Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: December 5, 2018

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Short-Term Rental Regulations

INTRODUCTION

At the Special Meeting of the San Diego City Council (Council) on October 22, 2018, the Council voted to repeal the short-term rental regulations[1] adopted on July 16, 2018. Following that meeting, Councilmember Alvarez asked this Office to summarize the legal advice previously provided to the Council and to describe the enforcement options available under existing law. We provide a summary of our prior advice below.

I. Summary of Legal Memoranda

A. Memo of September 12, 2007 (2007 Memo)

In 2007, then-Councilmember Kevin Faulconer asked this Office whether the San Diego Municipal Code (Municipal Code or SDMC) regulated or banned STVRs in single-family residential zones and, if it did not, whether the Council could amend the Municipal Code to regulate or prohibit STVRs in single-family residential zones.[2] 2007 City Att'y MOL 142 (2007-14; Sept. 12, 2007).

In response to the first question, we said that the Municipal Code did not specifically regulate or prohibit STVRs in single-family residential zones. We explained that the City of San Diego had created zones that define how land within the City's limits may be used. Permissible uses in single-family residential zones are described in Municipal Code section 131.0422, Table 131-04B. We also said that it is "unlawful to use or maintain any *premises* for any purpose not listed in § 131.0422." 2007 City Att'y MOL 142, 145.

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[1] This short-term use has been referred to by various names, such as short-term vacation rentals (STVRs), short-term rentals (STRs), and short-term residential occupancy (STROs). They have the same meaning for purposes of this memo.

[2] We noted that, "[w]hile 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." 2007 City Att'y MOL 142. This was to give context to our memo.

In response to the second question, we advised that the Council could amend the Land Development Code to regulate or prohibit STVRs in single-family residential zones, and provided examples of regulations from other cities and counties. We said that a ban "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." *Id.* at 151. We concluded that regulating or prohibiting STVRs would require defining the prohibited length of stay and certification by the California Coastal Commission if the Coastal Overlay Zone is impacted.

In summary, the 2007 Memo clarified that the Municipal Code that existed at that time did not address or even define STVRs. Under a permissive zoning ordinance, which existed in San Diego then as it does now, a use that is not expressly allowed is considered unlawful.[3] We advised that the Council could amend the Municipal Code to define and to ban STVRs, and cautioned that potential obstacles would exist if the Council banned STVRs in the Coastal Overlay Zone.

The advice rendered in our 2007 Memo remains unchanged.[4]

B. Memo of December 21, 2015 (2015 Memo)

The Mayor and the Council requested answers to three questions: (1) whether it was still the City Attorney's opinion that the Municipal Code neither regulated nor prohibited STVRs in residential zones; (2) whether the Municipal Code, which defines "visitor accommodations," bars STVRs; and (3) the City Attorney's recommendation on how to handle STVRs.

As to the first question, we confirmed that the opinion rendered in our 2007 Memo remained unchanged. We wrote, "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." City Att'y MS 2015-27 (Dec. 21, 2015). The only regulation that restricts the term of a rental pertains to boarders and lodgers, a term that is defined in the Municipal Code. *Id.* at 2.

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[3] It is not possible to list all potential uses and types of uses in the Municipal Code. The City's formal process leaves use determinations up to the City Manager, although the Planning Commission may provide an advisory opinion. SDMC § 131.0110. This Office understands that the City Manager, through several Development Services Department Directors, has long considered the use of dwelling units for short-term stays to be a residential use, although we are not aware of a written use determination. An earlier Report to Council from this Office noted the ability of the City to use its police powers to preserve the residential character of neighborhoods by regulating or prohibiting commercial uses, such as boarding houses. 2006 City Att'y Report 1146, 1149 (RC-2006-30; Nov. 20, 2006). Therefore, the City could consider amendments to the Municipal Code consistent with this advice.

[4] On May 27, 2015, then-City Attorney Jan Goldsmith issued a memorandum reiterating the conclusions of the 2007 Memo and advising that "[t]here is nothing in the 2007 MOL that would impede the ability to change the law. In fact, the 2007 MOL discussed regulations from other jurisdictions and suggested that the City consider updating the law."

We advised that the term "visitor accommodations" is vague and could not be enforced as an STVR because "there is no definition of 'visitor' or 'resident' in the Land Development Code . . . ." and "there is no ban on providing lodging to visitors and tourists, only providing lodging 'primarily' to visitors and tourists." *Id.* at 3 (citing 2007 Memo). We explained that "[d]ue 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." *Id.* at 3 (citing 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." *Id.* (citing 14 Cal. Jur. 3d, *Constitutional Law* § 336 (2015)).

