# New York City and Airbnb: The Ongoing War to Address the Need for Short-term Rental Units

Racquel Brown-Gaston
University of the District of Columbia

Donovan Y. Collier
University of the District of Columbia

**ABSTRACT**

The war between the New York City municipality and home-sharing platforms has gone to new heights, seemingly due to the bad faith actor characteristics demonstrated within the municipality. These new heights are widely considered as extreme and oppressive against residents and the platforms with which they voluntarily engaged in a contractual duty. In January 2022, New York City Council enacted Local Law 18 which inadvertently banned short-term rentals (rentals less than 30 days) such as Airbnb, unless the permanent resident of the unit is present (New York City Mayor's Office of Special Endorsement, 2023). This article examines the extent to which Local Law 18 yielded an unconscionable contract between the municipality and its residents, examine the municipality as a bad-faith actor, and assess the municipality's organizational culture and ethical decision-making process.

Keywords**;** New York Local City Law 18; Short-term rentals; Adhesion contract; Unconscionability; Bad Faith Actor; Organizational Culture, Business Ethics; New York State Multiple Dwelling Law Section 4; Airbnb.

## INTRODUCTION

The growing population of New York City demands housing and not all available spaces can be taken up by short-term rentals meant to be used for permanent residences. There are not enough accommodations in the New York City hospitality industry to satisfy the needs of tourism and Airbnb helps to fill that space while simultaneously rendering revenue to the city (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023). The city faces a dilemma that cannot be solved by eradicating one of its business partners. In this paper, we conduct a legal analysis of the struggle between New York City and Airbnb. In particular, the legal concepts "unconscionability" and "bad faith actor" are leveraged to frame the struggle and illustrate the deleterious impact it has on a range of stakeholder groups.

### A History of Airbnb and New York City

In order to address New York State's illegal transient occupancies taking place in accommodations meant for permanent residencies, in 2011, the New York State Legislature enacted Chapter 225 law (The City of New York v. Smart Apartment, LLCs et al., 2012) and amended the Multiple Dwelling Law ("MDL") prohibiting owners/lessees of apartments in permanent residential buildings, containing four or more units, classified as Class B multiple dwellings, from engaging in short-term rentals—those less than 30 consecutive days (Laws of New York 2010, § 225.)

In October 2016, New York State amended the law making it unlawful for Class A multiple dwellings—those are not within Class B classification, to advertise occupancy or use of an apartment for occupancy that violates the prohibitions of the 2011 amendment, (MDL § 121(1)) and imposed fines of up to $7,000 for a third and each subsequent violation (MDL § 121(2)). New York City subsequently passed a law mirroring that of MDL § 121(1), (2) (N.Y.C. Admin. Code § 27-287.1(1)). Airbnb, being a publisher of third-party short-term rental listings, was deemed an advertiser. Thus, it filed a complaint in the U.S. District Court for the Southern District of New York against former New York Attorney General Eric Schneiderman, the City of New York, and former New York City Mayor Bill de Blasio (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023), asserting violation of (i) the Communications Decency Act, 47 U.S.C. § 230; (ii) the First and Fourteenth Amendments of the U.S. Constitution; and (iii) the Home Rule Clause of the New York State Constitution, N.Y. Const. Art. IX, § 2(B)(2). Airbnb sought and obtained a temporary restraining order ("TRO") and preliminary injunction against the respondents' enforcement of the 2016 Amendments. The parties thereafter executed a Stipulation of Settlement where the City promised to "permanently refrain from taking any action to enforce the [2016 Amendments], including retroactively and/or under any theories of direct or secondary liability, as against Airbnb," and in return, Airbnb dismissed without prejudice the action against the City and the mayor (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023"). In 2018, New York City enacted Local Law 146, "Home sharing Surveillance Ordinance" to secure data about home-sharing transactions. This required booking platforms to submit monthly reports to OSE detailing each charged transaction.

