

New Zoning for a New Economy

E. Christopher Murray, Esq. *

JUNE 1, 2018

INTRODUCTION

In the last century local municipalities have adopted zoning regulations to control land use and protect the general health, safety and welfare of their residents. The zoning ordinances were adopted when there were relatively clear property classifications. Properties were residential, commercial, industrial or agricultural.

Over the years, the classifications became more specific. There were office and retail districts, not just commercial zones. And while there was some overlap, such as mixed use properties with commercial establishments on the first floor and residential units above, their classification and fitting them into a particular zone was not overly complicated. And, if a hardship arose to a property owner because of the classifications, local zoning boards were given the right to grant variances, and a local municipality could revise its zoning districts if they became outdated, or as circumstances dictated.

With the advent of the sharing economy, property uses have now been blurred. Is a residence turned into a hotel simply because the owner rents some of the space for short term stays? Does an apartment turn into a restaurant if individuals are invited over for a meal that they pay for? Is a driveway in a residential district turned into an improper commercial use because an automobile is shared by unrelated individuals for a fee? Our zoning ordinances must be updated to address these developments and this article will examine some of the alternatives that should be considered, as well as examine how some municipalities are reacting to this new sharing economy.

TRADITIONAL ZONING

In 1926, the United States Supreme Court, in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), upheld the power of municipalities to enact zoning regulations. The Supreme Court held that the zoning ordinance adopted by the Village of Euclid was not an improper use of the Village's police power. The Supreme Court also held that the zoning ordinance did not violate the Fourteenth Amendment of the United States Constitution. Instead, the Supreme Court determined that municipalities could utilize their policing powers to control land use to protect the health, safety and wellbeing of their residents.

At the time of the *Euclid* decision, zoning was a relatively new concept. Only a few cities had adopted zoning ordinances. However, with the Supreme Court's blessing over the next decades states permitted localities to adopt master plans and zoning ordinances so as to restrict certain uses to specific geographic areas, and zoning became commonplace. Today, Houston is the only major city that does not have a zoning ordinance.

Later in the century, creative challenges to zoning regulations were routinely rejected by the Courts. For example, arguments that zoning regulations amounted to an improper regulatory taking without compensation have been routinely rejected after the Supreme Court decision in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Supreme Court held that a regulatory taking can only occur if the regulation deprived an owner of "all economically beneficial or production use of land". As a result, that municipalities have wide latitude in enacting zoning laws is now unquestionable.

The logic behind zoning regulations is simple. For example, most people would not want factories being built next to single family homes. The idea was that certain areas would be designated for certain uses. There would be commercial districts, residential zones and areas set apart for industrial and agricultural purposes. By adopting such restrictions, property owners would be protected from undesirable uses of adjoining parcels.

States also authorized localities to provide relief from zoning regulations in appropriate cases. Area and use variances can be granted if certain criteria is met. For example, under New York law, an area variance—relief from setback and size restrictions—can be granted using a five part balancing test. And, while the criteria for a use variance is stricter, requiring a showing that a property owner cannot achieve a reasonable rate of return on his or her property, use variances are still available to overcome unreasonable hardship imposed by zoning regulations.

Also, special uses can be permitted when a land owner agrees to comply with certain conditions. And, a zoning classification may be changed when appropriate. As a result, municipalities, through their local zoning boards and their municipal power, have the power to address inequities created by zoning classifications.

However, as with many areas of the law, zoning regulations are becoming outdated by changes in technology and our economy. Sharing services has become more popular and has created economic efficiencies. If you have an extra room you are not using, why not rent it out for short periods of time? Why should an aspiring chef pay for a restaurant building that will not be used during long periods of time when you can open your kitchen and dining room in your residence to customers for a meal? Why buy a car that you only use infrequently when you can share one with others?

With the new sharing economy, how properties are used is becoming much more complicated. The sharing economy is becoming very popular, and gives people flexibility. But, as with anything new, someone is put at a disadvantage. Traditional businesses like hotels are threatened, and look to government to protect them. One way government can seek to restrict the growth of the sharing economy is through changes in zoning and land use regulations. However, is this the proper role of government?