Our 2015 Memo suggested the Mayor and the Council could amend the definition of "visitor accommodations" to include STVRs by: (1) defining "visitor" to provide an objective definition; (2) narrowing the application of the term "visitor" to renters only, and not to any person who is visiting (i.e., a guest, a renter, a friend, or a relative); and (3) clarifying the meaning of "primarily," or removing that word from the definition of "visitor accommodations."

Finally, we recommended that:

> 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.

Id. at 4.

The advice rendered in our 2015 Memo remains unchanged.

C. Memo of March 15, 2017 (2017 Memo)

Councilmember Bry asked this Office whether STVRs are "permitted" in a single-family residential zone under the City's current Land Development Code. This question had not been previously asked. Recall that the 2007 and 2015 Memos addressed whether STVRs are regulated or prohibited. Relying largely on the 2007 Memo, we responded that STVRs are "not specifically defined, expressly permitted, or listed in any of the zone use categories, including residential or commercial." City Att'y MS 2017-5 at 1 (Mar. 15, 2017). Accordingly, under the City's

"permissive zoning ordinance," STVRs are not permitted, because "any use that is not listed in the City's zoning ordinance is prohibited." *Id.* (citing City Att'y MS 2016-23 (July 22, 2016)).[5]

In addition, we relied on language in the Municipal Code concerning residential zones, which states: "It is unlawful to establish, maintain, or use any premises for any purpose or activity not listed in this section or Section 131.0422." *Id.* (citing SDMC § 131.0420(b)). The 2017 Memo proceeds to describe residential uses permitted by the Municipal Code, none of which expressly includes STVRs or any variation of STVRs, with the exception of boarder and lodger uses.

The advice rendered in our 2017 Memo remains unchanged and is consistent with prior advice rendered.

II. Miscellaneous City Attorney Reports and Memoranda

This Office has also issued several reports and miscellaneous memoranda analyzing specific STVR proposals before the Council. Since those reports addressed specific proposals, we will limit our summary to their main points.

A. Equal Protection

We have advised that any STVR adopted by the Council that treats similarly situated persons differently must be supported by a rational relationship to a legitimate state purpose. City Att'y Report 2017-6 (Oct. 17, 2017); City Att'y MS 2018-9 (July 6, 2018). When approving an ordinance, the Council has been advised to create an administrative record that includes '"any reasonably conceivable state of facts that could provide a rational basis for the classification'" supported by evidence presented at or before the hearing. City Att'y MS 2018-9 at 3 (citing *People v. Cruz*, 207 Cal. App. 4th 664, 675 (2012)).

B. California Coastal Commission

Any amendment to the City's Local Coastal Program must comply with the California Coastal Act policies. In particular, the California Coastal Commission strongly recommends that any proposed ordinance include data regarding location and availability of low-cost visitor accommodations. City Att'y MS 2018-9 at 3. This is consistent with State law, which provides that "[l]ower cost visitor and recreational facilities shall be protected, encouraged, and where feasible, provided." Cal. Pub. Res. Code § 30213.

[5] A "permissive" zoning ordinance means that any land uses not expressly permitted are presumed unlawful, as opposed to an ordinance that lists all prohibitory land uses (i.e., an ordinance that lists land uses that are not allowed). As described in section I.A. of this Memo, the City employs an informal use determination process as the Municipal Code cannot address every permutation of uses.

C. Imposition of Fees

The imposition of a fee triggers additional analysis. Under Proposition 26, for instance, the imposition of any levy, charge, or exaction of any kind imposed by a local government is a tax subject to approval by the electorate, unless one of seven exemptions apply. Cal. Const. art. XIII C, § 3(a), (d); City Att'y MS 2018-9 at 5. The City bears the burden of proving by a preponderance of the evidence that any charge is not a tax, and that the amount charged "is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Cal. Const. art. III C, § 1. Therefore, any permit fees would need to bear a reasonable relationship to the City's cost of administering and enforcing an STVR program.

In addition, impact fees, which are those fees calculated to mitigate the effects of a development, are also one of the listed exceptions from Proposition 26. City Att'y Report 2017-6 at 8. Legislatively imposed impact fees must be reasonably related to the impacts they are intended to address and must be proportionate to those impacts. *Id.* (citing *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996)).

D. Regulatory Taking

Government regulation that "goes too far" will be recognized as a regulatory taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); City Att'y MS 2018-9 at 6. Accordingly, the City would need to be careful not to deprive property owners of substantially all economic use of their property. *Id.*

E. Due Process/Enforcement

If the Council intends for undefined terms to have a specific meaning, it should include definitions or descriptions in the ordinance. City Att'y Report 2017-6 at 5. "[D]ue process requires that statutes be definite and certain so that citizens have notice of the required conduct and law enforcement cannot enforce the law in an arbitrary manner." *Id.* (citing 13 Cal. Jur. 3d *Constitutional Law* § 334 (2017)). STVRs, STRs, and other descriptors commonly used to describe short term occupancy are not currently defined in the Municipal Code; they must be defined in any proposed ordinance in order to provide citizens with notice of prohibited conduct and to successfully prosecute violations.

