

**LEARNING FROM COASE.
A PROPOSAL TO REGULATE RESIDENTIAL PROPERTY USES IN BARCELONA**

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Abstract

The tourist boom in Barcelona has resulted in an increase of the amount of tourists in the city but also in the amount of supply of lodging of very different kinds in the city. One of the most controversial lodges in the city has been the regulation, approved in 2007, allowing for applying for a license for converting the use of residential properties from residential to tourist use. The boom of this kind of lodges – around 9000 today – and the conflicts they have generated between residents and tourists have resulted in a ban for new licensed adopted by the former Mayor of Barcelona and continued by the current one. Regulating residential properties for tourist use and accommodating private, and public rights and interests has proved to be remarkably challenging and as of today, regulators have not managed to draft and adopt a regulation balancing all the interests at stake. At the same time, building charters, the only instrument available to owners of residential properties has proved ineffective given their lack of access to Public Registrars and hence to having third party effects. Consequently, there does not seem to be any instruments that would allow for an efficient regulation of such uses.

Learning from the Coase Theorem, this article argues that allowing owners of residential properties to negotiate whether to allow a residential property for tourist use in their building in exchange of compensation for the negative effects resulting from the tourist use would allow for reaching an efficient outcome given that would reduce conflicts between the parties involved, would allow the parties affected to agree on a compensation for the effects of the activity and would naturally regulate the allocation of residential properties for tourist uses in buildings were the neighbors would agree on it.

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1. Introduction

Barcelona is one of the major tourist destinations in Europe with more than 8 million tourists² and over 18 million overnight stays in 2014.³ The supply of lodging for tourists includes hotels of different luxury categories, hostels, camping and since 2007, residential apartments for tourist use. This last category, residential properties for tourist use has been remarkably controversial.

The possibility of using residential properties for tourist uses has been quite successful. Since 2007 the amount of residential properties applying for licenses has steadily increased reaching a maximum of 9000 apartments that currently hold a license for tourist uses.⁴ The development of this alternative use of residential properties has had a vast number of effects. On one side, it has allowed residential property owners to have a new way of obtaining a return from their residential properties and hence obtaining income that in many cases has been important, considering the impact of the economic crisis in Spain. However, at the same time, the remarkable amount of these residential properties for tourist uses has also brought an increase in conflicts between residents and tourists in buildings where there are simultaneously residential properties for residential use and for tourist use. Additionally certain areas of the city where the amount of hotels and residential properties for tourist uses is remarkable compared to the number of residents have experienced pressures in property prices, the appearance of lobbies representing certain business particularly targeted to tourists and zoning interests that have meant a decrease in the number of residents while at the same time, an increase in the number of tourists.

Owners of residential properties for residential uses have tried to react to the presence of residential properties for tourist uses in their buildings in order to avoid the nuisances resulting from the activity as well as the loss of market value of their residential properties when located in buildings with other residential properties for tourist uses. One of the instruments property owners had available was drafting a building charter allowed by article 553-11 of the Catalan Civil Code.⁵ In this building charter residents could agree on limiting residential property uses and hence not allowing a tourist use of residential properties. This is an instrument that has been used by some buildings when attempt to prevent having residential properties for tourist uses in their buildings. In order to have third party effects such instrument should be filed and registered before a Property Registrar.⁶ Up to today, Property Registrars in Barcelona have not allowed access to the Public Registrar to building charters including such limitation of uses of residential properties. Hence, despite of the potentials of this instrument, its limited access to the Public Registrar made it ineffective. As of today, owners of residential properties lack legal instruments to avoid having in their buildings residential properties for tourist uses and suffer its effects.

The constant increase in the number of applications of licenses for residential properties for tourist uses, the increasing number of conflicts in buildings between residents and tourists, the more common unwelcome attitude of residents in Barcelona with respect to tourists and the boom in the number of tourists in the city of Barcelona,

² <http://barcelonaeconomia.bcn.cat/ca/turisme-fires-i-congressos/activitat-turistica/turistes-i-pernoctacions-als-hotels-de-barcelona>

³ <http://www.idescat.cat/economia/inec?tc=3&id=5417>

⁴ Generalitat de Catalunya, Official Guide of Residencial Apartments for Tourist uses as of December 15, 2015.

<http://www14.gencat.cat/rtcwebguies/AppJava/cercaEstabliments.do?pst=5&pg=0&lg=&marcaR=-1&comarcaR=-1&municipiR=1004&poblacioR=1025&categoriaR=-1&retol=&idregstral=&carrer=&placesMin=&placesMax=>

⁵ Article 553-11 of the Catalan Civil Code can be found

http://portaljuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa/?action=fitxa&mode=single&documentId=694077&language=ca_ES

⁶ Article 553-11.3 of the Catalan Civil Code.

resulted in different attempts to regulate tourist lodgings as a whole in the city of Barcelona, including the regulation of residential properties for tourist uses. However, in light of the different interests at stake between resident neighbors, companies running hotels, hostels and companies running residential apartments for tourist uses, up to today, such regulation has neither been drafted nor adopted. But in light of the persistent conflicts arising from this situation, the Mayor of Barcelona at the time, Mr. Xavier Trias, that decided in April 2014 to ban the approval of new licenses for residential properties for tourist uses in certain areas of the city⁷ that was extended to the whole city in October 2014.⁸ After the municipal elections of May 2015, the new Mayor of Barcelona, Ms Ada Colau, extended the suspension of residential properties for tourist uses for another year while drafting a new regulation that as of today, it has not been issued.⁹

The current situation of residential properties for tourist uses in Barcelona and the conflicts they generate could be described as a situation where residential properties for tourist uses generate negative externalities to the resident neighbors of the same building. Today, the regulator, incapable of regulating such externality and reaching an equilibrium between all the interests at stake, has decided to prohibit the development of this market, at least temporarily and limit the licenses to the ones that had been approved before the ban.

In light of the negative externalities generated by the coexistence between residential properties for residential and for tourist use in a building, the limited or ineffective instruments for residents to avoid the activity that generates the externalities in the building they reside in and the incapacity of the regulator for regulating such market and reaching an efficient outcome that could accommodate all the interests at stake, this paper argues that allowing negotiation from residents with different interests in the building could reach efficient outcomes and reduce conflictive situations. This paper argues that the Coase Theorem,¹⁰ that suggests that when transaction costs are zero, the allocation of property rights is indifferent because the negotiation of the parties involved could reach an efficient outcome, could be of great negotiation between parties involved in a negative externality, either because they cause it or because they suffer them.

This paper suggests that allowing negotiation between residential property owners of residential uses and residential property owners that want to have their properties for tourist uses could result in an efficient outcome given that negotiation could include compensation for the negative externality suffered both in terms of nuisances and disturbances suffered by the residential neighbors as well as for the loss of value of their residential properties when sharing the building with other residential properties with tourist uses.

Such negotiation would provide an efficient outcome from different perspectives. First and most important, the decision of allowing a residential property for tourist uses and all its consequences would be a voluntary decision of the resident neighbors that eventually would suffer the negative externality generated by it. Second, such activity would result in compensation of the resident neighbors for the negative externality permitted, and hence, suffered. Third, residents through negotiation, that is, the market, would naturally regulate and allocate residential properties for tourist uses in building where the neighbors would allow for such use. The conflicts between the residents and the different uses of their properties, hence, would remarkably diminish. And last but not least, a comprehensive regulation by the town hall that has proved difficult to draft would become redundant given that it would be residents, and not a centralized regulator who would be deciding whether to allow or not such uses in their building. In

⁷ <https://bop.diba.cat/scripts/ftpisa.aspx?fnew?bop2014&05/022014011225.pdf&1>

⁸ <https://bop.diba.cat/scripts/ftpisa.aspx?fnew?bop2014&10/022014027807.pdf>

⁹ <https://bop.diba.cat/scripts/ftpisa.aspx?fnew?bop2015&07/022015017662.pdf&1>

¹⁰ Ronald Coase, The Problem of Social Cost, Journal of Law and Economics 3,1 (1960).

light of the impasse of the regulation of residential properties for tourist uses in Barcelona and how sensitive this issue has become in Barcelona, exploring imaginative solutions that could accommodate everyone's interests through allowing a more active role of owners of residential properties seems an alternative worth exploring.

