



Office of the City Manager

WORKSESSION  
October 22, 2019

To: Honorable Mayor and Members of the City Council  
From: Dee Williams-Ridley, City Manager  
Submitted by: Timothy Burroughs, Director, Planning and Development Department  
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Subject: Short-Term Rentals in Berkeley

### INTRODUCTION

On April 1, 2017 the City Council adopted an Ordinance to regulate Short-Term Rentals (STRs), and on September 1, 2017 the City began accepting on-line applications from Berkeley residents to register their short-term rentals.

Berkeley's STR regulations were designed to acknowledge the existence of this new form of rental accommodations and levy appropriate City taxes and fees to cover the direct and indirect costs incurred by the City and its residents from STR uses. The ordinance was crafted to address various concerns of the community by protecting existing and new rental housing stock, and providing safeguards to adjacent neighbors through registration requirements and enforcement practices.

City departments/divisions implementing portions of the STR Program include: Planning and Development, Finance, Neighborhood Services Code Enforcement, and Information Technology, along with the involvement of the Rent Stabilization Board. The City 311 telephone and online service center also takes in and routes STR-related questions to the appropriate departments.

This report provides updates on the status of Berkeley's program to register and regulate STRs since the current requirements came into effect on September 1, 2017. Updates include the volume of registrations, revenue generated for the City from Transient Occupancy Tax (TOT) required from STRs, agreements with AirBnB and other hosting platforms, the City's contract with Host Compliance for registration and enforcement, City enforcement practices for STR issues, and relevant litigation from elsewhere in California and the current legal landscape.

### SUMMARY

At the inception of Berkeley's STR registration requirements, the City contacted hundreds of property owners whom it believed, based on Host Compliance research, could be operating STRs. Owners were advised of the new requirements, the

registration platform, and provided a timeline by which registration must be completed in order to be in compliance. Since then, 517 applications have been filed and 382 have been approved. Close to \$3 million has been collected in Transient Occupancy Taxes. A focused enforcement effort is underway in the Land Use Planning division in coordination with Neighborhood Services, Finance, and the Rent Stabilization Board.

## CURRENT SITUATION AND ITS EFFECTS

### **A. BERKELEY'S ORDINANCE:**

The Berkeley Ordinance allows residents to provide Short-Term Rentals under certain conditions. No STR stay may exceed 13 consecutive days (beyond which City Rent Stabilization requirements take force). Units listed for STR uses must have property owner approval, be covered by liability insurance of at least \$1 million, and be located within specifically designated zoning districts. Units may not be used as STRs if they are designated as Below Market Rate units or have had a no-fault eviction within the last five years. Additionally, Accessory Dwelling Units (ADUs) which were built after April 1, 2017, or which have been used for long-term rental purposes since 2007, may never be used as STRs.

Among other requirements, the City's Short-Term Rental Ordinance limits the number of days a unit can be rented without the owner or lessee (the "Host") present in the unit to 90 days per year. (BMC 23C.22.050.B.2.) When the Host is present, the unit may be rented for an unlimited number of days in a calendar year. (BMC 23C.22.050.B.1.) The Host is responsible for paying City taxes in a timely manner (BMC 23C.22.050.J-.K).

The Ordinance may be enforced through the issuance of administrative penalties or through public nuisance proceedings. (BMC 23C.22.060.B-.C.) The Ordinance also provides that the host may be subject to civil penalties under Chapter 13.48 if more than one response to "loud or unruly parties, gatherings or similar events" occurs within any 120-day period. (BMC 23C.22.060.A.) The prevailing party may recover attorneys' fees in an action to enforce the Ordinance. (BMC 23C.22.060.D.)

### **B. STR REGISTRATIONS:**

To date the City has received 517 applications to register an STR (specifically, a Zoning Certificate for Short-Term Rental activities, or ZCSTR). Of those, 382 have been approved, 99 denied, and 11 withdrawn, with 25 still under review as of the writing of this report. Of the approved applications, 58 (15%) are hosted in an Accessory Dwelling Unit (ADU).

The application process requires interested parties to register online. The potential STR Host answers questions to determine if the unit is eligible based on its location; if not, the system automatically notifies the applicant and will not allow them to continue the application process. If the location is eligible, the applicant is required to upload proof of ownership or property owner approval, three proof of residency documents, and remit the non-refundable \$220 application fee. The system then generates a ZCSTR number and forwards the application for review, by Planning and Rent Board staff, for compliance with STR and Rent Board Ordinance requirements. Staff can either approve the ZCSTR application, deny it, or ask for additional information. Staff also answer the public's questions about STRs and provide input on the viability of STRs at specific locations based on the ordinance requirements.

