

A City Upon a Hill (or Down in the Bayou):
A Feasibility Analysis of Airbnb’s
Characterization of New Orleans as a
Nationwide “Model” for Short-Term Rental
Enforcement

Rachel Mazur*

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* © 2017 Rachel Mazur. J.D. candidate 2018, Tulane University Law School; B.A. 2014, Political Science, Barnard College, Columbia University. I would like to thank my family for their support and the editors of the *Journal* for their insightful suggestions and careful editing.

I. INTRODUCTION

Mardi Gras—a time for revelry, exuberance, and *laissez les bon temps rouler*.¹ Where should one stay during the festivities? Consider the options. One could spend the Carnival season in an adequate, albeit sterile, hotel room in downtown New Orleans, complete with all the basic amenities—stiffly starched sheets, cable TV, even an over-chlorinated pool. Alternatively, one could stay in the extra bedroom of a historic “Creole cottage” in the Tremé neighborhood by booking through the short-term rental (STR) service Airbnb.² Here, the homeowner, a third-generation New Orleanian, provides her guests with the experience of “liv[ing] like a local,” possibly divulging precious insight as to how one might catch a prized shoe during the Krewe of Muses parade.³ For those preferring something a bit more private, perhaps renting an entire “double-gallery” home along the Uptown parade route, also available through Airbnb, would be more appropriate for the occasion.⁴ Has it been mentioned that the entire home rental would likely cost 21.2% less, and that the room in Tremé would likely cost 49.5% less, than the hotel room downtown?⁵

It is clear from the above hypothetical, and from cities beyond New Orleans, that the unprecedented rise of STR platforms such as Airbnb pose a tangible threat to the hospitality industry.⁶ From July 2015 to July 2016, approximately 267,000 people stayed in New Orleans via Airbnb and generated \$150 million in economic activity.⁷ What once started as

1. A Cajun French proverb meaning “let the good times roll.” ALBERT VALDMAN & KEVIN J. ROTTET, *DICTIONARY OF LOUISIANA FRENCH: AS SPOKEN IN CAJUN, CREOLE, AND AMERICAN INDIAN COMMUNITIES* 563 (2009).

2. See LLOYD VOGT, *NEW ORLEANS HOUSES: A HOUSE-WATCHER’S GUIDE* 16 (1985); see, e.g., *Creole Cottage in Historic Tremé Room #1*, AIRBNB, <http://www.airbnb.com/rooms/509383> (last visited Aug. 14, 2017).

3. See Katie Benner, *Airbnb Wants Travelers To ‘Live Like a Local’ with Its App*, N.Y. TIMES (Apr. 19, 2016), <http://www.nytimes.com/2016/04/20/technology/airbnb-wants-travelers-to-live-like-a-local-with-its-app.html>; Jacqueline Mazur, *A Brief History of the Krewe of Muses: Throw Me Something Sister!*, WGNO (Feb. 15, 2017), <http://wgno.com/2017/02/15/a-brief-history-of-the-krewe-of-muses-throw-me-something-sister/>; Gracie Wilson, *How To Catch a Muses Shoe*, GONOLA (Feb. 2, 2017), <http://gonola.com/2016/02/02/how-to-catch-a-muses-shoe.html>.

4. VOGT, *supra* note 2, at 21.

5. *Airbnb vs. Hotels: A Price Comparison*, PRICEONOMICS (June 17, 2013), <http://priceonomics.com/hotels/>.

6. See Elaine Glusac, *Hotels vs. Airbnb: Let the Battle Begin*, N.Y. TIMES (July 20, 2016), <http://www.nytimes.com/2016/07/24/travel/airbnb-hotels.html>.

7. The total economic activity generated by the Airbnb community constitutes the sum of all host earnings and guest daytime spending. AIRBNB, *OVERVIEW OF THE AIRBNB COMMUNITY IN NEW ORLEANS* 3 (2016), <http://www.airbnbaction.com/wp-content/uploads/2016/09/new-orleans-mini-report-09222016.pdf>.

“Air Bed & Breakfast,”⁸ constituting “a couple of air beds on a floor in San Francisco,”⁹ has now burgeoned into a company projected to earn as much as \$3.5 billion by 2020, a figure representing a 3400% increase over 2016 earnings.¹⁰ However, growing concerns pertaining to Airbnb’s impact on neighborhood stability and the housing stock in New Orleans (amidst an ongoing affordable housing crisis)¹¹ prompted the New Orleans City Council (City Council) to pass a series of ordinances “that amount to a landmark regulatory framework for short-term rentals.”¹²

Said ordinances, which took effect April 1, 2017, included the following regulations: (1) the creation of a STR licensing and enforcement mechanism;¹³ (2) the definition of STRs as a land use and the provision of supplemental standards for STR operation;¹⁴ (3) the collection of a \$1.00 fee per night to be deposited into the Neighborhood Housing Improvement Fund;¹⁵ and (4) authorization for the Mayor to enter into a Voluntary Collection Agreement with Airbnb to implement a system for tax collection.¹⁶ Airbnb lauded the decision of the City Council and has repeatedly emphasized that New Orleans’ ordinances

8. Derek Thompson, *Airbnb CEO Brian Chesky on Building a Company and Starting a ‘Sharing’ Revolution*, ATLANTIC (Aug. 13, 2013), <http://www.theatlantic.com/business/archive/2013/08/airbnb-ceo-brian-chesky-on-building-a-company-and-starting-a-sharing-revolution/278635/>.

9. *Id.*

10. Leigh Gallagher, *Airbnb’s Profits To Top \$3 Billion by 2020*, FORTUNE (Feb. 15, 2017), <http://fortune.com/2017/02/15/airbnb-profits/>; see Brad Stone & Olivia Zaleski, *Airbnb Enters the Land of Profitability*, BLOOMBERG (Jan. 26, 2017), <http://www.bloomberg.com/news/articles/2017-01-26/airbnb-enters-the-land-of-profitability>.

11. See Gillian B. White, *A Housing Crisis Amid Tens of Thousands of Abandoned Homes*, ATLANTIC (Aug. 20, 2015), <http://www.theatlantic.com/business/archive/2015/08/new-orleans-bligh-hurricane-katrina/401843/>.

12. Kevin Litten, *New Orleans City Council Gives Final Approval to Landmark Short-Term Rental Laws*, NOLA.COM (Dec. 1, 2016, 2:16 PM), http://www.nola.com/politics/index.ssf/2016/12/short-term_rentals_legalized_a.html.

