

SHORT TERM RENTALS AND ENFORCEMENT

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INTRODUCTION

An effective Short Term Rental (STR) program for Del Mar needs three supporting legs to be successful:

- Consistency With The Community Plan, Zoning, And Local Coastal Program (LCP)
- An Effective Enforcement Program
- A Workable Administrative Implementation Program

In a prior paper dated July 2, 2016¹, I addressed the first leg—consistency with the Community Plan, Zoning, and LCP, concluding STRs are allowed by the current Community Plan, Zoning Code, and Local Coastal Program (LCP) in the Central Commercial (CC), North Commercial (NC), Professional Commercial (PC), Residential Commercial (RC) and Visitor Commercial (VC) zones, but not in the residential zones. To allow STRs in residential zones would require Community Plan, Zoning Code, and LCP amendments. In this paper I will address the second leg: Enforcement.²

ENFORCEMENT SUCCESS CRITERIA

All seem to agree that the ability to legally and effectively enforce an STR program is essential. There is no point in investing the time, effort, and money to fashion a regulatory program for STRs if it cannot be enforced. This will not be easy. Many other jurisdictions struggle to enforce their STR rules with limited success.³

The success criteria I have identified for Del Mar include:

- The enforcement strategies must be legal under the federal and state constitutions and under federal, state, and local statutory and case law.
- The enforcement mechanisms must be capable of deterring violations and of correcting violations when they do occur.

¹ This report can be found on my website at: <http://dwightworden.com/resources.html> and also as part of the City Council agenda packet for August 1, 2016 as Attachment B to item 6 located here: <http://www.delmar.ca.us/AgendaCenter/ViewFile/Agenda/08012016-1207>.

² This paper reflects my views and opinions based on my research as a councilmember but is not intended to be legal advice to anyone.

³ It is noted that some jurisdictions have codified and attempted to enforce rules against internet platforms like Airbnb and VRBO to require them to police their websites to prevent listing STRs not in compliance with the local city rules, imposing fines for listings in violation, and/or requiring Airbnb, VRBO and others to disclose information to the city. Airbnb has challenged these types of requirements in court contending that they violate Airbnb's first amendment right of free speech, and that the local rules are in violation of the 1996 Communications Decency Act (CDA). Airbnb contends that the CDA prohibits states and local governments from holding websites liable for content and actions by users who post on their online platforms. It is noted, however, that I am not recommending attempting this kind of enforcement in Del Mar, at least not until the law is clear.

- The rules, enforcement mechanisms, and penalties for violations must be clear and easily understood by STR owners (and their tenants, managers, agents, and operators), by neighbors and residents, and by the enforcement authorities.
- The enforcement process needs to minimize pitting neighbor against neighbor (or neighbor against owners, managers, and STR tenants of neighboring properties).

Basic Legal Principles

Some of the key legal principles protecting private property rights and persons accused of code violations that would apply to any enforcement program in Del Mar include:

- **Property Rights.** An owner of real property in Del Mar has certain property rights protected by the federal and state constitutions and by federal, state, and city laws. These rights include: the right to quiet enjoyment, the right not to have property taken without just compensation, the right to make reasonable and beneficial use of owned property, and the right to be free from unreasonable search and entry. Tenants also hold many of these rights during the term of their tenancy.
- **Privacy Rights.** California law protects a person's reasonable expectation of privacy in most circumstances, and recognizes a reasonable right of privacy inside one's home or place of abode, even if occupied temporarily.
- **Due Process Rights.** Federal and state law guarantee a right of due process before one's vested legal rights can be taken away or subjected to substantial interference by the government.
- **Rights When Faced with Code Enforcement.** Where the city undertakes to enforce its code through civil actions, such as fines, the alleged violator's rights include the right to a due process hearing before an impartial hearing officer,⁴ and to an opportunity to correct the alleged violation. One charged with a misdemeanor normally has all the rights of one charged with a crime, including the right to a Miranda warning, to a jury trial, to be protected from unreasonable search and seizure, and to be acquitted absent proof beyond a reasonable doubt. Many of these rights apply even in the case of an infraction.
- **State Law Limits on Penalties.** Current California law imposes limits and restrictions on fines and penalties that a Del Mar enforcement program could not exceed. These state restrictions provide that city code violations are misdemeanors unless the city code specifies they are infractions⁵. For infractions the maximum fines allowed by state law in most cases are \$100 for a 1st offense, \$200 for a 2nd offense in the same year, and \$500 for every

⁴ DMMC section 1.10.080.