2. Regulation of residential apartments for tourist use in Catalonia (including Barcelona)

The use of residential properties for tourist use, the economic crisis in Spain and the regulation of this activity have evolved in parallel. The economic crisis in Spain roughly started in 2007 and since then, among other things, it has resulted in a very important increase of unemployment rates, still very important today, and a general impoverishment of middle working class citizens.¹¹ Based on how attractive Barcelona was for tourists, many citizens decided to increase their income available by obtaining a return on their real estate assets through renting their apartments, particularly to tourists, given how profitable this activity was. At the same time, other started companies devoted to owning and managing the occupancy and leases of apartments for tourist use.

The attractiveness of Barcelona as a tourist destination, the economic need of some individuals combined with the profitability of renting residential apartments for tourist use resulted in an exponential increase of this activity in Barcelona. The regulation of such activity appeared, developed and evolved in parallel to its existence. The regulation of this activity, then, has been done at the same time as this sector was appearing in different parts of the city, growing importantly in others and collapsing in other neighborhoods as well. The records of the Barcelona town hall show that in January 2012 there were 2349 apartments and in 2014 there has been 7261. As of today, there are 9929.¹² Over a 300% increase in 4 years.

The regulation of apartments for tourist use in Catalonia originated with the Catalan Law 18/2007 of December 28, on the Right to Housing.¹³ This law allowed for municipalities, the first time, to regulate the possible use of residential apartments for tourist use. The initial regulatory framework of the tourist use of residential apartments was framed within the general right to housing. However, since 2011 it is part of the Catalan regulation of tourism.¹⁴ In this sense, renting residential apartments for tourist

¹¹ <https://www.defensordelpueblo.es/informe-anual/informe-anual-2015/>

¹² http://empresaiocupacio.gencat.cat/ca/treb_ambits_actuacio/emo_turisme/emo_empreses_establiments_turisticos/emo_registre_turisme_catalunya/emo_llistat_establiments_turisticos/

¹³ Law 18/2007 of December 28, of Right to Housing

(http://portaljuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa/?documentId=473076&), in its article 19, allowed municipalities to regulate the use of residential properties for tourist uses. On December 31, 2011, this article was overruled by article 155 of law [LLEI 9/2011, del 29 de desembre, de promoció de l'activitat econòmica](#). Whereby

1. Els habitatges amb activitats econòmiques, definits per l'article 3.1, han de disposar dels títols habilitants corresponents al tipus d'activitat. La manca d'aquests títols pot donar lloc a l'adopció de les mesures d'intervenció o sancionadores que estableixin les ordenances municipals o la normativa sectorial corresponent.

2. Les administracions competents han d'impulsar polítiques orientades a evitar la utilització il·legal d'habitatges amb activitats econòmiques. Amb aquesta finalitat, han d'aprovar programes d'inspecció i han de vetllar perquè aquests habitatges tinguin els títols habilitants corresponents.

¹⁴ Law [LLEI 9/2011, del 29 de desembre, de promoció de l'activitat econòmica](#). Whereby <http://www.parlament.cat/document/cataleg/48191.pdf>

use was and it is still today considered an activity that can contribute to adding value to the Catalan tourist sector.¹⁵

Complementary to the Catalan regulation of tourism is the law 5/2012 of March 20 of fiscal measures, financial and administrative and of the creation of the tourist tax. This law included the creation of a tourist tax that was remarkably controversial between the companies running hotels and tourist lodgings and the Catalan government. Additionally, the Catalan legislature consolidated in 2012 the regulation on tourist lodgings generally in Decree 159/2012 – including residential apartments for tourist use- and required suppliers of tourist lodgings to create a corporate entity that could manage and or own the tourist lodging offered to tourists.¹⁶

These two laws had the practical effect that individuals owning and or managing residential properties for tourist use were required to create a corporation – a limited liability corporate form - to manage the residential property for tourist use. These corporations were also responsible for charging tourists the tourist tax established by the law¹⁷ and to register in the Catalan Tourist Registry.¹⁸ The corporations owning and or managing residential apartments for tourist use are required to communicate the beginning of their activity to the municipalities and town halls provide this information to the Catalan government –the Generalitat of Catalonia. Only when this registration is formalized, residential property managers - and perhaps owners - are assigned a number – RTC - and hence can initiate their activity of tourist use in their residential properties. The creation of this registry was a consequence of the increase of the illegal activity of property owners renting their residential properties to tourists without a license and often generating a remarkable nuisance to their residential neighbors.

However, the increase of the residential properties legally and illegally used for tourists regenerated a remarkable amount of conflicts between tourists and residents and a complicated coexistence between them. Citizens started to complain about the negative externalities generated by such activity in the form of for example, noise, difficulty to rest in one's residency, rude behavior and security, among others. The Catalan government reacted to the social uneasiness about this activity and decided to introduce a tourist tax with the idea to reinvest it in the different areas where tourists were disturbing neighbors or damaging city common property. Up to today this tax, quite low, has not collected much and has been relatively unsuccessful.¹⁹

The increasing numbers of tourists in Barcelona²⁰ - and in Catalonia generally²¹ -, the increasing number of hotels and of residential apartments for tourist use together with the neighbor's discomfort for some of the negative externalities generated by them resulted in the Barcelona town hall to suspend the concession of new licenses for

¹⁵ See Law Decree 159/2012, of november 20, d'establiments d'allotjament turístic i d'habitatges d'ús turístic (http://portaljuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa?documentId=622795&action=fitxa)

¹⁶ See the Law Decree 159/2012, de 20 de novembre, d'establiments d'allotjament turístic i d'habitatges d'ús turístic (available at http://portaljuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa?documentId=622795&action=fitxa)

¹⁷ The tourist tax ranges from 0.65 euro to 2.25 euro per night per tourist plus 10% VAT in Barcelona and 0.45 euro per night per tourist plus 10% VAT in the rest of Catalonia.

¹⁸This registry is in force since January 30 2014.

http://empresaiocupacio.gencat.cat/ca/treb_ambits_actuacio/emo_turisme/emo_empreses_establiments_turistics/emo_registre_turisme_catalunya/ See also the Official Guide of residential apartments for tourist uses in Catalonia

<http://www14.gencat.cat/rtcwebguies/AppJava/cercaEstabliments.do?pst=5&lg=>

¹⁹ Since 2012, the tourist tax has collected around 80 million euros in Catalonia as a whole. See http://empresaiocupacio.gencat.cat/ca/treb_ambits_actuacio/emo_turisme/emo_coneixement_planificacio/emo_informes/emo_fullturisme_noticies/emo_numero_23/recaptacio/

²⁰

²¹

residential apartments for tourist use in 2014 in some neighborhoods that presented specific problems regarding the coexistence between residents and tourists.²² Tourist regulation and specifically, the regulation of the approval of hotel licenses and licenses for residential apartments for tourist continued in the political and electoral debate in municipal elections in different municipalities, but especially in Barcelona. The last municipal elections in Barcelona of May 24 2015 resulted in a new Mayor,²³ Ms Ada Colau, winning the elections with a strong political program in restricting tourist activities in Barcelona, both regarding hotel licenses and licenses of residential apartments for tourist uses. In July 2015, the new Mayor's team decided to indefinitely suspend the communications of activity of residential properties for tourist uses in order – a necessary prerequisite to obtain the license for the activity - until a new regulation is adopted.²⁴

Hence, as of today, this decision of the Town Hall of Barcelona of suspending any license of activity of any tourist lodging in Barcelona represents an elimination of such market, regardless of the type of offering of tourist lodging, the potential surplus it could generate and whether there would be any room for allowing for a market solution that could accommodate the tourist activity in Barcelona with the rights of the residents in the city.

