September 2021

HOT TOPIC ALERT

SHORT TERM RENTALS

The residential rental market is changing. For years, homeowners and investors have rented residential units and homes for profit. Traditionally, however, most property owners looking to earn income by renting out properties chose to make long term rentals to tenants. The growth of the sharing economy, in conjunction with the launch of Airbnb more than a decade ago, opened up a new possibility for residential property owners: short-term rentals, or leasing property for a few days or weeks at a time. Today, an increasing number of property owners are turning to short-term rentals as a way of making money off their property, either as a way of supplementing their incomes, or as a significant portion of their regular earnings. States, local governments, and HOAs are continuing to refine their approaches to balancing the benefits and the potential downsides of such rentals.

In this Hot Topic Alert, we explain what a short-term rental is. We discuss the advantages and criticisms of short-term rentals, summarize the most common types of regulation of short-term rentals, and highlight action on the issue by REALTORS®.

WHAT IS A SHORT-TERM RENTAL?

Short term rentals are furnished rentals of residential dwelling units for short periods of time. The unit being rented may be an entire home or it may be a portion of the home, such as a room or suite. There is no nationally recognized standard for how long the "short term" is. Traditionally, anything less than a 12-month term was considered a short-term rental. Today, regulations governing "short term" rentals often define a short-term rental as 30-days or less, but in everyday usage, the term is often used to refer to rentals that could be as long as six months. More than an exact length of the time, the key distinguishing factor that differentiates a modern short-term rental from a traditional rental is its temporary nature.

Short-term rentals come in many forms. A few notable examples include vacation rentals, Airbnbs (or similar rentals), corporate housing, and word-of-mouth underground rentals.

THE RISE OF SHORT-TERM RENTALS

Many forces contributed to the exponential growth of short-term rentals over the past decade, two are particularly noteworthy: the rise of the sharing economy and Airbnb. The sharing economy is defined by Investopedia as an "a peer-to-peer (P2P) based activity of acquiring, providing, or sharing access to goods and services that is often facilitated by a community-based online platform." In 2007, Airbnb extended the sharing economy to short-term rentals when it created an online marketplace for Airbnb. This marketplace provided a means for "hosts" to rent out spare rooms or properties, and for guests to book them.

Airbnb hosts create profile pages for their properties with that specify the type of accommodation (shared or private), booking periods, set "house rules," and provide photos. Guests review a calendar to see if the property is available on their desired dates and if so, they request to book the property, which the host can accept or decline. Following the interaction hosts and guests rate each other and may leave comments regarding their experience working with one another. Since its inception, Airbnb has gone from a niche website used by more intrepid travelers to a household name that is used by travelers of all types, including business professionals. The company charges a service fee for both hosts and guests when a rental is booked.

Today, Airbnb is not the only short-term rental service or online marketplace. Its top competitor is Vrbo. Vrbo predates the better-known Airbnb, but focuses only on vacation rentals of entire properties rather than just rooms or suites. Airbnb and Vrbo are not the only ways to find short-term rentals. They have at least 10 other national competitors and a host of smaller, local companies that deal in the short-term market. Yet, for now, Airbnb and Vrbo continue to be industry leaders.

The short-term rental market experienced a decline in 2020 with the onset of the COVID-19 pandemic which impacted travel companies of all types. However, this market was not hit nearly as hard as other travel related industries. In fact, by mid-2021, the market had largely returned to 2019 levels. It is expected that short-term rental market will continue to stay strong, though as with everything, trends regarding the types of rentals and locations that are most popular change.

A quick glance at Airbnb's key statistics demonstrates just how vibrant the short-term rental market is. As of September 2021, the following are the statistics just for Airbnb:

- Over 5.6 million listings (worldwide) on Airbnb alone.
- Hosts have earned more than $100 billion dollars on the platform.
- Over 1 billion guests have checked into Airbnbs.
- 100,000 cities have active Airbnb listings.

ADVANTAGES OF SHORT-TERM RENTALS

Modern short-term rentals provide a number of benefits for property owner hosts. For one, they offer an income stream which makes home ownership more affordable. According to one estimate, the average Airbnb host earns $924 per month from their rentals. The additional income from short-term rentals helps many property owners afford the mortgage on a home in an area where the price of purchasing a home is otherwise prohibitively expensive. Short term residential rentals also help ensure that properties are maximally utilized. Property owners turn unutilized or underutilized spaces in their homes or on their property and turn them into revenue generating rentals.

It is not just property owners who benefit. Short term rentals increase available housing options in a community for visitors and travelers. This can bring in tourists who either would have been priced out of visiting or just unable to find available lodging. Increased tourism to an area benefits the community as a whole because tourism dollars are spent in the region and today, tax is often collected on short-term rentals. Short term rentals also fill a gap for those who need temporary housing, most notably, corporate renters and new residents who need temporary housing while they look for a space to rent permanently or to purchase.

RESTRICTIONS ON SHORT-TERM RENTALS

The rise of the short-term rental market has also led to a rise in concern over the impact of the market, particularly on residential neighborhoods. The most common concerns over the short-term rental boom are neighborhood character, health and safety, long term prices, and taxation. These and other concerns are often cited when adopting short-term rental regulations.

