam-vacation-apartment-rental-regulations/509396/>.

⁴¹ *See id.*

⁴² *See id.*

⁴³ PORTLAND, OR., ZONING CODE § 33.207.060 (2015).

⁴⁴ *Id.*

⁴⁵ *Id.*

Chicago has attempted to impose regulations governing online platforms, which opponents argue violates their constitutional rights.⁴⁶ The law requires online platforms to share with the government all information about its users in Chicago.⁴⁷ The information required is much like that currently required in Portland.⁴⁸ In many instances, homeowners are unaware of the vast amount of information that is required and of the penalties for noncompliance.⁴⁹ Hosts are required to log a significant amount of information which city officials can request.⁵⁰

The regulations outlined above are a few of the common approaches to dealing with the unique economic shift within the service industry. However, there are a magnitude of other regulations which encroach upon homeowners' abilities to use their property within the peer-to-peer market. Although the governmental interests sought to be protected are substantial, it is important that homeowners are able to take advantage of their property and engage in the sharing economy.⁵¹ The framework in place protecting homeowners' rights from being consumed by lawmakers is inadequate⁵² and reaching a mutually agreeable solution is critical to balance both interests.

II. FIFTH AMENDMENT TAKINGS CLAUSE CHALLENGES

With immense regulations within the short-term housing market, homeowners undoubtedly suffer. In some instances, regulations completely prevent homeowners from renting their property or place strict limits on homeowners' ability to take advantage of economic opportunities.

⁴⁶ CHI., ILL., ORDINANCE, ch. 4-6, art. XXXI, § 4-6-400 (2016).

⁴⁷ *Id.*

⁴⁸ Compare *id.* with PORTLAND, OR., ZONING CODE § 33.207.060 (2015).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Belinda Smith, *Short Term Rentals: Homeowners and Businesses Benefit*, SAN DIEGO UNION-TRIBUNE (Feb. 1, 2017), <http://www.sandiegouniontribune.com/opinion/commentary/sd-smith-short-term-vacation-rentals-20170201-story.html> (acknowledging that short-term rentals can be problematic in some situations, however, considering the benefits to the community as well as property owners, arguing regulations must rein in careless operators rather than hindering the average short-term renter).

⁵² See *infra* Part II.

The Fifth Amendment provides in relevant part “. . . nor shall private property be taken for public use, without just compensation.”⁵³ Although the federal government has a constitutional right to take private property for public use, the Takings Clause of the Fifth Amendment requires the government to pay fair market value for the property.⁵⁴

The Takings Clause⁵⁵ serves to bar the government from forcing some individuals to bear the burdens, which in all fairness and justice, should be born by the public as a whole.⁵⁶ A taking is more likely to occur when an interference with property can be characterized as a physical invasion by the government, yet a taking may also occur when interference arises from overbearing regulation.⁵⁷ The Supreme Court has addressed the fact that the government would not be able to function if values “incident to property could not be diminished without paying for every such change in the general law.”⁵⁸ Where “the health, safety, morals, or general welfare” are promoted through specific regulations, the Supreme Court has continuously upheld regulations that destroy or adversely affect real property interests.⁵⁹ In these instances, the Court acknowledges that individuals’ rights to use their property are being affected, yet will not compensate them under the Takings Clause, reasoning that the health, safety, morals, and general welfare of the public outweigh the infringement upon these individuals’ rights.

Although zoning laws may infringe upon landowners’ rights, the Supreme Court has consistently held them to be constitutional.⁶⁰ In *Goldblatt v. Hempstead*, a city ordinance banned excavations below the water table, essentially prohibiting the landowner from continuing his sand and mining business.⁶¹ The Court upheld the ordinance determining no taking occurred although the regulation prohibited the

⁵³ U.S. CONST. amend. V.

⁵⁴ See *New York v. Sage*, 239 U.S. 57, 61 (1915) (defining market value as “what it fairly may be believed that a purchaser in fair market conditions would have given for it”).

⁵⁵ The Takings Clause is made applicable to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV (“Nor shall any State deprive any person of . . . property, without due process of law.”).

