New England Real Estate Journal

nerej

THE LARGEST COMMERCIAL/INVESTMENT REAL ESTATE NEWSPAPER IN THE WORLD

Reprint | nerej.com | Friday, December 16, 2016

What does the future hold for Airbnb? The times they are a changin' – by Joshua Bowman and Ben Lichtman

Josh Bowman
Sherin and Lodgen

Over the past decade, peer-to-peer companies (part of the so called "sharing economy") have radically transformed many industries. In the transportation industry, ride sharing services such as Uber and Lyft have dramatically altered the way in which we travel. In the hospitality industry, the so-called 800-pound gorilla in the sharing economy is Airbnb, the home-rental behemoth that facilitates, via the internet, the connection of "hosts," who can be owners or tenants of homes or apartments, with short-term renters, many of whom would otherwise be checking into a hotel or motel. To provide a sense of scale, consider that Airbnb is now valued at over $30 billion, which is more than double what Marriott International paid for Starwood Hotels & Resorts Worldwide earlier this year. However, it now appears that change is in the air for Airbnb.

Let's start with the story behind Airbnb's growth. Airbnb (which stands for "Airbed and Breakfast") was started in 2007 in San Francisco by two roommates who rented out air mattresses in their apartment to travelers who could not find convenient or affordable hotel rooms in San Francisco during times of peak demand (such as when large conventions were in town). The Bay Area startup took off when it started using spambot software to troll Craigslist (in clear violation of Craigslist's policy) to recruit new hosts to Airbnb, with promotional offers such as free professional photography for new listings.

As Airbnb grew, it enjoyed many advantages over the traditional hospitality industry. For example, Airbnb allows anyone with a lease and a smartphone to sidestep the governmental permits, complex and costly commercial financing arrangements, hiring, training and supervising of (union or non-union) employees, branding and marketing agreements, city and state hotel specific taxes and other legal requirements with which any traditional hotel owner/operator must comply. Moreover, since every residence is a potential Airbnb listing, the pace at which Airbnb can grow is exponential, absent governmental intervention.

Unsurprisingly, Airbnb's growth has not gone unnoticed. For traditional hotel owners, operators and branding companies, Airbnb has been a disruptive competitor that has quickly added supply to the market, without having to play by the same rules as everyone else (which, for starters, means paying local and/or state hotel taxes, as well as providing safe, secure and insured facilities for guests). For neighbors, there is often dismay and concern in discovering that the house next door, in your quiet neighborhood, is now a de facto hotel. And for prospective renters or purchasers of residences in large cities such as New York, San Francisco and Boston, an already uber-competitive residential real estate market has now become even more unaffordable. Why rent or sell an apartment the old fashioned way when Airbnb makes it so easy to turn any residence into a highly profitable stand-alone hotel? With less supply in the market, rents and sale prices have skyrocketed.

Yet, with all those concerns, and despite strong and concerted opposition, regulating Airbnb has proven difficult. In Massachusetts, for example, an effort at the state level to tax Airbnb (and other similar short-term rental companies) as hotels, earlier this year, failed in the face of staunch opposition by Charlie Baker, the Commonwealth's anti-tax, pro-business, governor. The Boston City Council is presently examining regulations at the city level, with a public hearing on the matter currently scheduled for December 12th, and many Massachusetts legislators have vowed to take up the fight for a state tax again next year. But ultimately it remains to be seen just how successful such efforts will be.

Even in places where legal regulations have been passed, enforcement has proven to be challenging. New York State, for example, passed the "Multiple Dwelling Law" in 2010, which prohibited rentals in multi-family dwellings for less than 30 days when the owner is not present. Four years later, a report by New York's Attorney General found that 72% of Airbnb rentals in New York City violated the law. When Governor Cuomo responded earlier this year by trying to impose fines on violators of the law (by punishing the advertising of listings), Airbnb sued, successfully arguing that the Communications Decency Act of 1996 exempts websites like Airbnb from liability associated with the improper activity of its hosts. The case was settled on December 2, 2016, with the result that the State of New York may pursue fines against hosts, but not against Airbnb itself. Given the number of hosts in New York City (which has over 40,000 listings and is a $1 billion annual Airbnb market), enforcement will continue to be a challenge.

San Francisco has also attempted to regulate Airbnb, with mixed results. In 2014, the San Francisco Board of Supervisors passed an ordinance that required hosts to obtain a business registration certificate from the City, pay a variety of fees and taxes, carry insurance and live at the rented premises at least 275 days a year. After amending the regulations to penalize the listing of properties, Airbnb sued the city. The case is still pending. Additionally, in the face of extreme housing affordability issues, San Francisco passed a new ordinance at the end of November that will, absent a successful legal challenge, cap the number of room-nights most hosts can sell within the city limits to 60 nights per year. However, here again, it is unclear how effective San Franscisco will be at enforcing its new regulations.

Back home in New England, it does not appear that an outright cap on room-nights sold via Airbnb is likely to happen anytime soon. However, Vermont, Rhode Island and Connecticut have each successfully implemented state taxes on Airbnb sales. The collection of such taxes is sometimes facilitated through Airbnb, a service for which Airbbnb collects an additional service fee. Connecticut's state tax of 15% appears to presently be the highest in New England, although it's difficult to do an "apples to apples" comparison, since many cities and towns layer their own taxes on top of applicable state taxes. For the time being, despite many legislative efforts, Massachusetts, Maine and New Hampshire have not passed Airbnb specific state taxes, although proponents of such regulations continue to advocate for their implementation. The cities of Boston and Portland are also each actively exploring their own new local taxes.

What does the future will hold for Airbnb? No one has a crystal ball. But, in the words of the Greek philosopher Heraclitus, "The Only Thing that is Constant is Change." And it appears that change is coming for Airbnb.

Joshua Bowman would like to thank Ben Lichtman, Esq. for his assistance with this month's article.

Joshua Bowman is a partner in Sherin and Lodgen LLP's Real Estate Department and Corporate Department and is the chair of the firm's Hospitality Practice Group. Over the past decade, Bowman has represented many of the region's most active hospitality owners, operators and developers with acquisitions, dispositions, financings, development projects and franchise issues involving hospitality properties all over the country.

Bowman is a member of the Academy of Hospitality Industry Attorneys, serves as an adjunct instructor at the Boston University School of Hospitality Administration and has been listed as a Rising Star or Super Lawyer by the publishers of Boston Magazine every year since 2005.