Short term rentals raise concerns over the character of neighborhoods. Permanent residents often complain about the disturbances that may be caused by short-term tenants focused on short term fun rather than maintaining neighborhood character. Common complaints regarding short term renters include excessive noise, late night parties, trespassing, increased traffic, and other activities that disrupt the residential character. Safety is also a concern, a survey by Porch revealed that 50% of property owners would feel less safe if their next door neighbor started renting their property on a short term basis.

It is not just neighborhood safety that is a concern with short-term rentals. The safety of renters is also a concern. Unlike traditional short-term lodging like hotels, residential homes and their utilities were not developed to withstand large numbers of guests – which can lead to safety issues caused by overuse. Additionally, there are currently fewer safety regulations and less safety oversight governing short-term rentals of residential properties than hotels and other traditional lodging establishments.

An important concern that often prompts short-term rental restrictions is the impact of unfettered short-term rentals on long term rental prices. When property owners elect to rent their homes on a short-term basis rather than renting on a longer-term basis (e.g., by the season or by the year), "they essentially squeeze the supply of the supply of housing, pushing up the demand, and subsequently, the cost" of housing in the community. While homeowners may have the option of renting out a portion of their home to help offset increasing prices, long-term renters typically lack such an option as their leases often prohibit subleasing.

It has been argued, often by hotel and motel lobbyists, that state and local tax governments lose out on tax revenue when short term renters choose short term rentals for lodging over hotels and motels. At one time this may have been the case; however, as discussed below, states and local governments are increasingly collecting taxes for short term non-traditional rentals. Today, hotel lobbyists point to the decreased property taxes from residential rentals (since they are typically taxed at a lower rate than commercial properties) as a concern, though how severe this impact may or may not be is not well studied.

In order to guard against the concerns associated with short-term rentals, state and local governments as well as neighborhoods have begun to adopt restrictions on short-term rentals. As with many real estate issues, approaches and thus, laws and covenants vary by jurisdiction. The most common types of restrictions are zoning ordinances, licensing requirements, taxation, and HOA covenants.

Restrictions and rules regarding short-term rentals in a city or town, if any, are typically found in the zoning or administration code. On the most severe end of the spectrum, ordinances in some locations prohibit short-term rentals in specific neighborhoods or zoning districts, or community-wide. For example, in Miami Beach, short-term rentals of less than six months and one day are outright prohibited in certain neighborhoods.

Even when not directly prohibited, some jurisdictions have applied already existing ordinances in a manner that restricts short-term rentals. For example, Hamilton Township, Pennsylvania, issued a citation to the owner of a property because the owner had been renting the property on a short term basis. The property was located in an area of the Poconos zoned for single-family use only The owner appealed the decision and ultimately lost when the Pennsylvania Supreme Court upheld the citation, noting that the zoning clearly prohibited “transient uses,” of the property. While other locations have zoning laws similar to the one in Hamilton Township, not all enforce them in a manner that restricts short-term rentals.

Municipalities do not always choose to adopt complete bars against short-term rentals. It is far more common for governments to limit the ability of property owners to use residential properties for short-term rentals, which are defined as less than 30 days. For example, Portland, Oregon’s short-term rental ordinance allows property owners to rent out only portions of their primary residence as short-term rentals. To be considered a primary residence under the ordinance, owners must live in the property at least 270 days (approximately 9 months) each year. The ordinance effectively prohibits investment property owners from renting out their property on a short-term basis.

Virtually all localities that have short-term rental ordinances incorporate a licensing (also referred to as a “permitting” or “registration”) requirement of some type in addition to other governing ordinances. These ordinances typically require property owners to obtain a license, permit, or proof of registration before beginning to rent the property on a short-term basis. There is typically a fee associated with the application, though some locations, like the City of Encinitas, California limit the price of the fee to the administrative costs of processing the application. Some locations also require an inspection. Some locations like Placer County, California require inspection by officials, while others like Coeur d’Alene, Idaho utilize a self-inspection process.

As discussed above, at one time there was a lot of concern over lost tax revenues for short term rentals booked through Airbnb and similar services versus traditional hotels and motels. Today, through the adaption of additional tax laws and amendment of existing laws to ensure such short term rentals don’t fall through any loopholes, this is not much of an issue. In addition to state short term taxes, an increasing number of localities have imposed local taxes on short-term rentals. In Texas, for example, the state’s Hotel Occupancy Tax statute applies to short-term rentals including a “tourist home” or “tourist house,” and imposes a 6% tax at the state level. The state’s tax code also permits Texas cities, towns, and villages to impose and collect an additional tax on short term accommodations.

Airbnb has adapted its business and platform to collect applicable state and local taxes. So has Vrbo. By collecting these occupancy taxes, Airbnb and Vrbo help ensure payment and save localities the cost of enforcement efforts. Thus, in jurisdictions which have such a tax, short-term rental restrictions can continue to be a significant source of tax revenue, particularly if the location has a robust tourist industry.

