



Position Paper

October 6, 2015

This document outlines Save San Diego Neighborhoods' position regarding each of the items below.

1. STVRs are Visitor Accommodations and Prohibited in Residential Zones

The definition of **Visitor Accommodations** is found in the Commercial Use Category of SDMC Section 131.0112, entitled Descriptions of Use Categories and Subcategories. This section provides descriptions of each use category and subcategory found in the Use Regulations Tables of each base zone. **Section 131.0112** does not determine in what zone a particular use is permitted.¹

Visitor Accommodations - Uses that provide lodging, or a combination of lodging, food, and entertainment, primarily to visitors and tourists. (SDMC Section 131.0112(K)(6))

Visitor Accommodations is a line item in the Use Regulations Tables for each zone.

To confirm this, locate the Use Regulations Table for Residential Zones (SDMC section 131.0422).² The category, "Visitor Accommodations" is on page 12 in the September 2015 version of the SDMC. Toward the bottom of page 12, you'll find the category - Visitor Accommodations. (See last page of this document.)

¹ This sentence is **bolded** because City Councilmember staffers have said it was their understanding the use description, **Visitor Accommodations**, "only applied in commercial zones and not residential zones". This is incorrect. Staffers are confusing use categories and subcategories – and what uses are permitted in which zones – with the zone itself. In other words, commercial uses, like Visitor Accommodations, are not found exclusively in commercial zones. For example, Bed & Breakfast Establishments, which are defined as Visitor Accommodations are permitted - under certain conditions, in residential zones. And, some commercial uses are permitted in industrial zones. Again, although Visitor Accommodations is a commercial use, it is *not* restricted to commercial zones.

² The Visitor Accommodations category may be on different pages depending on the SDMC version/publication one is referring to. In any event, the Visitor Accommodations category is in the Use Regulations Table and has been since the existing Code was adopted – decades ago.

The hyphen (-) in the boxes to the right indicate that the use is “not permitted”. (See the Legend for Table 131-04B on page 7 in the September, 2015 version of the SDMC.) You’ll find a hyphen in each of the boxes to the right of Visitor Accommodations. These hyphens indicate Visitor Accommodations are NOT permitted in residential zones. (See attached -- Legend for Table 131-04B from SDMC section 131.0422.)

2. The 2007 Opinion of City Attorney Michael Aguirre’s Office Is Legally Incorrect - And It Appears City Attorney Goldsmith Knows This

If one were to somehow conclude STVR do not fall under the definition of Visitor Accommodations, they are still **not** permitted because STVR are “not one of the enumerated permitted uses in the San Diego Municipal Code.”

In 2007, then City Attorney Michael Aguirre provided a written opinion stating because they are not listed in the SDMC, STVR are not prohibited. In fact, just the opposite is true. Because STVR are not listed they are NOT permitted and are unlawful. Simply put, the 2007 memorandum is a poorly reasoned legal opinion that reaches an erroneous legal conclusion.³

In his 2011-2012 prosecutions to shut down medical marijuana dispensaries, City Attorney Jan Goldsmith argued just this point – that because marijuana dispensaries were not listed in the SDMC, they were not permitted. The San Diego Superior Court agreed and concluded, “Marijuana dispensary, collective or cooperative is not one of the enumerated permitted uses in the San Diego Municipal Code, they are prohibited”.

To support this conclusion, the City Attorney and the Court cited SDMC Section 131.0520(b), which states, “*Within commercial zones, no structure or improvement, or portion thereof, shall be construed, established, or altered, nor shall any premises be used or maintained except for one or more of the purposes or activities listed in Table 131-05B. It is unlawful to establish, maintain, or use any premises for any purpose or activity not listed in this section or Section 131.0522.*”

This language – on which City Attorney supported his successful argument that medical marijuana dispensaries were prohibited - is identical to SDMC Section **131.0420(b)** which states, “*Within the residential zones, no structure or improvement, or portion thereof, shall be constructed, established, or altered, nor shall any premises be used or maintained except for one or more of the purposes or activities listed in Table 131-04B. It is unlawful to establish,*

³ Although merely an opinion, some staffers and City Councilmembers apparently believe the 2007 opinion carries the weight of law.

maintain, or use any premises for any purpose or activity not listed in this section or Section 131.0422.”⁴