What are residential properties for tourist use?

Residential apartments for tourist use are apartments the owner of which, directly or indirectly, cedes them regularly and repeatedly to third parties in exchange of a price, for a short stay and under conditions of immediate availability and with the characteristics established by the regulation.²⁵

The apartment must be ceded in its entirety under certain conditions. First, the apartment needs to have a certificate of occupancy and must satisfy the technical and quality conditions generally required to housing units in general. The residential property cannot be occupied for more individuals than the ones indicated in the certificate of occupancy and the property must be sufficiently furnished and equipped with residential appliances and utensils for its immediate occupancy. It must also be perfectly clean.

In order to be able to initiate the economic activity it is necessary to previously notify the intent to initiate the activities to the competent town hall where the property is located.

Since April 2014 and until today, Barcelona has suspended awarding licenses for initiating the activity in residential properties for tourist use.

²² Comissió de Govern de l'Ajuntament de Barcelona of April 30, 2014, BOPB 02/05/2014 (<https://bop.diba.cat/scripts/ftpisa.aspx?fnew?bop2014&05/022014011202.pdf&1>). On September 10 2014 Ciutat Vella, the neighborhood in the city center and one of the areas most affected by the conflicts between neighbors and tourists, was included in the suspension (<https://bop.diba.cat/scripts/ftpisa.aspx?fnew?bop2014&09/022014023407.pdf&1>). On October 22 2014, the suspension of communications prior to the beginning of the activities was extended to the whole city (<https://bop.diba.cat/scripts/ftpisa.aspx?fnew?bop2014&10/022014027807.pdf>). The Barcelona town hall decision also included the plan to have all residential apartments for tourist use in buildings devoted, all of them, to that activity within a time period of 6 years.

²³

²⁴ http://www.diba.cat/documents/479934/60665050/12.2+ATI-38-2015_-suspensio-licencies-BCN_WEB_versio-CAT.+Alfred+Lacasa.pdf/485ea61a-767a-4398-a858-8ede7c9b4ade

²⁵ See the Law Decree 159/2012, de 20 de novembre, d'establiments d'allotjament turístic i d'habitatges d'ús turístic²⁵.

3. The failed mechanisms for neighbors to keep the residential nature of buildings with residential properties

One of the hottest issues with residential properties for tourist use has been the difficult coexistence between residents and tourists in the same building. Undeniably, the priorities, behavior and nature of use of residential properties is remarkably different between full time residents who work, rest and have their daily life in the premises and tourists, who might want to enjoy conversations, music, late dinners, and a more relaxed time with flexible schedules without the obligations of having to go to work the following morning or just be subject to a daily life routine. The coexistence of these different types of uses generates a remarkable amount of inconveniences on both ends. Such inconveniences and complaints have been steadily growing in Barcelona.²⁶ On one side, because tourists rightfully would like enjoying their vacation without having to be subject to the constraints of daily working schedules. On the other side, because residents need to be able to follow their schedules of their working life, rest, and mostly need and more peaceful environment than the one one generally generated while on vacation.

In order to avoid the often difficult coexistence of these uses of residential properties in Barcelona, residents have tried to adopt different legal measures but up to today, they have had a very limited success. Two instruments may be highlighted. A first one is based on an individual claim from a property owner to another for nuisances caused by the activity conducted by the former in their residential property. The legal claim that may be used by the aggrieved resident is an injunction for private nuisance. A second instrument is the use of building bylaws to limit the uses of the owner's private properties.

In light of the growing amount of conflicts that the coexistence of tourists and residents in Barcelona and the current debate on how such coexistence should be articulated, none of these two instruments have proved effective. The recent amendment of the Catalan Civil Code by Law 5/2015²⁷ includes important legal changes that may – or may not - result in new empowerments for property owners when deciding whether to allow residential apartments for tourist uses in their buildings.

3.1 An individual instrument: injunction for private nuisances

A first instrument available to neighbors is the possibility of filing a claim requesting an injunction for private nuisance against owners of residential properties for tourist use, where the users of the private property, in this case, tourists, generate nuisances to the rest of the neighbors.

In addition to its lengthy process and its cost, the major flaw of these instruments has been the fact that it is contingent upon the existence of a nuisance for the action is for a specific nuisance. In this sense, neighbors are forced to collect a remarkable amount of evidence in the form of complaints to the police, pictures, levels of noise, anything that could show that repeatedly the activity generates a nuisance for the other neighbors.

However, it is not structural given that a nuisance action is against one of the neighbors with the risk that a second neighbor or more than one additional neighbor could start the activity and also generate nuisances to the rest of the neighbors.

²⁶ See, for example, the different neighbor organizations resulting from the conflicts between residents and tourists in the neighborhood of Barcelona, located on the sea side of Barcelona. (<http://bcndistricte11.com/2015/02/24/la-barceloneta-diu-prou-anima-els-veins-a-denunciar-els-pisos-turistics/>)

²⁷ Law 5/2015 modifying

3.2 Trying to say no: building bylaws as an instrument to avoid tourist uses in private residential properties.

The second and most used instrument available to neighbors has been the drafting of building bylaws limiting the use of residential properties for tourist uses. Building bylaws, regulated by article 553-11 of the Catalan Civil Code, as amended by law 5/2015²⁸ allow property owners to establish rules on different aspects of the relationship between property owners, the use of common building elements, include limitation on the use of their private properties and agree on the distribution of the owner's contributions to common expenses, among others.²⁹ Specifically articles 553-40 and 553-11.2e) of the Catalan Civil Code allow building bylaws to include clauses limiting the activities conducted in private residential properties located in buildings.³⁰

In order to be validly adopted, building bylaws require a reinforced majority of property owners given that they need to be approved by 4/5 of the owner's votes that represent 4/5 of the building's coefficients³¹ unless the building chart or the building bylaws, if any, would require a different majority.³² However, if building bylaws include

²⁸ Article 553-11 reads as follows:

»1. Els estatuts regulen els aspectes referents al règim jurídic real de la comunitat i poden contenir regles sobre les qüestions següents:

»a) La destinació, l'ús i l'aprofitament dels elements privatis i dels elements comuns.

»b) Les limitacions d'ús i altres càrregues dels elements privatis.

»c) L'exercici dels drets i el compliment de les obligacions.

»d) L'aplicació de despeses i ingressos i la distribució de càrregues i beneficis.

»e) Els òrgans de govern complementaris dels que estableix aquest codi i llurs competències.

»f) La forma de gestió i administració.

»2. Són vàlides les clàusules estatutàries següents, entre d'altres:

»a) Les que permeten les operacions d'agrupació, agregació, segregació i divisió d'elements privatis i les de desvinculació d'annexos amb creació de noves entitats sense consentiment de la junta de propietaris. En aquest cas, les quotes de participació de les finques resultants es fixen per la suma o la distribució de les quotes dels elements privatis afectats.

»b) Les que exoneren determinats propietaris d'elements privatis de l'obligació de satisfer les despeses de conservació d'elements comuns concrets, que poden incloure les del portal, l'escala, els ascensors, els jardins, les zones d'esbarjo i altres espais semblants.

»c) Les que estableixen la utilització exclusiva i, si escau, el tancament d'una part del solar, o de les cobertes o de qualsevol altre element comú o part determinada d'aquest en favor d'algun element privatiu.

»d) Les que permeten l'ús o el gaudi d'elements comuns per mitjà de la col·locació de cartells de publicitat.

»e) Les que limiten les activitats que es poden acomplir en els elements privatis.

