



Position Paper

March 25, 2018

This document outlines the position of Save San Diego Neighborhoods' on each of the items below.

1. STVRs are Visitor Accommodations and Prohibited in Residential Zones

The definition ***Visitor Accommodations*** is found in the Commercial Use Category of SDMC Section 131.0112, entitled "Descriptions of Use Categories and Subcategories". This section provides descriptions of each use category and subcategory found in the Use Regulations Tables of each base zone. **Section 131.0112** does *not* determine in which zone a particular use is permitted.¹

Visitor Accommodations – are "Uses that provide lodging, or a combination of lodging, food, and entertainment, primarily to visitors and tourists." SDMC Section 131.0112(a)(6)(K)

Visitor Accommodations is a line item in the Use Regulations Tables for *each* of the five base zones, including Residential Zones.

To confirm this, locate the Use Regulations Table for Residential Zones (SDMC section 131.0422).² The category, "Visitor Accommodations" is on page 12 in the September 2015 iteration of the SDMC. Toward the bottom of page 12, you'll find the category - *Visitor Accommodations*. (See the last page of this document.)

¹ This sentence is **bolded** because City Councilmember staffers have said it was their understanding the use description, ***Visitor Accommodations***, "only applied in commercial zones and not residential zones". This is incorrect. Staffers are confusing use categories and subcategories – and what uses are permitted in which zones – with the zone itself. In other words, commercial uses, like Visitor Accommodations, are not found exclusively in commercial zones. For example, Bed & Breakfast Establishments, which are defined as Visitor Accommodations, are permitted - under certain conditions - in residential zones. And, some commercial uses are permitted in industrial zones. Again, although Visitor Accommodations is a commercial use, it is *not* restricted to commercial zones.

² The Visitor Accommodations category may be on different pages depending on the SDMC version/publication. In any event, the *Visitor Accommodations* category is in the Use Regulations Table and has been since the existing Code was adopted decades ago.

The hyphen (-) in the boxes to the right indicate that the use is “not permitted”. (See the Legend for Table 131-04B on page 7 in the September, 2015 version of the SDMC.) You’ll find a hyphen in each of the boxes to the right of Visitor Accommodations. These hyphens indicate *Visitor Accommodations* are NOT permitted in residential zones. (See attached -- Legend for Table 131-04B from SDMC section 131.0422.)

2. Short Term Vacation Rental is NOT a Listed Use in the San Diego Municipal Code and therefore is NOT Permitted

Even if one were to conclude that STVR do not fall under the definition of *Visitor Accommodations*, STVR are not permitted because STVR are not one of the enumerated permitted uses in the San Diego Municipal Code.

On March 15, 2017, in response to a query by Councilmember Barbara Bry, City Attorney Mara Elliott responded:

You have asked whether “short-term vacation rentals” are permitted in single family residential zones under the City of San Diego’s current Land Development Code. The City has a “permissive zoning ordinance.” City Att’y MS-2016-23 (July 22, 2016). This means that any use that is not listed in the City’s zoning ordinance is prohibited. *Id.* Short-term vacation rentals are not specifically defined, expressly permitted, or listed in any of the zone use categories, including residential or commercial. City Att’y MS-2017-59 (March 15, 2017)

Like most other California cities, including Santa Monica, Santa Barbara, Carmel, Laguna Beach, Huntington Beach, Manhattan Beach and Hermosa Beach, San Diego a “*permissive zoning*” scheme. This means that if a particular use is not listed in the category of uses found in the municipal code, it is not permitted. San Diego’s Municipal Code has over 23 pages of listed uses. Neither Short Term Vacation Rentals nor Short Term Rentals is listed.

San Diego Municipal Code Section 131.0420(b) states, “Within the residential zones, no *structure* or improvement, or portion thereof, shall be constructed, established, or altered, nor shall any *premises* be used or maintained except for one or more of the purposes or activities listed in Table 131-04B. It is unlawful to establish, maintain, or use any *premises* for any purpose or activity not listed in this section or Section 131.0422.”