13. See NEW ORLEANS, LA., CODE OF ORDINANCES §§ 26-613 to 26-620 (1995). This ordinance includes a ninety-day limit on rentals that are not owner-occupied and a ban on noncommercial STRs in the French Quarter. *Id.* The French Quarter, also called the Vieux Carré (meaning “Old Square”), is the oldest neighborhood in New Orleans and is a National Historic Landmark District. See MAGGY BACCINELLI, NEW ORLEANS NEIGHBORHOODS: A CULTURAL GUIDE 22-23 (2015); *Form No. 10-300 (Rev. 10-74) National Register of Historic Places—Nomination Form*, NAT’L PARK SERV. (Oct. 1974), <http://www.nps.gov/nhl/find/statelists/la/VieuxCarre.pdf>.

14. See NEW ORLEANS, LA., COMPREHENSIVE ZONING ORDINANCE art. 1, § 1.6; arts. 8-17; arts. 20-22; art. 26 (2015).

15. See NEW ORLEANS, LA., CODE OF ORDINANCES § 70-415.1 (1995).

16. See NEW ORLEANS, LA., ORDINANCE 27,218 M.C.S. (2016), <http://nola.gov/nola/media/One-Stop-Shop/Safety%20and%20Permits/27218.pdf>.

represent a “model going forward” for other cities to emulate.¹⁷ But in a city known as The Big Easy, how will New Orleans enforce these ordinances?¹⁸

This Comment will explore the rise of Airbnb in New Orleans, and the city’s reaction to that rise. Part II will provide an overview of the Airbnb company and brand within the larger Sharing Economy. Part III will address the growth of Airbnb in New Orleans, which catalyzed the creation of the STR ordinances. Part IV will navigate the complex legislative process undertaken to produce the STR ordinances. Part V will address the resulting enforcement concerns pertaining to the implementation of the STR ordinances. Part VI will analyze whether Airbnb itself can offer effective enforcement solutions. Part VII will conclude.

II. AIRBNB BACKGROUND

A. *Airbnb and the Sharing Economy*

Airbnb.¹⁹ Uber. Thumbtack. These companies, so-called “pioneers”²⁰ of the Sharing Economy, are also considered “unicorns,” defined as “private, venture-backed companies valued at a billion dollars or more.”²¹ The Sharing Economy describes the peer-to-peer market phenomenon, in which people can “rent beds, cars, boats, and other assets directly from each other, co-ordinated via the internet.”²² Sharing

17. See Benner, *supra* note 3; Kevin Litten, *Airbnb: New Orleans Will Become Nationwide Model for Short-Term Rental Enforcement*, NOLA.COM (Nov. 30, 2016, 4:06 PM), http://www.nola.com/politics/index.ssf/2016/11/airbnb_new_orleans_model.html.

18. The Big Easy “nickname . . . refer[s] to the city with a slow, easy pace and a relaxed attitude toward life.” KEVIN FOX GOTHAM, AUTHENTIC NEW ORLEANS: TOURISM, CULTURE, AND RACE IN THE BIG EASY 97 (2007). “The epithet . . . drew attention not only to the variety of leisurely attractions[,] but also to the permissive attitude of local officials.” ANTHONY J. STANONIS, CREATING THE BIG EASY: NEW ORLEANS AND THE EMERGENCE OF MODERN TOURISM, 1918-1945 at 243 (2011).

19. Airbnb has been coined the “poster child of sharing.” Colin Strong, *Airbnb and Hotels: What To Do About the Sharing Economy?*, WIRED (Nov. 2014), <http://www.wired.com/insights/2014/11/hotels-sharing-economy/>.

20. *Airbnb, Snapgoods, and 12 More Pioneers of the ‘Share Economy,’* FORBES, <http://www.forbes.com/pictures/eaji45emgkh/airbnb-snapgoods-and-12-more-pioneers-of-the-share-economy/#31f8d00752cf> (last visited Apr. 1, 2017).

21. *How Unicorns Grow*, HARV. BUS. REV., Jan.-Feb. 2016, at 28; *The Unicorn List*, FORTUNE, <http://fortune.com/unicorns/> (last visited Apr. 1, 2017).

22. *The Rise of the Sharing Economy; Peer-to-Peer Rental*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>. Predicting, controlling, and analyzing the Sharing Economy has served as the subject of numerous law review articles. See, e.g., Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215 (2016); Stephen R. Miller,

assets is now cheaper and easier than ever before due to technology-reduced transaction costs—the availability of more data about people and things allows physical assets to be disaggregated and consumed as services.²³ The peer-to-peer model of the Sharing Economy facilitates cost-savings to consumers and revenue-gaining to producers.²⁴ In addition to the purely monetary gains proffered by the Sharing Economy, many individuals engaging in unicorn-created platforms report having a better experience in comparison to conventional services.²⁵

B. *The Creation and Rise of Airbnb*

The creation of Airbnb is considered Silicon Valley lore: “In October 2007, two unemployed art school grads living in a three-bedroom apartment in San Francisco, needing to make rent, decided on a lark to rent out some air mattresses during a big design conference that came to town and overcrowded the city’s hotels.”²⁶ Those two art grads, Brian Chesky and Joe Gebbia, cobbled together a rudimentary website for Airbnb, which was quickly refined to include a streamlined booking process requiring only three “clicks.”²⁷ In 2011, just four years after Chesky and Gebbia inflated those air mattresses, Airbnb was operating in eighty-nine countries and had 1 million nights booked on their platform.²⁸

III. AIRBNB IN NEW ORLEANS: PART I (ORIGINS-DECEMBER 2015)

A. *The Sharing Economy Arrives in New Orleans*

In 2011, two years after Airbnb began operating (rather placidly) in New Orleans,²⁹ controversy surrounding the home-sharing platform began to percolate throughout the Crescent City.³⁰ Airbnb initially drew

First Principles for Regulating the Sharing Economy, 53 HARV. J. ON LEGIS. 147 (2016); Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067 (2015).

23. *The Rise of the Sharing Economy; Peer-to-Peer Rental*, *supra* note 22.

24. *Id.*; see *Airbnb vs. Hotels: A Price Comparison*, *supra* note 5. Airbnb reported in September 2016 that their New Orleans hosts earn, on average, \$10,800 per year with over 80% of listings being rented for fewer than 180 days per year. See AIRBNB, *supra* note 7, at 3, 5.

