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MEMORANDUM OF LAW

DATE: September 12, 2007

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Regulation of Short-Term Vacation Rentals in Residential--Single Unit (RS) Zones

INTRODUCTION

Councilmember Faulconer, in response to inquiries from members of the public, recently asked our office to conduct research and provide advice on issues relating to the regulation of short-term vacation rentals in the single-family residential zone. In addition, the Pacific Beach Community Planning Committee recently requested that the City review and take action on this issue. While there is no definition of "short-term vacation rentals," the term is used throughout this memorandum to mean the rental of a single-family dwelling for any time period less than 30 consecutive calendar days.

Communication from members of the public indicates that short-term vacation rentals in the single-family residential zone cause disturbances relating primarily to noise and overcrowding. Other jurisdictions have addressed similar problems by regulating the use through a permit and/or prohibiting short-term rentals; the permissible rental period varies. The City of San Diego could consider adopting similar municipal code sections. Any prohibition in the Coastal Zone would be subject to approval by the California Coastal Commission prior to being effective.

QUESTIONS PRESENTED

1. Are short-term vacation rentals currently regulated or prohibited in single-family residential zones?

2. Can the Land Development Code be amended to regulate or prohibit short-term vacation rentals in single-family residential zones?

SHORT ANSWERS

1. No. There are currently neither regulations nor prohibitions on short-term vacation rentals in single-family residential zones.

2. Yes. The Land Development Code may be amended to regulate the use of single-family dwellings in single-family residential zones and/or amended to prohibit the use of single-family dwellings in single-family residential zones. However, the California Coastal Commission must certify any amendments to the Land Development Code before they can be effective in the Coastal Overlay Zone.

BACKGROUND

An inquiry was made as to whether prior to the Land Development Code [LDC] update (adopted in 1997, effective in 2000), short-term vacation rentals had been prohibited in the single-family residential zone. The single-family residential zone permitted uses, former §101.0407.B, permitted "[o]ne-family dwellings, provided that if the dwelling or any portion thereof is rented, leased or sublet, and the property is located within the area designated on Map C-841 on file in the office of the City Clerk, it must also be maintained and used in accordance with the One-Family Dwelling Rental Regulations of Section 101.0463."

Then, as is true now, the LDC contained defined terms. A "dwelling, one-family" meant "a detached building, containing only one kitchen, designed or used to house not more than one family, including all necessary employees of such family. Unless otherwise defined or provided for, the term 'one-family dwelling' is synonymous with the terms 'single family dwelling' or 'single family residence,' as they may appear elsewhere in the Municipal Code." San Diego Muni. Code §101.0101.17 (repealed, 2000). A "family" was defined as "two or more persons who are related by blood, marriage, or legal adoption, or joined through a judicial order of placement of guardianship. When used as an adjective to describe the occupants of a residential dwelling, or as an adjective to describe a type of residential dwelling, the term 'family' is synonymous with the term 'single housekeeping unit'." San Diego Muni. Code §101.0101.20 (repealed, 2000).

A "single housekeeping unit" was added to the Municipal Code on June 22, 1992, by ordinance O-17785.[1] New §101.0101.76.1 stated, "The term 'single housekeeping unit' refers to the status of the occupants of a residential dwelling unit and means one person, or, two persons who reside together, jointly occupy and have equal access to all areas of a dwelling unit and who function together as an integrated economic unit for a period of occupancy which exceeds one month." When the LDC was updated in 1997, this definition was deleted and the definition of "family" was amended and no longer included a reference to a "single housekeeping unit." See, San Diego Muni. Code §113.0103.

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[1] This ordinance was enacted on the same day as ordinance O-177786, which made minor amendments to the One-Family Dwelling Rental Regulations, yet neither municipal code section references the other.