⁵⁶ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁵⁷ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁵⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁵⁹ *Penn Cent. Transp. Co.*, 438 U.S. at 125.

⁶⁰ See generally *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

⁶¹ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

landowner from taking advantage of the most beneficial use of his property. The Court reasoned that the regulation served a substantial public purpose.⁶² However, it is implicit in *Goldblatt* that a regulation on real property which is not reasonably necessary to serve a substantial public purpose may constitute a taking.⁶³ When a land use regulation completely deprives an owner of all economically beneficial use of their property, a “regulatory taking” occurs and the landowner must be provided just compensation.⁶⁴

A. *The Penn Central Balancing Test*

The Supreme Court addressed the issue of regulatory takings in *Penn Central Transportation Co. v. New York City*, creating a three-factor balancing test to determine when regulation goes too far.⁶⁵ The three-factor balancing test requires courts to weigh the character of the regulation, the extent of the law’s interference with an owners’ investment-backed expectations, and the diminution in value of the property resulting from the regulation.⁶⁶ However, as we will see, this framework is not suitable and fails to account for the opportunities homeowners’ have in today’s peer-to-peer environment, inadequately providing Fifth Amendment Protection.

1. Character of the Regulation

In deciding whether a particular governmental action has effected a taking, courts focus on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.⁶⁷ A taking is more readily found when governmental interference with property is categorized as a physical invasion, rather than regulations which are aimed merely at promoting the common good.⁶⁸ Short-term rental laws seek to regulate communities in order to protect the character of the neighborhood, safeguard housing from severe inflation, ensure individuals are

⁶² *Id.* at 595.

⁶³ *Penn Cent. Transp. Co.*, 438 U.S. at 127.

⁶⁴ *Lingle v. Chevron U.S.A. Inc.*, 554 U.S. 528, 538 (2005).

⁶⁵ *Penn Cent. Transp. Co.*, 438 U.S. at 124 (“In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”).

⁶⁶ *Id.* at 124–25.

⁶⁷ *Id.* at 130–31.

⁶⁸ *Id.* at 124.

paying appropriate taxes, and eliminate interference with neighbors. The state is generally empowered to legislate to protect the public without compensation.⁶⁹ Yet, homeowners who seek to combat these regulations, which prevent them from taking advantage of the new dynamic business opportunities within the peer-to-peer market, may be able to prove significant losses which stem from these regulations. Under this analysis, “it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”⁷⁰

The analysis focuses heavily on whether the regulation is intended to provide a significant public purpose.⁷¹ In this instance the government will easily rebut homeowners’ claims by arguing that short-term rental regulations are in place to prevent public harm by ensuring neighborhoods maintain their character, eliminating nuisance complaints which come from continuously having new tenants, as well as ensuring homeowners are abiding by tax laws. When the government is protecting the public welfare—the public interest as a whole—the action weighs against a taking.⁷²

Although the government is arguably providing a benefit to the public through these regulations, it fails to account for the severity of some of the short-term rental laws.⁷³ There are other avenues available⁷⁴ and other laws in place to combat many of the “issues” that the government contends short-term rental laws eliminate.⁷⁵

⁶⁹ Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern “Sharing Economy”: Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557, 560 (2015) (“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.”).

⁷⁰ *United States v. Cress*, 243 U.S. 316, 328 (1917).

⁷¹ *Penn Cent. Transp. Co.*, 438 U.S. at 119 (explaining that when regulations are necessary to promote legitimate public purposes, individuals can only sustain their constitutional claim by proving they have been deprived of all reasonable beneficial use of their property).

⁷² *Id.* at 127.

⁷³ *Id.* (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner’s use of the property.”).

⁷⁴ See *infra* Part III.