25. See Daniel K. McDonald, *Reputation Will Teach the Sharing Economy To Share*, 27 U. FLA. J.L. & PUB. POL’Y 219, 222 (2016).

26. LEIGH GALLAGHER, *THE AIRBNB STORY: HOW THREE ORDINARY GUYS DISRUPTED AN INDUSTRY, MADE BILLIONS . . . AND CREATED PLENTY OF CONTROVERSY* 1 (2017).

27. *Id.*; Biz Carson, *How 3 Guys Turned Renting an Air Mattress in Their Apartment into a \$25 Billion Company*, BUS. INSIDER 7 (Feb. 23, 2016), <http://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2>.

28. Carson, *supra* note 27, at 16.

29. New Orleans residents have been using Airbnb since 2009. AIRBNB, *supra* note 7, at 2.

30. See, e.g., Skip Descant, *Homeowners Should Know Local Laws When Renting*, ADVOCATE (Oct. 11, 2011), http://www.theadvocate.com/baton_rouge/news/business/article_34

ire from the bed and breakfast (B&B) community, who expressed their indignation towards Airbnb hosts who routinely evaded the city's 13% occupancy tax³¹ and violated a notoriously unenforced city ordinance "prohibit[ing] unlicensed property owners from renting accommodations to anyone for less than 60 days in the French Quarter and less than 30 days elsewhere in the city."³² In 2013, events such as the New Orleans-hosted Super Bowl XLVII highlighted the growing prominence and profitability of STRs,³³ and weeks later, the City Council's Community Development Committee stated that stricter enforcement of the laws prohibiting illegal STRs was necessary.³⁴ Although members of the City Council were made aware of the concerns of their constituents, enforcement remained lax and any attempt at proposed regulation languished throughout much of 2013 and 2014.³⁵

46ef9d-85dd-59cf-a15f-7854e6f13255.html; *The Rambler's History of New Orleans with Thanks to the American Guide Series*, DEP'T TRANSP., FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/infrastructure/neworleansrambler.cfm> (last updated June 27, 2017) ("New Orleans is called the Crescent City because the original town . . . was built at a sharp bend in the Mississippi River.").

31.

B&Bs are split into three categories for occupancy tax purposes in New Orleans. A B&B with one or two rooms does not have to pay an occupancy tax, while three- to five-room operations are taxed 50 cents per room per night rented. Six- to nine-room B&Bs pay a 13 percent [sales] tax on room rates in addition to the 50-cent per night [hotel occupancy] tax.

Maria Clark, *B&B Owners v Online Hosts Who Don't Pay City Taxes*, ASSOCIATED PRESS (Nov. 10, 2012), <http://infoweb.newsbank.com/resources/doc/nb/news/1427B40F60D5CAD0?p=AWN>; see NEW ORLEANS, LA., CODE OF ORDINANCES § 150-1002, 150-576 (1995).

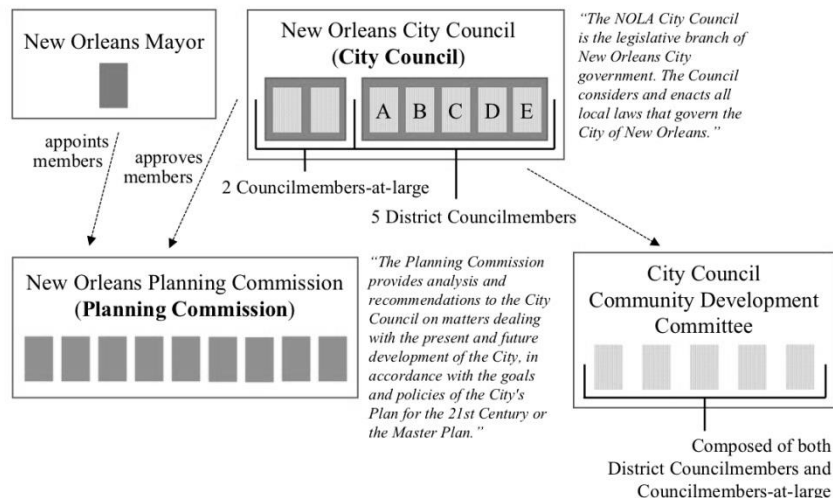
32. Clark, *supra* note 31.

33. See Chris Maldonado, *Super Bowl-ing for Dollars*, GAMBIT (Jan. 8, 2013), <http://www.bestofneworleans.com/gambit/super-bowl-ing-for-dollars/Content?oid=2126772&showFullText=true>. There is debate as to how successful STRs were during Super Bowl XLVII. See Richard Webster, *Short-Term Rental Demand Disappoints for Super Bowl 2013*, NOLA.COM, http://www.nola.com/superbowl/index.ssf/2013/01/short-term_rental_demand_disap.html (last updated Jan. 29, 2013, 9:44 AM).

34. See Danny Monteverde, *Revenue Uncollected: Short-Term Rental Restrictions Not Enforced*, ADVOCATE (Mar. 20, 2013, 3:38 PM), http://www.theadvocate.com/new_orleans/news/article_57f195b5-b6cc-5aac-a5ef-6092abe052e1.html.

35. See Richard Rainey, *New Orleans Residents Slam Illegal Short-Term Rental Practice*, NOLA.COM (Mar. 18, 2013, 11:30 AM), http://www.nola.com/politics/index.ssf/2013/03/new_orleans_residents_slam_ill.html.

Figure 1: An Overview of Relevant Components of the New Orleans City Government³⁶



B. Early Attempts at STR Legislative Reform

In July 2014, amidst growing protest from residents and neighborhood associations in New Orleans,³⁷ the City Council decided to take its first step in STR regulation by sharpening the language of the STR ban.³⁸ This decision was perceived by many residents and councilmembers as a “first step” towards curbing the infractions of

36. *Meet the Council*, NEW ORLEANS CITY COUNCIL, <http://www.nolacitycouncil.com/meet/meet.asp> (last visited Apr. 1, 2017); *City Planning Commission*, CITY NEW ORLEANS, <http://www.nola.gov/city-planning/> (“The New Orleans City Planning Commission is a nine-member citizen board appointed by the Mayor and approved by the City Council. The Planning Commission provides analysis and recommendations to the City Council on matters dealing with the present and future development of the City . . .”).

