

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: July 6, 2018
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: 2018 Short Term Residential Occupancy Ordinance

INTRODUCTION

On July 16, 2018, the San Diego City Council (Council) is scheduled to consider an ordinance (2018 Ordinance) regulating short term residential occupancy (STRO), an ordinance amending Chapter 1 of the San Diego Municipal Code regarding administrative subpoenas, and two resolutions: one approving a STRO License Fee and one approving an Affordable Housing Impact Fee. The purpose of this Memorandum is to remind the Council of legal considerations that we have raised in connection with prior STRO proposals, and address potential legal issues concerning the newly proposed Affordable Housing Impact Fee.

BACKGROUND

Last year, this Office issued a Report to Council regarding various aspects of proposed STRO ordinances. City Att’y Report 2017-6 (Oct. 17, 2017) (2017 Report). We advised that any STRO proposal adopted by the Council that treated similarly situated groups differently include a rational basis. In addition, we reminded the Council of the California Coastal Act policies and the requirement for any amendment to the City’s Local Coastal Program to comply with California Coastal Act policies. To that end, we recommended that the Council create a record that supports the approval of an STRO ordinance. While we cannot opine on the legal sufficiency of the record for the 2018 Ordinance from the dais without potentially compromising the City’s position in litigation, we provide general guidance below.

The 2018 Ordinance regulates STRO, which is occupancy for less than a month. The STRO of single and multiple family dwelling units will require a new annual, non-transferable license, if the host is not present during the STRO (whole home). A license is also required for the STRO if the host is present during the STRO (home share) when the dwelling unit has five or more bedrooms. In addition, when the dwelling unit has five or more bedrooms, a Process Two Neighborhood Use Permit is required, whether the STRO is whole home or home share.

The 2018 Ordinance requires a three night minimum stay in the Coastal Overlay Zone and the Downtown Community Plan area. The 2018 Ordinance contains many of the “good neighbor” provisions that the Council has considered previously; these requirements apply to both whole

home and home share STRO. The 2018 Ordinance also has enforcement provisions similar to those recently considered by the Council.

Only a host, who must be a natural person, may apply for an STRO License. A host may obtain one STRO License, or two STRO Licenses if one of the STRO Licenses is for the host's primary residence, as defined. In order to obtain a second STRO License under the primary residence rule, a host must reside in the primary residence for at least six months of the year. However, the number of STRO Licenses that may be issued to a host within the Mission Beach Planned District are unlimited.

Finally, the 2018 Ordinance includes a requirement to pay an Affordable Housing Impact Fee, and as well as other requirements for hosts and hosting platforms.¹

ANALYSIS

I. EQUAL PROTECTION ISSUES

As with the ordinances discussed in the 2017 Report, it could be argued that the 2018 Ordinance violates equal protection by treating some similarly situated groups differently.² The areas raising equal protection concerns are presented below, along with examples of how they are addressed in the staff report and the recitals in the 2018 Ordinance:

- To obtain two STRO Licenses, the host must reside in one of the dwelling units at least six months of the year. Other hosts would not be able to use a secondary residential property for STRO, even if that secondary property were also only used for STRO for less than a year. This distinction would allow all hosts to have one STRO, but the additional STRO for part of a year that is allowed for a primary residence would not have the effect of taking long term housing stock off the market.
- Hosts in the Coastal Overlay Zone and the Downtown Community Plan area must impose a three night minimum stay for this use of their property, whereas hosts elsewhere in the City do not have this requirement. This restriction reflects analysis that the majority of the STRO occurs in these areas and the three night minimum stay will reduce the impacts of high frequency turnover in the areas most likely to experience the impacts.
- Hosts in the Mission Beach Planned District are exempt from the STRO License limitations; however, hosts elsewhere may have a maximum of two STRO Licenses (if one is for a primary residence). This difference reflects the historic

¹ In general, the hosting platform regulations are modeled after similar regulations recently approved in San Francisco and Santa Monica. Thus far, those regulations have withstood legal challenge. However, the litigation on the San Francisco ordinance settled before reaching a final determination by a court and the decision by the trial court to dismiss the Santa Monica case is still subject to possible appeal.