⁷⁵ *Baltimore & P.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 329 (1883) (“[A] nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving

2. Owners' Investment-Backed Expectation

The Court in *Penn Central* ruled that no taking occurs where an owner merely believed they would have the future ability to exploit a property interest.⁷⁶ Under the *Penn Central* test, the expectation of the homeowner must be “distinct” rather than merely hypothetical.⁷⁷ To satisfy this prong of the test, homeowners have to prove that they have intended to use this property specifically for a short-term rental unit and the regulation has prevented them from doing so.⁷⁸

However, this is one of the major reasons the *Penn Central* analysis fails to adequately protect homeowners from overly broad regulations. It is most likely the case that individuals do not purchase a specific piece of property with the intention of creating a short-term rental unit. Similarly, most vehicle owners do not originally purchase their vehicle with the expectation of taking advantage of peer-to-peer ride sharing services, offering rides on the weekends or after they finish their day jobs.⁷⁹ The sharing economy allows those who have to share with those who need. Homeowners likely do not purchase their homes with the expectation of receiving anything more than a place to live, raise their family, or be sheltered from the elements, the basic expectations which come with owning a home. Yet, with the shift in the economy, these individuals now have the ability to share. Although this was a possibility before, these individuals now have access to online platforms which make it possible to reach out to millions of users seeking their services. The ability to reach such a large market, in and of itself, has led to the explosion of peer-to-peer property sharing. Now, individuals who have a spare bedroom have the means of matching with someone from anywhere in the world who may need a place to crash for a couple days or weeks, providing homeowners an ability to gain revenue like never before.

When the landscape of the marketplace completely changes, it is impossible to believe individuals could have some sort of investment-backed expectation. The lack

damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.”)

⁷⁶ *Penn Cent. Transp. Co.*, 438 U.S. at 130.

⁷⁷ *See id.* at 127.

⁷⁸ *Id.*

⁷⁹ *See, e.g.*, UBER, <https://www.uber.com> (last visited Feb. 5, 2018).

of an investment-backed expectation seriously affects homeowners' abilities to challenge these regulations as a violation of the Fifth Amendment Takings Clause.⁸⁰

3. Diminution in Property Value

The Court determines the diminution of value by comparing the value of the property prior to the regulation with its post-regulation value.⁸¹ When looking at the diminution in property value, homeowners are out of luck. For homeowners arguing that the potential revenue from renting their home would increase the value of their property, the Court has held that the diminution in value of property does not, by itself, constitute a taking.⁸²

Further, the diminution in value from these regulations is likely to be at least partially offset by an increase in value which flows from the effect these regulations have on neighboring properties—an average reciprocity of advantage.⁸³ Since all property owners are placed under the same restrictions, they not only benefit the municipality as a whole but also each homeowner within the area of regulation.⁸⁴ The three factors must be taken as a whole. As we have just determined, the other factors also do little to protect these homeowners' rights.

B. Unconstitutional Conditions Doctrine

Another test which the court may use to determine whether a taking has occurred is the Unconstitutional Conditions Doctrine.⁸⁵ In many instances, local governments require homeowners to obtain licenses or permits in order to participate in the short-term rental market. Individuals must comply with these regulations in order to use their property this way. In this context, the Unconstitutional Conditions

⁸⁰ Although homeowners who can prove they previously rented their property on a short-term basis may be able to fulfill this prong of the test, this does little for the millions of individuals who have just begun to take advantage of the possibility of peer-to-peer home sharing.

⁸¹ *Penn Cent. Transp. Co.*, 438 U.S. at 131.

⁸² *Id.*

⁸³ *Id.* at 147 (Rehnquist, J., dissenting) (“While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.”).

⁸⁴ By preventing short-term housing within an entire area, homeowners are prevented from taking advantage of the peer-to-peer market, yet they benefit from the fact that the neighborhood as a whole is unable to do so, maintaining property values and the community aesthetic.

⁸⁵ The Unconstitutional Conditions Doctrine states that the government may not force an individual to give away a fundamental constitutional right to receive some conferred benefit, first mentioned by title in *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting).

Doctrine states that a condition placed on the development of property is lawful if it substantially furthers governmental purposes.⁸⁶ The analysis has two prongs: first, whether an essential nexus exists between the condition and the interests of the state, and, second, whether there is a rough proportionality between the state's justification for the condition and the condition itself.⁸⁷

1. Essential Nexus

In order for an exaction to avoid being deemed a taking, the condition placed upon receiving the permit must substantially advance a government purpose. If the condition placed on the homeowner fails to further the interests of the state, refusal to issue a permit will constitute a taking. In nearly every instance, the conditions placed upon receiving permits will substantially advance a government purpose and pass this prong of the test.