⁵ Cal Gov't Code Section 36900(a). Note that the current Del Mar Code leaves it to the discretion of the city whether to charge zoning violations as misdemeanors or infractions, most likely leaving the default as a misdemeanor under state law. DMMC Section 30.98.060. However, DMMC section 1.08.010 specifies all code violations are infractions unless specified otherwise. These two apparently conflicting provisions leave the status uncertain.

offense thereafter.⁶ Misdemeanors carry a maximum fine of \$1,000 and up to 6 months in jail⁷.

Some of the key legal principles applying to a city's enforcement rights include:

- Cities have a right to enforce their zoning and other rules civilly and criminally.
- Cities have a right to make reasonable inspections of private property to ensure compliance with zoning, building, and safety rules.
- Cities have a right to enforce the terms and conditions of any permits or entitlements they issue.
- Cities have a right to declare violations of their codes to be public nuisances subject to abatement procedures.

Del Mar's Current Enforcement Provisions.

Here is a summary of Del Mar's existing code provisions on enforcement. The zoning code addresses enforcement in Chapter 30.98. General enforcement procedures are also found at Chapter 1.08 and administrative citations are addressed in Chapter 1.10. Some key points:

- Code violations are a public nuisance subject to abatement at the owner's expense. A lien can be imposed on the property to cover costs of abatement.
- Construction or use of property beyond what is allowed by approved plans/permits is a violation of the code.
- Each day that a violation continues is a separate violation subject to separate penalties.
- When the code makes something unlawful "...it shall also be unlawful for any person to allow, permit, aid, abet, suffer or conceal such act or omission."⁸
- A City Code Enforcement Officer can write infraction citations for violations occurring in the officer's presence.⁹
- New owners of property are required to abate existing violations and are liable for the same even though they may not have created them.

ENFORCING A REGULATORY PROGRAM

It is my conclusion that enforcing the key provisions of an STR regulatory program to "allow but regulate" STRs in residential zones in a manner that is consistent with the above-identified key legal principles and which meets the success criteria is difficult to impossible. An enforcement program that meets the criteria of deterring and correcting violations would need to be as intrusive as to, arguably, go beyond what is authorized by current law and to tread upon the property and privacy rights of home

⁶ Id. Section 36900(b). Violations of county safety ordinances may carry a fine up to \$500 for a first offense and can go higher where the offense was willful and/or posed a public safety threat. Id. Section 53096.4D.

⁷ Cal. Gov't Code Section 36901. DMMC Section 1.08.020.

⁸ Section 1.08.040 and 1.10.020(C).

⁹Section 1.08.070(a).

owners. To serve as effective deterrents, fines and penalties would need to be higher than the amounts currently authorized.

An enforcement program that is not intrusive and instead relies on traditional enforcement strategies as set out in the Del Mar code would likely fail to meet the key success criterion of actually deterring and correcting violations. The inability to effectively enforce STR regulations using traditional tools has proven to be the case in many other cities, and in Del Mar to date. Let's look at some specifics to see the problems.

Key provisions of an STR regulatory program will include one or more of the following types of restrictions (1) minimum limits on the length of stay, (2) limits on the number of people [2 per bedroom +2 is often proposed], (3) limiting the number of people based on parking, (4) limits on the frequency or time of year of STR rentals, (5) fines and penalties high enough to incentivize compliance and deter violations. How would Del Mar actually enforce such restrictions?

These kinds of restrictions can only be enforced if the City assures that each rental agreement complies with the restrictions, and there is some kind of follow up to ensure they are actually adhered to. When faced with a complaint of violation the enforcement authorities would need to conduct an investigation which in nearly all cases would of necessity include actual on-site verification to ensure that the regulations are in fact followed, i.e. that the number of tenants or cars do not exceed the limits, etc. I see no practical way to successfully conduct this kind of enforcement within the confines allowed by current state and city law and without intruding on privacy and other protections.