² Please refer to the 2017 Report for a more complete discussion regarding equal protection generally.

use of the Mission Beach area for STRO, the desire to provide low cost visitor accommodations in the Coastal Zone in accordance with California Coastal Act policy, and the limited availability of commercial lodging in the Mission Beach Planned District.

As this Office has opined previously, regulations that treat similarly situated persons differently must be supported by a rational relationship to a legitimate state purpose. This Office cannot predict how a court would rule on an equal protection challenge, however, when applying the rational basis test, courts are to uphold the classification “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *People v. Cruz*, 207 Cal. App. 4th 664, 675 (2012). In addition, legislative acts reviewed under the rational relationship test are presumed valid. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994). Although the standard of review for equal protection challenges that are not based on suspect classifications such as race is deferential, “it must find some footing in the realities of the subject addressed by the legislation.” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993).

In addition to the proposed bases for the areas of regulation set forth above, we recommend that Council members include any additional bases for the distinctions, supported by evidence presented at or before the hearing, in the administrative record.

II. CALIFORNIA COASTAL ACT POLICIES

The 2017 Report also opined on the California Coastal Act as it relates to the regulation of STRO in the Coastal Zone. The California Coastal Act generally requires that lower-cost visitor accommodations be protected, encouraged, and where feasible, provided.

As previously discussed, a minimum stay requirement may trigger restricted access concerns. The California Coastal Commission (CCC), following its staff’s recommendation, recently approved a three day minimum stay requirement in the City of Del Mar on June 7, 2018. However, the CCC may expect additional information from the City of San Diego when the City submits the 2018 Ordinance as a Local Coastal Program amendment. City of Del Mar Major Amendment LCP-6-DMR-17-0083-3 (Short Term Rentals) (May 24, 2018), Staff Recommendation on <http://documents.coastal.ca.gov/reports/2018/6/th14d-6-2018-report.pdf>. This Office again directs the Council to the December 2, 2015 letter from the CCC to the City of San Diego, specifically the information that the CCC staff indicated should accompany a proposed ordinance regulating STRO. Letter from California Coastal Commission, District Manager, to City of San Diego Planning Commission (Dec. 2, 2015), attached. In that letter, the CCC strongly recommended that any proposed ordinance include data regarding location and availability of lower-cost visitor accommodations.

In addition, the Council should be aware that while the local CCC staff has indicated support for a three night minimum stay, the ultimate decision rests with the CCC, which does not always follow staff recommendations. For example, on May 10, 2018, the CCC rejected its staff’s recommendation to approve a proposed Local Coastal Program amendment for the County of Santa Barbara that would have allowed whole home STRO in some commercial areas and in an overlay zone in a residential area historically used for short term residential occupancy, as well as home sharing in almost all other residentially zoned areas of the County. County of Santa

Barbara Local Coastal Program Amendment No. LCP-4-STB-17-0086-3 (Short Term Rentals Ordinance) (Apr. 27, 2018), <http://documents.coastal.ca.gov/reports/2018/5/th19a/th19a-5-2018-report.pdf>. The CCC basis for the rejection was that the proposal was too restrictive.³ The Council should ensure that the record supports the CCC's ability to determine that the 2018 Ordinance, which is a Local Coastal Program amendment, does not violate Coastal Act policies regarding lower-cost visitor accommodations.

III. IMPOSITION OF AN AFFORDABLE HOUSING IMPACT FEE

The 2018 Ordinance requires the payment of a per night Affordable Housing Impact Fee, to be deposited into the existing Housing Trust Fund, which is to be used solely for programs and administrative support to meet the housing needs for very low income, low income, and median income households. San Diego Municipal Code § 98.0503(a). Keyser Marston Associates prepared a Short Term Rental Nexus Study which details a connection between the low paying employment generated by both STRO (whole home and home share) and the associated visitor spending, which in turn generates the need for affordable housing. The Short Term Rental Nexus Study then details the research and analysis supporting the proposed impact fee. Legislatively enacted fees are subject to review for a "reasonable relationship, in both intended use and amount, and the deleterious public impact of the development." *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 671 (2002). The Short Term Rental Nexus Study sets forth a basis for the Council to conclude that STRO creates low paying employment, which leads to the need for affordable housing.