2. Rough Proportionality

The Supreme Court held that when an essential nexus does in fact exist, the burden imposed on the property owner by the condition must be roughly proportional when balancing the state's interest against the property owner's.⁸⁸ This second prong appears to favor homeowners, arguing that some regulatory schemes in place to acquire licenses or permits place a disproportional burden on property owners, resulting in a taking. However, in *Monterey v. Del Monte Dunes*, the Supreme Court stated that for a property owner to prevail they must be denied all economically viable use of their land.⁸⁹ Homeowners' are unable to make this argument, as their home is not stripped of all value through these regulations. Therefore, the Unconstitutional Conditions Doctrine provides homeowners no constitutional protection from overbearing, short-term rental regulations.

⁸⁶ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁸⁷ *Id.*

⁸⁸ *Id.* at 386.

⁸⁹ *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700 (1999) ("For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.").

III. WORKING TOGETHER WITH PLATFORMS

Airbnb, one of the major platforms for home sharing, has taken notice of the benefits of working closely with local governments.⁹⁰ Although the company has been battling with cities over their short-term rental laws,⁹¹ the platform now concedes that working together with the government places them in the best position to ensure renters are complying with the laws.⁹²

The current protection in place to ensure that governmental regulations do not cross the line—infringing upon homeowners' rights—is inadequate and fails to protect individuals with the shift in the service industry.⁹³ Local governments are trying to adapt to the ever-growing peer-to-peer environment, yet protecting the interests of the community from some of the common issues of property sharing is critical. With such a drastic shift in the economy, it is imperative that regulators take a novel approach. Instead of trying to curtail peer-to-peer property sharing, local governments should embrace the advantages which come alongside the growing industry⁹⁴ and should instead seek to work with online platforms as they are in the best position to regulate the market.

By working with major online platforms, local governments can ensure the community is free from harms commonly linked with peer-to-peer property sharing. One of the major issues is short-term renters failing to register their property and evading taxes.⁹⁵ Homeowners have a strong incentive to abide by an online

⁹⁰ See Marisa Kendall, *Airbnb agrees to help San Francisco monitor short-term rentals*, THE MERCURY NEWS (Nov. 14, 2016, 12:58 PM), <http://www.mercurynews.com/2016/11/14/airbnb-agrees-to-help-san-francisco-police-short-term-rentals/> (Chris Lehane, Airbnb's global head of policy and public affairs said, "There's a clear path forward to fix our short-term rental rules that protects housing and neighborhood quality of life in San Francisco. We recognize the work we need to do and we are eager to be a better partner with the city in the years to come.").

⁹¹ See generally *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016).

⁹² Kendall, *supra* note 90 ("Airbnb previously had taken a hard-line stance against helping cities with enforcement, and has sued a handful—including San Francisco and New York—when officials tried to force the company to monitor its site for listings that violate city laws.").

⁹³ See *supra* Part II.

⁹⁴ See Deanna Ting, *Airbnb Has a Golden Moment at the Rio Olympics*, SKIFT (Aug. 11, 2016), <https://skift.com/2016/08/11/airbnb-has-a-golden-moment-at-the-rio-olympics/> ("Airbnb is doing what most hotel companies cannot do as easily or quickly: helping house some of the estimated 500,000 visitors who are flooding the city of Rio de Janeiro for a little more than two weeks.").

⁹⁵ See Matt Rocheleau, *Lawmakers Worry Owners Taking Advantage of Airbnb*, BOSTON GLOBE (Aug. 24, 2015), <https://www.bostonglobe.com/metro/2015/08/23/some-boston-housing-now-used-like-hotels-via-airbnb/>.

platform's requirements because these hosts provide the simplest means of advertising and reaching mass markets, resulting in maximum revenue for the renter. The ability to advertise one's property to such an expansive group offsets the incentive of not registering, seeking to evade taxes. The problem is online platforms do not require their users to register according to governmental regulations and leaves it up to the users to abide by the laws.⁹⁶

Working with online platforms, state and local governments can implement the same regulations for users before they are permitted to advertise through the system. This will ensure individuals providing short-term housing are doing so legally and abiding by those interests that the state and local governments seek to protect. This protects the rights of property owners as well as the governmental interests seeking to be redressed by currently overbearing and inconsistent laws.