37. Robert McClendon, *Short-Term Rentals Rankle Some Residents*, TIMES-PICAYUNE B03 (May 21, 2014), <http://infoweb.newsbank.com/resources/doc/nb/news/14DF1845B8FD8DC8?p=AWNB>.

38. Andrew Vanacore, *New Orleans Moves To Tamp Down Illegal Short-Term Rentals*, ADVOCATE (July 10, 2014), http://www.theadvocate.com/new_orleans/news/politics/article_6f39a8d2-b015-5d82-b6bf-5e4a79d418c4.html. The City Council decided to (1) “[d]eclare all unlicensed short-term rentals to be illegal [as] [t]he previous law only specified those properties in business for a year or longer as operating outside the law,” and (2) “[r]emove the word ‘nonresidents’ from the law because it was[] [not] clearly defined . . .” Katherine Sayre, *New Orleans City Council Toughens Ban on Unlicensed Short-Term Vacation Rentals*, NOLA.COM (July 10, 2014, 12:23 AM), http://www.nola.com/business/index.ssf/2014/07/new_orleans_city_council_tough.html.

“flagrant violators” while the City Council attempted to create and enact a “more comprehensive law.”³⁹

C. An Initial Enforcement Experiment Reinforces an “Unworkable” Situation

The quest for an STR regulation ordinance in New Orleans finally gained traction in August 2015, when the City Council chose to focus on land-use rules that would explicitly define the boundaries of STR operations in New Orleans.⁴¹ That month, the City Council’s Community Development Committee voted to direct the Planning Commission to conduct a study and hold a public hearing on the regulation of STRs.⁴²

The following month, three New Orleanians produced an unsponsored analytical report of STR data, which promulgated the following conclusion: illegal STRs in New Orleans cluster in neighborhoods that are largely white or rapidly gentrifying, resulting in diminished housing stock for residents, along with higher rents and home prices.⁴³ An Airbnb spokesman quickly disputed the findings,⁴⁴ and weeks later, an MIT real estate economist stated that the assumption underpinning the report’s conclusion, that STRs “eat up supply,” was flawed.⁴⁵ These conflicting analyses proved particularly unsatisfying for residents and government officials alike at a time when both sides of the STR debate were vocalizing their concerns to the Planning

39. Katherine Sayre, *City Tackles Short-Term Rentals*, TIMES-PICAYUNE B01 (July 11, 2014), <http://infoweb.newsbank.com/resources/doc/nb/news/14EFE7CA5EEFA1C8?p=AWNB>.

40. Robert McClendon, *Action Sought on Short-Term Rentals—Residents Growing Frustrated—Council Member Says Current Situation is ‘Unworkable,’* TIMES-PICAYUNE A01 (June 23, 2015), <http://infoweb.newsbank.com.libproxy.tulane.edu:2048/resources/doc/nb/news/156243C8DC4AF738?p=AWNB>.

41. Greg LaRose, *New Orleans Moves Toward Crafting Short-Term Rental Rules*, NOLA.COM (Aug. 19, 2015, 5:34 PM), http://www.nola.com/politics/index.ssf/2015/08/new_orleans_moves_toward_craft.html.

42. *Id.* (“The study would include a look at other cities that have created rules for the burgeoning industry, including where they have fallen short of achieving their intended goal.”).

43. Robert McClendon, *Short-Term Rental Spread Could Further Gentrify New Orleans, Data Report Says*, NOLA.COM (Sept. 2, 2015, 7:04 AM), http://www.nola.com/politics/index.ssf/2015/09/short-term_rental_spread_could.html.

44. *Id.*

45. Robert McClendon, *MIT Professor Skeptical of Airbnb’s Impact on New Orleans Housing Prices*, NOLA.COM (Sept. 22, 2015, 9:24 AM), http://www.nola.com/politics/index.ssf/2015/09/mit_professor_skeptical_of_air.html. The economist, Professor Albert Saiz, argued that the study was flawed because, *inter alia*, it failed to account for (1) the non-static nature of the housing supply, and (2) the reality that “[e]very unit offered up for short-term does not represent the loss of a unit that would otherwise be occupied by a local tenant.” *Id.*

Commission.⁴⁶ However, a common theme emerged from this heated debate—the need for STR service providers, including Airbnb, to *share their platform-collected data* in order to craft effective, enforceable legislation.⁴⁷

D. *Airbnb Decides To “Play Nice”*⁴⁸

In November 2015, Airbnb made a drastic about-face. Without explanation or warning, Airbnb released *Overview of the Airbnb Community in New Orleans*, a seven-page “impact report” composed of the company’s internal, operational data about New Orleans.⁴⁹ The change came after six years of denied requests by Airbnb, who had previously left citizens and government officials on their own to fill the informational void, often by cobbling together unauthorized fragments of the company’s website.⁵⁰ The release of the report during a panel discussion at the University of New Orleans certainly marked a distinct change in company policy, but it was not entirely shocking. Both the report and panel were part of a larger public relations push by Airbnb as the City Council began its preliminary consideration of STR legalization.⁵¹

In addition to the New Orleans-specific impact report, Airbnb also released a “Community Compact” marking another departure from past practices.⁵² The compact signified a company commitment to work transparently with government officials in cities where Airbnb operates. The compact pledged the following: (1) to treat every city “personally”

46. See Jeff Adelson, *People on Both Sides of the Short-Term Rental Issue Have Their Say at New Orleans Planning Commission Meeting*, ADVOCATE (Sept. 30, 2015, 7:26 PM), http://www.theadvocate.com/new_orleans/news/politics/article_ca96a219-9e47-579c-bb0b-206e01de09eb.html. The Planning Commission Meeting was the “first step in fulfilling a mandate from the City Council to study short-term rentals and make recommendations on how they might be effectively regulated in the city’s zoning ordinance.” Robert McClendon, *Hearing on Airbnb-Style Rentals Lays Out the Fault Lines*, NOLA.COM (Sept. 29, 2015, 9:14 PM), http://www.nola.com/politics/index.ssf/2015/09/hearing_on_airbnb-style_rental.html.

47. Adelson, *supra* note 46; McClendon, *supra* note 46.

48. Robert McClendon, *Airbnb’s Pledge To Play Nice in New Orleans Could Clash with Its Business Model*, NOLA.COM (Nov. 20, 2015, 9:34 AM), http://www.nola.com/politics/index.ssf/2015/11/new_orleans_airbnb_community_c.html.