ALTERNATIVE ZONING ORDINANCES

Local governments are confronted with the choice of modifying their zoning laws to balance the growing sharing economy with the needs and desires of its citizens. Municipalities may try to update their existing zoning ordinances, or they can look to innovative ways to reform zoning and land use regulations altogether.

A. Updating Existing Zoning Ordinances

One of the obvious ways of addressing this new sharing economy is simply to update existing zoning codes. For example, if a municipality wanted to ban Airbnb type uses in certain areas, it could define temporary lodging as paid occupancies of less than thirty days. This way such room sharing could be prohibited in residential districts, but could be permitted in commercial areas.

Similarly, the definition of commercial activities could be expanded to include new types of sharing arrangements such as paid for meals in private homes. Also, a commercial use could include the storage of an automobile which is used for cab-like services, such as Uber, or where more than one individual pays for the vehicle. By making such changes these type of sharing arrangements can be thwarted.

Of course, any changes in the zoning laws will raise issues of enforcement. If a chef wants to invite guests to his home and charge a fee for a meal, who is going to know? But there is also a more fundamental question—should zoning and land use laws be used to protect existing businesses and restrict growing economic activity? There may be more creative means available to address the sharing economy so as to

protect the character of neighborhoods without restricting this new economic activity.

B. Form Based Zoning

A more innovated approach to reforming and updating zoning is to make districts based on the form of a building instead of based on a building's use. Traditional zoning districts focus on the use of a building, commercial versus residential, industrial as compared to agricultural. Form based zoning focuses on the type of building, its shape and size.

Currently a type of form based zoning is utilized when restrictions are established for items such as lot coverage, maximum square footage and setbacks. A form based code would dictate the type of building that can be built, but not regulate what goes on inside. This way the market will dictate a building's particular use, and the zoning code would be flexible enough to allow for the growing sharing economy.

Further, by using form based zoning, communities first determine the type of areas they want, and then draft the appropriate zones. As a result, instead of micromanaging use and density, communities will dictate the type of physical layout they want. By doing so, concerns about a sharing economy go away.

Although a new concept, form based zoning has become increasingly popular. While the complete rewriting of zoning codes is rare, form based zoning has been utilized to revitalize historic town centers. The idea is simple. Instead of dealing with ever more overlapping uses that are spurred on by the new sharing economy, municipalities can concentrate on assuring their citizens that districts will maintain their physical characteristics.

CASE STUDIES

Over the last few years, municipalities have struggled to address the sharing economy. The concept is popular with the general public, but threatens existing industries. Discussed below is how three different governmental units have sought to address this new economic activity.

A. New York

New York City has been ground zero in the fight against the sharing economy, particularly Airbnb. New York's hotel and restaurant industries are very powerful, and the hospitality industry is a major economic engine for the City's economy. As a result, there has been a tremendous push back against residential short term rentals.

In a 2014 report entitled "Airbnb in the City" the New York State Attorney General attempted to "use quantitative data to inform [the] ongoing debate about how we embrace emerging, disruptive technologies, while protecting the

safety and wellbeing of our citizens". The Attorney General argued that there were a number of "commercial users" who owned ten or more Airbnb units, receiving 37% of all host revenue. The report also stated that 72% of the rentals violated New York City's *Administrative Code* and *Multiple Dwelling Law*. The report found that millions of dollars were being shifted from traditional hotels and restaurants to temporary arrangements, displacing thousands of long term apartments, further exacerbating New York City's affordable housing crisis.

In an attempt to limit the ability of property owners to rent their apartments to transient visitors, New York State amended its *Multiple Dwelling Law*, which applies to buildings with three or more units, to prohibit temporary rentals of less than thirty days unless the owner is present. New York State also targeted advertising for illegal rentals, with a \$1,000 fine per advertisement.