Such a program requires questioning owners, managers, agents, and renters—when did renters arrive? When will they leave? Are those “extra” people seen on site staying overnight or day visitors? Which cars belong to renters and where are they parked? If there is a minimum stay requirement, and tenants do not stay the full length of their lease term, what process would be effective to prevent the re-rental of unused days resulting in more frequent turnover than allowed?¹⁰ This kind of enforcement and monitoring requires a city official to visit the rental site, perhaps ask to enter for visual inspection and to review the rental agreement, and to ask the renters to speak to the official,¹¹ something they are not necessarily legally obligated to do, are unlikely to want to do, and that produces the kind of intrusive experience most vacationers and city enforcement officials do not want.

For example, enforcing a limit on the number of people based on a per bedroom calculation may be the most important in regulating the intensity of use and resulting impacts to the neighborhood, but also a most difficult criterion to actually enforce. There is no way I can see to do that without entering, questioning, and counting people. Even then, how does an enforcement officer deal with a response like “I’m just visiting my friends and not staying here?” How does an enforcement official know: Are the

¹⁰ There are reports from other cities, including Solana Beach, that where length of stay limits are imposed rental agreements are often written to comply, but the actual stays do not comply. For example, the rental agreement may recite it is for 7 days, but tenants often leave after 2 or 3 days. It is of no concern if tenants leave early if the property remains unoccupied for the duration of the rental term. However, if the 7-day agreement is a subterfuge where the owner knows from the outset that the stay will be less than 7 days, and the owner enters into another agreement to re-rent to a different tenant for the unused portion of that 7-day period the provisions designed to regulate turnover are defeated. Catching and enforcing this kind of violation is extremely difficult.

¹¹ Where the alleged violation being investigated is a misdemeanor a Miranda warning may be required before questioning.

people in the house STR renters? Day visitors? The owner's family? Unless the officer enters and actually counts the people sleeping in the house how can it be known that the overall occupancy limit is being complied with? This kind of "entry" onto private property typically requires either voluntary consent from the occupants, which may or may not be received, or some kind of warrant backed by cause which will be difficult to document before questioning and entry take place.

Likewise, if occupancy were limited by available parking, how does an enforcement officer, or a neighbor, know whose cars are parked where? Does the city require every tenant to register their car with the city, or every STR operator to include license plate information in the rental agreement and provide that to a concerned officer upon request? How does that work for visitors picking up rental cars who don't know their license number at the time of signing a rental agreement? How do enforcement officers verify that tenants occupying the house on day 7 of a seven day stay are in fact the tenants who were there on day 1? How does the city deter violations where the fines allowed by state law and the city code are nominal--\$100 for a first offense?

In contrast to other code enforcement scenarios familiar to the city, STR violations are typically not visible in the way that other code violations are. In other enforcement scenarios the officer can see the violation occur, such as a dog off the leash, a parking meter expired, glass on the beach, illegal construction, etc. Enforcing STR regulations would be new for Del Mar. It would require some kind of probing of owners, managers, agents, and STR renters, to ferret out violators. It would require investigation going well beyond mere field observations and neighbor complaints. If enforcement mechanisms precluded such potentially invasive investigations then very few actual violations could be cited or proven.

An officer attempting to enforce STR regulations, in most cases, will not be able to rely on what the officer sees in the field even though personal observation is required by the code to issue a citation. If the officer sees a bunch of people in a home, or a bunch of cars out front, the officer has no way to know if a violation is occurring based solely on observation. Intrusive questioning and follow up are necessary. Nor can enforcement rely solely on what neighbors report as that is not something personally observed by the officer. Nor are neighbors in a position to gather the proof that would confirm a violation because they cannot engage in invasive investigations either.

An intrusive program might achieve the desired result of deterring violations, but it also subjects the innocent as well as the guilty to intrusive government action. It requires the type of government intrusion into private areas that are best avoided. Such a program would, as well, require revisions to the city code and likely to state law which would be a challenge to enact.