The One-Family Dwelling Rental Regulations, former §101.0463, were added in 1991 by ordinance O-17652. The regulations made it unlawful for any "owner of a one-family dwelling within an R-1-5000 zone located within the area designated on Map C-841 on file in the office of the City Clerk to rent, lease, or allow to be occupied or subleased, for any form of consideration, any one-family dwelling unit which is not occupied by that owner, in violation of any of the following regulations...." San Diego Muni. Code §101.0463.C (repealed, 2000). The regulations required, among other things, that there be at least 80 square feet of bedroom area for each person over 18 years old. In 1993, this section was amended by ordinance O-17893, in light of the ruling in the case of *Briseno v. City of Santa Ana*, 6 Cal.App.4th 1378 (1992). The court held that state law preempted local regulations related to minimum room dimensions. Therefore, the regulations in § 101.0463 were amended to delete the City's more restrictive bedroom size requirements, and to reflect state law instead. Non-substantive changes were made in 1992 by ordinance O-177786. Later amendments to this section related to non-substantive changes in department names and renumbering. (See O-17956; O-18088.) In 1997, effective 2000, this section was repealed as part of the LDC update.

ANALYSIS

1. Former Regulations

The former LDC regulated rentals through the One-Family Dwelling Unit Regulations by requiring that the rooms be of a certain size in rental units. Once the regulations were amended to conform to the ruling in *Briseno*, the only remaining requirement was compliance with the State Housing Code; compliance with which is already mandated. There was no restriction in the One-Family Dwelling Unit Regulations on the length of time a unit could be rented.

The former "single housekeeping unit" definition did contain a reference to a period of occupancy. The definition referred to residents who "reside together, jointly occupy and have equal access to all areas of a dwelling unit and who function together as an integrated economic unit for a period of occupancy which exceeds one month." San Diego Muni. Code §101.0101.76.1 (repealed, 2000). However, the section is awkwardly worded at best and seems to be an attempt to define the type of relationships appropriate for the "single-family" zone in that it "refers to the status of the occupants." San Diego Muni. Code §101.0101.76.1 (repealed, 2000). It does not seem to refer to the length of time that residents- regardless of their relationship- must occupy the dwelling. In addition, the application of the ordinance is not limited to non-owner occupants. To interpret this section to have required occupants to reside for a minimum of a "month," which is undefined, would have put every category of occupant in an illegal status until the expiration of that first "month," at which time legitimacy would be granted retroactively. To have attempted to apply these code sections in this manner would have resulted in uncertainty for the occupants, landlords, and law enforcement, and there has simply been no evidence to support that this definition of "single housekeeping unit" was applied to create a required period of occupancy.

By way of contrast, the former regulations for the Multiple Family Residential Zones allowed apartment houses, "excluding premises designed or used for the temporary residence of persons for less than one week." San Diego Muni. Code §101.0410.B.3 (repealed, 2000). Therefore, the use of apartment houses for residence of less than a week was prohibited. Similar language appears in the current Municipal Code pertaining to multiple-dwelling unit uses, § 131.0422. Table 131-04B reflects that in the RM zone (Residential--Multiple Unit), "Non-owner occupants must reside on the *premises* for at least 7 consecutive calendar days" (except for the RM-5 zone, which does not contain this restriction). This clear language regarding the required length of occupancy is missing from both the former and the current Municipal Code sections on uses in the single-family residential zone. Finally, the One-Family Dwelling Rental Regulations also did not contain any restriction on the length of occupancy.

2. Current Regulations

The City of San Diego zones are set forth in Chapter 13. The general rules for the base zones are set forth in Article 1, Division 1. The base zones are Open Space; Agriculture; Residential; Institutional; Retail Sales; Commercial Services; Office Use; Vehicle and Vehicular Equipment Sales and Services; Wholesale, Distribution, Storage Use; Industrial Use; and Signs Use. Id.

The Residential Use category "includes uses that provide living accommodations for one or more persons." San Diego Muni. Code §131.0112(a)(3). The single dwelling unit subcategory is "[d]welling units where no more than one dwelling unit is located on a *lot*, usually detached, and occupied by a single household unit." San Diego Muni. Code §131.0112(a)(3)(D).

