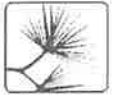




City of Del Mar



June 5, 2018

VIA EMAIL

SUBJECT: City of Del Mar LCPA (Short Term Rentals) Agenda Item Th14d

Dear Chair Bochco, Commissioners and staff:

I write as the Mayor of Del Mar in strong support of the City's LCPA addressing Short Term Rentals (STRs). The City's ordinance/LCPA is an appropriate use of local zoning authority and fully complies with Del Mar's certified Land Use Plan (LUP), which is the standard of review for the Commission. Attached is a memorandum addressing legal issues that support our position.

To be consistent with Del Mar's LUP, the LCPA must meet the following as demonstrated herein:

- Promote visitor serving recreational facilities;
- Separate commercial/visitor serving uses from residential (through zoning); and
- Assure that STRs will not degrade neighborhoods or cannibalize local housing stock.

The City promotes coastal access, visitor serving facilities, and accommodations as follows:

- **Del Mar provides extensive recreation facilities for local residents and millions of visitors.** Del Mar beach alone gets 2 million visitors each year. Del Mar visitors also enjoy free parks, tennis courts, beach parking (metered and free), dog beach, volleyball, surfing, swimming, fishing, junior lifeguards, a wounded warrior program, summer concerts (free), hiking trails, and public beach access at every street end. The Del Mar fairground's 300+ events bring another 2-3 million visitors each year. I challenge any town with a similar population around 4,200 to show they do more to accommodate coastal visitors.
- **Del Mar is served by 19 hotels/motels, timeshares, and 294 low cost RV spaces.** There are six hotels in Del Mar (all within walking distance of the beach) and at least 13 more within a 5-mile radius offering a range of amenities (i.e. suites and kitchenettes). Del Mar's ratio of overnight accommodations (per capita and by geographic area) is high--higher than our City neighbors. These options cover a broad geographic area with lower average rates than Del Mar STRs. Low cost RV spaces are available for rent by part-time fairgrounds personnel (summer) and the general public (off-season) at a daily rate of \$30-\$45. Del Mar hotels have an average vacancy rate of 30% per the 2017 Del Mar Village Association annual lodging report.

The City's LCPA limits commercial uses in residential zones to protect local housing as follows:

- **Provides for legal STR use in all residential zones per the 7/28 program.** The 7-day minimum rental and 28-day annual maximum align with surveys for the average STR stay in peak season. The limits keep STRs an accessory use to maintain long-term housing supply.
- **Provides for STR use in commercial zones with no limits.** This will allow a significant increase in overnight accommodation room nights in Del Mar, including STRs.

- **Projects to develop new types of local visitor accommodations are currently in process.** If approved, this could more than double the number of overnight accommodations in Del Mar and result in desired new on-site affordable visitor accommodations on the coast.

With due respect to the quality work of your staff, the following items are in need of correction:

- **STRs have never been a legal use in Del Mar residential zones (allowed only in RC zone).**
- **Del Mar does not have a long history of STR use.** Historically, rentals for the 43-day horse race season occurred in combination with second home vacation use and student rentals. Rentals that are more frequent are a newer phenomenon driven by online platforms.
- **Del Mar's 7/28 STR program can effectively accommodate coastal visitors year-round.** Owners can continue to rent their homes for more than 30 days during the race season as has historically been done, and may also rent their homes as STRs up to 28 days at any point during the year while long-term tenants are away.
- **Del Mar's hotels/motels, timeshares, and RV spaces are at lowest occupancy in the off-season.** This makes a broad range of accommodations available all year at varying prices.
- **Del Mar STRs are not "affordable" overnight accommodations.** In contrast to jurisdictions where STRs may be more affordable, that is not the case in Del Mar. The weight of the evidence shows that, on a per bedroom basis, Del Mar STRs are on average more expensive, especially taking into account booking fees, cleaning and other fees, and strict cancellation policies not applicable in hotels, motels, timeshares, and RV spaces. In contrast, hotels provide discounted rates during low occupancy periods.
- **Del Mar's certified LUP does not contain any language about affordability or "encouraging and promoting" overnight facilities.** The only criterion in Del Mar's LUP specific to overnight accommodations is that they be "quality."

In conclusion, Del Mar wants to work with the Commission to provide visitor serving overnight accommodations consistent with Del Mar's LUP and respectfully requests that you certify the LCPA as submitted. We reviewed the Commission's STR decisions to date and think we have found the balance to achieve Coastal Commission and City goals consistent with our certified LUP. Del Mar's LCPA must be evaluated based on Del Mar's LUP- not outside standards (i.e. San Mateo or Santa Barbara). The City is pleased to provide references and back-up for our stated position.

Sincerely,



Dwight Worden
Mayor

LCPA No. LCP-6-DMR-17-0083-3; Short Term Rentals

Summary of Key Legal Points for City of Del Mar

1. Del Mar's LUP is the standard of review for the LCPA.
2. Any Coastal Commission decision on the LCPA must be supported by substantial evidence.
3. Coastal Commission has no legal authority to interpret Del Mar's zoning code.
4. Pursuant to Del Mar's LUP, the Del Mar City Council has the ultimate authority to interpret Del Mar's zoning code.
5. Del Mar's zoning code is permissive and has never allowed Short Term Rentals in residential zones.
6. Neither the Coastal Act nor Del Mar's LUP makes any mention of Short Term Rentals or vacation rentals.
7. Del Mar has Constitutional authority to "make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."
8. Del Mar's interpretation of its own zoning ordinances is only superseded by an interpretation by the Superior Court.
9. All provisions of Del Mar's LUP, including the right of the Planning Commission and the City Council to interpret Del Mar's zoning, have been certified by the Coastal Commission.
10. Neither the Coastal Act nor Del Mar's LUP requires the inclusion of Short Term Rentals, housing or transient accommodations.
11. Recent state and federal court cases state that local government controls regulation of Short Term Rentals and that such regulation does not require Coastal Commission approval.
12. Denial of Del Mar's LCPA would be an endorsement by the Coastal Commission that Short Term Rentals in Del Mar are an illegal use.
13. The City's LCPA fully complies with CEQA as demonstrated by the City's initial study and conclusion that the LCPA is exempt.

June 7, 2018

California Coastal Commission
San Diego Area
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421

Re: *City of Del Mar LCPA No. LCP-6-DMR-17-0083-3; Short Term Rentals*

Dear Coastal Commissioners:

I am the City Attorney for the City of Del Mar. This letter presents an analysis of key legal points regarding Commission action on the LCPA. It provides a factual and legal basis for approval of the LCPA. Please contact me with any questions.

Statement of Facts

The City of Del Mar (the "City") is a California charter city located approximately 20 miles north of Downtown San Diego. The City is located on the California coast and is within the Coastal Zone. The City has a population of approximately 4,400 people.

The City officially incorporated in 1959. It adopted its first general plan in 1968. In 1973, the City began the process of revising the Community Plan (general plan) to bring it more in line with the community's vision. The strongest theme from citizens, during that revision process, was to maintain the village-like community setting of uncrowded, predominantly single-family residences. The overall goal of the Community Plan is stated at page 20:

"Preserve and enhance the special character of Del Mar, the elements of which are a village-like community of substantially single family residential character, a picturesque and rugged site, and a beautiful beach."¹

The Community Plan makes no mention of vacation rentals or short term rentals other than an anecdotal statement about transient housing for students, second home summer usage and race track people at page 56.

¹ Note that the Community Plan goals and policies to implement this overall goal are found verbatim in the City's certified LUP. See Goal IIA and policies thereunder.

In March 1993, the Coastal Commission certified the City's Land Use Plan. In September 2001, the Commission certified the City's Local Coastal Program Implementing Ordinances². Neither of these documents makes any mention of vacation rentals or short term rentals of less than 30 days.

The City's zoning code (the "Code") is set forth in Title 30 of the Del Mar Municipal Code. By virtue of Public Resources Code §30108.6, the Code is part of the City's Local Coastal Program. The Code is a permissive code, meaning that only uses specifically set forth therein are allowed uses in the City. Any uses not specifically set forth are not allowed. Permissive zoning is expressly recognized by California law (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433). The Code does not specifically allow Short Term Rentals of less than 30 days. Thus, under a permissive zoning ordinance such as the City's, Short Term Rentals are not an allowed use. This has been the case since adoption of the Code.

In January 2017, the City Council requested that the Planning Commission render an interpretation³ of the existing Code concerning Short Term Rentals. The Planning Commission determined that Short Term Rentals were not defined under the Code, which supports the City Council's ultimate conclusion that Short Term Rentals are not an allowed use. An appeal to the City Council followed.

In April 2017, the City Council heard the appeal of the Planning Commission's interpretation and found that Short Term Rentals are not an allowed use in all residential areas of the City, with the exception of the Residential-Commercial Zone. The City Council also found that STR's are an allowed use in most commercial zones and in the visitor-serving areas of the City.

In October 2017, the City Council introduced an ordinance amending the Code to allow Short Term Rentals in residential zones subject to a 7-day minimum stay with a maximum rental of 28 days per year. That ordinance was adopted by the City Council in November 2017.

The City filed the LCPA currently before the Commission in December 2017.

² The certified LCP (LUP and Implementing Ordinances, respectively), include verbatim goals and provisions from the Community Plan and from the city zoning code such that the key goals in all three documents are identical.

³ The IO's acknowledge that it is the city Planning Commission, and Council on appeal, not the Coastal Commission that render such interpretations. See LUP section 30.75.080B(9) [Planning Commission interprets the LCP] and 30.75.080A(2)[council hears appeals].

Standard of Review

The Standard of Review for an LCPA by the Coastal Commission is set forth in Public Resources Code §30513 as well as 14 CCR §13542. In short, the Commission must consult the City's Land Use Plan and determine whether the proposed amendment conforms with the City's certified Land Use Plan or not. The Standard of Review includes no authority for the Commission to interpret the City's zoning code, or to delve into the reasonableness of the City's interpretation of its own zoning code. The Coastal Commission's role in reviewing the City's LCPA is to either approve or disapprove based upon the City's LCP (*City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488). In reviewing the decisions of administrative agencies such as the Coastal Commission, courts base that review on whether or not the agency's decision is supported by substantial evidence (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 395; *LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 770, 780). Thus, in order to survive judicial scrutiny, any decision made by the Coastal Commission on the City's LCPA must be based upon substantial evidence.

Key Legal Points

1. The City of Del Mar may adopt any ordinance that is not in conflict with California's general laws. The STR ordinance, as adopted, does not conflict with the Coastal Act, the City's LCP or LUP or any state law.

A California City that is subject to general laws⁴ may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws (California Constitution Article 11, §7). This power is "well entrenched" (*IT Corp. v. Solano County Board of Supervisors* (1991) 1 Cal.4th 81, 89). Further, a city is empowered with the ability to interpret its own laws and such interpretation is given great weight. The state courts, rather than the Coastal Commission, have final responsibility to interpret local ordinances (*Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 922; *Gualala Festivals Committee v. California Coastal Commission* (2010) 183 Cal.App.4th 60, 66).

Here, the City rightly interpreted its permissive zoning ordinance concerning Short Term Rentals. It determined that since Short Term Rentals were not an explicitly allowed use in the Code, that they were an illegal use. They are legally allowed to make such an interpretation subject only to ultimate interpretation by the courts (*City of Corona, supra*).

⁴ Although Del Mar is a charter city, it has adopted California general law as it relates to planning and zoning.

The Code is part of the City's LCP (Public Resources Code §30108.6).⁵ All of the provisions of the Code, including the City's right to interpret its own code pursuant to the provisions allowed therein, were certified by the Coastal Commission in 2001. Thus, the Coastal Commission has already determined that the City's LCP is not in conflict with the Coastal Act. In fact, Coastal Commission staff makes no claim in the staff report for the LCPA that the City cannot interpret its own laws. Instead, staff makes the incorrect assertion that STR's have historically been allowed in the City when in fact, under the permissive zoning code, they have always been an illegal use. Simply because property owners violated the City's laws does not make their actions legal.

The Coastal Commission staff report at pages 16-17 cites the City's LUP policies, and then proceeds to ignore them. Staff applies standards, including Public Resources Code §§30221, 30222 and 30213, which are not found in the City's LUP and ignores the Standard of Review, which is the LUP itself, effectively making the Act the Standard of Review. Staff then cites prior decisions of the Coastal Commission as well as Short Term Rental policies of other jurisdictions, none of which are included in the City's LUP. This far exceeds Coastal Commission authority in reviewing LCPA's. Further, staff's assertions do not provide substantial evidence for a decision against the City's LCPA.

The primary responsibility of the Coastal Commission is to grant or deny permits for coastal development and to approve or disapprove LCP's (*Ibarra v. California Coastal Commission* (1986) 182 Cal.Appl.3d 687, 696). Once an LCP is certified by the Coastal Commission, it is the city, not the Coastal Commission, that becomes responsible for implementing and administering the LCP (Public Resources Code §§30519, 30600.5). The Commission has no authority to amend or modify the City's certified LCP. However, it is authorized to make recommendations concerning amendments (Public Resources Code §§30519(c), 30519.5). The Coastal Commission has not, prior to submission of this LCPA, made any official recommendation to the City concerning adding provisions to the Code to allow or expand Short Term Rentals.

The City has relied upon the Coastal Commission's certification of its LCP and has acted accordingly by first interpreting its existing, permissive ordinances and then proposing an amendment to its Code to allow Short Term Rentals in zones where they were not previously allowed, finding that expanding legal STR use in this fashion was good policy. Denial of the LCPA

⁵ See, also, Certified IO's at page 1: "The following Chapters of the Del Mar Zoning Code (Title 30 of the Municipal Code) along with the attached maps, constitute the Del Mar Local Coastal Program Implementing Ordinances."

by the Coastal Commission will put the City in the position of enforcement against all illegal Short Term Rentals in the City.

2. The Coastal Act requires no specific inclusion of Short Term Rentals, housing or transient accommodations with the limited exception of Public Resources Code §30213.

The Coastal Act itself makes no specific mention of Short Term Rentals. It does not, in any section, require a City to include Short Term Rentals as a land use in its zoning ordinances or LCP. In fact, the Coastal Act only mentions such accommodations in the negative:

“The commission shall not: (1) require that overnight room rentals be fixed at an amount certain for any privately owned and operated hotel, motel, or similar visitor-serving facility located on either public or private lands; or (2) establish or approve any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities” (Public Resources Code §30213).

Further, although §30213 previously included language allowing the Coastal Commission to consider “housing opportunities for persons of low and moderate income” that provision was repealed by the Legislature in 1981 when the current §30213 was adopted. In addition, Public Resources Code §30500.1 specifically prohibits the Coastal Commission from requiring any housing policy or program in an LCP. Denying the City’s LCPA unless significant additional STR opportunities are provided in residentially zoned areas, as the suggested modifications propose, would require the City to amend its zoning to include programs for housing visitors in private homes in violation of the City’s planning and zoning documents and in violation of the Coastal Act.

Finally, a recent effort to reinstate the Coastal Commission’s authority to require housing programs and policies in LCP’s failed in the Legislature. SB 663 died in committee on February 1, 2018.

The suggested modifications are an attempt by staff to require the City to include a housing program your staff feels has merit, even though it is not called for by the City’s certified LUP. Staff states that the reason for requiring Short Term Rentals is to allow low to moderate income persons and families to have access to the City’s coastline and beaches. This is a backdoor attempt to require the City to modify its community housing goals.

The City does not restrict access to its coastline or beaches. It is in full compliance with its LUP policies through provision of extensive parks and recreation facilities, most free, serving millions of visitors a year. Even though not required by the LUP, the City also offers extensive

overnight accommodations at a variety of prices. Through its LCPA the City proposes to expand those overnight opportunities. There is no factual basis to conclude that the City's LCPA falls outside the bounds of its certified LUP. The staff recommendation to dramatically change how the City addresses STR's is based on considerations outside the City's LUP and on housing policies prohibited by the Act.

3. Recent state and federal court decisions support the approval of the City's LCPA as submitted to the Coastal Commission. The decisions indicate a judicial trend in support of local control concerning Short Term Rentals.

Johnston v. City of Hermosa Beach

In January 2018, California's Second Appellate District issued an unpublished opinion concerning an ordinance adopted by the City of Hermosa Beach banning Short Term Rentals in the City (*Johnston v. City of Hermosa Beach* (2018) WL458920). While the City recognizes that an unpublished opinion carries no precedential value, and is not binding on any other court except in certain circumstances, it is however instructive. In that case, Hermosa Beach's Short Term Rental ban was challenged by two homeowners claiming, among other things, that the ban violated the California Coastal Act. The court issued the following rulings related to the Coastal Act and the Short Term Rental Ban:

1. Hermosa Beach's Short Term Rental ban was enacted pursuant to the city's police power and did not fall under the authority of the Coastal Commission;
2. There is no legal authority applying Public Resources Code §§30213 and 30222 to a city's police power to enact zoning ordinances.

The court's ruling in the Hermosa Beach case is consistent with existing California law. That is, the Coastal Commission may not interfere in a local jurisdiction's ability to enact zoning ordinances. Its only role is determining if an LCP is consistent with the Coastal Act. Further, this ruling reinforces the City's position that Short Term Rentals are beyond the purview of the Coastal Commission and are purely a local matter.

Homeaway.com, Inc. v. City of Santa Monica

The most recent Short Term Rental case is from the United States District Court in the Central District of California. Issued on March 9, 2018 the case of *Homeaway.com, Inc. v. City of Santa Monica* at WL 1281772 is a published case. The City again recognizes that this particular

case is not precedential. However, its legal reasoning and conclusions are entitled to consideration.

In this case, Homeaway sought a preliminary injunction against enforcement of a Short Term Rental ban adopted by the City of Santa Monica. The court was not convinced. It found, among other things:

1. The Coastal Act does not preempt the police powers of California cities absent a *clear* conflict with the Act;
2. A local ordinance regulating Short Term Rentals is presumptively not an LCP amendment and need not be processed as such;
3. A local zoning ordinance is not a “development” requiring Coastal Commission approval.

Applying the reasoning of these two cases to the City’s LCPA submittal, the Coastal Commission has no authority to interfere in the City’s local zoning ordinances unless there is a clear conflict with the Coastal Act. There is none. There is no mention of Short Term Rentals in the Coastal Act. Further, there is no mention of even local accommodations for visitors in the Coastal Act. There is only the general principal that local access and local recreational facilities should be maintained and maximized to the extent possible. The City has fulfilled and continues to fulfill both of those requirements.

These two cases represent the most recent judicial reasoning concerning a city’s authority to control and regulate Short Term Rentals in jurisdictions within the Coastal Zone. This is a developing area of law with decisions from two separate jurisdictions favoring the right of cities over the Coastal Commission when it comes to matters of local control. This is a judicial trend that the Coastal Commission needs to be cognizant of when considering LCPA’s dealing with Short Term Rental regulation.

4. Denial of the City’s LCPA will effectively be an endorsement by the Coastal Commission that STR’s are an illegal use in the City. The City will then have a legal obligation to enforce existing law.

As stated above, the City’s LCP, including the provisions contained therein allowing the City to interpret the Code, has been certified by the Coastal Commission since 2001. Also as stated above, the Coastal Commission has no authority to require an amendment to the City’s LCP and can only make recommendations for amendments. The Coastal Commission has not, prior to

submission of the LCPA, presented the City with any formal recommendation that the City amend its zoning code to include Short Term Rentals as a land use.

Since the Coastal Commission certified the City's LCP, it must have been aware of the provisions contained within the LCP including the fact that the zoning code is a permissive zoning code which contains no reference to Short Term Rentals. If it were intended at the time of LUP certification, the Commission could have insisted on suggested modifications inserting policies in the City's LUP similar to those found in PRC sections 30222 and 30213 promoting affordable visitor serving facilities, policies that your staff now so heavily relies on. This did not happen and no such policies are found in the City's LUP, although it is common to find them in the LUP's of other jurisdictions.⁶ Further, the Coastal Commission must be aware that the Coastal Act contains no reference whatsoever to Short Term Rentals or anything like them. The Coastal Commission must also be aware that current California law states that a land use not specifically set forth in a city's zoning code is presumed to be illegal (See *City of Corona*, supra).

Thus, the City's interpretation of its zoning code concerning Short Term Rentals is a valid and binding interpretation. This means that Short Term Rentals are currently an illegal use in most residential zones within the City. The City has adopted an ordinance that will allow regulated Short Term Rentals in most residential zones. Denial of the LCPA will result in the continued illegality of most Short Term Rentals within the City.

5. The City's LCPA as submitted fully complies with CEQA and no modifications are necessary.

Coastal Commission staff inaccurately asserts that the LCPA, as submitted, would violate CEQA unless it is amended (Staff Report page 4). Staff then goes on to assert at page 28 in the Staff Report that local governments are exempt from CEQA's requirement of preparing an environmental impact report in connection with a local coastal program. In fact, as Staff points out, the City prepared an initial study and made a determination that the proposed ordinance and thus the LCPA are exempt from CEQA because the ordinance involves no significant expansion of use. Staff's proposal, on the other hand, would significantly increase the use of single-family residences effectively turning them into mini-hotels with expanded traffic and expanded intensity. Staff fails to address how this expansion is not an impact but the City's lower intensity proposal is an impact.

⁶ See, e.g., City of Santa Monica LUP which states: "Lower cost visitor and recreational facilities shall be protected, encouraged, and where feasible provided" taken verbatim from PRC section 30213.


Conclusion

The Coastal Commission can only require modifications to the City's LCPA that are reasonably necessary to find it conforms to the City's certified LUP. The only criterion in the City's LUP specific to overnight accommodations, is that they be "quality." The City's LUP does not contain the provisions of PRC sections 30221, 30222 or 30213 relied on in your staff report or any similar language regarding overnight accommodations. The LUP does not identify a shortage of overnight facilities, nor does it raise issues of affordability⁷ or mention short term vacation stays. The Commission staff recommendations have stepped well outside the LUP in an attempt to expand the standard of review to include sections of the Coastal Act that do not apply.

It is respectfully submitted that the Commission reject this expanded review standard and judge the City's LCPA on the certified LUP as required by law. The LCPA presents a reasonable, balanced approach designed to meet all the LCP goals, including maintaining the separation of residential and commercial uses, protecting residential neighborhoods and the city's housing stock, and providing, where feasible, visitor serving recreation facilities including overnight accommodations even though not required by the LUP. It is not for the Commission to assert its independent judgment to impose a different balance between these competing goals where the City's balance is reasonable and in compliance with the LUP.

Very truly yours,

DEVANEY PATE MORRIS & CAMERON, LLP


Leslie E. Devaney
City Attorney, City of Del Mar

LED/ss

⁷ While there is a reference in a separate LUP policy to serving "all socio economic situations" (Goal VA, page 90)) that language by its terms is limited to Del Mar's "Park and Recreation System" of day use facilities, and not to overnight accommodations.