In 2018, Airbnb again sued New York City in the U.S. District Court for the Southern District of New York (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023) citing violations of the First and Fourth Amendments of the U.S. Constitution; Article

I, § 12 of the New York State Constitution; and the Stored Communications Act, 18 U.S.C. §§ 2701 et seq. In 2019, the court granted Airbnb's motion for a preliminary injunction, as it had determined that Airbnb was likely to succeed on the merits of its claim under the Fourth Amendment of the United States Constitution (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023). Thereafter, the City and Airbnb entered into a 2020 Settlement Agreement, where the City agreed it "shall make best efforts" to make amendments to Local Law 146. (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023). Those amendments included (i) Airbnb would only report short-term rentals rented for more than four days, rentals that encompassed the entire dwelling unit, or those rented to three or more individuals at the same time (Local Law 146. 10 § 1). Additionally, Airbnb would report quarterly, as opposed to monthly (Local Law 146. 10 § 2. 58).

Furthermore, Airbnb would provide the city with the physical address for each listing and host's name, address, e-mail, phone number, URL of the listing, the amount of money the host is making for each transaction, their account name, and provide an anonymized account identifier relating to those payments (Kerr, D, 2020). According to the OSE Executive Director, this would detect fake accounts and again address those who were taking away housing from New Yorkers (Kerr, D., 2020).

Consequently, the City agreed not to bring enforcement against Airbnb, and Airbnb dismissed the action. The amendments were enacted as ("Local Law 64") and took effect on January 3, 2021( N.Y.C. Admin. Code §§ 26-2101, 26-2102).

Airbnb informed the hosts of the reporting of data requirement compelling Airbnb to hand over the names and addresses of people who rent their homes through its site; and subsequently, 29,000 hosts opted to leave the short-term rental platform, dropping Airbnb listings in NYC by 21% (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023).

New York City's objective of the settlement according to former Mayor de Blasio was met as the city's aim was to prevent illegal hotel operators, preserve affordable housing in the city's limited housing supply, as well as maintain protected communities (Kerr, D., 2020).

Accordingly, the NYC council stated that this would make it easier to locate the "bad actors" renting apartments to tourists to the detriment of the housing crisis (Kerr, D., 2020). Airbnb expressed consolidation with the city when its co-founder Nathan Blecharczyk, remarked that he hoped that the company's willingness to be transparent would assist in reassuring the city that short-term rentals can be regulated allowing residents to share their homes, without blunt prohibitions in fear of illegal hotels (Kerr, D., 2020).

In January 2022, New York City Council enacted Local Law 18, which inadvertently banned Airbnb, and also secured stringent rules for residents to engage with home-sharing platforms for short-term rentals (New York City Mayor's Office of Special Endorsement, 2023).

**The Unconscionability Factor of Local Law 18**

In order for a contract to exist, there must be an agreement—offer and acceptance, there must be consideration—bargain for and exchange, there must be legality within all, mutual assent—the outward expression of intent to engage in a contractual duty from all parties (Kowalchuk v. Stroup, 2009). New York City agency, the Mayor's Office of Special Enforcement ("OSE"), and the residents of New York City engaged in a contract regarding short-term rentals utilizing share-homing platforms. Based on the latest law by New York City to curb short-term

rental, under Local Law 18, residents would apply to the city for a license to engage in a short-term rental (thus offering their terms to the city) and the residents would await the city's acceptance of those terms New York City Mayor's Office of Special Endorsement, 2023). The residents would also certify that they understand and will comply with a myriad of laws (New York City Mayor's Office of Special Endorsement, 2023).