I see no way around the problem: To actually enforce these kinds of "allow but regulate" STR restrictions requires an enforcement strategy that would involve the city in intrusive actions that are not currently allowed and that the city is unlikely to want to engage in even if the law were changed to allow it. If the city is left to rely on its traditional enforcement techniques, they will be insufficient to effectively enforce an STR regulatory scheme. Del Mar's own history, and that of many other cities, tells us that in the STR context traditional enforcement strategies are easily gamed and doomed to fail, leaving the city with STRs that, effectively, are left unregulated.

Perhaps the city attorney can figure out how to effectively enforce an "allow but regulate" STR program in residential zones, but I have been unable to do so.

IN COMPARISON, ENFORCING NO STRS IN RESIDENTIAL ZONES IS RELATIVELY EASY.

No STR enforcement program will be easy. But, in contrast to the difficulties in enforcing an “allow but regulate” program, enforcement of the current Community Plan and zoning which do not allow STRS in the residential zones would be relatively easy. An effective enforcement program could be comprised of city staff’s (or a contractor’s) periodic review of internet listings on Airbnb, VRBO, etc. This could be done from a city hall staff desk. Any STR listing in a residential zone would indicate a violation subject to enforcement without the need for any onsite intrusions or questioning, narrowing the need for follow up to instances where probable cause exists. In addition, a staff member could periodically drive the residential neighborhoods to look for and photograph yard signs in residential zones advertising STRS which would also indicate violations. Neighbors could file similar reports of online or yard sign advertising for STRs in residential zones without having to confront STR owners, managers, or tenants.

STR rentals need to have a method to be “found” by prospective tenants which means they are also findable by the city. That need to be found is currently met by internet and yard sign advertising. If new forms of advertisement were to emerge, those could also be monitored without the need for intrusive actions.

These two simple actions, reviewing internet listings and observing yard signs, would catch the vast majority of violations. As to those rare cases where STRs occur without on-line listings or yard signs, traditional neighbor complaints would still be available. The important point is that effective enforcement could be achieved without the need for any of the intrusive and problematic actions needed to enforce an “allow but regulate” approach. The rules would be clear, simple, easily understood, and easily enforced.

A 15 day Exemption. If the city chooses to add an IRS type exemption to such a “no STRs in the residential zones” program here is how such an exemption could work. The exemption could be modelled on the IRS rules that allow rentals up to 15 days per year on the grounds that such limited rentals do not put the owner “in the business” of renting. Del Mar could create a similar 14 night (15 day) exemption, i.e., short term rentals for 14 nights or fewer in a year would be exempt from the otherwise applicable prohibition on STRs in residential zones. Those wishing to avail themselves of the exemption would file a simple exemption form with the city setting out their address, the number of bedrooms and parking spaces, verifying basic health and safety requirements, and indicating the dates when rental will occur. There might be a small fee to cover costs. The city would then know who was utilizing the exemption.

If an owner using the exemption is alleged to be in violation by renting for more days than allowed by the exemption, follow up could occur including loss of the exemption privilege if a violation is established. An owner found renting for more than 15 days without reporting the income would also be in violation of IRS rules and subject to IRS penalties, a strong motivator in itself independent of any city enforcement action.

It is noted that allowing STRs under such an exemption is, in my opinion, consistent with the Community Plan. STR rentals for a maximum of two weeks per year would in most circumstances result in the presence of the owner, or a long term tenant, on site most of the year. In most cases, the predominant use of the property would be to house permanent or long-term residents who would be true neighbors and not visitors, and the neighborhood fabric would remain intact.

The “allow but regulate” approach, in contrast, is not consistent with the current Community Plan, zoning or LCP, and would require Community Plan, Zoning Code, and LCP amendments as well as CEQA and Coastal Commission review. Securing these approvals would be time consuming, expensive, and uncertain.

Del Mar Community Plan Amendments require either a vote of the public or 4/5ths vote of the city council, a steep hill to climb. An LCP amendment requires approval from the Coastal Commission which might impose requirements other than those desired by Del Mar. CEQA review would be required on these city amendments and could result in program changes, and there is always the opportunity for legal challenges to any or all of these steps, as well as the opportunity for a referendum as to Community Plan and zoning changes. There is also a draft initiative petition in the wings already waiting to be circulated to prohibit STRs in residential zones should the city seek to allow them. All of these variables introduce uncertainty as to whether or not the City can implement and enforce an “allow but regulate” approach.