Permitted uses in the RS (Residential--Single Unit) zone are set forth in section 131.0422, Table 131-04B. It is unlawful to use or maintain any *premises* for any purpose not listed in §131.0422. San Diego Muni. Code §131.0420(a). Residential uses allowed in the RS zone are mobile home parks, single dwelling units, boarder and lodger, companion, employee housing of less than 6 employees, garage, yard and estate sales, home occupations, housing for senior citizens, and residential and transitional care facilities. Some of these uses, such as employee housing for 6 or fewer employees and boarder or lodger accommodations, are permitted uses, provided that certain set standards are adhered to. Other uses, such as residential or transitional care for more than 6 people, require a conditional use permit.

The Commercial Services category "includes uses that provide for consumer or business services, for the repair and maintenance of a wide variety of products, and for entertainment." San Diego Muni.Code §131.0112(a)(6). The subcategories are building services; business support; eating and drinking establishments; financial institutions; funeral and mortuary services; off-site services; personal services; assembly and entertainment; radio and television studios; and visitor accommodations. Id. Commercial Services in the RS zone are generally not an allowed use. Bed and Breakfast Establishments and Child Care facilities are exceptions. San Diego Muni. Code §131.0422, Table 131-04B.

Visitor accommodations are uses "that provide lodging, or a combination of lodging, food, and entertainment, primarily to visitors and tourists. (Outside of the Coastal Overlay Zone, includes single room occupancy hotels.)" San Diego Muni. Code §131.0112(a)(6)(K). There are no examples given in the current code of these uses.[2] However, because there is no definition of "visitor" or "resident" in the Land Development Code, the "visitor accommodation" regulations do not prohibit the short-term rental of a single-family dwelling.[3] Furthermore, the Visitor Accommodations section does not even pertain exclusively to visitors, only referring to "primarily to visitors and tourists." Id., emphasis added.

A dwelling that is rented out in its entirety as a short-term rental is not a hotel or motel. Hotel/motel is defined as "a building containing six or more *guest rooms* that are rented for less than 30 days and used or designed to be used for sleeping purposes. *Hotel* or *motel* does not include any jail, hospital, asylum, sanitarium, orphanage, prison, detention home, or other institution in which human beings are housed and detained under legal restraint." San Diego Mun. Code §113.0103. A guest room is then defined as "any rented or leased room that is used or designed to provide sleeping accommodations for one or more guests in *hotels*, *motels,* bed and breakfast facilities, private clubs, lodges, and fraternity or sorority houses." Id. The rental of an entire dwelling does not constitute the rental of guest rooms, and thus, the dwelling does not become a hotel or motel.

Additionally, to interpret the rental of an entire dwelling as creating a hotel or motel creates a conflict in the LDC sections. Hotels and motels, which fit the description of a type of visitor accommodation, are not a permitted use in the RE (Residential--Estate), RS, RX (Residential--Small Lots), or RT (Residential--Townhouse) zones, nor are they a permitted use in any of the RM zones, except for the RM-4 and RM-5. Multiple-family dwellings are also allowed in the RM-4 zone, however, non-owner occupants must reside on the premises for at least 7 consecutive calendar days. Therefore, in the RM-4 zone only, interpreting the rental of an entire dwelling as creating a hotel/motel directly conflicts with the restrictions placed on multiple-family dwellings: a non-owner occupant in the RM-4 zone must reside in the hotel/motel for at least 7 consecutive calendar days. There is no rational basis for such a distinction.

