



Sophie Hahn
Councilmember District 5

SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: July 10, 2018

Item Number: 21

Item Description: Revisions to Ordinance No. 7,521-NS in the Berkeley Municipal Code to increase compliance with the city's short-term rental ordinance

Submitted by: Councilmember Sophie Hahn

Thanks to Councilmember Worthington for seeking to close potential loopholes in the STR Ordinance, now that litigation in various jurisdictions has been resolved, allowing Berkeley to regulate in ways that previously might have invited costly and duplicative litigation.

Having worked closely with the Mayor and City Attorney (Cowan) to make the recently adopted, complex new STR ordinance work, I believe some of the amendments as proposed would benefit from better integration into the regulatory framework already in place. I propose to Continue this item until the July 24 Council meeting and if possible, given the Brown Act, will work with Councilmember Worthington and community advocates to achieve the goals of the proposed amendments in ways that more closely conform to the existing definitions and regulatory framework.

A few of the conforming changes I propose to work on include:

1. Currently proposed:

Only one Permanent Resident may be associated with a Residential Unit on the Registry, and it shall be unlawful for any other person, even if that person meets the qualifications of a "Permanent Resident," to offer a Residential Unit for Short-Term Residential Rental.

"**Permanent Resident**" is not a defined term for purposes of this ordinance. We have defined "**Host**" and a Host must prove that s/he is "**Resident**," but there is no such thing as a "Permanent Resident". With a few edits, it should be possible to achieve the intended outcome without introducing a new and undefined term.

2. Currently proposed:

A Permanent Resident offering a Residential Unit for Short-Term Residential Rental shall maintain a valid business registration certificate.

The STR ordinance already requires a business license to be presented in the permitting process:

BMC 23C.22.050(K) . . . The Host shall also provide both the Business License number, if required pursuant to Chapter 9.04, and Zoning certificate for the STR to the City and/or a vendor hired by the City to administer this Chapter . . .

The question of requiring a Business License for all STR's was discussed with the City Attorney at length when the STR ordinance was drafted. There are some instances where a Business License may not be required currently; to require a Business License of all STRs may require changes elsewhere to the BMC. This should be re-explored, as requiring the Business License of all STR's was specifically rejected by the City Attorney for technical reasons at the time the ordinance was drafted.

3. Currently Proposed:

No person shall provide or offer for rent any City approved home-sharing dwelling unit, in whole or in part, to any person(s) for exclusive transient use of thirty consecutive days or less. Exclusive transient use shall mean that none of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitor's stay. Any such use shall be considered vacation rental use and thus prohibited. This regulation shall not apply to rental of units within City approved hotels, motels and bed and breakfasts.

Short Terms Rentals are defined as 14 days or less. This proposed amendment creates a new category, 30 days, and is likely to impact rent and eviction control laws in unintended ways. Also, a 30 day rental is not a Short Term Rental by definition, so it would need to be regulated elsewhere in the code, not in the STR section.

4. **Vacation Rental** also is not a defined term in Berkeley's STR regulations. This part of the proposed amendment seems to be trying to address the situation where the Host is NOT present. The STR ordinance, as adopted, defines "**Host Present**," and when the Host is NOT present, these are the rules that apply currently:

When the Host is not present, the number of days that the unit can be used for Short-Term Rental purposes shall be limited to 90 days per calendar year.

Because a short term rental cannot take place for more than 14 days, the effect is that a total of 90 days cannot be exceeded in the aggregate when the Host is NOT present, and the short term rentals must be in increments of no more than 14 days at a time, to one Short-Term Rental Transient (this is also a term defined in the STR code – essentially, a guest).

There are other changes that would help the proposed amendments conform to the STR code as currently adopted, and reduce the possibility of introducing unintended conflicts and confusions. I hope to have the opportunity to work with the Author and advocates to bring these back as quickly as possible.

