

## Airbnb: Boon Or Bane For NYC Residential Real Estate?

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One of the “hot” topics in New York City residential real estate that increasingly dominates the discussions of both lawyers and laypeople is the popular website known as “Airbnb.” For the uninitiated, Airbnb.com seeks to provide tourists with an alternative to traditional hotels by allowing “hosts” of residential real estate (*i.e.* owners or tenants in physical possession) to list their residences for short-term rental. Instead of staying in cookie-cutter hotel rooms owned by large corporations, Airbnb invites tourists to “find hosts with extra rooms, entire homes, and unique accommodations” so that they “feel at home, anywhere [they] go in the world” while “discover[ing] amazing places.” Airbnb.com provides a platform for travelers to “connect with hosts, confirm travel dates, and pay” for their accommodations.

The appeal of Airbnb in a tourist haven such as New York City is easy to understand. From the traveler’s perspective, Airbnb provides advantageous pricing. For instance, a search for accommodations for the weekend of Friday May, 15 through Sunday, May 17, 2015, returned “1,000+ rentals” at an average price of \$169 per night. By contrast, a search for New York City hotel rooms for the same dates on kayak.com revealed that even many two-star hotel rooms listed for well over \$200 per night, with prices for better hotels increasing steeply from there. For a tenant paying the notoriously high rents and enduring the high cost of living that characterizes New York City, renting some or all of his or her apartment to transient guests can provide welcome financial relief. For an owner, renting an apartment to short-term guests as opposed to tenants signing leases for one year or longer has the potential to double — or more — the asset’s productivity.

Airbnb, in short, hits an economic “sweet spot” where everyone involved has the potential to financially benefit from short-term lodging transactions. It is no surprise, then, that Airbnb has boomed in New York City. According to an October 2014 report from the Office of the New York State Attorney General, short-term rentals on Airbnb in New York City have experienced “explosive growth,” with bookings increasing tenfold between January 2010 and June 2014, and revenue to Airbnb and its hosts nearly doubling every year between 2010 and 2013. The attorney general’s report, in fact, estimated that revenue in 2014 exceeded \$282 million.

However, while short-term rental transactions via Airbnb provide clear financial benefits for both sides



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of the transaction, it appears that too few hosts or guests have taken relevant legal and safety considerations into account. Before their next visit to Airbnb.com, New York City hosts and guests should fully educate themselves about the risks that attend the potential financial benefits of short-term rental transactions.

The most significant law affecting New York City short-term rentals is New York State Multiple Dwelling Law § 4(8)(a), which defines a “Class A” multiple dwelling (*i.e.* residential apartment buildings with three or more apartments) under state law. The law provides, in relevant part:

A ‘class A’ multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes ... A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, ‘permanent residence purposes’ shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit (emphasis supplied).

Given that a “class A” multiple dwelling in New York State “shall” consist of occupancies of 30 days or greater, most Airbnb transactions in New York City — 72 percent of the bookings between 2010 and June, 2014, according to the attorney general’s report, *totaling over 300,000 reservations and resulting in over \$300 million in revenue for hosts* — appear to have violated the law, insofar as they involved the rental of an entire apartment for less than 30 days in violation of New York State Multiple Dwelling Law § 4(8)(a) and/or a similar provision of the New York City Administrative Code.

The apparently overwhelmingly illegal nature of these transactions has attracted a wide array of opposition to Airbnb in New York City. Although somewhat disparate in their origin and motivation, they are united in their desire for the authorities to crack down on violators.

Predictably, the hotel industry and hotel workers’ unions are opposed to Airbnb, which threatens the profits of New York City hotels and the jobs of their employees. The city itself, however, also has an interest in ensuring that visitors stay in hotels rather than transiently in residential apartments. One reason is economic. New York City imposes a 5.875 percent occupancy tax on hotel and other short-term room rentals. Very few Airbnb hosts, however, have filed the paperwork necessary to remit these taxes. The attorney general’s report estimates that as a result, private short-term rentals booked through Airbnb from January 2010 through June 2014 *incurred unpaid hotel room occupancy taxes of over \$33 million*.