Like most California cities, including Santa Monica and Los Angeles, San Diego has what is described as a “*categorical use zoning scheme*”. Which means, **if the use is not listed, it is not permitted.**

The bottom line: If you believe STVR are not Visitor Accommodations, STVR are not listed and are not permitted.⁵

3. The City Is Not “Estopped” from Enforcing the Ordinance Prohibiting STVRs In San Diego Residential Zones

On July 15, 2015, the *San Diego Union-Tribune*, quoting comments made by City Attorney Goldsmith, reported him stating the following at a recent La Jolla Town Council meeting:

Ultimately, because San Diego has long permitted the use of homes for short-term rentals, Goldsmith opined, “the better interpretation and conclusion was that there was not a ban. ...

“A longtime interpretation (of a law) by a governing body charged with its enforcement is given great weight by the judges ... (particularly when) the city is charged with enforcing its own ordinances and it basically has not shut anybody down for that whole 30-year ordinance,” Goldsmith said, adding that times have changed and an online industry has created “a steady stream of neighbors who are coming in, partying, leaving, then new neighbors are coming in and partying.”⁶

⁴ Each Division for each Base Zone in Municipal Code Chapter 13 - Zones has an identical section with the **same language which prohibits any use not enumerated/listed as a category in the Use Table**. Open Space –SDMC section 131.0220(b); Agricultural – SDMC section 131.0320(b); Residential – SDMC section 131.0420(b); Commercial – SDMC section 131.0520(b); Industrial – SDMC section 131.0520(b). (Note that even the section numbers are identical save the division – which denotes the zone.)

⁵ This is why San Diego’s is called a Categorical Use Zoning Scheme. “If the use doesn’t fit . . . you can’t permit!”

⁶ At the meeting City Attorney Goldsmith also said, referring to the 2007 Aguirre opinion, “That opinion was actually well done, but it is not definitive because the law is ambiguous.” In fact, the opinion is erroneous and the law is not ambiguous. In any event, it’s clear the City Attorney isn’t “embracing” the 2007 opinion.

On this occasion, and others, City Attorney Goldsmith has said that because of the length of time that has passed without enforcement, the City is now precluded or “estopped” from enforcing the San Diego Municipal Code ordinances that prohibit STVR in residential zones.

City Attorney Goldsmith’s legal opinion - that the City is estopped because of its elected officials have failed to enforce the zoning laws - is unequivocally **not** supported by California Courts.

The following is an excerpt from a published California Court of Appeals decision issued on May 20, 2015 – less than five months ago. In this matter, the City of Los Angeles had failed to enforce the residential zoning restriction for over 25 years on a parcel that had been used as a parking lot. The property owner’s estoppel argument failed and the Court of Appeals ruled that, despite the passage of decades without enforcement, the City – charged with protecting the interest of the public – was not estopped and had the right to enforce the residential zoning ordinance.

These protectable interests further manifest themselves in the preservation of land values, in esthetic considerations and in the desire to increase safety by lowering traffic volume. **To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake. Thus, permitting the violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating nonconforming uses and against expansion of such uses.** *Schafer v City of Los Angeles*, 237 Cal.App.4th 1250 (2015), p.665 (emphasis added)

Below is an excerpt from a case titled *Feduniak v California Coastal Commission*, 148 Cal App 4th 1346. This case is also cited by the Court in *Schafer v City of Los Angeles* (supra).

As the court in *Caminetti v. State Mut. Life Ins. Co.*, supra, 52 Cal.App.2d 321, explained, “To govern themselves, the people act through their instrumentality which we call the State of California. *The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary committed the night before.* [Citations.]” (Id. at p. 326.).

The length of time a City, either wittingly or unwittingly, fails to enforce a zoning ordinance will not give rise to a successful “estoppel” argument.

Additionally, all of the land use attorneys with whom SSDN has consulted, including City Attorneys in other California municipalities, have said City Attorney Goldsmith’s “estoppel argument” is legally wrong.⁷ That the City would be estopped from enforcing its ordinances prohibiting STVR in residential zones, merely because the City has failed to enforce and “not shut anybody down for that whole 30-year ordinance,” – is simply incorrect and unsupported in California law.⁸

Conclusion

SSDN closes with the following quote from the California Supreme Court in the case, *Miller v Board of Public Works* (1925), 195 Cal. 477 cited in *Ewing v City of Carmel-by-the-Sea* (1991), 234 Cal.App.3d 1579.

