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**HERE TO STAY OR A FLASH IN THE PAN?
HOW ZONING AND PROPERTY LAWS MAY AFFECT
AIRBNB IN BALTIMORE AND THE NATION**

Michael Schultes

I. Introduction

The advent of the Internet, smartphones, and social media has shrunk the world to the point where a person in Baltimore can connect with someone in Botswana with only the click of a finger. Whether it be a social media post or business e-mail, eight thousand miles can feel more like eight feet with how quickly we can connect and converse with people around the globe. The use of these information technology tools and inventions to store, retrieve, transmit, and manipulate data has transformed the way we learn, the way we communicate, and the way we do business. This newfound technology has not only gone from a luxury to a necessity in the business world but also has helped spawn an entire sector of the economy. Commencing in the early to mid-twenty-first century, the “sharing economy” simply began as a way for people to make an extra dollar during the economic downturn.¹ Today, it has created a multi-billion-dollar industry.² Just as peer-to-peer businesses such as eBay or Craigslist allow anyone to become a retailer by merely making an account, the sharing economy is made up of websites, companies, and applications which allow individuals to act as an “ad hoc taxi service, car-hire firm or boutique hotel as and when it suits them.”³ At the forefront of the sharing economy boom is the San Francisco-based company Airbnb, which enables people to list, find, and rent lodging throughout the country and world, often for much cheaper prices than similarly located hotels or motels.⁴ According to their website, “Airbnb is a community marketplace where guests can book spaces from hosts, connecting people who have space to spare with those who are looking for a place to stay,” but as Airbnb continues to undercut and undermine the hotel

1. *The rise of the sharing economy*, THE ECONOMIST (March 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

2. *Id.*

3. *Id.*

4. According to a *Priceonomics* study, Airbnb apartment rentals cost 21.2% less than staying at a hotel and simply renting a private room at a host’s house can save 49.5%. See *Airbnb vs. Hotels: A Price Comparison*, PRICEONOMICS (June 17, 2013), <http://priceonomics.com/hotels/>.

industry, the question remains, is it legal?⁵ This article will delve into the history of Airbnb, into its foundations and presence in Baltimore, and will explore the tax and zoning laws that may affect Airbnb owners and guests within the city.

II. Background

A. *History of Airbnb*

Airbnb, short for Air Bed and Breakfast, started in 2007 when a few twenty-year-olds from San Francisco – Joe Gebbia and Brian Chesky – struggling to pay the bills decided to rent out the extra space in their apartment to strangers who were in town for a conference.⁶ Shortly thereafter, the founders noticed that the city’s hotels were continually fully booked when conferences and other events took place.⁷ Both having previously dabbled in entrepreneurship and realizing that there was an opportunity, wanted to connect people with temporary, affordable lodging.⁸ Soon after, the two men from San Francisco got in touch with another former roommate, a computer programmer named Nathan Blecharczyk, and the business was born.⁹

To put it simply, Airbnb is as a marketplace for people to turn their unused houses, apartments, bedrooms, and other spaces into quasi-hotel rooms that potential visitors can view online and rent for a designated number of nights.¹⁰ Airbnb earns a percentage of each rental and the rest of the proceeds go directly to the people who listed the residence.¹¹ In the eight years since its inception, Airbnb has had over 40,000,000 guests stay in their now 1,500,000 listings that can currently be found in over 34,000 cities worldwide, including Baltimore.¹²

B. *Presence in Baltimore*

Airbnb has over six hundred rental listings in the Baltimore City area alone, ranging from a twenty-dollar private room near Pigtown to an eight-bedroom mansion in Charles Village going for \$640 per

5. *What is Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/1> (last visited Aug. 26, 2015).

6. Jessica Salter, *Airbnb: The story behind the \$1.3bn room-letting website*, THE TELEGRAPH (Sept. 7, 2012), <http://www.telegraph.co.uk/technology/news/9525267/Airbnb-The-story-behind-the-1.3bn-room-letting-website.html>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Are Your Tenants Putting Your Investment At Risk By Using Airbnb?*, BAY MGMT. GRP. (July 15, 2015), <http://www.baymgmtgroup.com/blog/are-your-tenants-putting-your-investment-at-risk-by-using-airbnb/> (last visited Aug. 26, 2015).