In 2011, City Attorney Jan Goldsmith sued to shut down medical marijuana dispensaries. He successfully argued that because marijuana dispensaries were not a listed use in the San Diego

Municipal Code, they were not permitted. The San Diego Superior Court agreed and concluded, “The operation or maintenance of marijuana dispensary, collective or cooperative is not one of the enumerated permitted uses.”

The bottom line is, short term vacation rentals are not a listed use in the San Diego Municipal Code and are therefore not permitted. And the listed uses in the San Diego Municipal Code that most closely resemble short term vacation rentals are hotels, motels and bed and breakfast establishments. None of these uses is permitted in Residential Zones, save Bed and Breakfast Establishments which require a Neighborhood Use Permit or Conditional Use Permit.

3. The City Is Not “Estopped” from Enforcing the Ordinance Prohibiting STVRs In San Diego Residential Zones

On July 15, 2015, the *San Diego Union-Tribune*, quoting comments made by former City Attorney Goldsmith, reported him stating the following at a La Jolla Town Council meeting:

Ultimately, *because San Diego has long permitted the use of homes for short- term rentals*, Goldsmith opined, “the better interpretation and conclusion was that there was not a ban. ...

“A longtime interpretation (of a law) by a governing body charged with its enforcement is given great weight by the judges ... (particularly when) the city is charged with enforcing its own ordinances and *it basically has not shut anybody down for that whole 30-year ordinance*,” Goldsmith said, adding that times have changed and an online industry has created “a steady stream of neighbors who are coming in, partying, leaving, then new neighbors are coming in and partying.”³

On this occasion, and others, former City Attorney Goldsmith said that because of the length of time that has passed without enforcement, the City is now precluded or “estopped” from enforcing the San Diego Municipal Code ordinances that prohibit STVR in residential zones.

³ At the meeting City Attorney Goldsmith also said, referring to the 2007 Aguirre opinion, “That opinion was actually well done, but it is not definitive because the law is ambiguous.” In fact, the opinion is erroneous and the law is not vague or ambiguous. In any event, it’s clear the City Attorney isn’t “embracing” the 2007 opinion.

City Attorney Goldsmith's legal opinion - that the City is estopped because of its elected officials have failed to enforce the zoning laws - is unequivocally **not** supported by California Courts.

The following is an excerpt from a published California Court of Appeals decision issued on May 20, 2015 – less than a year ago. In this matter, the City of Los Angeles had failed to enforce the residential zoning restriction for over 25 years on a parcel that had been used as a parking lot. The property owner's estoppel argument failed and the Court of Appeals ruled that, despite the passage of decades without enforcement, the City – charged with protecting the interest of the public – was not estopped and had the right to enforce the residential zoning ordinance.

The Court stated:

These protectable interests further manifest themselves in the preservation of land values, in esthetic considerations and in the desire to increase safety by lowering traffic volume. **To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake. Thus, permitting the violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating nonconforming uses and against expansion of such uses.** *Schafer v City of Los Angeles*, 237 Cal.App.4th 1250 (2015), p.665 (emphasis added)

Below is an excerpt from a case titled *Feduniak v California Coastal Commission*, 148 Cal App 4th 1346. This case is also cited by the Court in *Schafer v City of Los Angeles* (supra).

As the court in *Caminetti v. State Mut. Life Ins. Co.*, supra, 52 Cal.App.2d 321, explained, "To govern themselves, the people act through their instrumentality which we call the State of California. *The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary committed the night before.* [Citations.]" (Id. at p. 326.).

The length of time a City, either wittingly or unwittingly, fails to enforce a zoning ordinance will not give rise to a successful "estoppel" argument.

All of the land use attorneys with whom SSDN has consulted, including City Attorneys in other California municipalities, have said City Attorney Goldsmith's "estoppel argument" is legally

wrong.⁴ That the City would be estopped from enforcing its ordinances prohibiting STVR in residential zones, merely because the City has failed to enforce and “not shut anybody down for that whole 30-year ordinance,” – is simply incorrect and unsupported in California law.⁵

4. The former City Attorney’s Opinion That the Definition of “Visitor Accommodations” Is Vague and Therefore Unenforceable is Incorrect

Although we have pointed out that Short Term Vacation Rentals are not permitted because they are not a listed use, we now turn back to the definition of *visitor accommodations*.