In the meantime, consideration is demonstrated by the act of the resident rendering a non-refundable fee of $145 (New York City Mayor's Office of Special Endorsement, 2023), and if the resident's terms are accepted, the city will grant a registration number with which the resident can engage in short-term rentals. Additionally, the home-sharing platforms must also pay the city a fee once per listing per calendar year and must then verify electronically to OSE the legality of the applicant host's unit for short-term rental (New York City Title 43, § 22, 2022). Any minute discrepancies with the verification will lead to the denial of business with such residents (New York City Title 43, § 22, 2022). Despite the existence of a contract, with offer, acceptance, consideration, and legality, such a formation can be met with defenses, one of which is unconscionability, hence rendering a contract unenforceable (Gillman v. Chase Manhattan Bank, 1988). The Court of Chancery declared that a bargain is unconscientious when "no man in his senses and under delusion would make on the one hand, and as no honest and fair man would accept on the other" (Earl of Chesterfield v. Janseen, quoted in Hume v. United States). "To prove unconscionability, two prongs using a "sliding scale" approach must be met. "If there exists gross procedural unconscionability then not too much is needed by way of substantive unconscionability, and that the same 'sliding scale' be applied if there be great substantive unconscionability but little procedural unconscionability" (Funding Systems Leas. Corp v. King Louie Intern, 1979).

A contract is found to meet the procedural unconscionability element if the negotiation of its terms includes a disadvantaged party. (Funding Systems Leas. Corp v. King Louie Intern, 1979). In January 2022, the New York City Council created a legal duty when it passed legislation requiring specific residents to engage in an agreement with the city in order to engage in short-term rentals--an action with which residents have already been engaged for at least a decade. The residents' comments on the proposed legislation at two public hearings held on December 5, 2022, and January 11, 2023 (New York City Mayor's Office of Special Endorsement, 2023) for the government to consider, was the point of negotiation in the formation of the contract. As such, the OSE revised some of the proposed rules in response to the comments received at the hearings (New York City Mayor's Office of Special Endorsement, 2023) by the residents. The government being a party is evidence of a lack of equal bargaining power as the residents had no meaningful choice in the negotiation.

A contract is found to meet the substantive unconscionability element if the terms are oppressive. The proposed law is burdensome because it requires proof of residency with two documents dated within 60 days and a government ID; it requires always the presence of the resident host and prohibits the renting of an entire unit; the applicant host can only have one registration number as a host can only have one permanent dwelling, and thus cannot rent any investment properties; the host must submit the number of all unrelated residents such as intimate partners, friends (those who stay over 30 days) and the moving in and moving out dates of the unrelated residents; there can be no more than two short term rental guests at a time and guests must be treated as if they are a part of the common household in the unit at any time (New York City Title 43, § 21, 2022), ensuring no privacy. Furthermore, residents are prohibited from advertising their units for short-term rental without the registration number; should this occur, the

advertisers will be charged between $1000-7500 (New York City Title 43, § 22, 2022). The residents have to access a complex application process and renew the application every four years, with an annual verification; the residents must register their listings with OSE and provide the uniform resource locator or listing identifier and the associated booking service name for all existing listings of the unit; retain records of rentals which will be made available to the government upon request; and the residents must certify that they understand *and agree* to comply with the terms (New York City Mayor's Office of Special Endorsement, 2023). Failure to do so undoubtedly would lead to a revocation of the registration and future denial of the registration number. Additionally, failure to timely notify the government of any changes regarding the information presented in the application will come with a penalty starting at $100 and third and subsequent default being $5000 (New York City Mayor's Office of Special Endorsement, 2023).

The burdensome also takes effect under the requirement of the home-sharing platform to verify to OSE the resident applicant's address for the requested rental, the host's full name as depicted on the host's application, the associated registration number granted to the applicant from the city, and the uniform resource locator or listing (New York City Title 43, § 22-02(1)–(2)). The home-sharing platform must pay a fee to use the system and if any minute variation including abbreviations will deem the verification invalid and a denial of the applicant to proceed with the rental. Similar to the applicant's need to reverify prior to the expiration of its registration, the home-sharing platform has to track the applicant's registration expiration dates, the re-verification listing annual deadlines, and any changes to the applicant's information that would require it to update OSE (New York City Title 43, § 22-02(1)–(2)).