The city, perhaps more importantly, is also concerned about the fact that illegal Airbnb rentals in residential apartment buildings usually violate the New York City Fire Code. This stems from the fact that while residential apartment buildings are constructed to house nontransient permanent residents who, from living in the same place on a daily basis, will presumably acquire a familiarity with their surroundings that will allow them to vacate quickly in the event of a fire or other emergency, hotels, by nature, will be populated by transient guests without such familiarity. By reason thereof, the Fire Code requires that hotels be constructed with certain additional safeguards not present in residential apartment buildings, such as, for example, the provision of photoluminescent exit path markings for exits and stairwells, the posting on every hotel room entrance door of diagrams showing the route to two stairwells or other means of egress, and the provision of portable fire extinguishers. In the event of widespread occupancy by transient guests in residential housing not containing such protections, serious injury or death — both to the guests and the firefighters attempting to save them — could occur in the event of a fire.

The city is also concerned, moreover, that widespread and unchecked Airbnb usage would result in the reduction of the supply of residential housing. This, in turn, would drive up residential rents and make residential housing less affordable overall because of (1) simple supply and demand, as fewer residential apartments combined with the same number of tenants seeking housing would necessarily lead to higher rents, and (2) the increase in value of residential apartments to investors if they can be used for transient occupancy. The city, quite simply, has an interest in preserving as much affordable housing as possible for permanent residents.

Finally, widespread short-term rentals facilitated by Airbnb have the effect of upending the expectations and quality of life of existing tenants in residential housing. Most tenants do not sign leases on the assumption that they will be surrounded by units housing unfamiliar transient occupants turning over every few days, which can lead to a change in the character of a building or even a neighborhood, as well as safety concerns.

New York State Multiple Dwelling Law § 4(8)(a) does provide two limited exceptions to the 30-day rule. First, the statute permits occupancy by natural persons living within the permanent occupant's household while the permanent occupant remains in occupancy, "such as house guests or lawful boarders, roomers or lodgers." Note, however, the qualifier "lawful." This exception does not override, for example, the provisions of the rent laws prohibiting rent-regulated tenants from profiteering on their tenancies by overcharging their roommates in excess of the apartment's legal regulated rent — a not-infrequent source of litigation in New York City's landlord-tenant courts. Second, the statute permits "incidental and occasional occupancy" by transient occupants for less than 30 days "when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment ..." There is, however, a crucial additional requirement: such occupancy is only permitted if "there is no monetary compensation paid to the permanent occupants for such occupancy" — which, of course, undermines the very reason that most hosts list their apartments on Airbnb.

Residential tenants who host guests via Airbnb face another risk. Given that most form residential leases prohibit tenants from engaging in illegal conduct, a tenant discovered by the landlord to be renting his or her apartment to transient guests via Airbnb faces the possibility of eviction for defaulting under the lease. In addition, as noted, rent-regulated tenants are prohibited from charging roommates or subtenants amounts in excess of the legal rent. In fact, the case law holds that utilizing a residential apartment as a hotel room is an *incurable* lease default and, thus, that the tenant is subject to eviction without being given a chance to stop the illegal behavior. A New York City Civil Court judge recently added to this body of case law by handing down the first known decision awarding an eviction based on a tenant's illegal renting via Airbnb.[1]

There is various proposed and pending legislation relating to Airbnb, which, depending on the bill, would ease or further restrict the use of New York City residential apartments for short-term stays. What will or will not become law is the subject of intense lobbying from both sides of the debate and, at this point, is anyone's guess. What is certain, however, is that both guests and hosts of transient lodging in New York City via Airbnb need to better inform themselves about the many potential pitfalls — legal and otherwise — that can result from their actions.

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[1] *42nd & 10th Associates LLC v. Ikezi*, 46 Misc. 3d 1219(A), 2015 N.Y. Slip Op. 50124(U) (Civ Ct NY County). In addition, in December, 2014, Rosenberg & Estis PC successfully represented a landlord in obtaining a preliminary injunction preventing a rent-controlled tenant from continuing to rent her apartment to transient occupants via Airbnb, establishing, among other things, that the landlord had shown a “likelihood of success on the merits” of its claims that such use violated, among other things, New York State Multiple Dwelling Law § 4(8)(a) and the Rent Control Law and its associated regulations. See *Brookford, LLC v. Penraat*, 2014 N.Y. Slip Op. 24399(Sup Ct NY County).

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