Platforms have already begun this process on their own, seeking to regulate users in an attempt to prevent short-term renters from evading local taxes,⁹⁷ although, in many locations hosts are still responsible for collecting taxes. In areas where the platform has made agreements with governments,⁹⁸ the company will collect and remit local taxes on behalf of hosts. The company calculates and collects these taxes from guests upon booking their rental, and takes it upon itself to ensure⁹⁹ taxes are paid to the proper authorities on the host's behalf.¹⁰⁰ Airbnb is seeking to expand this option and create agreements in as many locations as possible to help facilitate

airbnb/deDVOZf6EYYBmxDyWWHfJ/story.html ("People have long rented vacation homes and private residences on a short-stay basis, largely without regulation, taxes, or anyone paying attention.").

⁹⁶ See generally Deanna Ting, *Airbnb Wants to Strike a Deal With Politicians in New York and San Francisco*, SKIFT (Oct. 19, 2016, 2:00 PM), <https://skift.com/2016/10/19/airbnb-tries-to-strike-a-deal-with-politicians-in-new-york-and-san-francisco/>.

⁹⁷ Chris Lehane, *How Airbnb, SF Can Help Hosts Meet City's Rules*, SAN FRANCISCO CHRONICLE (Nov. 13, 2016), <http://www.sfchronicle.com/opinion/openforum/article/How-Airbnb-SF-can-help-hosts-meet-city-s-rules-10611714.php?ipid=gsa-sfgate-result>.

⁹⁸ See *In what areas is occupancy tax collection and remittance by Airbnb available?*, AIRBNB, <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available> (last visited Feb. 5, 2018).

⁹⁹ *Id.* (Although Airbnb assists in collecting occupancy taxes, hosts located in these areas are still responsible for assessing all other tax obligations, including state and city jurisdictions.).

¹⁰⁰ See *How does occupancy tax collection and remittance by Airbnb work?*, AIRBNB, <https://www.airbnb.com/help/article/1036/how-does-occupancy-tax-collection-and-remittance-by-airbnb-work> (last visited Feb. 5, 2018).

occupancy tax collection and eliminate one of the major issues governmental bodies have with short-term rentals.¹⁰¹

Airbnb has also taken great strides to abide by specific zoning regulations and short-term rental laws.¹⁰² The company implemented a One Host, One Home Policy in New York City and San Francisco, two of the major cities fighting the peer-to-peer movement. The One Host, One Home Policy¹⁰³ prevents would-be hosts from posting multiple listings on the website. This upholds their constitutional right to use their property¹⁰⁴ while preventing them from owning a vast amount of short-term rental units that could potentially clog the housing market.

Working with platforms could be very beneficial and provide cities with the proper system to regulate and protect public interests. San Francisco has a mandatory registration system for short-term rentals, yet the city has had difficulty getting hosts to comply with the registration.¹⁰⁵ Airbnb does not require its hosts to be registered. However, simply working together, by requiring mandatory registration, Airbnb and the city could ensure that the laws are not being violated. Users are unlikely to go elsewhere if Airbnb were to require registration due to the major benefit users receive from the ability to advertise their listings on a platform that has worldwide reach. Airbnb has reached out to San Francisco to assist with the creation of a simplified registration system in which Airbnb would share the data of its users with the city, if the city would implement certain privacy and safety measures to protect the data.¹⁰⁶

In Chicago, Airbnb already provides its users the ability to register once they sign up, the information is then transferred to the city.¹⁰⁷ However, this process is not mandatory and users are able to opt out.¹⁰⁸ Homeowners have brought an action

¹⁰¹ See Lehane, *supra* note 97.

¹⁰² *Id.*

¹⁰³ *Id.* (The policy seeks to prevent unwelcome commercial operators from running illegal hotels on the company's platform.)