Kriss Worthington

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ACTION CALENDAR

July 24, 2018

(Continued from July 10, 2018)

To: Honorable Mayor and Members of the City Council
From: Councilmember Kriss Worthington, District 7
Subject: Revisions to ORDINANCE NO. 7,521--N.S. in the Berkeley Municipal Code to increase compliance with the city's short-term rental ordinance.

RECOMMENDATION

Refer the City Manager to look into adopting revisions to ORDINANCE NO. 7,521--N.S by modeling after the Home-Sharing Ordinance of the City of Santa Monica and the Residential Unit Conversion Ordinance of the City of San Francisco in order to increase compliance with city regulations on short-term rentals of unlicensed properties.

BACKGROUND

Cities in California have faced issues with online rental platform compliance with city short term rental ordinances. For example, the recent *HomeAway and Airbnb v. Santa Monica* case arose due to a city ordinance stating that “[h]osting platforms shall not complete any booking transaction for any residential property or unit unless it is listed on the City’s registry [of licensed home-sharing hosts] at the time the hosting platform receives a fee for the booking transaction.” The City of Santa Monica also argued that “the short-term rental market reduces affordable housing supply by converting residential apartments to tourist use for the financial benefit of the unit owner.” Similarly, the ordinance at issue in *Airbnb v. San Francisco* “would have required companies like plaintiffs to actively monitor and verify content provided by third-party hosts before publication, at the peril of being held criminally and civilly liable if a listing for an unregistered unit was published on their websites.”

With the rising vacation rental industry, limited housing supply is threatened by the prospect of companies converting homes, especially affordable rental units, into tourist and transient use. The purpose of amending ORDINANCE NO. 7,521--N.S is to benefit the general public by preventing the loss of residential units and minimizing adverse impacts on the housing supply and on persons and households of all income levels. Though Airbnb and HomeAway filed a lawsuit in attempt to invalidate the cities’ rules and regulations on short term rentals, in both cases, the Judge found the cities’ ordinances in compliance with the the First Amendment, the Communications Decency Act, and the California Coastal Act. These companies also sought a preliminary injunction to prevent the city of San Francisco from enforcing the law, but the city prevailed after the ruling. It is important to note that these ordinances do not penalize

the Plaintiff's publishing activities. However, these ordinances do seek to restrict business transactions on sites that violate the law.

LINKS:

1. Text of ruling in *HomeAway and Airbnb v. Santa Monica*
<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2708&context=historical>
2. Text of ruling in *Airbnb v. San Francisco*
<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2324&context=historical>

The City of Berkeley has been working to regulate short-term rentals since 2015, and short-term rentals were formally legalized in early 2017, following the increasing use of online rental platforms. According to the Short Term Rentals Ordinance Chapter 23C.22, Berkeley residents hosting short-term rentals must pay a 12% Transient Occupancy tax and apply for a Zoning Certificate. Though Berkeley residents hosting short-term rentals must pay a 12% Transient Occupancy Tax and apply for a Zoning Certificate, the City of Berkeley has also faced issues around safety, affordability, and enforcement due to its inability to actively govern short term rental listings published online.

LINKS:

Home-Sharing Ordinance of Santa Monica:

<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2682&context=historical>
[https://www.smgov.net/uploadedFiles/Departments/PCD/Santa%20Monica%20HomeSharing%20Rules%20PDF%20July%202017\(1\).pdf](https://www.smgov.net/uploadedFiles/Departments/PCD/Santa%20Monica%20HomeSharing%20Rules%20PDF%20July%202017(1).pdf)

Residential Unit Conversion Ordinance of San Francisco:

[http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD_Chapter41A](http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_Chapter41A)

FISCAL IMPACTS OF RECOMMENDATION:

Minimal.