The imposition of an impact fee may raise other issues, such as the Mitigation Fee Act (California Government Code sections 66000-66008) procedures and limitations, Proposition 26, and federal and state constitutional prohibitions on taking private property. However, we believe the 2018 Ordinance is likely defensible against claims raised on these grounds for the reasons discussed below.

A. Mitigation Fee Act

The Mitigation Fee Act allows local agencies to impose fees as a condition of approval of a development project. Several substantive and procedural requirements are set forth, including the establishment of a reasonable relationship between the fee's use and the type of development project; a reasonable relationship between the public facility and the type of development project on which the fee is imposed; and special noticing, accounting, reporting, and expenditure provisions. Cal. Gov't Code §§ 66000-66008. A fee is defined in part as "a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad-hoc basis, that is

³At the May 10, 2018 hearing, the CCC staff noted that the City of Carpinteria's recently approved limitations were a good example of STRO regulations. The City of Carpinteria amended their land use regulations to allow whole home STRO within a specific overlay zone, limited to 218 whole home STROs (a number slightly higher than the current number to allow for some growth). The whole home STROs in other areas of the city will be allowed five years to cease operations. Home sharing will be allowed in all residentially zoned areas. Licensing and good neighbor regulations will be imposed on both types of STROs. City of Carpinteria Local Coastal Program Amendment No. LCP-4-CPN-16-0024-1 (Nov. 17, 2016), <http://documents.coastal.ca.gov/reports/2016/12/th8b-12-2016.pdf>.

charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the costs of public facilities related to the development project . . .” Cal. Gov’t Code § 66000(b). Development project is defined as “any project undertaken for the purpose of development. ‘Development project’ includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.” Cal. Gov’t Code § 66000(a). Public facilities “includes public improvements, public services, and community amenities.” Cal. Gov’t Code § 66000(d).

Recently, relying in part on *California Building Industry Ass’n v. City of San Jose*, 61 Cal. 4th 435 (2015) (discussed further below), a court determined that affordable housing in-lieu fees were a development regulation and were not subject to the Mitigation Fee Act. *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016). The court found that, as in *San Jose*, the purpose of the in-lieu fees was to combat the overall lack of affordable housing and enhance the public welfare by promoting the use of land available for low income housing, and not to mitigate the adverse impacts of new development or to defray the cost of increased demand on public services due to the petitioner’s specific development project.

Like the in-lieu fee imposed by the *City of West Hollywood*, the Affordable Housing Impact Fee is likely not subject to the Mitigation Fee Act because the fees are for the overall public welfare and not to defray the cost of increased public demand on public services due to any host’s specific STRO. In addition, compliance with the City’s STRO regulations, including the payment of the Affordable Housing Impact Fee, does not fall within the definition of “development project” in the Mitigation Fee Act because the regulations do not involve a permit to construct or reconstruct.

B. Proposition 26

Proposition 26 amended Article XIII C, section 1 of the California Constitution. Generally, 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 the seven specific exemptions apply, including fees charged as a condition of property development.⁴ A general tax is defined as any tax imposed for general governmental purposes, and a special tax is one imposed for specific purposes. Cal. Const. art. XIII C, § 2(a), (d). Either type of tax requires voter approval. Cal. Const. art. XIII C, § 3(a), (d). A challenge based on Proposition 26 to the imposition of an affordable housing in-lieu fee was rejected in *616 Croft Ave*. The court found that the in-lieu fees were charged as a condition of property development, one of the enumerated exceptions to Proposition 26.⁵

⁴ For a general summary of Proposition 26, see 2011 City Att’y MOL 46 (2011-3; Mar. 4, 2011), *Proposition 26 and Its Impact on City Fees and Charges*.