ENFORCING THE INTERIM MORATORIUM

On April 4, 2016 the City Council enacted a 45 day interim moratorium¹² (Ord. 913) that allows existing STRs which can prove ongoing operations prior to the moratorium to temporarily continue operating, while prohibiting the start-up of any new STRs in residential zones. The purpose of the moratorium is to maintain the status quo while the city explores options for the long term. As described by the city staff: “The intent of the ordinance is to maintain the status quo and allow City staff to develop both new zoning regulations concerning Short Term Rental uses as well as regulations concerning the operation of Short Term Rentals.”¹³

So far, city staff reports only one complaint post enactment of the moratorium. No formal enforcement has yet to be instituted. This lack of complaints may be due to any one or more of the following:

- All the operating STRs qualify for the “existing use” exemption
- New STR uses are difficult to discover
- Citizens are reluctant to file complaints, or lack sufficient information to know or prove that an STR started after the date of the moratorium, or that it is operating in violation
- Citizens believe that all ongoing, exempted STRs are, at least temporarily, “legalized” during the term of the moratorium and not subject to operational complaints
- The moratorium is being respected and no new STRs are being started
- STR operators are consciously doing a better job of regulating tenant behavior reducing neighborhood concerns

At this point we do not know for certain what the explanation is, only that few complaints have been received. The city recently instituted a “hotline” and an online email address has been located on the city website for receiving complaints about STR violations. The city has taken efforts to publicize these contact opportunities. As awareness of these hotlines grows, we will see what kind of responses are received.

¹² The moratorium was subsequently extended for an additional 6 months on May 16, 2016 and now expires on November 16, 2016.

¹³ City staff report, p.1, April 4, 2016

THE COMPLAINT PROCESS: PRACTICAL ISSUES

The city's current enforcement process, which relies on citizen complaints, is not conducive to timely addressing the kinds of STR concerns actually occurring in our neighborhoods. Nor is it good at collecting data on STR problems. At its meetings the city council has heard complaints about STR operations, and there is much anecdotal talk in town of residents experiencing STR problems, but so far the city has received only limited specific complaints. Beyond the reasons outlined above as to why complaints are not being received, I believe there are at least two reasons attributable to the process itself for the lack of a record of specific complaints.

First, the current complaint process is formal, requiring signing a formal complaint¹⁴ under penalty of perjury¹⁵ alleging a code violation or some kind of crime. Many residents are reluctant to take such formal action. They are not looking to start a war with their neighbors or to see someone charged with a crime or code violation. They just want the party noise next door to quiet down, the trash picked up, or the cars blocking access to be moved. Their concerns are neighborhood nuisances, many of which do not rise to the level of code violations or crimes. For example, a group of next door STR tenants on vacation for 3 days may be out on the deck or patio late in the evening, perhaps playing music, talking and laughing, or otherwise having fun while disturbing the neighbors. But, most likely the noise ordinance is not violated, no code violation has occurred, and no crime has been committed. These kinds of nuisance disturbances are exasperating to those impacted, but are not amenable to the complaint process or to correction under the current city code. We need something else.

Second, most STR problems occur in the evenings after city hall is closed. Calls to city hall go unanswered or to an answering machine. Lifeguards, parking enforcement officers, the city's code enforcement officer, are off duty. Reports I have received indicate that calls to the sheriff often result in long waits on hold and a reluctance by the sheriff to respond where it appears the call is for a nuisance, not a crime. On those occasions where the sheriff does respond it is often an hour or more later, and often after the disturbance has ended. If the disturbance is still ongoing, the typical sheriff response is to advise the resident to take it up with the city as no crime has been committed. Many citizens have reported to me that they have called the sheriff only to experience these frustrations and then gave up the effort.

Put simply, there currently is no effective way for a citizen to bring forward an STR concern that can be timely and effectively addressed, nor is there a way for the city to log, respond to, and correct these kinds of STR problems. In my opinion, this is a primary reason why formal complaints and calls to the sheriff are so few. We need a new process, not to replace the formal code violation process, but in addition thereto. We need an after-hours phone number active preferably 24/7, but until at least midnight during the week and 2 am on weekends and holidays, that is answered by a live person. We need an email address that can log problems and complaints and generate a timely response 24/7.