49. See Robert McClendon, *In Push for Legalization, Airbnb Releases New Orleans Data for the First Time*, NOLA.COM (Nov. 17, 2015, 3:59 PM), http://www.nola.com/politics/index.ssf/2015/11/in_push_for_legalization_airbn.html; AIRBNB, *OVERVIEW OF THE AIRBNB COMMUNITY IN NEW ORLEANS* (Nov. 2015), <http://www.airbnb.com/wp-content/uploads/2015/11/NewOrleansImpactReport.pdf>.

50. See McClendon, *supra* note 49.

51. *Id.*

52. See AIRBNB, *THE AIRBNB COMMUNITY COMPACT* (Nov. 2015), <http://www.airbnb.com/wp-content/uploads/2015/11/Airbnb-Community-Compact.pdf>.

by ensuring that Airbnb pays its “fair share” of hotel and tourism taxes; (2) to foster an “[o]pen and [t]ransparent [c]ommunity” by sharing its data; and (3) to “[p]romote [r]esponsible [h]ome [s]haring,” especially in neighborhoods with a shortage of long-term rental housing, going as far as “ensuring [that] hosts agree to a policy of listing only permanent homes on a short-term basis.”⁵³ Critics swiftly dismissed Airbnb’s “newly conciliatory rhetoric,” emphasizing that Airbnb’s compact promises stood in opposition to the company’s business model “built on scale, low overhead and anonymity for its users.”⁵⁴

IV. AIRBNB IN NEW ORLEANS: PART 2 (2016-PRESENT)

A. *The Planning Commission Study Results Catalyze Legislation*

In January 2016, six months after the City Council’s Community Development Committee called on the Planning Commission to conduct a study on the feasibility of STR legalization,⁵⁵ the results were released.⁵⁶ The Planning Commission study identified 2400-4000 STRs in operation in New Orleans, with about *70% of those listings being whole home or apartment rentals*.⁵⁷ In addition to the statistical data released in the study, the Planning Commission also passed, after a 6-to-1 vote, general STR recommendations via a series of proposed ordinances.⁵⁸ The Planning Commission recommended that the City Council legalize STRs and create a system to license said properties, facilitating the collection of operators fees and taxes, while requiring operators to obtain liability insurance and an STR activity log as outlined in the aforementioned study.⁵⁹ Most notably, the Planning Commission voted to downsize its initial legalization regime, which would have permitted

53. *Id.* at 2-4.

54. *See* McClendon, *supra* note 48.

55. *See* LaRose, *supra* note 41.

56. *See* NICHOLAS KINDEL ET AL., CITY PLANNING COMM’N, SHORT TERM RENTAL STUDY (2016), <http://www.nola.gov/city-planning/major-studies-and-projects/short-term-rental-study/final-short-term-rental-study/>.

57. *See* Cain Burdeau, Associated Press, *New Orleans Looks at Legalizing Short-Term Rentals*, WASH. TIMES (Jan. 20, 2016), <http://www.washingtontimes.com/news/2016/jan/20/new-orleans-looks-at-legalizing-short-term-rentals/>.

58. The Planning Commission’s recommendations were presented to the City Council via a formal proposal. Jeff Adelson, *Plan To Legalize Short-Term Rental Market in New Orleans Gains Praise From Supporters*, ADVOCATE (Jan. 22, 2016), http://www.theadvocate.com/new-orleans/news/politics/article_314dfac5-41f0-5266-ae3d-041d4133c4f2.html.

59. The Planning Commission vote, and subsequent recommendation, occurred one week after the study results were released. Jeff Adelson, *Planning Commission Endorses Proposal To Legalize Most Short-Term Rentals*, ADVOCATE (Jan. 27, 2016), http://www.theadvocate.com/new-orleans/news/politics/article_b2a5d416-b1df-5d8c-9c96-53935e3267e0.html; *see* KINDEL ET AL., *supra* note 56, at vi.

“principal residential’ rentals, investor properties in residential neighborhoods that are rented to tourists full time.”⁶⁰

B. Market Mushroom: The City Council Weighs In, Jazz Fest Booms, and the Mayor (Finally) Speaks

When Jazz Fest kicked off in New Orleans in late April 2016, the music festival immediately inspired “renewed backlash” in the STR debate.⁶¹ Almost 20,000 of the Jazz Fest’s 425,000 attendees stayed in STRs booked through the Airbnb platform.⁶² Just days after Jazz Fest’s conclusion in early May 2016, Mayor Mitch Landrieu asked the City Council to instruct the Planning Commission to hold public hearings on its *original* legalization regime, which *included an explicit provision permitting entire home or apartment rentals*.⁶³ Shortly thereafter, the City Council voted unanimously for the Planning Commission to hold more hearings on the STR issue and requested that the Planning Commission reconsider its stance on whole-home rentals, in accordance with the Mayor’s request.⁶⁴

Following the City Council vote, the proposed STR ordinances were officially sent back to the Planning Commission for additional

60. Robert McClendon, *Commission Reins in Proposal To Legalize Airbnb-Style Rentals*, NOLA.COM, http://www.nola.com/politics/index.ssf/2016/01/commission_reigns_proposal_to.html (last updated Jan. 27, 2016, 7:15 AM). It is important to note that the Planning Commission’s vote was not binding on the City Council, which had the ultimate authority on the STR ordinance. *Id.*

61. *Jazz Fest Inspires Renewed Backlash in Fight over Airbnb, Other Short-Term Rentals*, ADVOCATE (Apr. 24, 2016, 5:50 AM), http://www.theadvocate.com/new_orleans/news/politics/article_ae00a79c-8081-5b12-b3d3-89f687e7f9b6.html. The New Orleans Jazz and Heritage Festival, commonly referred to as “Jazz Fest,” is a ten-day music festival held in New Orleans every April since 1970. ADAM KARLIN & LISA DUNFORD, *NEW ORLEANS CITY GUIDE* 42, 50 (2009).

62. *See Letting the Good Times Roll with Airbnb During New Orleans’ Jazz Fest*, AIRBNB CITIZEN (Apr. 22, 2016), <http://new-orleans.airbnbcitizen.com/letting-the-good-times-roll-with-airbnb-during-new-orleans-jazz-fest/>.