⁵ This Office previously opined that the Housing Impact Fee for Nonresidential Development, also called the “linkage fee,” which imposes affordable housing fees on the construction of nonresidential development, was not a tax under Proposition 26. 2013 City Att’y MS 211 (2013-13; Oct. 25, 2013), *City of San Diego Housing Impact Fee for Nonresidential Development*. That Memorandum also noted that the property development exception to Proposition 26 was not limited to fees imposed pursuant to the Mitigation Fee Act. In other words, a fee may be exempt from Proposition 26 as a condition of property development, and not be a fee subject to the Mitigation Fee Act.

Although the proposed Affordable Housing Impact Fee is not related to the City's grant of permission to construct, it may still be considered a fee charged as a condition of property development. In *Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892 (1986), the court found that fees charged when residential hotel rooms were converted to tourist hotel rooms or condominiums were not a tax because the fees were not earmarked for revenue, were not compulsory because they are only exacted if the property owner elects to convert a residential hotel to another use, and had no impact upon general governmental spending. The fees were determined to be charged as a condition of property development, even though they were not "imposed upon the land," but were imposed upon the privilege of converting residential hotel units to other uses.⁶ *Terminal Plaza Corp.*, 177 Cal. App. 3d at 907. Although *Terminal Plaza Corp.* was a pre-Proposition 26 decision, as the *616 Croft Ave.* decision points out, Article XIII D, section 1 states that "[n]othing in this article or Article XIII C shall be construed to . . . (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development." *616 Croft Ave.*, 3 Cal. App. 5th at 630.

Like the permit and fee upheld by the court in *Terminal Plaza Corp.*, the STRO Affordable Housing Impact Fee is not for revenue creating purposes, is not compulsory, and has no impact on general governmental spending. It is a fee imposed by law as a condition of using single or multiple family dwelling units for STRO, and is limited to that necessary to address affordable housing needs created by the STRO use. However, imposing a fee greater than the amount calculated to address the low income housing needs generated by STRO would likely be found to be a tax, and would require voter approval.

C. Constitutionally Prohibited Taking of Private Property

Both the United States and California Constitutions prohibit the taking of private property without just compensation. U.S. Const., amend. V; Cal. Const. art. 1, § 19. A "taking" in this context is not limited to circumstances of physical possession by a public agency; a governmental regulation that "goes too far" will be recognized as a regulatory taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

In *San Jose*, the California Supreme Court held that the City of San Jose's ordinance was not an exaction subject to the U.S. Constitution's Fifth Amendment due process takings protections. The ordinance required developments of 20 or more units (new, additional, or modified) to set aside at least 15 percent of the for sale units for low or moderate income households or comply with alternative compliance (off-site, in-lieu fee, land dedication, or acquiring and rehabilitating a comparable number of units). *San Jose*, 61 Cal. 4th at 442. The court determined that this requirement was "an example of a municipality's permissible regulation of the use of land under its broad police power." *Id.* at 457. The conversion of residential hotel rooms in *Terminal Plaza Corp.* was also found not to be an unconstitutional taking because the regulation did not deprive the owner of substantially all economic use of the property.

⁶ It is unclear what "not imposed upon the land" referred to, but it appears to mean that no permit was issued that was required to be recorded on the property. The decision refers to a conversion permit, which was ministerial, of general applicability, regulated existing uses, and did not call for land use decisions. *Terminal Plaza Corp.*, 177 Cal. App. 3d at 902.

Similarly, here, owners or operators of STROs are also not deprived of substantially all economic use of their property; they may sell or trade their property, many may continue to use their property in much the same manner as before the ordinance, or they may use the property for long term rentals.

CONCLUSION

The 2018 Ordinance, if adopted, should be supported by evidence of a rational basis for the regulations. While the staff report and 2018 Ordinance recitals provide some examples of rational bases, we encourage the Council to base its decision on as comprehensive a record as possible. This would include testimony presented during the hearing. In addition, the Council should be mindful of the Coastal Act policies regarding the protection, encouragement, and provision of lower cost visitor accommodations. Lastly, the 2018 Ordinance includes a requirement to pay an Affordable Housing Impact Fee. The fee is proposed at an amount calculated to address the affordable housing needs of the low income workers associated with STRO. The fee is likely legally defensible provided that it does not exceed the amount calculated to address impacts. As always, this Office is available to review and provide legal advice on any proposed evidence prior to the hearing.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Shannon M. Thomas