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[2]The former code, §101.0426.1, Commercial Visitor- Service, was "intended to provide for establishments catering to the lodging, dining, and shopping needs of visitors…." Section 1010.0426.1.B listed numerous uses: hotels and motels; retailing of goods and services from the following establishments: agencies for tickets, travel, and car rental; antique shops; apparel shops; art stores and art galleries; bakeries; barber shops and beauty shops; bicycle shops, including rental and repair; book stores; cocktail lounges; confectionaries; delicatessens; drug stores; florists; food stores; gift shops; greeting card shops; hobby shops; jewelry shops; laundromats; liquor stores; music stores; photographic equipment stores and outlets; restaurants, including outdoor dining; shoe stores and shoe repair shops; sporting good stores, including rental and repair; and stationers. In addition, the following uses were allowed on floors other than the ground floor: business and professional offices (excluding employment agencies and hiring halls); private clubs, lodges, and fraternal organizations; studios for teaching art and music; and apartments. Id.

[3]Transient Occupancy Taxes (TOT) must be paid for occupancy of less than 30 days. San Diego Muni. Code, Chapter 3, Article 5, Division 1. While compliance with all laws is required, this section regarding payment of transient occupancy taxes is not a definition of visitor for land uses purposes. See, §§ 111.0101, defining the Land Development Code; and 113.0101, containing definitions specific to the Land Development Code.

Finally, the issue whether to create a minimum stay for single dwelling units was presented in 1997 to the Land Use & Housing Committee, which recommended against regulating the minimum stay in single dwelling units. On November 18, 1997, the City Council introduced the LDC amendments without a minimum stay requirement. *See*, City Manager's Report P97-153, September 29, 1997, attach. 1, pg. 11; attach. 8, pg. 6.

If the prohibition of short-term rentals is desired, amendments to the Land Development Code should define what length of stay is prohibited, similar to the regulations for the apartment houses in the Residential--Multiple Unit zone.

3. Future Regulations

Many jurisdictions have struggled with issues relating to vacation rentals. Some jurisdictions have addressed the problem by regulating short term vacation rentals in single-family residentially zoned areas. Some common requirements:

- obtain a permit, although some jurisdictions just use the business license as a permit
- length of rental required varies from 7 days to 1 month
- a contact person must be designated that can respond 24 hours a day, 7 days a week; this contact information must be publicly posted and/or on file
- no on-site advertising allowed
- parking restrictions
- occupancy restrictions
- trash collection
- penalties vary- increasing levels of fines, revocation of the business license, misdemeanor prosecution

Other jurisdictions have attempted to ban short-term rentals. Anecdotal evidence supports the belief that most short-term vacation rentals are in the coastal area; any amendments to the City's local coastal program must be certified by the California Coastal Commission [CCC]. However, because of the reduced access to the coast the CCC has rarely approved an actual prohibition on short-term rentals in residential areas. The City of Imperial Beach did succeed in prohibiting the use in residential areas, but they allowed it as a new use in commercial areas, also on the coast. In addition, there were only nine residences affected, and the use was to be phased out at those locations. The City of Coronado also prohibits "transient occupancy" of less than 25 days in any residential area, with a few exceptions. The following is a summary of regulations in various coastal cities and counties:

<u>Encinitas:</u>

Over the last couple of years, the City of Encinitas proposed two changes to their municipal code that are relevant to this issue. One change was that short-term vacation rentals, defined as a rental of 30 days or less, would be completely prohibited in all residential areas. At

the CCC meeting of November 14, 2006, the Coastal Commission approved this proposed amendment to Encinitas' Local Coastal Program [LCP], with modifications. However, the modifications were that short- term vacation rentals would in fact be *allowed* in residential areas west of Highway 101, where 90% or more of the city's vacation rentals were located, essentially gutting the very regulation that Encinitas was attempting to have the CCC approve.

The second amendment to the Encinitas' municipal code was a regulation of the short-term vacation rentals. Chapter 9.38 was amended to require that short term rentals obtain a permit prior to operation, the operators use their "best efforts" to control various nuisances such as noise, and respond within 2 hours of a report of the nuisance and use their best efforts to resolve the complaint within 24 hours. Any operator that fails to timely respond to two or more complaints is subject to specified fines that range from $250-$1000. The occupancy of the short-term rental unit is limited and cannot exceed two persons per bedroom unit, plus one additional person per dwelling.[4] The number of vehicles is limited to the number of on-site parking spaces. Trash may not be in public view, except for from sunset on of the day prior to trash pick up, and must be in approved receptacles. The information regarding the permissible number of occupants and vehicles, and trash disposal requirements must be included in each rental agreement. The operator must display the permit, which includes the maximum number of applicants and vehicles and the 24 hour, 7 day phone number of the responsible operator, on the inside of the main entry door. This same information must also be displayed on the outside of the unit, in plain view of the general public.