### C. REVENUE GENERATED:

Short-term rentals are subject to the Transient Occupancy Tax (TOT) at a rate of 12% of gross rental income received, and to the STR code enforcement fee at a rate of 2%. The TOT tax is paid by the transient/guest and the code enforcement fee is due from the host of the rental property. Below is the summary of the revenue and expenses for the STR tax collection in its first two fiscal years of operation:

**Short -Term Rental Operating Summary**  
*Revenue and Expense Summary for FY 2018 and FY 2019*

Description	FYE 2018*	FYE 2019	Difference	% change
TOT (Short-term Rentals)	\$ 1,053,815	\$ 1,806,679	\$ 752,864	71.4%
TOT (Code Enforcement fees)		\$ 24,317	\$ 24,317	100.0%
<b>Total Revenue</b>	<b>\$ 1,053,815</b>	<b>\$ 1,830,996</b>	<b>\$ 777,180</b>	<b>73.7%</b>
<b>Less: Operational Costs</b>	\$ 143,000	\$ 186,310	\$ 43,310	30.3%
<b>Net Revenue</b>	<b>\$ 910,815</b>	<b>\$ 1,644,686</b>	<b>\$ 733,870</b>	<b>80.6%</b>

\* Note that the program operated for only seven months during FYE 2018, with TOT and Code Enforcement fees tracked together.

Short-term TOT revenue in FY 2019 increased by 71.4% over the first year of implementation. The increase can be attributable to the shorter period of implementation in that first year, when the AirBnB collection agreement came into force in November 2018.

The gross TOT revenue from STRs in FYE 2019 was \$1.8 million, of which \$1.6 million (89%) derived from hosts listed on AirBnB, and \$0.2 million (11%) came from non-AirBnB listings.

#### **D. HOST COMPLIANCE CONTRACT, AGREEMENTS WITH HOSTING PLATFORMS**

The City contracted with Host Compliance on April 21, 2017, for a term of three years plus an additional two year renewal option. Host Compliance provides: a) software to identify STRs and their hosts; b) a web-based tax and enforcement fee collection mechanism on behalf of the City; c) on-going monitoring of STRs for compliance by sending up to two letters, and/or providing reports and analysis to support tax audits and support STR-related investigations; and d) a telephone and email hotline staffed 24 hours a day for complaints and other non-emergency problems related to STRs.

Berkeley entered into a voluntary collection agreement (VCA) with AirBnB effective November 3, 2017. AirBnB agreed to collect and remit TOT beginning December 1, 2017; the City receives a check monthly for all TOT collected the previous month. Payments are submitted without any detailed information on the booking transactions from which the tax derives, as the VCA allows AirBnB to remit the taxes on behalf of the hosts without producing personally identifiable information relating to any hosts or guests. The City is limited to submitting an audit request to AirBnB once every four years, and such an audit may only include 12 consecutive months of activity.

Staff are currently working with the City Attorney's office for a VCA agreement with another platform. Finance staff work with Host Compliance to identify potential VCA opportunities with various other hosting platforms. Research and analysis for these platforms has been on-going, and platforms have been encouraged to participate. Finance also provides assistance to any STR hosts who need assistance filing their tax returns.

#### **E. CITY ENFORCEMENT:**

Neighborhood Services Code Enforcement (NSCE) has to date been the primary division leading STR enforcement efforts. NSCE works from data gathered through the Host Compliance website, tracking listings on the most popular STR sites such as AirBnB, VRBO, etc. Data from Host Compliance is used to confirm compliance of registered hosts and identify potentially non-compliant listings, both reactively, in response to specific complaints received, and proactively by comparing listings against Berkeley's list of properly registered hosts.

The Planning Department recently created and filled an Associate Planner position in the Land Use Planning Division whose primary work involves zoning code enforcement, including STR enforcement. Many of the functions previously led by NSCE are now being transferred to Land Use Planning for more dedicated enforcement.

The work to investigate and enforce potential violations of Berkeley's STR Ordinance involves the following steps:

1. Intake complaints via Host Compliance: These stem either from hotline calls, which are prioritized (as per usual City code enforcement practice), or from proactive Host Compliance research, identifying listings for sites which have not registered with the City.
2. Host Compliance courtesy warning: Host Compliance identifies listings for a Berkeley STR which may not be registered and notifies the City. The City issues a warning letter to the host via the Host Compliance website. This courtesy letter informs the property owner of his/her obligation to register and remit TOT. A second letter is sent after 30 days if compliance has not been achieved.
3. Initial investigation: Staff confirm listings which may be non-compliant (e.g. rental listings lacking a valid ZCSTR). Staff verify ownership of the rental property and assign a case number.
4. Continuing investigation: Staff check records to determine whether the listing is for an ADU, and whether the property on which the STR listing is located is owner occupied, as Berkeley's Ordinance has specific compliance obligations and restrictions in those cases. Staff confirm whether the listing is for a legal dwelling unit; if not, enforcement would include a cease and desist letter and requirement to either pursue legalization of the unit, or to have it removed or converted to a non-dwelling unit.
5. Enforcement: Once a listing is confirmed as non-compliant, the City issues a Citation Warning letter, with a copy of the courtesy warning Host Compliance previously sent, and provides the owner a deadline by which he/she must comply or face penalties. If the warning does not promptly result in compliance, the City issues administrative citations with progressively increasing fines.

## **F. COMPLIANCE SUMMARY**

According to Host Compliance, there are approximately 1,061 active hosts in the City of Berkeley. According to City records, 389 hosts have been issued valid ZCSTRs.