Whether or not transient rentals have the other "unmitigatable, adverse impacts" cited by the council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. **They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.**

⁷ SSDN and its attorneys have consulted over 15 land-use attorneys, including past and present California City Attorneys.

⁸ Setting aside any discussion about whether this statement by the City Attorney is correct. Even he agrees STVR have only become a severe problem over the course of the last ten years.

San Diego Municipal Code

Chapter 13: Zones

Relevant SDMC Sections

§131.0401 Purpose of Residential Zones

The purpose of the residential zones is to provide for areas of residential development at various specified densities throughout the City. **The residential zones are intended** to accommodate a variety of housing types and to encourage the provision of housing **for all citizens of San Diego**. It is also intended that the residential zones reflect desired development patterns in existing neighborhoods while accommodating the need for future growth.

§131.0403 Purpose of the RS (Residential--Single Unit) Zones

(a) The purpose of the RS zones is to provide appropriate regulations for the development of single dwelling units that accommodate a variety of lot sizes and residential dwelling types and which **promote neighborhood quality, character, and livability**. It is intended that these zones provide for flexibility in development regulations that allow reasonable use of property while minimizing adverse impacts to adjacent properties.

§131.0420 Use Regulations of Residential Zones

The regulations of Section 131.0422 apply in the residential zones where indicated in Table 131-04B.

(b) Within the residential zones, no structure or improvement, or portion thereof, shall be constructed, established, or altered, nor shall any premises be used or maintained except for one or more of the purposes or activities listed in Table 131-04B. **It is unlawful to establish, maintain, or use any premises for any purpose or activity not listed in this section or Section 131.0422.**

§131.0112 Descriptions of Use Categories and Subcategories

(6) Commercial Services Use Category

(K) Visitor Accommodations - Uses that provide lodging, or a combination of lodging, food, and entertainment, primarily to visitors and tourists.

§131.0422 Use Regulations Table for Residential Zones

The uses allowed in the residential zones are shown in the Table 131-04B.

Legend for Table 131-04B

Symbol In Table 131-04B	Description Of Symbol
P	Use or use category is permitted. Regulations pertaining to a specific use may be referenced.
L	Use is permitted with limitations, which may include location limitations or the requirement for a use or <i>development permit</i> . Regulations are located in Chapter 14, Article 1 (Separately Regulated Use Regulations).
N	Neighborhood Use Permit Required. Regulations are located in Chapter 14, Article 1 (Separately Regulated Use Regulations).
C	Conditional Use Permit Required. Regulations are located in Chapter 14, Article 1 (Separately Regulated Use Regulations).
-	Use or use category is not permitted.

Use Categories/ Subcategories [See Section 131.0112 for an explanation and descriptions of the Use Categories, Subcategories, and Separately Regulated Uses]	Zone Designator	Zones																						
	1st & 2nd >>	RE-	RS-												RX-		RT-							
	3rd >>	1-	1-												1-		1-							
	4th >>	1	2	3	1	2	3	4	5	6	7	8	9	10	11	12	13	14	1	2	1	2	3	4
Separately Regulated Retail Sales Uses																								
Agriculture Related Supplies & Equipment	-	-												-		-								
Alcoholic Beverage Outlets	-	-												-		-								
Farmers' Markets																								
Weekly Farmers' Markets	-	-												-		-								
Daily Farmers' Market Stands	-	-												-		-								
Plant Nurseries	-	-												-		-								
Retail Farms	-	-												-		-								
Retail Tasting Stores	-	-												-		-								
Swap Meets & Other Large Outdoor Retail Facilities	-	-												-		-								
Commercial Services																								
Building Services	-	-												-		-								
Business Support	-	-												-		-								
Eating & Drinking Establishments	-	-												-		-								
Financial Institutions	-	-												-		-								
Funeral & Mortuary Services	-	-												-		-								
Instructional Studios	-	-												-		-								
Maintenance & Repair	-	-												-		-								
Off-Site Services	-	-												-		-								
Personal Services	-	-												-		-								
Radio & Television Studios	-	-												-		-								
Tasting Rooms	-	-												-		-								
Visitor Accommodations	-	-												-		-								
Separately Regulated Commercial Services Uses																								