In commenting on the proposed permit system, the Coastal Commission found that the nuisances associated with short-term rentals "can be substantially regulated to assure the compatibility of vacation rentals in the residential neighborhoods." (CCC staff report, Tue 9c, October 26, 2006, pg. 2.) Therefore, the CCC found a complete prohibition on short-term rentals unnecessary.

Imperial Beach:

In 2002, the City of Imperial Beach also sought to amend their LCP to prohibit short-term rentals (defined as rental of a dwelling for less than 30 consecutive calendar days) in all residential zones. The CCC rejected this proposed amendment as unnecessarily restrictive. However, in 2004, the CCC did approve an LCP amendment to add the short-term rentals as a permitted use in the Commercial and Mixed-Use zones near the shoreline, and to phase out the existing uses in the residential area (9 affected residences).

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[4] This occupancy restriction would seem to be preempted by the ruling in *Briseno v. City of Santa Ana*, 6 Cal.App.4th 1378 (1992), in which the court held that local standards on occupancy were preempted by the State Housing Code. An occupancy standard based on state law standards would be permissible. The City of Solana Beach has a handout for landlords of short term vacation rentals, which reminds the landlords of the state occupancy requirements and their duty to comply with the law.

City of Solana Beach:

In 2003 and 2004, the City of Solana Beach enacted an ordinance requiring a permit for short-term vacation rentals. A short-term vacation rental is defined as the rental of any structure or portion thereof for "occupancy for dwelling, lodging or sleeping purposes for more than seven, but no more than 30, consecutive calendar days in duration in a residential zoning district, including detached single-family residences, condominiums, duplexes, twinplexes, townhomes and multiple-family dwellings." Solana Beach Muni. Code §4.47.030. Rental for less than seven consecutive calendar days is prohibited; rental for more than 30 consecutive calendar days is not regulated. Solana Beach Muni. Code §§4.47.040; 4.47.050.

The operator of a vacation rental is responsible for the nuisance behaviors of the occupants; failure to control the occupants is considered failure to respond. Solana Beach Muni. Code §4.47.060. The permit must be displayed on the inside of the main entry door and posted in public view. Solana Beach Muni. Code §§4.47.080; 4.47.090. Failure to comply results in a $500 fine for the first violation in any 12 month period, $1000 fine for the second violation in any 12 month period, and revocation of the permit for the third violation in any 12 month period. Solana Beach Muni. Code §4.47.070.

The City of Solana Beach has not yet submitted their ordinances for CCC certification.

Humboldt County:

The county ordinances had previously prohibited short term vacation rentals, although it seemed the use continued. In 2005, the CCC approved an LCP amendment to allow the use in the single family residential and mixed residential areas in a newly created zone, with a permit. A vacation home rental is defined as the "transient use of single and two family (duplex) dwelling units." Humboldt Co. Code §314-157. A dwelling unit is defined as a "room or combination of rooms including one and only one kitchen (unless otherwise specified in these regulations), and designed or occupied as living or sleeping purposes for a person or family." Humboldt Co. Code §313-139. Transient habitation "includes motels, hotels, resorts and other facilities other than for recreational vehicle parks providing lodging services to guests on a less-than-weekly basis." Humboldt Co. Code §172.17.