Of the unregistered hosts, Host Compliance states that roughly 85% are listed with AirBnB. Even though they are not registered, the City still collects the TOT revenue from these hosts, through the agreement with AirBnB to collect and remit the tax.

Because of this, the lack of compliance with the ZCSTR requirement does not cause a loss of TOT revenue. However, units which have not met registration requirements are not reviewed for the legality of their location, ADU limitations, host presence and stay duration restrictions, liability insurance requirements, or compliance with Rent Stabilization laws. Lack of ZCSTR compliance also causes a significant shortfall in the resources available to conduct the ongoing enforcement envisioned by the STR ordinance.

From the Zoning Code Enforcement, in the first 18 months of the local registration requirement the City opened 128 cases, 48 of which (37%) were reactive enforcement in response to hotline complaints, and 80 of which (63%) derived from proactive enforcement from listings identified by Host Compliance. The remaining 33 complaints were investigated and deemed not to be in violation.

Of 128 cases opened, 96% (all but five) were resolved to compliance within 30 days. A total of 19 administrative citations have been issued, amounting to \$10,200 in fines. These comprised 14 citations for first-time violations, four for second violations, and one for a third violation. All of these cases had also reached compliance as of the end of June, 2019.

Staff estimate that each case of possible non-compliance requires an average of two hours of work, researching the case, determining its compliance status, issuing warnings and citations, and following up until closure is reached. Code enforcement activities always require a labor-intensive process, to ensure that any City action is well-founded. As such, by the time a set of cases is resolved, staff always have a new working list of potential violations from Host Compliance on which to follow up.

#### **G. RECENT LEGAL LANDSCAPE:**

Some jurisdictions, including the City of Santa Monica, have enacted home sharing ordinances that are more restrictive than Berkeley's Short-Term Rental Ordinance. Santa Monica's Home Sharing and Vacation Rentals Ordinance prohibits all rentals of any dwelling unit when the Host is not present. (SMMC 6.20.010, 6.20.030). The Santa Monica Ordinance also makes hosting platforms responsible for collecting and remitting transient occupancy taxes to the City. (SMMC 6.20.050(a)), for providing detailed host information to the City (SMMC 6.20.050(b)), and for removing listings that are not properly registered with the City (SMMC 6.20.050(c)). The Ninth Circuit Court of Appeals recently upheld this provision of the Santa Monica Ordinance against challenges brought by AirBnB and HomeAway under the federal

Communications Decency Act and the First Amendment. The deadline for the hosting platforms to seek Supreme Court review is November 14, 2019.

### BACKGROUND

The City of Berkeley employs a decentralized model of code enforcement, wherein numerous divisions and departments have roles in aspects of the code enforcement process, without any one body retaining full oversight. City entities directly involved in review and enforcement of STR matters include the Neighborhood Services Code Enforcement Unit of the City Manager's office, the Land Use Division of the Planning Department, the Revenue Development Division of the Finance Department, and the Rent Stabilization Board. Other City bodies involved in STR enforcement more occasionally or indirectly include the 311 Online Service Center, Planning's Building and Safety Division, the Police Department, and the Fire Department.

A summary of the Berkeley Short-Term Rental program is provided on the City website at: <https://www.cityofberkeley.info/str/>

### ENVIRONMENTAL SUSTAINABILITY

There are no clear environmental effects associated with the subject of this report.

### POSSIBLE FUTURE ACTION

The City could consider revisions to its STR ordinance to reflect lessons learned in other cities, including the City of Santa Monica.

Staff report that the limitation of 13 continuous days for a single STR stay, and the limitation of 90 rental days when a Host is not present, are difficult to track and enforce and could be reconsidered in future ordinance updates.

In agreements with hosting platforms, Berkeley could negotiate for a greater level of detail on individual STR locations, including room-nights rented, lengths of stays, and TOT remitted, rather than simply receiving aggregated city-wide data.

### FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Included in the FY 2019 Adopted Budget was \$840,000 from STR that was allocated to baseline services. If the Council applies its current fiscal policy, anything above the \$840,000 would be allocated as follows:

- ✓ 66.7% to the Affordable Housing Trust Fund
- ✓ 33.3% to the Civic Arts Grant Fund

Generally, this allocation would be appropriated in the First Amendment to the Appropriation Ordinance (AAO#1) presented to Council in November 2019. However,

on June 25, 2019, as part of the FY 2020 & FY 2021 Biennial Budget Adoption Council reduced the General Fund allocations that would have augmented the Paramedic Tax Fund and funded a Human Resources Manager (1FTE) and instead redirected that funding to the Civic Arts Grant Fund (Civic Arts) increasing the baseline allocation for Civic Arts to \$500,000 per year. As a result of the increased allocation to the Civic Arts baseline in addition to the approval of Measure O, which authorized \$135 million in general obligation bonds to create and preserve affordable housing, the fiscal policy will be submitted to the Budget and Finance Policy Committee for review and discussion.

Some ordinance revisions contemplated could restrict or loosen STR requirements, resulting in lesser or greater amounts of TOT revenue received, and lesser or greater amounts of staff enforcement capacity.

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