»f) Les que preveuen la resolució dels conflictes per mitjà de l'arbitratge o la mediació per a qualsevol qüestió del règim de la propietat horitzontal.

»3. Les normes dels estatuts que no siguin inscrites en el Registre de la Propietat no perjudiquen tercers de bona fe.

²⁹ Owners of residential properties do not have an absolute property right. The exercise of property rights of residential properties located in buildings regulated by a horizontal property structure is limited by the law or building bylaws, if adopted by the property owners. In this sense, the Catalan Civil Code limits the rights of property owners regarding their rights and duties with respect to the building's common property elements or with respect to its organization. Examples of these duties are included in articles, 553-38, 553-39, 553-40 and 553-47 of the Catalan Civil Code. In its turn, building bylaws can include additional restrictions under article 553-11 of the Catalan Civil Code.

³⁰ If building bylaws validly restrict or prohibit conducting a certain activity in residential private properties, property owners will be prevented from conducting such activity. See article 553-40 of the Catalan Civil code.

³¹ See article 553-25-2 of the Catalan Civil Code.

³² Art XXX

a clause limiting the uses of private property elements such as, for example, not using residential private properties for tourist use, the express consent of property owners affected by such restriction was required.³³ The idea behind requiring consent of property owners the uses of the property of which was restricted was protecting the rights of property owners so that they could not see their property rights limited without their consent.³⁴ However, if property owners understand that the vote against the bylaws of the property owners was done in bad faith, abusing their legal position or exercising their rights in an antisocial way, they could go to court and prove it.³⁵ However, few cases show property owners prevailing in this kind of cases given that the burden of proof is difficult to achieve and the probability of prevailing in court remarkably low. It should be noted that since May 2015, such consent does not seem to be required.³⁶

Once building bylaws are validly drafted and approved by property owners, they are binding to all the property owners of the building. Further, they may be registered in a public property registry in order for them to have *erga omnes* effects.³⁷ In order to access a public property registrar, such building bylaws should be notarized and checked by the property registrar, who, after determining that bylaws comply with the legal requirements they are subject to, will allow access to the property registry.³⁸ Once registered in the property registrar building bylaws will be binding for the property owners who adopted the agreement as well as for the subsequent *bona fide* buyers who might consider buying a residential property in that building.³⁹ If the building bylaws were not registered in a property registry they would only be binding for the property owners who held title when the bylaws were adopted.

The possibility of including provisions limiting the use of residential private properties in buildings has been an attractive element for many property owners to engage in drafting and approving building bylaws restricting the use of residential private properties for tourist use.⁴⁰ However, their content, approval, and registration in property registrars have proved to be more controversial than it was initially anticipated.

3.2.1 Reinforced majorities v. unanimity: drawing the content of express consent.

³³ See the old wording of article 553-25-4 of the Catalan Civil Code.

The Superior Court of Justice of Catalonia has repeatedly stated that no one can be limited of the uses of their private properties unless such limitation is voluntarily agreed on or there is a legal cause that justifies it. In any other case, such limitation cannot be enforced. See Judgment of the Superior Court of Justice of Catalonia of 25 de marzo de 2013 y de 20 de febrero de 2012. Such interpretation, is in line with the interpretation of the Spanish Supreme court regarding law XXX in its Judgment of September 12, 2013 where the Spanish Supreme Court stated that private property owners should be entitled to use their property as they wish unless it is legally prohibited or where their uses are expressly prohibited by the legal regime of property buildings, the building statutes or the building bylaws.

³⁴ See Resolution JUS/163/2010 of April 21 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 5637 (2010).

³⁵ See Resolution JUS/1726/2015 of July 14 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6925 (2015).

³⁶ See the new wording of article 553-24 of the Catalan Civil Code as amended by Law 5/2015.

³⁷

³⁸ Article 18 of the Spanish mortgage law requires the public property registrar to check on the validity of the legal document intended to be registered in the public registrar and to register it, if validly adopted and reject such registration otherwise.

³⁹

⁴⁰ See, for example, Resolution JUS/163/2010 of April 21 of the Head of the Law and Legal Entities of the Catalan Department of Justice that was the first resolution of the Law and Legal Entities XXX interpreting the relationship between articles 553-25-2 and 553-25.4 of the Catalan Civil Code.

The interaction between reaching the 4/5 of votes and coefficients of the building property owners in order to adopt the building bylaws and the express consent required for all owners affected by the limitation by a use of their private properties has been, up to today, one of the most controversial issues when drafting building bylaws and has ultimately resulted in an amendment of article 553-25-4 of the Catalan Civil Code.

Different issues arose regarding how the interaction between these two requirements had to be interpreted. A first question has been whether reaching the majority necessary for adopting the building bylaws that limit the use of private properties was enough to grant access to property registrars and hence have third party effects. Alternatively, whether express consent was required and hence even though bylaws could be validly adopted by the 4/5 of the building votes and coefficients, their content required express consent of all property owners and hence, did not have access to property registrars unless unanimity was reached when approving the building bylaws. Finally, another issue discussed has been how this express consent was to be provided, that is, whether it was necessary voting in favor of the bylaws or whether the lack of express opposition by property owners was enough to consider that consent was provided.

When addressing these different issues, three constellations of cases might be differentiated:

- a) A first group of cases refers to cases where neighbors validly adopted the building bylaws with the required majorities of coefficients and votes but one, few or some of the property owners expressly opposed to the adoption of the bylaws limiting the use of the private property elements of the building and voted against such decision.⁴¹

In this first group of cases property registrars did not allow the registration of such bylaws in the property registry and hence left the bylaws with no third party effects. Property owners challenged the property registrar's decision and the Directorate of Law and Legal Entities, the unit of the Catalan Department of Justice responsible for determining whether the rejection of registering the building bylaws, based on the public registrar's interpretation Catalan Civil Law, was adequate.

Whenever building bylaws were adopted with the required majorities of votes and coefficients of article 553-25-2 but property owners, even one, expressly opposed to the content of such bylaws and public registrar denied entry to the property registry, the Directorate of Law and Legal Entities of the Catalan Government understood that the property registrar's decision was correct.⁴² The argument provided in these cases was that in light of the content of the building bylaws whereby the use of private properties was limited, the express consent of all the property owners of article 553-25-4 was required and the majorities of votes and coefficients of article 553-25-2 were insufficient. The interpretation of property registrars as well as the Directorate of Law and Legal Entities of the Catalan Government suggests that consent of the property owners affected by the limitation of use of their properties is required regardless whether the activity that the bylaws aim at limiting is being conducted or whether is a potential use of the property that has never been carried out.⁴³

⁴¹ See Resolution JUS/163/2010 of April 21, DOGC 5637 (2010); JUS/2299/2013 of October 28, DOGC 6498 (2013), JUS/2410/2014 of October 9, DOGC 6742 (2014) and JUS/1726/2015 of July 14, DOGC 6925 (2015) of the Head of Law and Legal Entities of the Catalan Department of Justice.

⁴² See Resolution JUS/163/2010 of April 21 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 5637 (2010).

⁴³ See Resolution JUS/2410/2014 of October 9 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6742 (2014) noting that if the activity that is intended to limit is performed by one of the property owners and not by the others, it will be necessary to

Consequently, in light of such interpretation, bylaws including a provision whereby residential properties were not to be used for tourist uses, express consent of each of the property owners was required and hence, unanimity was necessary in order to be able to be registered in a property registry.