63. *See Jeff Adelson, Mayor Mitch Landrieu Pushing To Authorize More Short-Term Rentals than Planning Commission Wants*, ADVOCATE (May 4, 2016), http://www.theadvocate.com/new_orleans/news/politics/article_53aa5860-b299-557c-b433-5e489592ebc0.html; Jeff Adelson, *City Council Sends Issue of Short-Term Rentals Back to Planning Commission*, ADVOCATE (May 5, 2016), http://www.theadvocate.com/new_orleans/news/politics/article_f9ae8c18-26a4-512f-a8fa-ea5ffb18882.html [hereinafter Adelson, *City Council*] (“The vote . . . would have been a minor procedural move but for one issue: the inclusion of a line instructing the Planning Commission to use a study put together by its staff, rather than the amended version the commission members approved and sent to the council earlier this year . . .”).

64. *See Greg LaRose, Council Wants More Feedback Before Setting New Orleans Short-Term Rental Policy*, NOLA.COM (May 5, 2016, 1:36 PM), http://www.nola.com/politics/index.ssf/2016/05/council_wants_more_feedback_be.html.

review.⁶⁵ The next day, the City Council voted unanimously to require the Planning Commission to conduct a study to investigate how proposed projects would affect the supply of affordable housing and consider how changing zoning rules could encourage development aimed at lower-income residents.⁶⁶

C. *A (Politically) Heated New Orleans Summer*

After three months of heated debates, the Planning Commission recommended (1) to legalize owner-occupied STRs, allowing homeowners to rent out their whole homes for thirty days per year; and (2) to *prohibit year-round, entire-home rentals*.⁶⁷ Hours before the Planning Commission's vote, Airbnb released a rather timely report entitled *Airbnb, Housing, and the Crescent City*.⁶⁸ The report's "key findings" attempted to refute common "misperception[s]" about entire home listings.⁶⁹ Said "findings" were delineated as follows: (1) most Airbnb hosts list their residence in large part to supplement the cost of living and home expenses; (2) entire home listings comprise 1.8% of all housing units in New Orleans; and (3) most entire home listings are "shared only occasionally," with "full-time" entire home STRs constituting those listings rented out more than 270 days per year, representing only 0.06% of the City's total housing stock.⁷⁰ Unsurprisingly, the report used congenial rhetoric while presenting the findings, such as an introductory paragraph highlighting that Airbnb hosts are "ordinary people" who work with Airbnb to "strengthen[] communities."⁷¹ With the Planning Commission's recommendation, the proposed STR ordinance was again sent to City Council.

65. See Adelson, *City Council*, *supra* note 63.

66. See Jeff Adelson, *City Council Looking at Ideas To Promote More Affordable Housing in New Orleans*, *ADVOCATE* (May 6, 2016, 3:20 PM), http://www.theadvocate.com/new_orleans/news/politics/article_ce235728-dc40-5ef1-ba8b-4cc714491d92.html. Councilwoman Susan Guidry acknowledged that "the short-term rental issue [needs to be examined] through the affordability lens." *Id.*

67. Katherine Sayre, *Short-Term Rentals of Whole Homes Should Stay Out of New Orleans, Planning Commission Votes*, *NOLA.COM* (Aug. 9, 2016, 10:54 AM), http://www.nola.com/business/index.ssf/2016/08/short_term_rentals_legalize_ci.html.

68. See AIRBNB, *AIRBNB, HOUSING AND THE CRESCENT CITY* (2016), <http://www.airbnbcitizen.com/wp-content/uploads/2016/08/NOLA-housing-report-v5.pdf>; Katherine Sayre, *Airbnb Report Paints Positive Picture of Short-Term Rentals*, *NOLA.COM* (Aug. 9, 2016, 8:00 AM), http://www.nola.com/business/index.ssf/2016/08/airbnb_short_term_rentals_new.html.

69. AIRBNB, *supra* note 68.

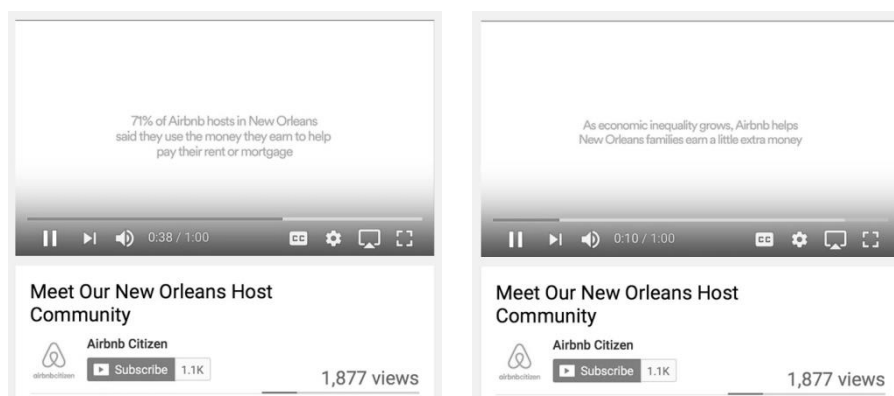
70. *Id.* at 2-6.

71. *Id.* at 1.

D. The Final Push for STR Legalization: Ad Campaigns, City Council Vote Postponement, Mayoral Compromise

Ahead of the City Council's October 6 vote on the Planning Commission's recommended STR ordinances,⁷² Airbnb launched a "nearly \$1M" ad campaign aimed at rousing support for STR legalization.⁷³

Figure 2: Screen Grabs from a 60-Second Airbnb Commercial Released in September 2016⁷⁴



Opponents of the STR legalization ordinance were frustrated over their inability to compete with Airbnb's polished commercials,⁷⁵ so instead, they orchestrated a demonstration in the form of a neighborhood "funeral parade" in front of City Hall in an effort to compel City Council to support the entire-home STR ban.⁷⁶ Two days later, Airbnb countered the protestors and bolstered its "media blitz" with a news conference at City Hall, where the company explicitly stated that Airbnb was "very

72. See Kevin Litten, *City Council Schedules Short-Term Rental Vote for Oct. 6*, NOLA.COM (Sept. 7, 2016, 7:00 AM), http://www.nola.com/politics/index.ssf/2016/09/city_council_short-term_rental.html.

73. See Kevin Litten, *Airbnb Launches Nearly \$1M New Orleans Ad Campaign Ahead of Short-term Rental Vote*, NOLA.COM (Sept. 14, 2016, 8:00 AM), http://www.nola.com/politics/index.ssf/2016/09/airbnb_ad_campaign_short-term.html.

74. Airbnb Citizen, *Meet Our New Orleans Host Community*, YOUTUBE (Sept. 13, 2016), <http://www.youtube.com/watch?v=U67EILzVks8>.