The permit requires compliance with residential parking standards[5], limits the occupancy to 10 persons, [6] prohibits on-site advertising, and requires that a contact name and number be mailed to all occupied residences within a 300 foot radius. Humboldt Co. Code §314-37.1. The contact person must reside within a 5 mile radius, and must be available 24 hours a day to respond to tenant and neighborhood questions and concerns and to ensure compliance with the

[5] There are no parking requirements specific to Vacation Rentals.
[6] See ftnt. 1.

code. Id. The operator must obtain a business license, collect the appropriate transient occupancy tax, and ensure that trash is disposed of on a weekly basis. Id.

San Luis Obispo County:

In 2003, the CCC approved an amendment to the San Luis Obispo County's LCP to allow short term vacation rentals in some areas, with regulations.[7] Vacation rentals are limited to one individual tenancy within seven consecutive days (excluding the property owner). San Luis Obispo Co. Code §23.08.165. Vacation rentals may not be located within 200 linear feet of another residential vacation rental or "other type of visitor- serving accommodation that is outside of the Commercial land use category." Id. The code limits the maximum number of occupants to the amount of on-site parking available, not to exceed two persons per bedroom, plus two additional persons.[8] Id. Advertising on-site is prohibited, all parking is required to be on-site, noise is regulated, and the use of large electrical equipment is prohibited. Id. All vacation rentals must designate a local property manager who is available 24 hours a day to respond to tenant and neighborhood questions or concerns. Id. This contact information must be on file with the county sheriff, provided to property owners within a 300 foot radius, and posted in the rental unit. Id. Failure of the responsible person to respond more than three times in any consecutive six month period may be grounds for revocation of the business license. Id.

City of Coronado:

The City of Coronado generally prohibits "transient occupancy," which is defined as a stay of 25 consecutive calendar days or less, in any residential area. Coronado Muni. Code §§ 86.78.020; 86.78.060; 86.78.070.[9] However, the Coronado Local Coastal Program was approved by the CCC in 1983, and based on recent CCC actions; it is unlikely that the Commission would support such a restriction today.

Possible future City of San Diego actions regarding short-terms rentals could include a permit system and/or a ban on rentals of a certain length of time. However, should a ban be sought, it is not possible to predict what length of stay the CCC is likely to approve.[10] The CCC staff report for the City of Encinitas' application summarized some of their recent short-term rental decisions, and stated: "In each case, the Commission must evaluate the availability of existing hotel/motel accommodations in the near shore area, the historic pattern of short-term vacation rentals in the area, the specific visitor serving uses available, the services available to

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[7] In comparison to the County of San Luis Obispo, the City of San Luis Obispo prohibits vacation rentals in any zone. San Luis Obispo Muni. Code §17.22.010.G. A vacation rental is a "dwelling or part of a dwelling where lodging is furnished for compensation for fewer than thirty consecutive days." San Luis Obispo Muni. Code §17.100.220.

[8] See ftnt. 1.

[9] Dwelling units within R-4 zone motels, or lodging houses with in the "P" Overlay Zone may be used as transient rentals. Coronado Muni. Code §§ 86.78.060.B.

[10] The May 23, 2007 letter from the Pacific Beach Community Planning Committee requested a minimum rental period of one month.

serve the proposed vacation rental use, and the impacts of such vacation rental use in the residential community." CCC Staff Report, Tue 9C, October 26, 2006, pg. 12.[11]

Any proposed amendment to the City's local coastal program that proposes to ban short-term rentals should include at a minimum information regarding the size of the area affected, the approximate number of short-term rentals currently available, whether the short-term nature is seasonal or not, where other short-term lodging is located in relation to the coastal area and how much lodging is available, and the historical availability of short-term rentals.

CONCLUSION

There is no evidence that the past zoning codes prohibited short-term vacation rentals in the single-family zone, nor do the current regulations prohibit such a use. Should the City decide that there is sufficient rationale, it may consider requiring a permit, similar to that used by other cities, and/or a prohibition on short-term rentals. A change in the zoning laws of the Coastal Zone will require CCC approval prior to becoming effective.

MICHAEL J. AGUIRRE, City Attorney

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[11] The report is available at http://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf.