Long-Term Rules for Short -Term Rentals

written by BRETT GLADSTONE & KURT FRANKLIN

City legislation that puts regulations on short-term rentals is moving forward.

After over a year of meetings with stakeholders (including landlords, tenants, Airbnb and internet providers with similar platforms), there has emerged enough of a consensus on the regulation of short-term apartment rentals to make possible the introduction of legislation at the San Francisco Board of Supervisors to legalize and regulate aspects of this growing phenomenon. Among such stakeholders, landlords are most likely to challenge many aspects of this proposed legislation.

Nonetheless, San Francisco Supervisor David Chiu introduced legislation on April 15, 2014, that allows local residents to rent their "primary residence" on a limited basis for a period of less than 30 days per year to overnight guests. Tenants or landlords who wish to become "hosts" for these guests would need to register with the city and prove they occupy the unit 75% of the year (or a smaller portion of the year under circumstances described below). The same 14% hotel tax that currently applies to hotel rooms would apply to these rentals. The legislation's intent is to partially diminish the loss of the city's housing due to short-term rentals.

This legislation would apply only to buildings of two or more units. Single-family homes, which are already exempt from the short-term rental ban but are barred under zoning rules from using their properties for commercial purposes, will not be affected. Supervisor Chiu has stated that he is open to including them in the legislation in the future.

Under the proposed rules, the San Francisco Department of Building Inspection would create and maintain a registry of permitted "hosts." These hosts would then apply and pay a fee to receive a permit. To qualify to be a host, tenants or owners who rent out their units would need to meet many requirements. First, they must maintain rental or homeowners' property or casualty insurance for at least $150,000 worth of property damage; or if no such insurance is obtained, they must use a hosting platform that provides a means by which the platform company will guarantee payments as to property damage in an amount not less than $150,000 per incident.

However, landlords may have good reason to be concerned that their insurance will not cover personal injury and property damage when that damage is caused by short-term renters. A number of insurance companies and two insurance programs that actively write policies for landlords have indicated that they would fail to renew such policies if they become aware that Airbnb rentals are occurring at a location that they already insure. While Airbnb has insurance covering a "host" (the renter who is allowing short-term rentals), such insurance does not cover any apartment owned in whole or in part by anyone but the renter who is the host.

The proposed legislation also requires that hosts: prove they have lived in the unit for at least 275 days a year (or a portion of that time if there has been no occupancy for the full preceding calendar year); and prove that they have lived in the unit for at least 60 days before renting out the unit. They must occupy the unit as a "primary residence."

For units subject to rent control, hosts can charge no more rent than the rent the primary resident is paying to his or her landlord. Hosts must pay the same transient occupancy tax paid by city hotels, namely 14% of the amount paid for the stay. In the case of a hosting platform, the hosting platform may collect and pay the transient occupancy tax to the city. Finally, hosts must maintain records for at least two years demonstrating compliance with these rules.

The legislation also regulates "hosting platforms" such as Airbnb and VRBO. These hosting platforms would have to notify hosts about the city's regulations, and would have to remove a listing for one year when a host has not obtained a permit from the city. The city would create and maintain a registry of all the permanent residents who are allowed to offer their units for such short-term residential rental use. There will be an application and renewal fee for the registry. The registry will be available for public review to the extent not prohibited by privacy laws.

Violations and Their Consequences

The legislative staff at the Board of Supervisors has written the following with regard to the law's effect on current residential leases: "The proposed legislation also amends Chapter 37.9 of the Administrative Code. Under

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the current provisions of Chapter 37.9, a landlord may evict a tenant if the tenant is using or permitting a rental unit to be used for any illegal purpose." Attorneys representing San Francisco landlords are looking at this provision and will be discussing its effect on current leases, which may provide for eviction based on short-term rental or based on conducting an illegal use.

Upon violation of the proposed law, DBI or tenants in the building where the use is taking place (or nonprofit housing organizations) will be able to file a complaint with the city. The city would then hold a hearing on the allegation. DBI would allow the violation to be corrected within a certain timeframe; if there is no correction, DBI may prohibit an owner or lessee from listing his or her residential unit on any hosting platform for one year. Once a violation is found by DBI and there is no cure after notification to cure, the city, building tenants or a nonprofit housing organization may also file a civil action in court to enforce the law and recover penalties.