11. *Id.*

12. *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Aug. 26, 2015).

night.¹³ The listings span all across the city and can be found in all the major neighborhoods, with the most concentrated areas centering around Midtown-Belvedere and Mt. Vernon, and a heavy presence in areas such as Fells Point, Canton, and Federal Hill as well.¹⁴ While the typical hotel room in Baltimore City costs around \$169 a night, a 2013 study reveals that the average rate of \$95 a night for an Airbnb apartment and \$59 a night for an Airbnb private room presents a significantly cheaper option for visitors to the Baltimore area.¹⁵ As a result, more people are choosing Airbnb over hotel chains than ever before.¹⁶

III. Analysis

The Airbnb business model is situated in a gray area of property law, located between an owner conveying a license to a friend to stay with him or her for a few days and an owner leasing out his or her space to a tenant for a full year.¹⁷ Others believe Airbnb operates more similarly to that of a hotel, drawing comparisons to the per-night rates and often shorter stays that both Airbnb and hotels employ.¹⁸ However, while hotels are usually geared toward business travelers and located in touristy areas, Airbnb allows the traveler to stay in a neighborhood with character and truly get a feel for the city.¹⁹ Still, the main difference between Airbnb and hotels is that many Airbnb owners do not need to collect hotel taxes, which allow their prices to stay so low.²⁰ Whether the particular state does not yet enforce these taxes, or the individual owners simply choose not to collect them, the issue of hotel and lodging taxes has recently come to the forefront.

A. Hotel and Lodging Taxes

Hotel and lodging taxes are “transient occupancy taxes” and typically apply to spaces that are being rented for thirty days or fewer.²¹ These taxes are different from standard income taxes and are utilized by the government to produce more revenue for the hotel industry.²²

13. Airbnb Search of Baltimore Rentals, AIRBNB, <https://www.airbnb.com> (in “Where do you want to go” insert “Baltimore, MD”).

14. *Id.*

15. *Airbnb vs. Hotels: A Price Comparison*, *supra* note 4.

16. *Id.*

17. Robert J. Aalberts, *Airbnb: Will It Become the Next Battle Ground Over Property Rights?*, 44 REAL EST. L.J. 1 (2015).

18. *Id.*

19. *See supra* note 13.

20. Ann Carrns, *Lodging Taxes and Airbnb Hosts: Who Pays, and How*, N.Y. TIMES (June 16, 2015), http://www.nytimes.com/2015/06/17/your-money/lodging-taxes-and-airbnb-hosts-who-pays-and-how.html?_r=0.

21. *Id.* In some areas, these taxes can be imposed for rentals up to 90 days or even longer. Florida, for instance, imposes the tax to all rentals of six months or less. *Id.*

22. *Id.*

While many states have not cracked down on Airbnb or individual owners for these taxes, it is likely that local governments will demand for them to be paid.²³ The government's position is that if Airbnb owners are renting out their rooms or apartments for extended periods of time, they are behaving as a hotel and consequently should be taxed in the same fashion.²⁴

Currently, Airbnb only offers a collection of hotel and lodging taxes in eleven U.S. cities, as well as in the entire state of North Carolina.²⁵ Additionally, while Airbnb encourages hosts to collect and pay these taxes in locations where the government requires hotel and lodging tax, it only imposes these taxes upon guests in the eleven aforementioned cities.²⁶ This list also includes Washington D.C., which has a 14.5% tax rate on the listing price for reservations 90 nights or shorter, and Philadelphia, which has an 8.5% tax rate on any reservation 30 nights or shorter.²⁷ With Baltimore situated directly between these two cities, it is likely that it could be next in line to see these taxes implemented. For now, the 8% hotel tax rate that currently exists in Baltimore is only encouraged to be collected by Airbnb owners, and not stringently enforced or done so automatically through the website.²⁸ According to City Code §21-4, "[e]very person, firm association or corporation owning or operating any hotel in Baltimore City shall collect the tax levied and imposed. . . from the persons paying the rental or other charges for the use or occupancy of any room or rooms for sleeping accommodations in his or its hotel."²⁹ Therefore, as long as the property is not officially listed as a hotel, owners are likely exempt from paying this tax.