75. See Kevin Litten, *New Orleans Short-Term Rentals Opponents, Outspent on Airwaves, Gear Up for City Council Fight*, NOLA.COM (Sept. 15, 2016, 2:26 PM), http://www.nola.com/politics/index.ssf/2016/09/airbnb_ad_campaign_opponents.html.

76. See Kevin Litten, *Residents Plan Short-Term Rental Demonstration at City Hall*, NOLA.COM (Sept. 26, 2016, 6:06 PM), http://www.nola.com/politics/index.ssf/2016/09/short-term_rental_protest_city.html.

willing to talk about data sharing,” claiming, “We want to be regulated; we want to pay taxes.”⁷⁷ While the coordinated demonstrations by residents and Airbnb occurred days before the scheduled October 6 vote, both sides of STR debate were required to wait an additional two weeks following a vote deferment until the October 20 City Council meeting.⁷⁸

During this time of extended deliberation, Mayor Landrieu “dispatched” Deputy Mayor Ryan Berni to negotiate with City Council and Airbnb “to form a compromise.”⁷⁹ Mayor Landrieu initially pushed for the legalization of entire-home STRs, but in an email from Deputy Mayor Berni to the City Council, it was revealed that the Mayor was willing to compromise to limit entire-home STRs to 120 rented days per year.⁸⁰

After more than two years of deliberation, protest, and frustration, the City Council approved “landmark short-term rental regulations,” in a packed City Council meeting on October 20.⁸¹ The approved ordinances were then codified, subjected to a final City Council vote, and passed on December 1, 2016.⁸²

E. *The STR Legislation*

The resulting legislation amended both the City’s Comprehensive Zoning Ordinance and the City Code to define and permit “Short Term Rentals” in zoning districts throughout the city and to create a STR

77. Kevin Litten, *Airbnb Continues Media Blitz with News Conference at City Hall*, NOLA.COM (Sept. 29, 2016, 4:06 PM), http://www.nola.com/politics/index.ssf/2016/09/airbnb_short_term_rental_news.html (quoting Laura Spanjian, Airbnb).

78. See Jeff Adelson, *Future of Short-Term Rentals in New Orleans To Remain Up in Air After Latest Delay*, ADVOCATE (Oct. 4, 2016), http://www.theadvocate.com/new_orleans/news/article_4c542f0c-8a84-11e6-8a12-db9482f8fb15.html. The delay came as no surprise as several councilmembers’ offices indicated that they were hoping to put off the vote to further consider their positions and determine the position of the Landrieu administration. *Id.*

79. Kevin Litten, *Mitch Landrieu Seeks Compromise on Short-Term Rentals*, NOLA.COM (Oct. 17, 2016, 5:10 PM), http://www.nola.com/politics/index.ssf/2016/10/mitch_landrieu_short-term_rent.html.

80. Jeff Adelson, *Landrieu Administration’s Proposal Shows Whole-Home Rentals Not Really ‘Off the Table’ in New Orleans*, ADVOCATE (Oct. 18, 2016, 3:21 PM), http://www.theadvocate.com/new_orleans/news/politics/article_41d017a4-9569-11e6-a009-f71abe172501.html. By contrast, “[t]he Planning Commission recommended limiting those rentals to a maximum of five times a year totaling 30 days or less. Those limits would likely prevent units from being used solely as short-term rentals.” *Id.*

81. Kevin Litten, *New Orleans City Council Legalizes Short-Term Rentals, Limits Whole-Home Listings*, NOLA.COM (Oct. 20, 2016, 5:29 PM), http://www.nola.com/politics/index.ssf/2016/10/short_term_rentals_council.html.

82. Kevin Litten, *New Orleans City Council Gives Final Approval to Landmark Short-Term Rental Laws*, NOLA.COM (Dec. 1, 2016, 2:16 PM), http://www.nola.com/politics/index.ssf/2016/12/short-term_rentals_legalized_a.html.

licensing process.⁸³ The legislation includes the following: (1) the creation of licensing and enforcement mechanisms for STRs;⁸⁴ (2) the definition of STRs as a land use, provided where such uses are authorized, and the provision of supplemental standards for STR operation;⁸⁵ (3) the collection of a fee of \$1.00 per rental night of STRs to be deposited into the Neighborhood Housing Improvement Fund;⁸⁶ and (4) authorization for the Mayor to enter into a Cooperative Endeavor Agreement with Airbnb, Inc., for the reporting, collection, and remittance of hotel sales and use taxes and hotel occupancy privilege taxes for booking transactions conducted on Airbnb.⁸⁷

V. ENFORCEMENT CONCERNS

*“The life of the law is in its enforcement.”*⁸⁸

Soon after the passage of the STR ordinances, the Short Term Rental Administration was created as a division of the Department of Safety and Permits.⁸⁹ According to the New Orleans City Government’s website, “The STR Administration works cooperatively with the Zoning Administration Division and the Administrative Hearings Bureau of the Department to effectively administer short term rental regulations of the City’s Comprehensive Zoning Ordinance and the City Code.”⁹⁰ As of March 17, 2017, 232 STR license applications were received for the 4500 Airbnb listings in New Orleans.⁹¹ As of April 5, 2017, the STR Administration failed to post a registry of approved STRs, which was to be made available April 1.⁹²

83. *Short-Term Rental Administration*, CITY NEW ORLEANS, <http://nola.gov/short-term-rentals/> (last updated Apr. 1, 2017).

84. *See* NEW ORLEANS, LA., CODE OF ORDINANCES §§ 26-613 to 26-620 (1995). This ordinance explicitly delineates that whole-home rentals are limited to a maximum of ninety days per year, except in the Vieux Carré, where STRs are entirely forbidden. *Id.* Thus, the ordinance provides “unfettered” use of STRs in areas outside the Vieux Carré for shared (i.e., non-entire-home) listings. *See* Litten, *supra* note 12.

85. *See* NEW ORLEANS, LA., COMPREHENSIVE ZONING ORDINANCE art. 1, § 1.6; arts. 8-17; arts. 20-22; art. 26 (2015).

86. *See* NEW ORLEANS, LA., CODE OF ORDINANCES § 70-415.1.

87. *See* NEW ORLEANS, LA., ORDINANCE 27,218 M.C.S. (2016), <http://nola.gov/nola/media/One-Stop-Shop/Safety%20and%20Permits/27218.pdf>.

88. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 619 (1908) (emphasis added).