This unanimity does not mean that all building bylaws limiting the use of private properties should be voted unanimously given that this would disregard the 4/5 of votes and coefficients required by article 253-25-2 of the Catalan Civil Code. Generally, article 253-25-2 should be interpreted so that whenever the limitation of the use of a private element is not general but only affects certain property owners, such owners should vote in favor and hence be part of the 4/5 of votes and coefficients required to adopt the building bylaws.⁴⁴ Consequently, property owners not affected by the limitation of use could vote against the bylaws adopted but as long as the 4/5 votes and coefficients required by article 253-25-2 of the Catalan Civil Code were met and the property owner specifically affected by the limitation of use voted in favor of it, the bylaws would be correctly adopted and hence have allowed to register in the property registry.⁴⁵

- b) A second group of cases where those where the building bylaws were adequately adopted and the 4/5 majority of votes and coefficients was achieved and there was not vote against the agreement but an abstention.⁴⁶

The heart of this case's discussion stems on how the express consent required by article 553-25-4 of the Catalan Civil Code should be interpreted. In other words, did the *de facto* unanimity required by article 553-25-4 of the Catalan Civil Code required an affirmative vote of property owners or the owner's non-opposition, that is, their abstention was enough? When discussing abstention and its potential equivalence as express consent two situations might be differentiated. A first one is the one where the property owner who did not vote in favor of the building bylaws attended the neighbors' meeting and decided neither voting in favor nor against the bylaws. A second situation is the situation where the property owner did not attend the neighbor's meeting where the bylaws were adopted, did not vote in favor or against the building bylaws and did not challenge the validity of the agreement adopted.

These two situations have been remarkably differentiated by the interpretation of the Directorate of Law and Legal Entities of the Catalan Government that resulted in a legal amendment of the First Book of the Catalan Civil Code in 2015. Regarding the first case, where the property owner who neither vote in favor nor against the bylaws adopted, the Law and Legal Entities of the Catalan Department of Justice⁴⁷ established in 2014 that the no-opposition to the adoption of bylaws limiting the use of residential private properties did not amount to the express consent required by article 553-25-4 of

have the consent of the property owner who is conducting the activity but also the consent of the other property owners waiving their rights to eventually conduct the activity in the future.

⁴⁴ See Resolution JUS/2299/2013 of October 28 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6498 (2013).

⁴⁵ This has been the interpretation of the Catalan Superior Court of Justice in judgments *sentència del Tribunal Superior de Justícia de Catalunya de 20 de febrer de 2012 i 22 juliol 2013*, i en les resolucions de la Direcció General dels Registres i del Notariat (DGRN) de 12 de desembre de 2002, 9 de febrer de 2008, 22 de setembre de 2009, 27 de desembre de 2010 o 8 d'abril de 2011, com també de les resolucions d'aquesta Direcció General de 21 d'abril de 2010 i de 28 d'octubre de 2013 See Resolution JUS/105/2015 of January 7 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6804 (2015).

⁴⁶ See Resolution JUS/2426/2014 of October 14, DOGC 6743 (2014) and JUS/105/2015 of January 7, DOGC 6804 (2015).of the Head of Law and Legal Entities of the Catalan Department of Justice.

⁴⁷ See Resolution JUS/2426/2014 of October 14 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6743 (2014).

the Catalan Civil Code.⁴⁸ Consequently, express consent was interpreted to be a positive vote to the building bylaws adopted by the owners in order to be registered in the property registry.

However, such strict interpretation mean that passive owners had a veto power for preventing property owners from using their properties for tourist uses, regardless whether such activity was being conducted or not. This challenge resulted in a different interpretation in the second case that consolidated in a legal amendment. In the second case, the owner's abstention was the same as in the earlier case but the attitude of the neighbor was rather different given that in this latter case, the property owner was remarkably passive and had not attended the neighbor's meeting nor expressed any opinion – positive or negative.⁴⁹ In this latter case the issue was beyond the abstention of the property owner and became whether the passive attitude of one property owner may jeopardize the agreement – the building bylaws- validly adopted by the other property owners. The Law and Legal Entities of the Catalan Department of Justice, in this case, understood that such abstention should be interpreted as a legal consent and hence as a vote in favor of the agreement adopted.⁵⁰

The abstention, hence, has a different legal content depending on whether the property owner attended the meeting where the decision to limit the uses of private properties was adopted or not.⁵¹ If the property owner attended the meeting express consent of article 553-25-4 of the Catalan Civil code was required and owner's abstention was not equivalent to the consent necessary to limit the use of private properties. However, if the property owner did not attend the neighbor's meeting and did not oppose to it, then such abstention was counted as a vote in favor of the agreement adopted by the owners' in the meeting, whichever that was. Consequently, if the building bylaws were validly adopted with the required majorities and with all the votes in favor of the property owners attending the neighbor's meetings, an abstention of a property owner who did not attend the meeting should be counted in favor of the adoption of the building bylaws even if such bylaws restricted the use of private properties.⁵² This is what the Law and Legal Entities of the Catalan Department of Justice called a legal consent.⁵³ The underlying argument of this interpretation was that property owners should be encouraged to be active and diligent with the affairs of the building and their passive attitude should not be rewarded by allowing them to veto with their silence agreements that the rest of the property owners found adequate for their building.⁵⁴

The Directorate of Law and Legal Entities of the Catalan Department of Justice considered that the interpretation of this latter abstention of a property owner who did not attend the owner's meeting should neither be considered an express consent nor a tacit consent. The owner's silence should be interpreted as a legal consent given that the vote is counted as a result of the mandate of the law.⁵⁵

⁴⁸ See Resolution JUS/2426/2014 of October 14 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6743 (2014).

⁴⁹ See Resolution JUS/105/2015 of January 7 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6804 (2015).

⁵⁰ See Article 553-26.2 of the Catalan Civil Code.

⁵¹ See Resolution JUS/105/2015 of January 7 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6804 (2015).

⁵² See article 553-26.3 of the Catalan Civil Code.

⁵³ See Resolution JUS/105/2015 of January 7 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6804 (2015).

⁵⁴ See Resolution JUS/105/2015 of January 7 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6804 (2015).

⁵⁵ See Resolution JUS/105/2015 of January 7 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6804 (2015).

- c) Responding to social realities: legal amendments in order to provide owners with an instrument to prevent tourist uses in residential properties.

Given that very often majorities in votes and coefficients were met in order to adopt building bylaws limiting the use of private properties for tourist uses, the role and form of express consent became the crucial element when having access to property registrars and hence have third party effects. The lack of express consent of all the property owners regarding the limitation of the use of private properties resulted in a systematic rejection by public registrars and hence in a lack of effectiveness of building bylaws as an effective instrument to prevent residential property owners to use their properties for touristic use.

In light of the growing importance of residential apartments for tourist use in Barcelona and the growing resistance and skepticism of residents for the often negative effects of such activity performed in their residential buildings, the Catalan Government amended some provisions of the Fifth Book of the Catalan Civil Code regarding property rights and adopted Law 5/2015.⁵⁶

Law 5/2015 includes two remarkable novelties. On one side, the new wording of article 553-26-4 does not require express consent of private property owners when building bylaws limit the use of the building's private property elements. On the other side, article 553-45 includes the possibility of establishing in the building statute contributions to the building expenses based on the intense use of the building's common elements.⁵⁷ Even though it remains to be seen how such amendments will be interpreted, from the new wording of article 553-26-4 property owners might see the uses of their properties limited without their consent. Further, the uses and activities developed in residential properties might justify a different contribution to the building expenses, regardless of the coefficient the property represented in the building.

However, the current regulation leaves some open questions that remain to be interpreted.

No express consent is needed when limiting the use of private properties in building bylaws as long as they are adopted by the required majorities of 4/5 of votes that represent 4/5 of the building coefficients.⁵⁸ Consequently, it seems that the Catalan legislator intended to eliminate the veto power that a property owner could have against the building majority when limiting uses of private elements. Does this mean that building bylaws limiting the use of private properties adopted by the required majorities will be valid and have access to property registries and hence third party effects? If that was the case, this legislative amendment would balance and equilibrate the interest of the majority of property owners with that of individuals opposing to the majority. However, Law 5/2015 still requires consent for a property owner prevented from using a common element in the building. Even though the law expressly does not include an express consent for limiting the use of private properties, it seems difficult to conclude that Law 5/2015 requires consent from a property owner for preventing him from using common elements but does not require consent for limiting a the use of a private element. And if such consent is not required would property owners approving such bylaws have to compensate for the limitation of use and the potential or actual loss of the property owner that intended – or not – to conduct an activity now not allowed or was actually conducting such activity?

⁵⁶ Law 5/2015 of May 13 modifying the Fifth Book of the Catalan Civil Code on property rights, DOGC 6875 (2015), available at http://portaljuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa/?action=fitxa&mode=single&documentId=694077&language=ca_ES

⁵⁷ See the new Reading of article 553-26-4 of Law 5/2015 of May 13 modifying the property law book of the Catalan Civil Code that does not require express consent of all property owners in order to adopt of bylaws limiting the uses of private properties.

⁵⁸ Article **XXX**

A first tentative approach on how the new reading of article 553-25.4 of the Catalan Civil code⁵⁹ should be interpreted was done by the Directorate of Law and Legal Entities of the Catalan Department of Justice in its resolution of October 15, 2014⁶⁰ where it stated that the - at the time - project of amendment of article 553-25-4 of the Catalan Civil Code did not require express consent of the owner who saw the uses of its property limited but at the same time, stated that the decision of the majority of the property owners regarding the limitation of uses of private property should not be imposed to owners who disagree with such decision.⁶¹ How this decision of the majority should be channeled, then? Is express consent required even though the article does not require it any longer? Should any other consideration be taken into account?

Given the open ends left by the new wording of the articles amended by Law 5/2015, it remains to be seen how they will be interpreted by property registrars, courts and eventually the Directorate of Law and Legal Entities of the Catalan Department of Justice.⁶²

4. Dying from success: suspending a market for regulatory incapacity

The current situation, with a remarkable amount of residential apartments for tourist use in Barcelona, with residents – and voters – increasingly questioning the effects of such activity and with up to now limited instruments for reacting against the potentially negative effects some residents experience, the Barcelona TownHall decided to suspend approving licenses for residential apartments for tourist use in 2014. Since then, the current Barcelona Mayor Ms Ada Colau decided to continue with such suspension⁶³ that recently extended for another year until 2017.⁶⁴

The arguments provided by the different Mayors have been that the expansion of residential apartments for tourist use in Barcelona took place really fast causing a remarkable amount of inconveniences to residents, an increase in leases and in property prices, a lack of equilibrium between residents and tourists in certain areas of the city strongly affecting the structure of local stores in certain areas.⁶⁵ For that reason, since 2014, the increase in the supply of legal residential apartments for tourist use has been suspended leaving only by the apartments that previously had a license to conduct the activity.

It seems undeniable that the market of residential apartments for tourist use has caused some changes in certain areas of the city, creating negative effects for residents and indirectly modifying the supply of residential apartments for residential use and hence their price. However, suspending the potential evolution of this market, restricting its supply to residential apartments with licenses for tourist use before 2014 does not seem neither an efficient alternative, nor a potential solution to balancing the different interests involved in this market and generally in a city.

The current situation is quite inefficient and does not represent a solution to the problem Mayors in Barcelona believe need to address. Market forces should be able to function in order to generate efficient outcomes and be able to react against

⁵⁹ At the time, a legal Project not in force.

⁶⁰ See Resolution JUS/2426/2014 of October 14 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6743 (2014).

⁶¹ See Resolution JUS/2426/2014 of October 14 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6743, 2.3 (2014).

⁶² In this sense, I am as puzzled as Miriam Anderson, *Recursos Governatius. Doctrina de la Direcció General de Dret i d'Entitats Jurídiques* (juliol – octubre 2015) (2016), 7, *Indret* 1/2016, www.indret.com

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apartments that may not meet the standards required to have a tourist use and hence should not be supplied while others, that may generate activity without negative externalities or with negative externalities lower than the positive benefits they may generate should be able to participate in the market.

Distributing property rights so that parties can negotiate and so that the market generate efficient outcomes might be a relatively easy mechanism to improve the situation this market is currently in. The proposal of this paper is the object of the next section.

5. Learning from Coase: negotiation as an efficient instrument to allow for tourist uses in residential properties

The use of a residential apartment for tourist use in a building might be characterized as a negative externality from at least two perspectives: on one side, for the potential nuisances that such activity may cause to the other building residents as well as for the loss of value of the properties cohabiting in a building with residential properties for tourist use.⁶⁶ The first factor may not be present given that property owners with residential apartments for tourist use might be very careful in avoiding generating negative externalities to other residents but regardless of whether a tourist use of a residential property generates such negative externality the latter effect is undeniably present. The prospect of having a residential apartment for tourists as a neighbor with the potential inconveniences it may cause might be enough to justify a lower price for such property or even a lower value when used as collateral for a mortgage.⁶⁷ In other words, two similar properties will be differently priced if one is in a building with residential apartments for tourist use and the other is not.

As explained above, when addressing the challenges presented by residential properties for tourist use in Barcelona, liability based solutions have not appeared very effective to address this issue and balance the different interest at stake. At the same time, property rights, as they are currently allocated, have not shown any effectiveness either and the 2015 reform does not seem to have understood the nature of the problem and the potentials of property rights allocation and the market when reaching efficient or at least welfare enhancing outcomes.

Consequently, so far, the situation of residential properties for tourist use in Barcelona is stuck in an inefficient point: residents complaining and unhappy, tourist licenses suspended and a market stopped waiting for a regulation the TownHall does not seem to be able to effectively draft.

This paper argues that Law and Economics literature, particularly the scholarly and insights brought by Coase provide a welfare enhancing alternative that would improve the current and difficult equilibrium of the current situation of residential properties for tourist uses in Barcelona.

5.1 Learning from Coase

⁶⁶ It is interesting to note that courts and the Law and Legal Entities of the Catalan Department of Justice has only referred to the loss of value of the residential property in a building of properties for tourist use from the perspective that limiting uses might result in a loss of value. However, the loss of value of the other residential properties cohabiting with a residential property for tourist use has not been a parameter to consider when analyzing such issue in court. See Resolution JUS/163/2010 of April 21 of the Head of Law and Legal Entities of the Catalan Department of Justice. See also Resolution JUS/2426/2014 of October 14 of the Head of Law and Legal Entities of the Catalan Department of Justice, DOGC 6743 (2014).

⁶⁷ See article 117 of the Spanish mortgage law

In “The problem of Social Cost,”⁶⁸ Coase deals with the potentials for negotiation between parties for reaching efficient outcomes when one of them generates a negative externality to the other and transaction costs are zero. In this context, Coase suggests that regardless of the initial allocation of property rights, the absence of transaction costs will lead parties to negotiate and allocate the property rights – in this initial example, the right to pollute – to the party that values them most and hence is willing to pay most for them. As a result, if the polluting party has the right to pollute, pollution will take place up to the point where preventing it from happening is more expensive than suffering it. In contrast, if the non-polluting party had the right to clean air, pollution would take place as long as the cost of compensating the non-polluting party for allowing some pollution was higher than the benefits obtained from polluting. In his 1960s article Coase argued that regardless who had the property right over the externality – the right to generate it or the right not to suffer it – if transaction costs were zero parties would reach the same equilibrium.

Since the Coase Theorem was published it has received much analysis, praise and criticism. The context and strong assumptions of the Coase Theorem make it a theoretical exercise with limited practical impact when more realistic assumptions are considered.