Airbnb owners must be careful; the city and the State of Maryland want their tax money, and will make sure to collect it.³⁰ If the authorities find out that you knew, or should have known, that your property was listed on Airbnb without properly accounting for hotel taxes, you may be on the hook for back taxes, or even tax evasion.³¹ Penalties for not collecting hotel and lodging taxes typically range from ten to

23. *Id.* The increased scrutiny has also resulted in part from complaints from big hotel operators who argued that smaller operators such as Airbnb should collect the same lodging and sales taxes that they do. *Id.*

24. *Id.* Specifically, cities like Los Angeles and New York that have significant tourism industries are becoming more serious about regulating short-term rentals and collecting related taxes from companies such as Airbnb. *Id.*

25. *In what areas is Occupancy Tax Collection and Remittance by Airbnb available?*, AIRBNB <https://www.airbnb.com/help/article/653> (last visited Aug. 28, 2015).

26. *Id.*

27. *Id.*

28. *Taxes*, BALTIMORE COUNTY GOVERNMENT, <http://www.baltimorecountymd.gov/Agencies/economicdev/baltimorecountybusiness/businessresources/taxes.html> (last visited Aug. 28, 2015).

29. BALT. CITY CODE, Art. 28, §21-4 (2013).

30. *See supra* note 8.

31. *Id.*

twenty-five percent of the tax due, plus interest and late fees.³² Although these penalties are seldom enforced, as companies like Airbnb continue to grow, it is only a matter of time before the local tax collector or IRS is knocking at your door wanting to collect. Consequently, it is very likely that the City Code will undergo amendments to include Airbnb-type properties under the umbrella of hotel taxes so that the city and state can get in on this revenue stream in the near future.

Aside from hotel and lodging taxes, Airbnb owners must also account for the money they generate from renting out their spaces.³³ Currently, the IRS states that owners can rent out all or part of their home or apartment for up to 14 nights per year and keep the rent tax-free.³⁴ As long as the space is rented for less than 14 nights at a fair rental price, *and* the owner personally stays at this property for more than 14 nights a year, the income made from renting it out is tax-free.³⁵ On the other hand, any property rented for more than 14 nights per year, regardless of how often the owner stays there or the rental price, is susceptible to income tax and must be reported.³⁶ Hotel and lodging taxes – despite being less prominent than income tax and, therefore, often overlooked – apply to any and all rentals, no matter how many nights per year the property is rented.³⁷

B. Zoning Laws

Aside from taxes, zoning laws may also present issues for Airbnb owners by prohibiting standard residential home and apartment owners from operating their residence as hotels. Until recently, a zoning code in Montgomery County specifically prohibited tenancy of less than a month in all residential zones.³⁸ This essentially made it illegal for an owner to rent out his or her room or home for a night or a weekend, which is the crux of the Airbnb business model.³⁹ New York's attorney general, Eric T. Schneiderman, released similar information in a report in October of last year.⁴⁰ The report mentioned the explosive growth of private short-term bookings in New York City and the expected \$282 million in revenue that Airbnb and its hosts

32. *See supra* note 17.

33. *As Airbnb Pays Hotel Tax, Are You Paying Tax on Airbnb Money? You'd Better*, FORBES (Feb. 19, 2015), <http://www.forbes.com/sites/robertwood/2015/02/19/airbnb-pays-hotel-tax-but-are-you-paying-tax-on-airbnb-money-you-d-better/>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See supra* note 20.

38. Aaron Kraut, *Zoning Change Would Make Airbnb Legal in Montgomery County*, BETHESDA MAGAZINE (Jan. 14, 2015), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Zoning-Change-Would-Make-Airbnb-Legal-In-Montgomery-County/>.