In addition, New York City has increased enforcement against illegal rentals. The City often relies on zoning and building code provisions, such as the need for a sprinkler system, to issue summonses for what the City may believe are illegal rentals, applying the tougher standards imposed upon hotels to residential units that are suspected of being used for short term rentals. And, while an owner may contest a summons, even if successful the owner can spend significant amounts of money on a legal defense.

New York City depends on the hospitality industry for a large amount of its economic activities and tax receipts. In addition, the hospitality industry employs a large union workforce. As a result, New York is extremely hostile to the sharing economy and is using whatever tools it has, including zoning laws, to prevent it from succeeding.

B. San Francisco

By contrast to New York, San Francisco, where Airbnb began, was originally welcoming to the shared economy. The City was one of the first in the world to make short term rentals legal. However, as Airbnb and other shared services grew, so did the opposition. With regard to Airbnb, a combination of the traditional hotel industry and affordable housing advocates mobilized, and deep divisions among the many who supported Airbnb and those that opposed this service grew.

Initially, the City authorized short term rentals of up to 90 days per year if the owner was not present, and for an unlimited amount of time if the owner also resided at the property. Then, Proposition F was put before the residents which would have restricted short term rentals to 75 days a year, required the owner to notify the neighbors of any rental

activity, and allowed anyone within 100 feet of a property to bring an action against anyone violating the applicable regulations. However, the voters rejected this proposition.

Then, in 2016, the San Francisco Board of Supervisors passed a bill limiting rentals to sixty days per year. However, the Mayor vetoed this legislation. Also, the City's attempt to require in person registration was negated by a settlement reached after Airbnb sued. Accordingly, although the hospitality industry and affordable housing advocates oppose the growth of Airbnb, it is popular among the general public, many of whom see it as a way to supplement their income.

C. Maryland

Maryland has adopted a number of measures in recent years to address the sharing economy. However, instead of focusing on where short term rentals and the like may take place, the attention is more on making sure the state receives tax revenue. Maryland now requires hosts to register with the state, and revised how online transactions are taxed. Maryland recognizes the reality that the sharing economy is now big business, and the governments of Maryland now want their share.

For example, in October of 2017, a bill was introduced in the Baltimore City Council that would have applied the City's 9.5 percent hotel tax to bookings made through Airbnb, and would institute a licensing system that allowed advertisement. The bill was withdrawn, but is expected to be reintroduced.

There are similar concerns by the shoreline vacation areas of Maryland. In Worcester County, where Ocean City is located, over \$13 million in room taxes are collected annually. The fear is that this revenue source will be severely impacted by the growth of the sharing economy and municipalities are looking to the state government for answers, which have not come yet.

Clearly, every state and municipality worries about its tax revenue. In Maryland, the concern seems to outweigh the potential negative effect on established industries.

CONCLUSION

The sharing economy presents novel challenges to traditional industries and local governments. Municipalities seek to utilize zoning and other land use regulations to hold back its growth. However, the sharing economy has one important ally, the general public who values the efficiency that it creates, and which opens up opportunities for those who seek to advance their economic wellbeing. In large part, this has been the traditional battle between new economies and old established industries. If history is any guide, the sharing

economy will continue to grow regardless of whatever roadblocks governments may devise.

*This article first appeared in Westlaw's publication entitled **Sharing Economy**. The publication is part of the **Emerging Areas of Practice Series** – a new publishing initiative which reduces product to market time to cover emerging areas of the law as they develop. New documents are loaded to Westlaw on a rolling basis as received and content is updated quarterly.*

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E. Christopher Murray is a Partner at **Ruskin Moscou Faltishek PC** (Uniondale, NY), where he is Chair of the Environmental and Land Use practice group, and a member of both the Real Estate and Commercial Litigation groups. He has more than 25 years of experience in real estate, municipal affairs, environmental law and complex commercial litigation.

He has served on the Town of North Hempstead Board of Zoning and Appeals, Nassau County Ethics Commission, North Hempstead Housing Authority and presently is a member of the Suffolk County Community College Board of Trustees.