In addition to local and state regulation, neighborhoods and residential complexes often utilize covenants to restrict short-term rentals. These private controls typically are found in the covenants, conditions, and restrictions (CC&Rs) adopted by a homeowners’ association (HOA). CC&Rs can control virtually any aspect of a residential community, such as the use of property, the exterior color of a home, pets, or landscaping. CC&Rs can also be written to prohibit property owners from renting their homes on short-term bases (or from renting them at all). CC&Rs are however, still subject to state laws which may restrict their powers. In Florida, for example, state law restrains an HOA's ability to adopt rental restrictions that apply to new property owners, but certain short-term rental restrictions are a notable exception. HOAs continue have pretty broad power to adopt and enforce short-term rental restrictions in the state.

REALTOR® EFFORTS ON SHORT TERM RENTAL ISSUES

The National Association of REALTORS® ("NAR") has not adopted an official position on state and local restrictions on short-term rentals as a whole. Instead, NAR recognizes that state and local regulations and their impacts are unique and must be considered on a case-by-case basis. NAR focuses on educating its members on the rapidly evolving state of short-term rentals in the United States. It also supports local and regional initiatives regarding short-term rentals that are aligned with NAR's other policy positions including its position on property rights ,which provides that "[g]overnments shall not arbitrarily infringe on the basic right of the individual to acquire, possess and freely transfer real property, and shall protect private property rights as referred to in the 5th and 14th Amendments of the United States Constitution."

NAR's Land Use Initiative ("LUI") has been frequently utilized by state and local REALTOR® associations in connection with short-term rental issues. The LUI is a program designed to assist state and local REALTOR® Associations in their public policy advocacy of land use issues by providing recommendations to requesting REALTOR® associations desiring to improve/support/oppose proposed state or local land use measures. Upon request, NAR will provide expert analysis of the legal, planning, economic and environmental issues surrounding legislative and regulatory land use proposals.

Recent LUI requests related to short-term rentals include an August 2020 review of the draft city ordinance proposed by Lafayette, Louisiana to limit the geographic distribution of STRs to certain zoning districts and to require owners to obtain and prominently display a certificate of occupancy for the property. While the analysis found that the proposed ordinance is considerably less burdensome than some other ordinances, portions of the proposal were vague and confusing. The display requirement for the certificate of occupancy could have the unintended consequence of making short-term rental properties a target for crime. The proposed restrictions were not enacted.

Another August 2020 request dealt with a proposed transient occupancy lodging ("TOL") ordinance in Hudson, New York. The proposal would limit TOL to certain districts and require conditional use permits, as well as maximum occupancy, safety equipment, and inspection requirements. The NAR analysis concluded that the TOL ordinance unreasonably infringes on private property rights, in particular the core property right to rent one's property. The ordinance that was ultimately approved allows short term rentals of owner-occupied residences, with some regulations imposed.

State and local REALTOR® associations have been active in responding to short-term rental issues in their areas to ensure that any restrictions are logical and in the best interests of the local community and real estate market.

In the summer of 2020, the Cape Cod and Islands Association of REALTORS® announced its Safe Summer guidelines. These guidelines gave guidance to property owners who would be offering short term rentals after the Massachusetts COVID-19 restrictions were lifted. Meanwhile, the Delaware Association of REALTORS® successfully lobbied the Delaware Governor to lift the short-term rental ban that had been imposed in the wake of COVID-19. In March 2020, the Raleigh Regional Association of REALTORS® successfully lobbied the Raleigh City Council to undo short-term rental restrictions put in place by the last City Council.

In Hawai'i, when the Maui Council considered phasing out STRs, the REALTORS® Association of Maui rallied more than 100 people to attend the Town Hall, and the City Council appeared to back off the proposal. Similarly, the Greater LA Association of REALTORS® opposed a proposed 1-year minimum lease on all rentals in West Hollywood. As a result of concerted public participation and protest against the measure, the City Council tabled it indefinitely.

The Boise Regional REALTORS® got involved in public discussions about the mayor's recommendations on limiting STRs to one unit per property with requirements for owner occupation and licensing. This led to an outpouring of public opposition. The mayor withdrew the recommendation in November 2019.

When the Village of Rhinebeck, New York, was considering strict short-term rental restrictions that included an annual lottery that would have permitted no more than 15 homes to be rented, and rentals for no more than 16 days per year, the Dutchess County Association of REALTORS® successfully lobbied to soften the measure. The regulation version that the Village Board approved in late 2019 allows un-hosted rentals with renewable permit requirements.

CONCLUSION

Love them or hate them, short-term rentals are not going anywhere anytime soon. As with any innovation there are downsides; however, they can offer unique benefits too property owners, travelers, and the communities where they are located.

To best serve their clients, REALTORS® should stay apprised of state and local regulations as well as HOA covenants that impact property owner's ability to rent out the property as a short-term rental. They should advise their clients, whether sellers or purchasers, accordingly. The ability or inability to use a property for a short-term rental may impact the desirability and thus, the price of a given property.

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Questions or concerns contact Melissa Horn
Email: MHorn@nar.realtor
Phone: 202-383-1026

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