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# Short-term rent of private accommodation

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### Introduction

The demand for short-term apartment rents both in tourist areas and cities has strongly increased. At the same time, the available rental space has become increasingly scarce, especially in larger cities of Switzerland.

As a consequence, certain cantons and municipalities have implemented specific public law restrictions of short-term apartment rents. In other cantons and municipalities, such restrictions are under discussion. Additional restrictions may result from tenancy law and condominium ownership regulations.

### Public law in general

A main goal of restricting short-term apartment rents is to combat housing shortages. Such restrictions also address certain competitive disadvantages of traditional hotels and govern compliance with certain security and health requirements, as well as the levying of tourist taxes.

Generally, the restrictions govern short-term apartment rents via hosting and home sharing platforms (eg, Airbnb or booking.com) by instruments such as the following:

- limiting the duration of short-term rents;
- introducing a permit requirement for renting out private apartments on a commercial basis; or
- subjecting the providers to a prior registration requirement.

For instance, the following cantons and municipalities have implemented specific restrictions or are currently discussing their introduction:

- In the Canton of Basel-City, according to mandatory cantonal law, the inappropriate use of residential space represents a change in purpose, which requires a construction permit from the competent authority.<sup>(1)</sup> In a 2017 decision, the Cantonal Court of Appeal decided that such a change in purpose is given in case of a commercial letting of an entire building (total of ten apartments) through an online hosting platform.<sup>(2)</sup> In the specific case, the entrance of the building and the individual apartments showed specific features for short-term apartment rents, namely a digital key box for key delivery and return in the entrance area, no individual items in the apartments and specific information notices with similar information like in a hotel.
- In the Canton of Geneva, according to mandatory cantonal law, the renting out of a private accommodation for a duration exceeding 90 days per year via a hosting or home sharing platform is considered to be carried out on a professional basis, which constitutes a change of use (commercial activity) and is subject to authorisation.<sup>(3)</sup> Such authorisation will only be granted if a provider fulfils additional requirements applicable to commercial housing professionals.
- Similar restrictions are currently being discussed in the City of Berne for the commercial rent of apartments located in the old town.
- In the Canton of Zurich, the municipal council of the City of Zurich decided in September 2021 that apartments are no longer considered as residential property if they are rented out for a maximum of one year at a time. As a consequence, such apartments are no longer considered for the calculation of the residential ratio (*Wohnanteil*) and they are thus only allowed in residential zones, where the applicable minimum residential ratio has already been reached. The aim of this amendment is to prevent entire houses in residential neighborhoods from being converted into anonymous second homes. The respective amendment of the building and zoning regulation of the City of Zurich is currently in preparation and not yet in effect. Further, discussions about a registration obligation for landlords, sub-landlords and other flexible accommodation providers are ongoing in the Canton of Zurich.

### Zoning law in particular

Several municipalities indirectly restrict the short-term renting of accommodation on the level of the zoning law by limiting the activities and noise levels in a specific zone or by requiring a certain mandatory residential ratio. For instance, the building and zoning regulation of the City of Zurich explicitly excludes any hotel-use and residential-like use in industrial zones.<sup>(4)</sup>

In a particular case, it is decisive whether a specific business of short-term accommodation qualifies as residential or hotel-like. This mainly depends on the size and operation of the concerned business. To the extent that no clear criteria apply, a specific business model should be discussed at an early stage with the concerned municipality.

Regardless of the legal qualification of a specific business, additional emissions such as noise and traffic caused by short-term rents may, in individual cases, prevent zone conformity.

## Tenancy law

If the provider of short-term accommodation is the tenant of the concerned apartment or building, he must obtain from the landlord the prior approval for subletting the lease object. Unless a specific rental agreement explicitly allows subletting (which is usually not the case), the landlord approval must be obtained in any case and regardless of the duration of the sublease and for any separate sublease.

The landlord may only refuse approval for the following reasons:

- the tenant refuses to disclose the conditions of the sublease;
- the conditions of the sublease are abusive compared to the main lease agreement; or
- the landlord suffers substantial disadvantages from the sublease.

In the present context, excessive profit generated by subletting, excessive wear and tear of the rental property, as well as excessive emissions on other tenants, may be relevant.

Since short-term renting of accommodation via hosting platforms usually does not allow the tenant to obtain prior approval of the landlord in a timely manner for a specific sublease, the above requirement leads to practical problems.

In part, the opinion is held that it is sufficient to ask the landlord for approval before the release of an offer on a hosting platform by informing them of the parameters of the planned subletting. This view, however, is controversial and has so far not been confirmed by Swiss jurisdiction.

The legislator has considered introducing a right for tenants to ask for a general approval of short-term subletting. Due to strong resistance from various parties, however, this proposal was rejected in 2019.

## Condominium ownership

If the provider of short-term accommodation is the owner of the unit in a condominium ownership, they must comply with the applicable provisions of the condominium ownership law and the co-ownership regulations.

In particular, the co-ownership regulations may restrict the rental and in particular the short-term rental of apartments via hosting or home-sharing platforms. In practice, such restrictions are used more and more often. They are usually justified with the purpose of use of the apartments.

In 2019, the Swiss Federal Supreme Court decided that restrictions on short-term renting via hosting or home-sharing platforms are basically admissible, but this must be evaluated on a case-by-case basis.<sup>(5)</sup> In particular, the specific location and the previous use of the property is decisive – for instance whether the property is an urban residential building or a property with holiday apartments in a tourist area. In the case concerned, the court held the restrictions admissible, in particular because the building served as the main residential residence for upscale living purposes and therefore the need for silence qualified as significant.

## Comment

On a public law level, in certain cantons and municipalities, the short-term rent of accommodation via hosting platforms is regulated either by specific legal provisions or indirectly by zoning law requirements.

On a private law level, tenancy law and co-ownership regulations may restrict such activities.

There is a general tendency to tighten existing rules governing the short-term rent of accommodation through hosting platforms. Accordingly, additional cantons and municipalities are expected to implement such rules in the future.

Nevertheless, regulations that are too strict would significantly affect the freedom of ownership and cannot be introduced. Considering the principle of proportionality and the requirement of a public interest when restricting the freedom of ownership, a general prohibition and excessive limitations of short-term rents appears inadmissible. The same applies to subletting for the short-term, because mandatory tenancy law significantly restricts the freedom of a landlord to refuse such consent.

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## Endnotes

(1) Section 26 Abs. 1 lit c of the Building and Planning Ordinance of the Canton of Basel (BPV), SG 730.110.

(2) Basel Court of Appeal VD.2016.139 of 1 December 2017.

(3) Article 4A of the Geneva Implementing Regulation of the Law on Demolitions, Alterations and Renovations of Residential Houses, L 5 20.01, and Federal Supreme Court 1C\_472/2018 of 25 March 2019.

(4) Article 19a paragraph 2 of the Building and Zoning Code of the City of Zurich, AS 700.100.

(5) Federal Supreme Court 4A\_436/2018 of 4 April 2019.