ENVIRONMENTAL SUSTAINABILITY:

None

CONTACT PERSON:

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ORDINANCE NO. 7,521--N.S.
REVISIONS TO ORDINANCE NO. 7,521--N.S. TO THE BERKELEY MUNICIPAL CODE UNDER TITLE
23C.22: "SHORT-TERM RENTALS":

BE IT ORDAINED by the Council of the City of Berkeley as follows:

That revisions to Section 23C.22.050 and Section 23C.22.060 be added to the Berkeley Municipal Code reading as follows:

Chapter 23C.22
SHORT-TERM RENTALS

Section 23C.22.020 Applicability

- A. Short-Term Rentals shall be allowed in residential uses in the following zoning districts: R~1, R-1A, R-2, R-2A, R-3, R-4, R-5, R-S, R-SMU, C-DMU, C-1, C-NS, C-SA, C-T, C-W, and MU-R.
- B. Short-Term Rentals shall be prohibited in below market rate (BMR) units. BMR units for Short-Term Rental purposes refer to dwelling units whose rents are listed as a result of deed restrictions or agreements with public agencies, and whose tenants must be income-qualified.
- C. A property containing a unit with a no-fault eviction cannot operate Short-Term Rentals for five years unless it is a single-family home vacated for purposes of owner occupancy.
- D. Short-Term Rentals shall not be allowed in lawful Accessory Dwelling Units, but are allowed in Accessory Buildings and existing Accessory Dwelling Units that have been used as a Short Term-Rental for at least one year: preceding November 29, 2016.
- E. Only one Permanent Resident may be associated with a Residential Unit on the Registry, and it shall be unlawful for any other person, even if that person meets the qualifications of a "Permanent Resident," to offer a Residential Unit for Short-Term Residential Rental.*
- F. A Permanent Resident offering a Residential Unit for Short-Term Residential Rental shall maintain a valid business registration certificate.*
- G. No person shall provide or offer for rent any City approved home-sharing dwelling unit, in whole or in part, to any person(s) for exclusive transient use of thirty consecutive days or less. Exclusive transient use shall mean that none of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitor's stay. Any such use shall be considered vacation rental use and thus prohibited. This regulation shall not apply to rental of units within City approved hotels, motels and bed and breakfasts.*

Section 23C.22.030 Definitions

The definitions set forth in this Section shall govern the meaning of the following terms as used in this Chapter:

- A. "Adjacent properties" mean the dwelling units abutting and confronting, as well as above and below, a dwelling unit within which a Short-Term Rental is located.
- B. "Host" means any person who is the owner of record of residential real property, or any person who is a lessee of residential real property, who offers his or her Host Residence, or portion thereof, as a Short-Term Rental.
- C. "Host present" means the host is living in the Host Residence or the Accessory Dwelling Unit during the short-term rental period.
- D. "Hosting Platform" means a business or person that provides a means through which a Host may offer a dwelling unit, or portion thereof, for Short-Term Rentals. A Hosting Platform is usually, though not necessarily, provided through an internet-based platform. It generally allows a property owner or tenant to advertise the dwelling unit through a website provided by the Hosting Platform and provides a means

for potential Short-Term Rental Transients to arrange short-term rentals, whether the Short-Term Rental Transient pays rent directly to the host or to the hosting platform.

- E. "Host Residence" means a Host's domicile as documented by motor vehicle registration, driver's license, voter registration or other such evidence.
- F. "Local Contact" means a person designated by the Host who shall be available during the term of any short-term rental for the purpose of (i) responding within sixty minutes to complaints regarding the condition or operation of the dwelling unit or portion thereof used for short-term rental, or the conduct of Short-Term Rental Transients; and (ii) taking remedial action to resolve such complaints.
- G. "No Fault Eviction" means an eviction pursuant to the Ellis Act or Sections 13.76.130.A.9 or 10 of the Berkeley Municipal Code.
- H. "Short-Term Rental" or "STR" means the use of any dwelling unit or portions thereof for dwelling, sleeping or lodging purposes in any single-family dwelling, two-family dwelling, multi-family dwelling, Accessory Building, or Accessory Dwelling Unit that has been in use as a Short Term Rental for at least one year preceding November 29, 2016 by Short-Term Rental Transients. Short-Term Rental shall be an accessory use to a residential use and be considered neither a tourist hotel nor a residential hotel for purposes of this Title.
- I. "Short-Term Rental Transient" or "STR Transient" means any person who rents a dwelling unit or portion thereof for less than 14 consecutive days.
- J. *"Home-Share" means an activity whereby the resident(s) host visitors in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitors' stay.*

Section 23C.22.050 Operating Standards and Requirements

- A. Proof of Host Residency.
 - 1. A property owner Host of a Short-Term Rental must provide documentation including, but not limited to, motor vehicle registration, driver's license, voter registration or other such evidence to the City as evidence of property ownership of the proposed Short-Term Rental. The Host must live at the address of the STR.
 - 2. The tenant Host must present written authorization allowing for a Short-Term Rental from the building owner or authorized agent of the owner.
- B. STR Duration and Required Residency Timeframes
 - 1. When the Host is present and living in the unit used for Short-Term Rental purposes, the unit, or a portion thereof, may be rented as a Short-Term Rental for an unlimited number of days during the calendar year.
 - 2. When the Host is not present, the number of days that the unit can be used for Short-Term Rental purposes shall be limited to 90 days per calendar year.
- C. Number of Occupants. The maximum number of Short-Term Rental Transients allowed for a Short-Term Rental unit shall be as provided for in the Berkeley Housing Code (BMC Chapter 19.40).
- D. Notification. Initial, one-time notification of a Short-Term Rental shall be provided to all adjacent properties. Notification shall include Host and Local Contact information.
- E. Enforcement Fee. For the initial enforcement period, while enforcement costs are being determined, the Host shall pay an additional enforcement fee in an amount equal to 2% of the rents charged by that host, not to exceed the cost of the regulatory program established by this Chapter over time. Such fees may be paid by the Hosting Platform on behalf of the Host. After the initial enforcement period, the Council may revise the enforcement fee by resolution.
- F. Liability Insurance. Liability insurance is required of the Host, or Hosting Platform on behalf of the Host, in the amount of at least \$500,000.
- G. Compliance with Second-Response Ordinance. The Host shall comply with the Second Response Ordinance (BMC Chapter 13.48). The Host shall be prohibited from operating Short-Term Rentals for one year upon issuance of a third violation affidavit.
- H. Documents Provided to STR Transients. Community Noise Ordinance and SmokeFree Multi-Unit Housing Ordinance must be provided to transients upon arrival.

- I. Transient Occupancy Tax. Either the host or Hosting Platform must pay the transient occupancy tax (TOT).
 - 1. *If a Hosting Platform does not collect payment for the rental, hosts are solely responsible for the collection of all applicable TOT and remittance of the collected tax to the City on a monthly basis. If a Hosting Platform does collect payment for rentals, then it and the host shall both have legal responsibility for the collection and remittance of the TOT.*
- J. Housing Code Compliance. Any building or portion thereof used for Short-Term Rentals shall comply with the requirements of the Berkeley Housing Code (BMC Chapter 19.40).
- K. Payment of Taxes. Host shall pay all City taxes and fees owed in a timely manner.
- L. The Host shall provide the Business License number and/or Zoning certificate for the STR to the City and/or a vendor hired by the City to administer this Chapter, as specified by staff.
- M. *Advertisement. Offering a Residential Unit for Short-Term Residential Rental, including but not limited to advertising the Residential Unit's availability, while not maintaining good standing on the Registry shall constitute an unlawful conversion in violation of this Chapter 23C.22 and shall subject the person or entity offering the unit in such a manner to the administrative penalties and enforcement procedures, including civil penalties, of this Chapter.*
 - 1. *A host may not advertise their home-sharing business in any area that is exterior to the dwelling unit where the home-sharing is occurring. This includes common interior areas.*
 - 2. *A host must clearly advertise the unit as a shared space, unless the advertised rental is an accessory structure, in which case the accessory structure may be advertised as a separate unit (aka "entire home/apartment").*
 - 3. *A Home-Share host must provide the Uniform Resource Locator (URL), (i.e. the web site address) for any and all advertisements of the rental on the business license application.*
 - 4. *A Home-Sharing applicant must provide the following as part of his/her application a link to the advertisement of the rental.*
- N. *STR Safety. A Permanent Resident offering a Residential Unit for Short-Term Residential Rental shall post a clearly printed sign inside his or her Residential Unit on the inside of the front door that provides information regarding the location of all fire extinguishers in the unit and building, gas shut off valves, fire exits, and pull fire alarms.*