39. *Id.*

40. *Id.*

were set to produce last year alone.⁴¹ However, the report also went on to say that most short-term rentals booked in New York also violated the law.⁴² In fact, state and local laws in New York – the Multiple Dwelling Law and the New York City Administrative Code – prohibit certain short-term rentals.⁴³ While the size and magnitude of New York City is much larger than that of Baltimore, the fact that over 72% of private short-term rentals on Airbnb in New York violated zoning laws makes it easy to assume that zoning violations are likely happening in other cities along the east coast.⁴⁴

Some cities and states remain stubborn with their zoning codes, refusing to allow the upstart company to continually take revenue away from the hotel industry and state.⁴⁵ Still others, such as Maryland and Montgomery County, are adapting to help stay in touch with the booming sharing economy.⁴⁶ After taking nearly seven years to rewrite and approve, the zoning code that went into effect in October of last year is already being amended to permit boarding houses, where rooms could be rented for any period of time.⁴⁷ The proposed amendment is designed to remove the duration of tenancy requirements for residential uses.⁴⁸ It states, “[u]nder the new zoning code, tenancy of less than a month is prohibited in residential zones. This restriction makes many types of short-term rentals illegal. ZTA 15-01 would allow all forms of short-term rental and residential use.”⁴⁹

While Montgomery County and many other cities and counties around the nation have taken steps to either outlaw or facilitate these short-term leasing practices, the Baltimore City Code remains silent on the subject. The only thing that speaks closely to Airbnb’s model is the subleasing process.⁵⁰ A sublease exists when a tenant (or landlord) leases all or part of the premises to another person for a period

41. Eric T. Schneiderman, *Airbnb in the city*, THE OFFICE OF NEW YORK STATE ATTORNEY GENERAL (October 2014), <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>.

42. *Id.*

43. *Id.*

44. *Id.*

45. Referring to the aforementioned hotel and lodging taxes. *See supra* notes 17-30.

46. Bill Turque, *Plan Would Make Shorter Airbnb Stays Legal in Montgomery County*, THE WASHINGTON POST (Jan. 15, 2015), http://www.washingtonpost.com/local/md-politics/plan-would-make-shorter-airbnb-stays-legal-in-montgomery-county/2015/01/15/d73205c8-9cb4-11e4-bcfb-059ec7a93ddc_story.html?wprss=rss_maryland.

47. *Id.*

48. Jeffrey L. Zyontz, *Memorandum: Zoning Text Amendment 15-01*, GRANICUS (Jan. 9, 2015), http://montgomerycountymd.granicus.com/Viewer.php?view_id=6&event_id=1705&meta_id=74865.

49. *Id.*

50. *Subleases, Subtenants and Roomers*, THE PEOPLE’S LAW LIBRARY OF MARYLAND, <http://www.peoples-law.org/subleases-subtenants-and-roomers> (last visited, Aug. 30, 2015).

less than his or lease term.⁵¹ Absent a specific provision in the lease, the tenant has every right to sublet his or her space to another person, and because there is no limit of nights imposed by the zoning code, property owners and tenants without a subletting provision in their lease have every right to rent out their spaces on Airbnb.⁵² In any sublease, however, the original tenant is still responsible for complying with the terms of his lease with the landlord, and the subtenant (the Airbnb guest) is responsible for complying with the terms of his sublease with the tenant (Airbnb owner).⁵³ In this sense, as long as Airbnb participants follow the subleasing laws of the city, they are perfectly legal.

IV. Conclusion

While the zoning laws in Baltimore City seem to be silent on the limitations for the number of nights that a property owner can rent out his or her property, and hotel and lodging taxes seem to only pertain to official hotels, it is only a matter of time before these regulations and laws are amended. As the sharing economy continues to boom, the government must also adapt with it. Just as Governor Hogan signed legislation earlier this year that cleared the way for ride-sharing companies such as Uber and Lyft to operate legally in the state under a far less burdensome regulatory structure compared to traditional taxi companies, it is likely that the same will happen to Airbnb.⁵⁴ While it is doubtful that laws will be passed outlawing Airbnb in the city, it is more probable that regulations will change to place Airbnb owners under the same umbrella as hotels – putting them on the hook for hotel and lodging tax – allowing them access to a large revenue stream while also keeping hotel chains happy. For now, Airbnb owners seem to be safe from the law when renting out their houses, apartments and rooms. Untidy guests on the other hand, remains to be seen.

51. *Id.*

52. *Id.*

53. *Id.*

54. Kevin Rector, *Uber, Lyft Secure Future in Maryland with Passage of Ride-Share Law*, THE BALTIMORE SUN (Apr. 14, 2015, 8:25 PM), <http://www.baltimore.sun.com/business/bs-bz-rideshare-bill-20150414-story.html>.