On December 21, 2015 former City Attorney Goldsmith offered his written opinion to the Mayor and City Councilmembers that the “visitor accommodations” ordinance⁶ bars residential uses that “provide lodging . . . primarily to visitors and tourists.” But, he went on to write the “visitor accommodations” ordinance is “vague” and may be unenforceable. He supports this opinion by stating variously that the terms “visitor” and “primarily” are not defined and suggests adding the word “rental” to the ordinance.

The City Attorney, like the Mayor and City Councilmembers, is an *elected* official – a *politician*. The City Attorney is the attorney for the Mayor and City Councilmembers. In this context, the City Attorney’s role is *only* to provide advice to the Mayor and City Council. The City Attorney is *not* a judge. The City Attorney does not have the authority to determine whether an ordinance is vague or ambiguous. And finally, it is *not* the City Attorney’s role to make policy.

A number of years ago San Diego City Officials, including the then Mayor and City Councilmembers – after legal review and approval of the then City Attorney, as well as the Development Services Department - determined to define *visitor accommodations* as, “Uses that provide lodging, or a combination of lodging, food and entertainment, primarily to visitors and tourists.”

Understanding the definition, these officials determined to prohibit *visitor accommodations*

⁴ SSDN and its attorneys have consulted more than 15 land-use attorneys, including past and present California City Attorneys.

⁵ Setting aside any discussion about whether this statement by the City Attorney is correct. Even he agrees STVR have only become a severe problem over the course of the last ten years.

⁶ City Attorney Goldsmith refers to SDMC section 131.0112(a)(6)(K) as the “visitor accommodations” ordinance.

from San Diego residential zones. They did not believe their definition of *visitor accommodations* to be vague or unenforceable. They also defined hotels, motels and bed and breakfast establishments as examples of *visitor accommodations*. These City officials understood that there were other commercial uses that would fall under this definition. It was their intent to prevent this type of commercial use from operating in residential neighborhoods.

Specifically, addressing former City Attorney Goldsmith's opinion that the ordinance is vague, the California Legislature and ordinances throughout California regularly use terms such as "principally" and "primarily" to define prohibited conduct. (See, e.g., §§ 189, 243, subd. (f)(19), 498, subd. (c)(1); Civ. Code, § 1802.4; Ins. Code, § 11580.06, subds. (a), (d); Lab. Code, § 108.2, subd. (b)(3); Veh. Code, § 435.5; Bus. & Prof. Code, § 10133.1, subd. (a)(5); Fam. Code, § 852, subd. (c); *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1132-1133)

Additionally, we cite the following California Appellate Court cases and Supreme Court case excerpts to support the proposition that the definition, *Visitor Accommodations*, is neither vague nor unenforceable.

A statute is not unduly vague because its terms may be dissected to yield some ambiguity or uncertainty. (*People v. Heffner* (1977) 70 Cal.App.3d 643, 653.)

Ambiguous terms can be made reasonably certain by reference to "definable sources" such as other code provisions. (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 272; *Personal Watercraft Coalition, supra*, 100 Cal.App.4th at p. 139.)

The parties agree the word "principally" should be understood to mean "primarily" or more than 50 percent of the time. (*Parker v State of California* (2013)

All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. (*Personal Watercraft Coalition v. Board of Supervisors* (2002) 100 Cal.App.4th 129, 137 (*Personal Watercraft Coalition*), quoting *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484.)

Short Term Rentals (STR), like hotels and motels, are *visitor accommodations*. They function just as hotels do, providing lodging primarily to visitors and tourists.

The intent of the definition, *visitor accommodations* - - and the creation of this use category and the decision to not permit this use in residential zones - - was to make communities safer and to promote neighborhood quality, character and livability.

CONCLUSION

SSDN closes with the following quote from the California Supreme Court in the case, *Miller v Board of Public Works* (1925), 195 Cal. 477 cited in *Ewing v City of Carmel-by-the-Sea* (1991), 234 Cal.App.3d 1579.

Whether or not transient rentals have the other "unmitigatable, adverse impacts" cited by the council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. **They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.**

San Diego Municipal Code

Chapter 13: Zones

Relevant SDMC Sections

§131.0401 Purpose of Residential Zones

The purpose of the residential zones is to provide for areas of residential development at various specified densities throughout the City. **The residential zones are intended** to accommodate a variety of housing types and to encourage the provision of housing **for all citizens of San Diego**. It is also intended that the residential zones reflect desired development patterns in existing neighborhoods while accommodating the need for future growth.

§131.0403 Purpose of the RS (Residential--Single Unit) Zones

(a) The purpose of the RS zones is to provide appropriate regulations for the development of single dwelling units that accommodate a variety of lot sizes and residential dwelling types and which **promote neighborhood quality, character, and livability**. It is intended that these zones provide for flexibility in development regulations that allow reasonable use of property while minimizing adverse impacts to adjacent properties.

§131.0420 Use Regulations of Residential Zones

The regulations of Section 131.0422 apply in the residential zones where indicated in Table 131-04B.

(b) Within the residential zones, no structure or improvement, or portion thereof, shall be constructed, established, or altered, nor shall any premises be used or maintained except for one or more of the purposes or activities listed in Table 131-04B. **It is unlawful to establish, maintain, or use any premises for any purpose or activity not listed in this section or Section 131.0422.**

§131.0112 Descriptions of Use Categories and Subcategories

(6) Commercial Services Use Category

(K) Visitor Accommodations - Uses that provide lodging, or a combination of lodging, food, and entertainment, primarily to visitors and tourists.

§131.0422 Use Regulations Table for Residential Zones

The uses allowed in the residential zones are shown in the Table 131-04B.

Legend for Table 131-04B

Symbol In Table 131-04B	Description Of Symbol
P	Use or use category is permitted. Regulations pertaining to a specific use may be referenced.
L	Use is permitted with limitations, which may include location limitations or the requirement for a use or <i>development permit</i> . Regulations are located in Chapter 14, Article 1 (Separately Regulated Use Regulations).
N	Neighborhood Use Permit Required. Regulations are located in Chapter 14, Article 1 (Separately Regulated Use Regulations).
C	Conditional Use Permit Required. Regulations are located in Chapter 14, Article 1 (Separately Regulated Use Regulations).
-	Use or use category is not permitted.

Use Categories/ Subcategories [See Section 131.0112 for an explanation and descriptions of the Use Categories, Subcategories, and Separately Regulated Uses]	Zone Designator	Zones																						
	1st & 2nd >>	RE-	RS-												RX-		RT-							
	3rd >>	1-	1-												1-		1-							
	4th >>	1	2	3	1	2	3	4	5	6	7	8	9	10	11	12	13	14	1	2	1	2	3	4
Separately Regulated Retail Sales Uses																								
Agriculture Related Supplies & Equipment	-	-												-		-								
Alcoholic Beverage Outlets	-	-												-		-								
Farmers' Markets																								
Weekly Farmers' Markets	-	-												-		-								
Daily Farmers' Market Stands	-	-												-		-								
Plant Nurseries	-	-												-		-								
Retail Farms	-	-												-		-								
Retail Tasting Stores	-	-												-		-								
Swap Meets & Other Large Outdoor Retail Facilities	-	-												-		-								
Commercial Services																								
Building Services	-	-												-		-								
Business Support	-	-												-		-								
Eating & Drinking Establishments	-	-												-		-								
Financial Institutions	-	-												-		-								
Funeral & Mortuary Services	-	-												-		-								
Instructional Studios	-	-												-		-								
Maintenance & Repair	-	-												-		-								
Off-Site Services	-	-												-		-								
Personal Services	-	-												-		-								
Radio & Television Studios	-	-												-		-								
Tasting Rooms	-	-												-		-								
Visitor Accommodations	-	-												-		-								
Separately Regulated Commercial Services Uses																								