One of the most obvious limitations of the Coase Theorem is that in the real world, transaction costs are not zero. They might be low or higher depending on the market structure but they are generally positive.⁶⁹ Latter work by Coase⁷⁰ relaxes the strong and unrealistic assumption of zero transaction costs. When moving from a zero transaction costs scenario to a positive transaction costs situation what becomes of crucial importance of the legal systems in this new world society needs to understand and design a welfare enhancing system combining property and contractual rights as well as market mechanisms. Further, depending on how important transaction costs are, legal instruments such as property and negotiation through contract interact differently and may or not may be substitutes.⁷¹

Despite of the inherent limitations of the Coase Theorem this paper uses his underlying message by which property rights allocation together with parties’ negotiation may allow reaching welfare enhancing equilibriums. The structure of property affects the nature of property rights and their role in market transactions.⁷² In this sense, based on the inefficient and unsatisfactory current situation of residential properties for tourist use in Barcelona, Coase provided a useful setup for exploring the potentials of property rights allocation and negotiation between parties as an instrument to achieve efficient outcomes or at least welfare enhancing equilibriums for situations like the one object of this paper. We are well aware that the proposal of this paper might not be the first best efficient outcome theory might predict but a second best conditioned by the positive transaction costs involved in practice.⁷³

⁶⁸ Coase, Ronald H. 1960. “The Problem of Social Cost.” *Journal of Law and Economics* 3(1):1–44.

⁶⁹ Pagano U (2012) No institution is a free lunch: a reconstruction of Ronald Coase. *Int Rev Econ* 2(59). Doi 10.1007/s12232-012-0154-0

⁷⁰ XXX

⁷¹ See Nicita, Rizzolli & Smith, Exploring Coase’s world: an introduction, *Int Rev Econ*, 59:111-120 (2012) noting that when transaction costs are zero property and contract are perfect substitutes when reaching efficient outcomes but when transaction costs are positive the degree of substitutability of property and contract depends on the relevance of transaction costs. The higher transaction costs are, the more relevant property rights become and contracts are less used.

⁷² Nicita, Rizzolli & Smith, Exploring Coase’s world: an introduction, *Int Rev Econ*, 59:111-120 (2012).

⁷³ See Pagano U (2012) No institution is a free lunch: a reconstruction of Ronald Coase. *Int Rev Econ* 2(59). Doi 10.1007/s12232-012-0154-0 noting that the Coasean world is always a second-best world when compared to the first best neoclassical economic models predict.

Hence, this paper proposes a shift of property rights allocation when determining whether residential properties might be used for tourist use. As of today and based on the current regulation⁷⁴ in order to have a residential apartment for tourist use, the property right holder is the property owner who may decide to perform this use regardless of the opinion of the other property owners in the same building. So, unless the 4/5 of votes and coefficients of property owners drafted building bylaws⁷⁵ preventing residential properties to have tourist uses, residential property owners may, after obtaining a license from the Town Hall, use their properties for tourist use. As of today, if property owners would like to reach the 4/5 of votes and coefficients necessary to adopt the bylaws that would allow preventing such tourist activity they would need buying the votes from the other property owners in order to avoid adopting such bylaws. So as the Coase Theorem predicts, property owners would like to prevent or avoid having a residential property for tourist use in their building they would need to negotiate and eventually compensate the owner who might want to initiate the activity so that it decides not to do so or compensate enough owners so that they would vote in favor of adopting the building bylaws preventing it. The default, though, is that residential property owners have the property right to use their properties for tourist uses and hence generate a negative externality on the rest.

This paper proposes to shift make property owners the holders of the right to have their properties for residential use unless compensation would be awarded to be able to initiate a tourist use in a residential property. This proposal involves a shift of property rights with respect to the current situation. The property right should be awarded to residential property owners who use their residential properties in a way that does not generate a negative externality on others. Hence, this paper suggests that residential property owners should not be able to use their properties for tourist use and hence be entitled generate a negative externality on others. If property owners would want to use their residential properties for tourist use, they would need to buy such property right to the rest of property owners, who through negotiation, would decide to agree – or not - on a price to allow such use. No institution is a free lunch.⁷⁶ Hence, in line with Coase, property rights would be the object to market exchange, through parties' negotiation or contracting.⁷⁷

This proposal presents remarkable advantages but also important challenges.

5.2 Potential advantages of the proposal

This proposal presents remarkable advantages:

- 1) The proposed solution is a horizontal solution where if there is a loss of value of properties because of their non-tourist use it potentially affects all the properties in Barcelona.
- 2) The parties who eventually would suffer the negative externality would be the ones deciding over it.

The parties eventually damaged by the negative externality caused by residential apartments for tourist use would be the ones deciding whether to allow the externality

⁷⁴ It should be reminded that as of today the licenses for residential properties for tourist use have been suspended. See XXX

⁷⁵ See articles 553-11 and 553-26.4 of Law 5/2015.

⁷⁶ Pagano U (2012) No institution is a free lunch: a reconstruction of Ronald Coase. *Int Rev Econ* 2(59). Doi 10.1007/s12232-012-0154-0

⁷⁷ Nicita, Rizzolli & Smith, Exploring Coase's world: an introduction, *Int Rev Econ*, 59:111-120 (2012).

in exchange of a monetary compensation provided by the property owners who wanted to use their residential properties for tourist use.

- 3) The financial position of the parties involved in the negotiation is not symmetric.

Property owners who intend to use their properties for tourist uses do it because they expect to obtain revenues from this activity and potentially profits. However, in light of the negative externality generated by such activity, the rest of property owners see the value of their property reduced. In this sense, the property owner with the prospect of obtaining profits from the tourist activity will be the one in a better position to determine his willingness to pay to property owners for developing such activity based on the potential profits it expects to obtain.

- 4) It allows naturally regulating the allocation of residential properties for tourist use.

The right of property owners when negotiation whether to allow property owners to use its residential property for tourist use will vary depending on the expected profits the activity might generate. Such profits will depend on the supply of tourist lodgings in a certain city area as well as on the demand by tourists. In that respect, high demand areas will have a high price and hence property owners will ask for a high price for allowing a tourist use in a property in the building. At the same time, the supply of tourist lodging will also affect the price of the right. In this sense, in areas with a high supply of tourist lodgings – not only tourist apartments - areas with a high supply of tourist lodgings will result in a low price for allowing such use in their building. So in this sense owners may feel the compensation they may get for allowing a property for tourist use in their building might not compensate for the negative externality it may generate in their property.

As a result, areas with a high demand and a small lodging supply will result in a high price for the potential tourist use while areas with a high demand and a high tourist lodging supply will result in a low price of the potential tourist use making it unattractive for property owners and hence eventually naturally stopping the increase of residential properties for tourist use in certain areas.

- 5) A solution based on property rights allocation presents remarkable advantages over a regulation-based solution.

Residential property owners, and not the Barcelona Town Hall, are in the best position to have the best information and assess the potential effects – positive as well as negative - of having a property for tourist use in their residential building.

- 6) Market effects generated by residential properties for tourist use would eventually benefit the party authorizing such use.

Market effects of the increase in supply of tourist apartments. reduction of the supply of residential apartments, increase in leases and property prices.

- 7) It will allow concentrating properties for tourist use in whole buildings.

- 8) Cheap in terms of regulatory and enforcement costs.