Section 23C.22.060 Remedies

- A. Violation of any provision of this Chapter is punishable as set forth in Chapters 1.20 and 1.28.
- B. Violation of any provision of this Chapter is hereby declared to be a public nuisance subject to abatement under Chapters 1.24, 1.26 and 23B.64.
- C. In any enforcement action, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs; provided that, pursuant to Government Code Section 38773.5, attorneys' fees shall only be available in an action or proceeding in which the City has elected, at the commencement of such action or proceeding, to seek recovery of its own attorneys' fees. In no action or proceeding shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the City in the action or proceeding.
- D. Any resident of the City may bring a private action for injunctive relief to prevent or remedy a public nuisance as defined in this Chapter. No action may be brought under this subdivision unless and until the prospective plaintiff has given the City and the prospective defendant(s) at least 30 days written notice of the alleged public nuisance and the City has failed to initiate proceedings within that period, or after initiation, has failed to diligently prosecute.
- E. Any occurrence at a Short-Term Rental unit that constitutes a substantial disturbance of the quiet enjoyment of private or public property in a significant segment of a neighborhood, such as excessive noise or traffic, obstruction of public streets by crowds or vehicles, public intoxication, the service to or

consumption of alcohol by minors, fights, disturbances of the peace, litter or other similar conditions, constitutes a public nuisance.

- F. It shall be a public nuisance for any STR Transient of a Short-Term Rental unit where an event is taking place to refuse access to, or interfere with access by, Fire Department personnel responding to an emergency call or investigating a situation.
- G. Notwithstanding any provision of Chapter 13.48 to the contrary, a public nuisance as defined in this Section shall be subject to remedies set forth in Section 23C.22.060.
- H. *An Interested Party who is a Permanent Resident of the building in which the Tourist or Transient Use is alleged to occur, is a Permanent Resident of a property within 100 feet of the property containing the Residential Unit in which the Tourist or Transient Use is alleged to occur, or is a homeowner association associated with the Residential Unit in which the Tourist or Transient Use is alleged to occur may institute a civil action for injunctive and monetary relief against an Owner or Business Entity if:*
 - 1. *The Interested Party has filed a Complaint with the City;*
 - 2. *The City has not made a written determination pursuant to Section 23C.22.050 Operating Standards and Requirements that there is no violation of this Chapter 23C.22 or basis for an investigation for an unlawful activity;*
 - 3. *An administrative hearing officer has not issued a final determination pursuant to subsection Section 23C.22.050 regarding the Complaint within 135 days of the filing of the Complaint with the Department;*
 - 4. *After such 135-day period has passed, the Interested Party has provided 30 days' written notice to the Department and the City Attorney's Office of its intent to initiate civil proceedings; and*
 - 5. *The City has not initiated civil proceedings by the end of that 30-day notice period.*
 - 6. *Under this subsection 23C.22.060 (H), the prevailing party shall be entitled to the costs of suit, including reasonable attorneys' fees, pursuant to an order of the Court.*
- I. *In the event of multiple violations of any Owner's or Business Entity's obligations under this Chapter 23C.22, The City shall remove the Residential Unit(s) from the Registry for one year and include the Residential Unit(s) on a list maintained by the City Manager or designee that may not be offered for Tourist or Transient Use until compliance. Any Owner or Business Entity who continues to offer for rent a Residential Unit in violation of this Section 23C.22.060 shall be liable for additional administrative penalties and civil penalties of up to \$1,000 per day of unlawful inclusion.*