**New York City as a Bad Faith Actor**

The "Strict Scrutiny" test requires that government actions that affect a person's fundamental liberties or interests adversely must be justified by a showing of compelling government interest (Skinner v. Oklahoma ex rel. Williamson, 1942). In New York City, as the law promotes one state's interests, it compromises another. The new law deprived residents of liberty by prohibiting privacy. The households of the resident applicants are compelled to treat the guests as if they are a part of the common household. Although the government has the broad authority to govern how property owners carry out their broad rights with the disposition of their properties, (Friedman, L., 1966), the restriction caused by New York City does not serve a legitimate state interest. As the officials cited the availability of affordable housing being a legitimate state interest, requiring residents to do away with their privacy does not address such interest but rather serves as a deterrent for residents to engage in short-term rentals, thus the exhibition of bad faith.

New York City's actions deprived residents of their property with the prohibition of creating revenue. New York Personal Property Law defines "property" as "money (NY CLS Pers P § 251 1). As such, Courts have ruled accordingly. *See Morgan & Bros. Manhattan Storage Co. v. McGuire County, 1982, Rosenhack v. Chemical Bank & Trust Co., 1977.* Based on the Figures below depicting an analysis of the Airbnb share-homing platform, the median host earned up to $4,896 in 2021, leading to a payout of $210.16 million to residents (Salinger, 2022).

**Figure 1: Median Airbnb host annual earnings from 2017-2021**

| | 2017 | 2018 | 2019 | 2020 | 2021 |
|---|---|---|---|---|---|
| New York City | 1,901 | 2,497 | 3,350 | 417 | 4,896 |

Source: CRA analysis of Airbnb listing data.

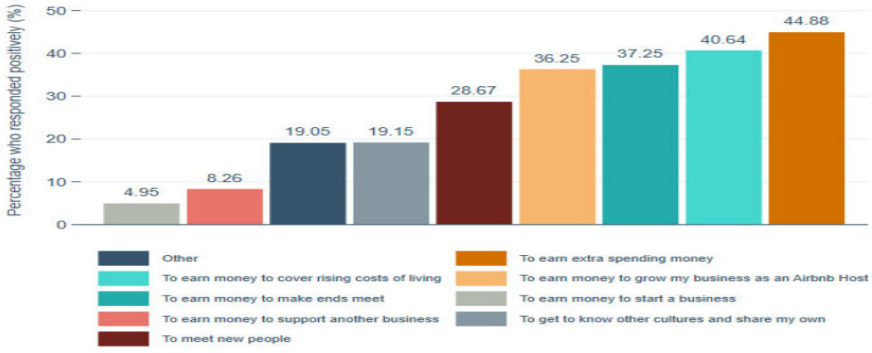
**Figure 2: Pay-out from listings 2017-2021**

| Year | Median Host Pay-out from Listings Below Breakeven Level of Nights Stayed (in $) | Total Host Pay-out from Listings Below Breakeven Level of Nights Stayed (in $M) |
|---|---|---|
| 2017 | 1,019 | 272.59 |
| 2018 | 1,261 | 300.78 |
| 2019 | 1,610 | 340.83 |
| 2020 | 264 | 111.89 |
| 2021 | 2,452 | 210.16 |

Source: CRA analysis of Airbnb data.

Given the affordability crisis in NYC, such income has served as relief for many residents. Based on Figure 3 below, this supplemental income has offered relief ranging from offsetting the rising costs of living to creating entrepreneurship opportunities.

**Figure 3: Reasons for hosting with Airbnb**




Source: Airbnb survey on hosts in United States (2021).

