Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: December 21, 2015

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Short term vacation rentals

INTRODUCTION

On September 12, 2007, former City Attorney Michael Aguirre issued a Memorandum of Law ("2007 Memorandum") concerning short term vacation rentals in residential-single unit ("RS") zones. The 2007 Memorandum concluded that there are neither regulations nor prohibitions on short-term vacation rentals in single-family zones. The Memorandum suggested that the City Council consider implementing such regulations or prohibitions and provided examples adopted by other cities.

Our office has been asked to clarify portions of the 2007 Memorandum.

QUESTIONS PRESENTED

1. Does it remain the City Attorney office's opinion that there are currently neither regulations nor prohibitions on short-term vacation rentals in RS zones?

2. Does the "visitor accommodations" ordinance bar short-term vacation rentals?

3. What does the City Attorney's office recommend be done to address the issue of short-term vacation rentals?

SHORT ANSWERS

1. Yes with an explanation. This question is only directed toward regulations or prohibitions based upon the term of an occupancy. The only regulation in RS zones that restricts the term of a rental pertains to boarders and lodgers which by definition are typically not short-term vacation rentals. That regulation should be applied where supported by facts.

2. The "visitor accommodations" ordinance is not based upon a specific term of an occupancy, so it does not bar "short-term" rentals. It does, however, bar residential uses that "provide lodging… primarily to visitors and tourists." The 2007 Memorandum concluded that this provision is vague and therefore unenforceable as to short term vacation rentals.

3. The Mayor and City Council should change the Municipal Code to clarify what is meant by "visitor accommodations" and "boarders".

DISCUSSION

A. Does it remain the City Attorney office's opinion that there are currently neither regulations nor prohibitions on short-term vacation rentals in RS zones?

RS zones permit single family residences. With one exception, there are no restrictions or regulations that are based upon the term of occupancy. The one exception is not directed at what has commonly been referred to as short-term vacation rentals, i.e., the rental of an entire dwelling without the owner or a long-term occupant present.

The one regulation pertains to "boarders and lodgers". Under Municipal Code section 141.0301 ("the boarders and lodgers ordinance"), boarders and lodgers must occupy the premises for a minimum of 30 consecutive calendar days in an RS zone. In addition, there are a number of use regulations that would apply, including a restriction of no more than two boarders and lodgers per dwelling unit.

Under Municipal Code section 113.0103, a boarder "means an individual resident who is furnished sleeping accommodations and meals in a residential structure." A lodger "means any person renting a room in a residential structure for living or sleeping purposes without having free access to and use of the rest of the structure."

The definition of lodger appears clear. The occupancy must be a renter (as opposed to a non-paying guest) who rents a room without free access to and use of the rest of the structure. This type of occupancy is not normally associated with a short-term vacation rental, but if the circumstances do fit within this definition, the rental must be for at least 30 consecutive calendar days in an RS zone, and there must be no more than two lodgers.

The definition of boarder should be clarified. As it currently reads, it applies to anyone who is a resident and is provided sleeping accommodations and meals. It is not limited to renters. This definition could apply to all occupants of a home and thereby limit to two the number of people residing in a home, raising significant legal issues. That was unlikely the intent of the City Council in adopting the ordinance and it should be clarified.

Regardless, the current form of the boarder definition would not cover short-term vacation rentals because short-term occupants typically are not residents (i.e., more permanent occupants) and are typically not provided meals.

B. "Visitor Accommodations"

"Visitor accommodations" are not permitted in the RS zone. San Diego Municipal Code section 131.0422, Table 131-04B.

"Visitor accommodations" are defined as uses "that provide lodging, or a combination of lodging, food and entertainment, primarily to visitors and tourists". San Diego Municipal Code section 131.0112(a)(6)(K) ("the visitor accommodations ordinance")

The 2007 Memorandum concluded that the "visitor accommodation" ordinance is vague and therefore unenforceable as to short term vacation rentals. On page 5 the 2007 Memorandum pointed out that "there is no definition of 'visitor' or 'resident' in the Land Development Code…." To further support its conclusion of vagueness, the 2007 Memorandum also pointed out that there is no ban on providing lodging to visitors and tourists, only providing lodging "primarily" to visitors and tourists (2007 Memorandum, page 5).