The Code Enforcement Division of the Development Services Department (DSD), which reports to the Mayor, is the first point of contact for enforcement of zoning codes. If this Division is unsuccessful in resolving the violation, the Code Enforcement Division may refer the case to the City Attorney's Office for review and potential prosecution. DSD has created a fact sheet that describes the quality of life offenses associated with short-term stays that are currently enforceable under other laws (such as excessive noise). This fact sheet, attached, is readily available on DSD's website at sandiego.gov/short-term-residential-occupancy. This Office stands ready to enforce laws that are clear and devoid of vagueness.

III. Considerations for Future Council Action Relating to the Adoption of STVR Regulations

A. Consideration of Alternative STVR Regulations

It is our understanding that the Mayor's Office is preparing new proposed STVR regulations for the Council's consideration. As we've explained in prior memoranda, when the Council repeals an ordinance suspended by a referendum, as was the case here, the Council cannot enact another essentially similar ordinance for a period of one year after the date of repeal. City Att'y MOL No. 2011-9 (July 21, 2011); 2014 City Att'y MOL 87 (2014-7; July 16, 2014). The Council may, however, enact an ordinance that deals with the subject matter of STVRs during the one-year period if the ordinance is "essentially different" from the first ordinance. *Id.* The court in *In re Statham*, 45 Cal. App. 436, 439-40 (1920), explained the rule as follows:

> [W]hen an ordinance which has been suspended by a referendum has been repealed . . . the council cannot enact another ordinance in all essential features like the repealed ordinance . . . . The council may, however, deal further with the subject matter of the suspended ordinance, by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. If this be done, not in bad faith, and not with intent to evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause.

Our Office will need to analyze any subsequent ordinances, and any motions to amend those ordinances, before they are proposed for adoption to advise as to whether they are essentially different from the ordinance that was repealed.

The Council may, on the other hand, reconsider the ordinance it repealed on November 13, 2018 (the second reading), one year after the date of repeal has passed.

B. Conduct of a Meeting to Consider Alternative STVR Regulations

The hearings to discuss proposed STVR regulations have, at times, lasted for more than ten hours. Some Councilmembers have asked whether public comment can be shortened so that those who wish to attend the hearing may witness deliberations and the vote. Deliberations at the meeting on December 12, 2017, for instance, did not begin until nearly eight hours into the meeting, at which point, many of the attendees had already left the meeting.

The Brown Act does not specify any particular time period for public comment. 2014 City Att'y MOL 172 (2014-16; Dec. 2, 2014). Instead, the Brown Act requires that the Council agendas provide an opportunity for the public to directly address the Council on items within its subject matter jurisdiction. The Council may adopt "reasonable" regulations for comments including limiting the amount of time allocated for each individual speaker. *Id.* The Council has wide discretion to establish reasonable regulations so long as the discretion is exercised reasonably

and not in an arbitrary or capricious manner. *Id.* Thus, the Council may, for instance, limit non-agenda public comment to two minutes per speaker. *Id.*

In addition, the Brown Act explicitly permits the Council to dispense with public comment on an agendized item if that item was previously heard by a standing committee of the Council where the public was afforded an opportunity to speak and the item has not substantially changed since committee.[6] Cal. Gov't Code § 54954.3; City Att'y MOL No. 2017-2 (Mar. 24, 2017). Accordingly, if the newly proposed STVR regulations are first heard at committee, and the regulations are not substantially changed before they are brought to the Council, then the Council may dispense with public testimony. *Id.*

As the concern is ensuring that those who attend the hearing witness deliberations, the City may, through its City Clerk, suggest that proponents and opponents pool their comments, deliver joint presentations, or submit their letters of support or opposition to the Council and Mayor in lieu of testimony and in advance of the hearing.

CONCLUSION

This Office has provided consistent advice concerning the regulation of STVRs since September 12, 2007. We've repeatedly advised that residential land may not be used in any manner that is inconsistent with the purposes or activities listed in the Municipal Code. The existing Municipal Code does not expressly define, expressly permit, or prohibit STVRs, although the Municipal Code could be amended to accomplish those objectives. To prosecute violations of the City's zoning laws, the public must understand what is and what is not permissible. This Office continues to be available to assist the Mayor and the Council in creating clear and objective regulations that are enforceable. In the meantime, this Office will review for prosecution zoning violations referred to us by DSD.

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By /s/ Mara W. Elliott
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[6] We have recommended in recent years that the Council amend its Rules if it wants to take advantage of this Brown Act provision.