The city may sue an owner or tenant or business entity for injunctive and monetary relief and such parties may be liable for a civil penalty of up to $1,000 per day, including attorneys' fees up to the amount of the monetary award. It will also be a misdemeanor. The law requires that DBI designate a contact person for members of the public who wish to file complaints.

Discrimination Laws

As renting out space moves away from roommates who stay a month and closer towards a "host" (either a landlord or tenant) acting as a micro-hotelier providing short-term rentals for travelers, landlords should be aware of the applicability of anti-discrimination laws, including but not limited to the ADA, the Unruh Act and the California Disabled Persons Act. While it may be true that in a 2004 court case involving Roomate.com, the Ninth Circuit Court of Appeals held that the anti-discrimination provisions of the Fair Housing Act do not apply to roommate situations, the court in this case also

acknowledged that a business transaction would be much different.

These Airbnb-type uses are, in fact, engaged in a business transaction, and the place of stay is a hybrid between a private home and a place of lodging. Most of the time, stays in private homes are not covered by the ADA, but once rented to travelers, they may lose this exemption. The ADA applies to "places of lodging," which include inns, hotels, motels and places that are used for short-term stays. In fact, the United State Department of Justice has found other temporary short-term dwellings to be "places of lodging" under the ADA, including homeless shelters and timeshares. (Amenities like reservation numbers, housekeeping services and laundry service have pushed timeshares to be covered by the ADA.)

Airbnb recognizes this area of law is unsettled and asks hosts to take responsibility for compliance if compliance is necessary. It typically writes that anti-discrimination laws are complex and "may include things such as access and service dogs."

Both landlords and tenants who permit these short-term visitor stays take on risk of liability as both landlords and tenants are joint and severally liable for damages, attorneys' fees and costs under many of the discrimination laws. For landlords, the operation of these short-term rentals risks triggering expensive accessibility upgrades. It remains to be seen whether landlords with many dwellings being used for short-term stays may be required to make a certain number of units accessible. Even before the actual passage and possible enactment of the Chiu legislation, there is no question that these accessibility issues will be the topic of discussions by Airbnb, landlords who allow tenants to have short-term guests, and landlords renting units directly for short-term use.

More Negotiations To Come

Many landlords and the San Francisco Apartment Association have stated that this new law does not adequately address many of their concerns, including but not limited to the fear that short-term renters could pose a safety and health risk to other

Take a new look

SFAA's website was recently revamped to make its content easier to read, and make sure the information most important to apartment owners is available and accessible to members. Check it out at www.sfaa.org.

tenants. Many property owners believe that people who are using a unit for transient use are not as careful as those who use a unit as a primary residence.

Airbnb has indicated it will be advocating for some small changes to Chiu's proposals, particularly regarding a proposed registration system that could make public certain personal information about people who rent out space. Airbnb is concerned that, in theory, such information could make tenants vulnerable to landlord retaliation. We can look forward to many months of hearings and comments on this legislation.

Complicating matters, in May, three veterans of San Francisco land-use battles with an interest in preserving affordable housing filed a ballot initiative that would go even farther in regulating Airbnb and similar platforms. It's main features include: verification of city registration of "hosts" by Airbnb and other listers prior to accepting listings; compliance for single-family homes and group housing, which the Chiu legislation does not; holding homeowners associations' Board of Directors responsible for compliance as to condominiums; requiring that tenants submit written proof of authorization from his or her building owner to rent short-term; and requiring a homeowner's policy or rental insurance policy to provide coverage in an amount not less than $250,000. For the renter's policy, the owner of the building must be named an additional insured party, and proof of insurance must be submitted at the time of registration with the City. Finally, no affordable housing units, units that have been the subject of an Ellis Act eviction, or in-law units created or legalized under local law, may be used for short-term rentals.

At the very least, the filing of this ballot initiative will put pressure on Supervisor Chiu to amend his legislation to incorporate some of these stricter terms.

The information within this article is general in nature. Consult an attorney for any specific problem. M. Brett Gladstone is a partner in the San Francisco law firm of Hanson Bridgett, LLP. Kurt Franklin is also a partner in the San Francisco office of Hanson Bridgett and specializes in disability law and employment counseling and litigation. They can be contacted at 415-777-3200.