Due process requires that statutes forbidding or requiring any act must be set forth in such terms that people of common intelligence do not need to guess at its meaning, or differ as to its application. 58 Cal. Jur. 3d, *Statutes* § 21 (2004). Such a standard not only provides law-abiding citizens with the guidelines they need to follow, it also prevents enforcement on a subjective, ad-hoc basis. 14 Cal. Jur. 3d, *Constitutional Law* § 336 (2015).

The visitor accommodations ordinance could be interpreted to ban many different types of rentals, ranging from year-long leases to short-term vacation rentals. The 2007 Memorandum did not interpret the visitor accommodations ordinance in that manner, but declined to enforce the ordinance in light of its vagueness. We see three areas of vagueness that should be corrected if the Mayor and City Council want the visitor accommodations ordinance to cover short-term vacation rentals:

1. Definition of Visitor. As pointed out in the 2007 Memorandum, the term "visitor" is not defined in the ordinance. Although a common meaning could be applied to infer that the person must be a temporary occupant, it is not clear what term of occupancy is sufficiently temporary to be deemed a "visitor". For example, a tenant with a one year lease on a temporary job assignment and, for that matter, any tenant who still considers another place as "home", may be "visitors". Absent a clear delineation of what occupancies are covered by the prohibition, application of the ordinance becomes subjective on an ad hoc basis. If the intent is to cover short-term vacation rentals, the ordinance should be amended to provide some objective term of occupancy such as "… who occupy (or rent, see below) the premises for less than ____ days."

2. Rental. The visitor accommodations ordinance does not require the occupant to be a renter for its provisions to apply. Thus, a "visitor" can be anyone who is visiting- a guest, a renter, a friend or a relative. This could result in overbroad applications that extend to visiting family members and a broad range of other

occupancies. If the intent is to cover short-term vacation rentals, the ordinance should be amended to add "rental" to the definition.

3. "Primarily". As the 2007 Memorandum pointed out, the visitor accommodations ordinance does not ban visitors or tourists from occupying a dwelling. Rather, there is a ban on providing lodging "primarily" to visitors and tourists. This "primarily" standard needs to be clarified or removed and replaced with a more objective standard.

   There is no definition of "primarily". Assuming we can apply a common usage definition (e.g., "for the most part" or more than half the time), what period of time should judges and jurors use to calculate whether visitor and tourist lodging is the "primary" use of the dwelling? For example, if the home provides visitor and tourist lodging less than 6 months in a year, can we conclude that the "primarily" standard has not been met? Or, is it to be measured over a shorter period of time than one year? Should it be measured over a weekend? A month? Or, over the entire time period of ownership? This is left to the imagination and subjective application.

In order for a zoning law to result in criminal conviction it must be written in language that is clear and devoid of vagueness. The visitor accommodations ordinance should be clarified so that it can be enforced in an objective manner and not on a subjective, ad-hoc basis.

Enforcement of zoning codes begins with case referrals to the City Attorney's office from the Code Enforcement Division of the Development Services Department. This Department operates under the Mayor. Attesting to its vagueness, the City Attorney's office has not found a single case that has been referred to the office under the visitor accommodations ordinance.

The fact that the City has never interpreted the visitor accommodations ordinance to bar short-term vacation rentals would be a significant hurdle to overcome in any enforcement action. See *Coca-Cola Co. v. State Board of Equalization* (1945) 25 Cal.2nd 918, 921 (contemporaneous administrative construction of the ordinance by those charged with its enforcement and interpretation is entitled to great weight).

C. What does the City Attorney's office recommend be done to address the issue of short-term vacation rentals?

The Mayor and City Council should decide what policy they want to adopt regarding short-term vacation rentals and then clarify the existing law regarding "visitor accommodations", "boarders" and other types of transient residential uses.

Rather than have a broad, vague and unenforceable regulation, the Mayor and City Council should clearly identify what is and what is not allowed in terms that people of common intelligence do not need to guess at its meaning, or differ as to its application. A clear policy would ensure that enforcement is equal under the law and not on a subjective, ad-hoc basis.

As always, this office is available to assist.

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MS-2015-27
cc: Scott Chadwick, Chief Operating Officer
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