5.3 Challenges presented by the regulatory proposal

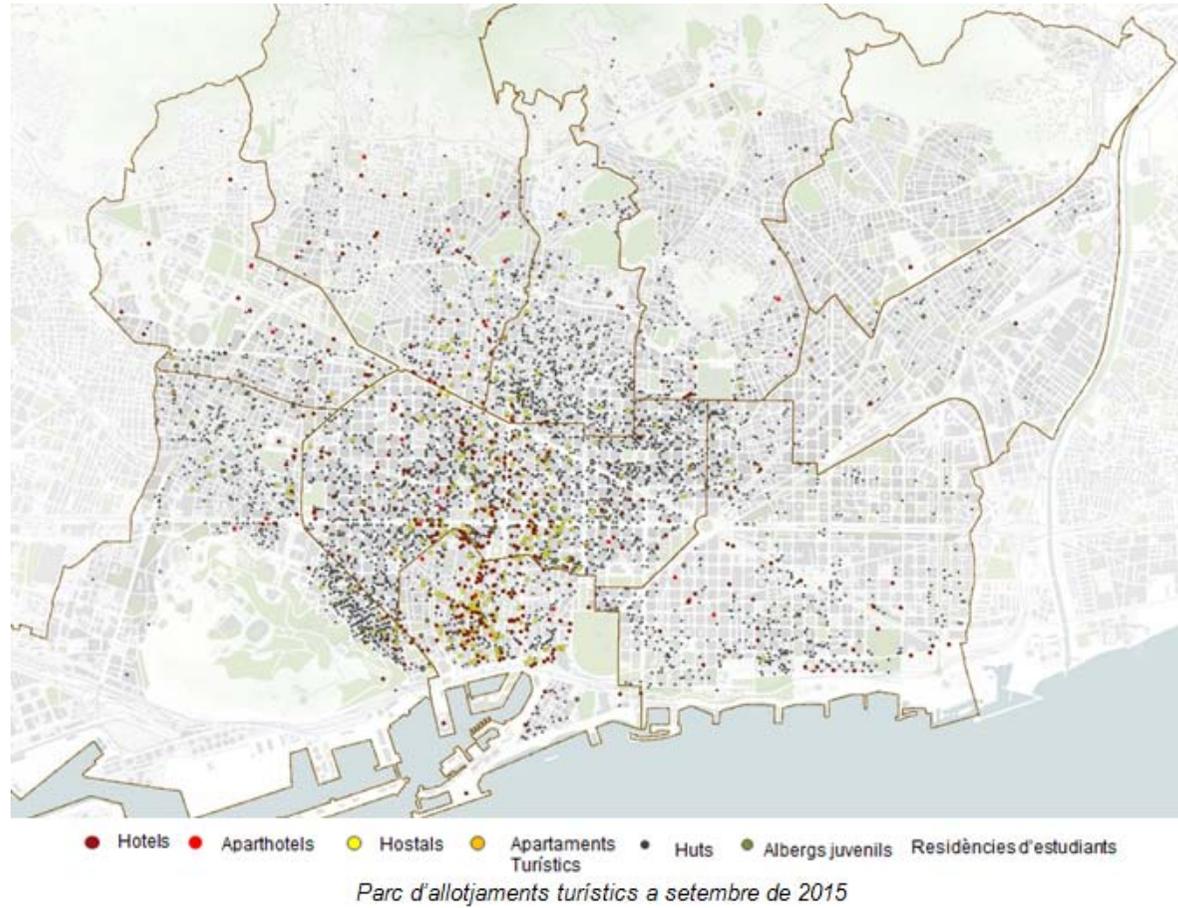
This proposal presents two major challenges:

- 1) Costs of transition costs.

transition costs might be expensive

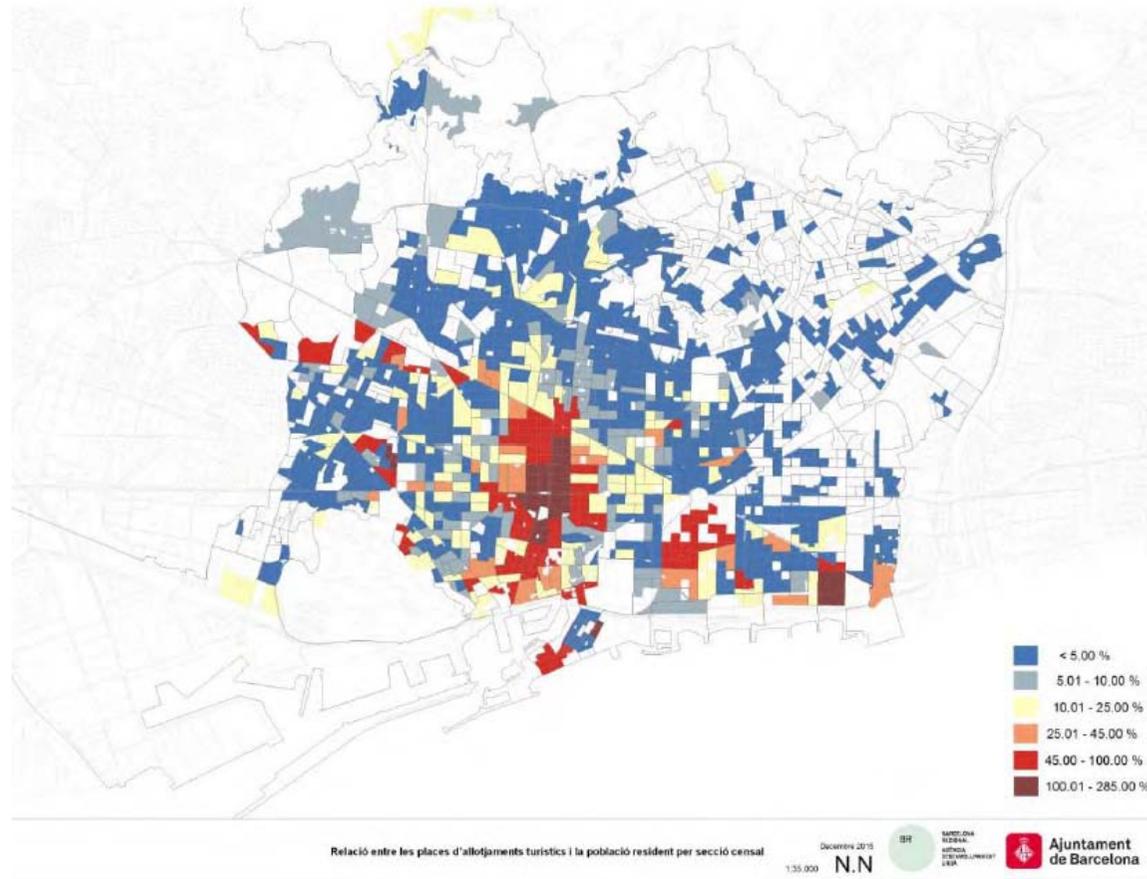
- 2) The negotiators will be property owners and not residents who would be the ones affected by the nuisance eventually generated by the property with tourist use in their building.

Tourist lodgings in Barcelona as of September 2015⁷⁸



⁷⁸ Barcelona Townhall , October 2015. This map can be found at <http://premsa.bcn.cat/2015/10/23/lajuntament-clou-lanalisi-de-licencies-dalotjaments-turistic-afectades-per-la-suspensio-i-inicia-el-proces-participatiu-del-pla-especial/>

Relació entre les places d'allotjaments turístics i la població resident per secció censal⁷⁹



⁷⁹ The map has been elaborated by the Barcelona TownHall, i The map can be found in the special plan for residential properties for tourist use (PEUAT), 2015, page 20 <http://premsa.bcn.cat/download/peuat.pdf> s

6. Conclusions

Residential apartments for tourist use in the city of Barcelona have grown rapidly in the last 10 years. Such activity generates income for property owners who use their property for tourist uses but also has growingly generated nuisances to residents and an increasing inconvenience and uneasiness towards the activity. This attitude has become a political issue object of debate up to the point that the former, as well as the current Barcelona Mayors decided to suspend granting licenses to residential apartments for tourist use.

One of the major challenges of this situation is that the regulation, so far, has not allocated property rights in an efficient way and the outcome has resulted in all parties being dissatisfied with the situation.

This paper proposes a shift of property rights so that residential property owners are the ones entitled to have residential properties used for activities not causing negative externalities. That is, residential property owners should not be entitled to use their properties for tourist use unless they compensate the other property owners affected by the negative externality generated by the activity.

Such new allocation of property rights would naturally regulate the allocation of residential properties for tourist use in Barcelona, would benefit the neighbors affected by it and would reduce the need for intervention of the Barcelona Town Hall that so far has proved not to be effective.