Shannon M. Thomas
Deputy City Attorney

SMT:als

MS-2018-9

Doc. No.: 1784431_3

Attachment: December 2, 2015 Letter from Coastal Commission

ATTACHMENT

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370



December 2, 2015

City of San Diego
Planning Commission
202 "C" Street
San Diego, CA 92101

Re: Planning Commission Docket for December 3, 2015: Item 7 – Short Term Vacation Rentals and Home Sharing

Dear Commissioners,

Over the last several years, the emergence and proliferation of short term rentals or vacation rentals has become an issue in many coastal communities. In general, under the Coastal Act, they represent a high priority visitor-serving use that should be promoted as a means to provide overnight accommodations and support increased coastal access opportunities. In addition, they may also serve as a more affordable option of overnight accommodations than traditional hotels, motels or timeshare units, especially for families. Specifically, the pertinent Coastal Act sections are as follows:

Section 30213

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. (emphasis added)

Section 30222

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation *shall have priority over private residential, general industrial, or general commercial development*, but not over agriculture or coastal-dependent industry. (emphasis added)

Due to their function as a high priority visitor-serving use, this agency has generally interpreted local zoning ordinances in a broad fashion and found that short term rentals or vacation rentals are a form of residential use, permitted by right, in any residentially zoned area unless such uses are specifically prohibited or otherwise restricted. Nonetheless, as noted above, this agency also understands and appreciates that these uses may raise a number of neighborhood character and operational issues, such as site management, number of occupants, special events, parking, litter and noise limits. Therefore, the Coastal Commission has endorsed certain regulations to require on-site management, enforcement protocols, occupancy limits, required parking and other use provisions.

City of San Diego
Planning Commission – Short Term Rentals
December 2, 2015
Page 2

For the proposed ordinance amendments, based on a review of the Planning Commission report and materials, it is this office's understanding that the City is considering the adoption of ordinance amendments that would create a new separately regulated use category for "short term vacation rental" of a dwelling unit for less than 30 consecutive days and a new "home sharing accommodation" provision. In the case of a "short term vacation rental", the proposed ordinance amendment would require a minimum night stay of no fewer than 21 nights in single family residential zones. In some of the materials, there appeared to be a provision for a lower minimum night limit if a Neighborhood Use Permit was obtained but it is unclear whether or not that is what is before you today. Alternatively, for a "home sharing accommodation" where the owner occupant would remain in residence, there is no minimum night stay in all residential zones.

The standard of review for any proposed ordinance amendment is the City's certified land use plans; the City's analysis should review any proposed changes for conformity with those certified community plans. Based on the Coastal Act mandates, the certified land use plans and an evaluation of the proposed regulatory revisions, Commission staff has serious concerns about, and would not likely support, the proposed adoption of a minimum 21 night stay for short term rentals in single family residential zones. Given that many coastal visitors may be looking to get away for only a week or an extended weekend, the establishment of a three week minimum would not expand the visitor opportunities for many travelers. In addition, the attractiveness of vacation rentals for many families is the kitchen facilities and expanded living space; so, again, a three week minimum stay would be limiting the availability of those rentals.

In summary, while Commission staff acknowledges the need to provide for some regulatory controls and management provisions for short term rentals, the adoption of a 21 night minimum stay in single family residential zones is too restrictive. In addition, Commission staff would strongly recommend that as part of any proposed ordinance amendment, an updated inventory and mapping of existing visitor-serving accommodations by type, capacity, ownership and price range be conducted in order to gain an accurate assessment of what is or is not available for tourists. Utilization studies would also be helpful to gauge how various forms of vacation rentals operate and demand projections for overnight visitor accommodations are also needed to evaluate whether the current supply is adequate to meet future needs. We appreciate the opportunity to provide comment and look forward to working with the City to develop a vacation rental ordinance that promotes and expands affordable coastal visitor opportunities while also addressing neighborhood concerns. If you have any questions, please don't hesitate to contact me at the above office.

Sincerely,



Deborah N. Lee
District Manager