Survey evidence also depicted that Airbnb hosts in 2021 reported using 46% of their total income on paying rent or mortgages (Salinger 2022). Based on the OSE Executive Director's May 2023 email to Airbnb's Regional lead, only 9 applicants have been approved for registration (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023). "This equates to 0.04% of the active listings in New York City on Airbnb's platform that had each been booked at least once since January 2023" (Airbnb Inc. v New York City Mayor's Office of Special Enforcement, et al., 2023). The severance of this supplemental income will likely lead to economic strain on the residents, increasing the likelihood of foreclosures, and inadvertently leading to a devaluation within the housing market, again triggering upside-down loans. There is a

legitimate state interest in this being avoided. The number of pre-foreclosures has significantly increased across New York City since the state's COVID-19 foreclosure moratorium was lifted in January 2022 (Taguine, 2023). Subsequently, in December 2022, New York State enacted the Foreclosure Abuse Prevention Act (the "Act"), which hinders lenders and servicers' ability to foreclose on New York homeowners beyond a six-year statute of limitation, upon filing, to foreclosure; a voluntary discontinuance of a mortgage foreclosure action by either party will not allow for the statute of limitations to reset (JDSUPRA, 2023). Although this act proves beneficial to residents, it gives lenders fewer incentives to be lenient with homeowners and triggers an urgency for lenders to foreclose within a shorter time span when allowed.

Not only is there a risk of an economic strain on the resident, but the government has also interfered with a property that the owner can no longer enjoy its use. When a public agency such as the New York City Council and the Mayor's Office of Enforcement has interfered with a property that the owner can no longer enjoy its use, courts have held although the government has no intention to condemn the property, it has taken the land in a constitutional sense (Evans v City of Johnstown, 1983). In this scenario, it is the owner rather than the government that would bring the condemnation action which has thus become known as "inverse condemnation." (7A Nichols On Eminent Domain, §14.03[1], p 14-46). Inverse condemnation in the New York courts has been a procedural vehicle for granting damages to an injured party where a government agency that has the powers of eminent domain has interfered with the property rights of a landowner that it amounts to a compensable taking (Evans v City of Johnstown, 1983). Once the property is taken, the owner of the property is allowed to "be made whole" by compensation at fair market value for the expropriated property, damages to the property, disturbance damages, special difficulty in relocation, and in this case, business loss.

However, the residents will not have such recourse in this situation as the United States Supreme Court has ruled "a taking" "takes effect if the ordinance does not substantially advance legitimate state interests…or denies an owner economically viable use of his land" (Agins v. City of Tiburon, p. 193, 1980). New York City officials have repeatedly represented that the legitimate state interest is to secure affordable housing and the integrity of its neighborhoods. Agins v. The City of Tiburon's ruling also reiterated that a taking occurs when governmental regulations limit the use of private property to such a degree that the landowner is effectively deprived of all economically reasonable use or value of their property. Here, the homeowner does possess the ability to rent the property out for 30 days or more, though with that comes at a higher risk of a lengthy eviction process, should the tenant fail to pay, given New York tenant-friendly laws. More than 146,000 landlords have filed for eviction since the moratorium due to COVID-19 was lifted in January 2022 (Kaushal, 2023).

Although a municipality such as New York City has the legal authority to exercise powers regarding residents' use of their properties for the sake of a legitimate state interest, such a municipality does not have the right to abuse its power. Regardless of its broad powers, the municipality is an organization engaging in a business transaction between its residents and Airbnb. It has an ethical duty to act in good faith for the purposes of predictability expected from contractual transactions. Based on the history of lawsuits by Airbnb against New York City, and Airbnb's upkeep of its agreement from each settlement, yet the City continues to breach its contract, one can determine that the city forewent the ethical decision-making process in its latest endeavor against Airbnb and the resident homeowners or lessors.

## Conclusion

New York City became the subject of lawsuits due to the implication of bad faith, under different mayors. New York City's decision to subject its residents to punitive conditions in order to engage in short-term rentals when the legitimate state interest has already been met via the settlements with Airbnb. Thus, its actions proved neither to serve the greater good under utilitarian principles nor to meet the threshold of duty-based ethics, giving the appearance of malicious intent. As such, one can conclude that the later decision regarding Local Law 18 was merely an attempt to outperform its competitor Airbnb for even more affordable housing to meet the demands of the housing crisis. A single house owner, Class A dwelling, will more likely share a room for a short-term rental than engage in a lease tenancy. It is moments such as these where the municipality organization needs to balance the interests of all stakeholders.

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