¹⁰⁴ See generally *Nebbia v. New York*, 291 U.S. 502, 523 (1934) (stating that property rights are not absolute; individuals may not use their property to the detriment of his neighbors).

¹⁰⁵ Ting, *supra* note 96 (A report from the city's Budget and Legislative Analyst Office determined that 80% of short-term rental hosts in the city were not registered.)

¹⁰⁶ Lehane, *supra* note 97.

¹⁰⁷ *Id.* ("This data would include addresses, number of nights booked and relevant contact information.")

¹⁰⁸ Ting, *supra* note 96.

against the city for the new ordinance,¹⁰⁹ which imposes an additional 4% tax on short-term rentals on top of Chicago's 17.4% hotel tax.¹¹⁰

The homeowners bringing this action against the city claim that the new law violates their constitutional rights to communicate freely on the internet, use their property as they see fit, and be safe from illegal searches and seizures.¹¹¹ Airbnb has not joined the lawsuit and is prepared to comply with the ordinance whenever it goes into effect. Although the law seems to infringe upon homeowners' rights, it is critical for homeowners to bend as well. Understanding that short-term rentals create issues within the housing market and can lead to inflation as well as change the quality of a neighborhood, these property owners must comply with new regulations.

Proponents of these restrictive regulations argue that short-term rentals are taking over neighborhoods turning condos into hotels for partying out-of-towners.¹¹² Although the peer-to-peer market will inevitably alter the character of some neighborhoods, this does not justify overbearing regulations. Airbnb provides the opportunity for neighbors to comment on specific home listings, including the ability to make complaints.¹¹³ Working side-by-side, local governments can use services provided by platforms to regulate renters in a manner which benefits homeowners as well as the community as a whole. Working with online platforms where nuisances can be reported easily and relayed to local governmental authorities, problematic short-term rentals can be restricted from advertising on these platforms and virtually eliminated from the market.¹¹⁴

Airbnb has imposed automatic limits to the number of nights an individual can rent their home in some cities.¹¹⁵ The platform requires hosts in Amsterdam and London to obtain a license to rent their homes for more than sixty days and ninety days, respectively.¹¹⁶ Although these limits seem to infringe upon homeowners'

¹⁰⁹ Amended Complaint, *Keep Chicago Livable v. City of Chicago*, No. 16-cv-10371 (N.D. Ill. Feb. 27, 2017), 2017 WL 3188306.

¹¹⁰ CHI., ILL., ORDINANCE, ch. 3-24, § 3-24-030 (2016).

¹¹¹ See Amended Complaint, *supra* note 109.

¹¹² John Byrne, *Airbnb Rules Easily Pass Chicago City Council Despite Vocal Opposition*, CHI. TRIB. (June 22, 2016), <http://www.chicagotribune.com/news/local/politics/ct-chicago-city-council-airbnb-rules-met-20160622-story.html>.

¹¹³ See *Airbnb and Your Neighborhood*, AIRBNB, <https://www.airbnb.com/neighbors> (last visited Feb. 5, 2018).

¹¹⁴ *Id.*

¹¹⁵ O'Sullivan, *supra* note 40.

¹¹⁶ *Id.*

rights, providing some give and take from the government as well as renters, a mutually beneficial limit may be reached.

IV. CONCLUSION

By working closely with online platforms and compromising on regulations, governmental bodies can ensure their interests are protected while not infringing upon homeowners' rights. Online platforms have the ability to control the users in this market and are a key matchmaker for anyone seeking to reach a vast amount of users and take advantage of the demand. Although users are apprehensive and appear unwilling to agree to sharing such information, these major platforms, by making it a requirement to access their network can offer these users the ability to take it or leave it. In a brand new environment of peer-to-peer sharing, new regulations are critical, yet must be balanced with citizens' constitutional rights. Such information and control is necessary to prohibit abuse and protect public interest without completely eliminating these citizens' rights to use their property as they choose. Reaching a mutual agreement between these platforms and governmental bodies is the proper balance, providing benefits which will be great for society as a whole.