The city needs to log and follow up on all complaints in a timely way, within minutes, not hours or days. We need to accept oral and email complaints. The focus needs to be on solving problems quickly. Options for timely follow up can range from a simple call to the property owner or to on site tenants, to a site visit

¹⁴ DMMC Section 30.98.050

¹⁵ DMMC 1.08.060

to observe and ask for immediate correction of any problem, to more formal pursuit of a code violation or referral to the sheriff.

Updating the city complaint procedures along the above-suggested lines is, in my view, essential under any STR program and should be part of any pilot program. In doing such an update, the city needs to design a system that will accommodate informal oral and email complaints that will be addressed immediately, 24/7, while at the same time ensuring that false or grudge complaints are weeded out. Establishing a workable process will require thought and study.

SHUTTING DOWN STRs AND AMORTIZING.

A difficult, but important, part of enforcing any STR program will be closing down non-complaint STRs. Both the “allow but regulate” and “no STRs in residential zones” strategies will require shutting down some STRs. Even though STRs would be allowed in residential zones under an “allow but regulate” approach, not all those currently operating will be allowed to continue. Those that raise health and safety issues, that are non-conforming in some important way, that refuse to apply for a permit, that violate their permits, or repeatedly generate valid complaints, will all need to be closed. Likewise, under the “no STRs in residential zones” strategy STRs in the residential zones, except those qualifying for the limited IRS type exemption, will need to be phased out.

In both situations closing an STR will raise challenges and will depend on a fact based determination that the STR is out of compliance. Importantly, that will be a much more difficult and complicated task in an “allow but regulate” program, as every STR will have the option to apply to be permitted, to contest a permit denial or conditions imposed, to contest claims of violation, to take the city to administrative hearings and appeals on the facts specific to each case or complaint, and potentially to court, and to argue that the STR should be allowed to operate since STRs are allowed by the program.

Under the “no STRs in residential zones” approach, proving non-compliance will be much less complicated as all that needs to be established is that the property is operating as an STR and that it is located in a residential zone. There will be no need for administrative hearings about the details of alleged permit non-compliance, about alleged fact based violations, and so on. An STR operating in a residential zone would be a per se violation, and unless it qualifies for a limited 15 day IRS type exemption, can be shut down.

Amortization.

The city has no obligation to amortize or mitigate impacts resulting from closure of an illegal or unpermitted use unless the owner/operator can prove non-conforming use rights by establishing that the use was lawfully started with all needed permits, and has been in constant operation and not expanded since its lawful inception. To establish this type of “grandfather right” would require, based on my research, proof from the applicant that the STR was lawfully started under prior county zoning before the city incorporated in 1959.¹⁶

An illegal STR use that cannot prove non-conforming rights is subject to immediate abatement as a public nuisance. The city may, however, consider a voluntary amortization program to ease the hardship on those STRs required to be phased out. Such an amortization period could run until any existing

¹⁶ This issue was addressed in my first paper on Community Plan and Zoning consistency at p.11.

contracts are honored, and perhaps for an additional grace period not to exceed one year, to minimize economic hardship and to give owners sufficient time to adapt to the new rules. I would support consideration of such a program.

CONCLUSION

After much study, it is my considered opinion that enforcing an “allow but regulate” approach would be difficult if not impossible, would necessitate changes in the City Code, perhaps in state law, and would require utilization of enforcement mechanisms that would be full of challenges and undesirable even if legally possible. Using the existing enforcement process to enforce an “allow but regulate” approach is doomed to fail in meeting identified success criteria, just as that approach has failed to date in Del Mar and in many other cities wrestling with STR issues.

In contrast, enforcing rules that STRs are not allowed in residential zones is relatively easy and can be accomplished with little need for intrusive actions. If an exemption is coupled with such a program to allow occasional rentals for 14 nights (15 days) or fewer per year, some complexities are likely to arise, but at a much smaller scale. They strike me as manageable and worthwhile as they would accommodate Del Mar residents who want to occasionally rent their homes short term while they take a vacation, visit relatives, etc., while excluding the business of short term rentals in our residential zones.