89. *See Short-Term Rental Administration*, *supra* note 83.

90. *Id.*

91. Charles Maldonado, *Here’s a Map of Everyone in New Orleans Who Has Applied So Far for a License To Rent Their Home on Airbnb*, LENS (Mar. 16, 2017), <http://thelensnola.org/2017/03/16/heres-a-map-of-everyone-in-new-orleans-who-has-applied-for-a-license-to-rent-their-home-on-airbnb/>.

92. *See Short-Term Rental Administration*, *supra* note 83.

Although the implementation of the STR ordinances posed significant enforcement challenges, many hoped that the “pass through registration” system, the polestar of the enforcement legislation, would bear scrutiny.⁹³ Under this streamlined system, upon a host’s STR registration on Airbnb, the company agreed to turn over the information to the city’s registry for enforcement purposes.⁹⁴ Airbnb described the system as a “21st-century, forward-looking approach.”⁹⁵ New Orleans claimed to be “ahead of the curve” in terms of STR regulation.⁹⁶ And with more than 400 notices of STR infractions having gone out to 382 properties in New Orleans in May 2017 alone, the City of New Orleans’s commitment to STR enforcement had appeared to produce tangible results.⁹⁷

However, despite Airbnb’s unrelenting support for the STR ordinances, dozens of illegal STR listings in New Orleans remained on Airbnb’s website following the June 1 deadline, the date on which Airbnb agreed to remove noncompliant properties.⁹⁸ With only seven city employees tasked with overseeing the implementation of the STR ordinances,⁹⁹ serious questions remain as to whether this enforcement mechanism can sufficiently handle the growing presence of STRs in New Orleans.

VI. ANALYSIS

As the Supreme Court opined, the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹⁰⁰ This right speaks directly to the intrinsic appeal of Airbnb: hosts set the availability of their properties, hike up prices for high-demand periods, and take their property on and off the Airbnb marketplace with one click if they so choose.¹⁰¹ But what about a

93. See Litten, *supra* note 17.

94. *Id.*

95. *Id.*

96. Chelsea Brasted, *Here’s How New Orleans Is Enforcing Short-Term Rental Regulations*, NOLA.COM (June 8, 2017), http://www.nola.com/business/index.ssf/2017/06/airbnb_violations_new_orleans.html.

97. *Id.*

98. *Id.*; see Chelsea Brasted, *Dozens of Illegal Airbnb Listings Remain Available in New Orleans*, NOLA.COM (June 8, 2017), http://www.nola.com/business/index.ssf/2017/06/airbnb_illegal_listings_new_or.html.

99. See Brasted, *supra* note 96.

100. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

101. *Why You’ll Love Becoming a Host*, AIRBNB, <http://www.airbnb.com/host> (last visited Apr. 1, 2016). Airbnb also has a formal nondiscrimination policy; for example, Airbnb hosts may not decline a guest based on race, color, ethnicity, national origin, religion, sexual orientation, gender identity, or marital status. See *Airbnb’s Nondiscrimination Policy: Our*

property owner's right to include? Should all property owners be able to turn their homes and other properties into STRs? Not so fast. When another person, such as an Airbnb guest, is added into this equation, "the property rights of one person impinge on, and interfere with, both the property and the personal rights of others."¹⁰² Therefore, "[a]bsolute property rights are self-defeating."¹⁰³ As demonstrated by many New Orleanians, the inability to operate an STR on their properties (prior to the 2016 legalization) left many residents frustrated, feeling as though their homes were no longer their castles.¹⁰⁴ But what of other New Orleanians, priced-out of their neighborhoods due to an Airbnb-induced constriction on the affordable home supply?

This exclusion-inclusion debate highlights a prominent strain within the property system: the "tension between privacy and free association norms on one side and equality norms on the other . . . is one that property law must resolve."¹⁰⁵ Can technology provide the solution? It could. Many New Orleanians would argue that Airbnb certainly caused the problem—so why couldn't (or shouldn't) Airbnb solve it? Despite its aggressive marketing campaigns and saccharine appeals to the New Orleans community, Airbnb could very well hold the key to the solution. Airbnb's advanced platform and data analytics could be reconfigured to identify where neighborhoods are most vulnerable to gentrification and limit STR availability or potentially institute community involvement initiatives to decrease the fragility of certain areas of New Orleans.

Commitment to Inclusion and Respect, AIRBNB, <http://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect> (last visited April 1, 2016).

102. Joseph William Singer, *Rent*, 39 B.C. L. REV. 1, 34 (1997).

103. *Id.*

104.

The [C]astle [Doctrine] . . . conceives of the homeowner as exercising a virtually unlimited power over his property, a "sole and despotic dominion," as William Blackstone put it. . . . [T]he castle metaphor yields a very robust, perhaps even absolute, conception of the owner's right to exclude. This right to exclude encompasses private parties . . . as well as the state, whose entry into the home is resisted through any number of legal doctrines, including the Fourth Amendment. The state can of course attempt to "enter" one's property in a multitude of ways—for example, by regulating what goes on inside one's castle.

Eduardo M. Penalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2972-73 (2006) (citations omitted).

105. JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES, at xxxiii (6th ed. 2014).

VII. CONCLUSION

The STR debate and subsequent ordinances enacted in New Orleans demonstrate the frustrating, arduous legislative process cities must undertake to grapple with new problems posed by the Sharing Economy. However, cities should not shoulder this process on their own. Unicorns of the Sharing Economy should work openly with cities in which they operate to create meaningful, effective regulation legislation. In doing so, said unicorns can foster more harmonious relationships in cities that might be quick to categorize them as market disrupters. Airbnb's eventual willingness to share data with the City of New Orleans resulted in legislation that can better address the current and unique challenges of the rental housing stock in New Orleans.

“Property rights serve human values. They are recognized to that end, and are limited by it.”¹⁰⁶ Property rights exist “*only to the extent* that they serve a socially-acceptable justification.”¹⁰⁷ Whether STR legalization serves a socially acceptable justification in New Orleans will remain a juicy, sometimes-sour Satsuma,¹⁰⁸ ripe for debate in the Crescent City for years to come.

106. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

107. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4-5 (3d ed. 2012) (emphasis added).

108. Satsuma oranges are the traditional citrus fruit grown by Louisiana homeowners. *See* LA. STATE UNIV., AGRIC. CTR., LOUISIANA HOME CITRUS PRODUCTION 5 (2008).