



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** March 7, 2017

**TO:** Carolyn Lehr, City Manager

**FROM:** Charles S. Bryant, Community Development Director

**SUBJECT:** Ordinance Of The City Council Of The City Of Emeryville Adding Article 21 To Chapter 5, And Amending Chapters 2, 3, 5, And 7, Of Title 9 Of The Emeryville Municipal Code Regarding Short-Term Rental Of All Or Part Of A Dwelling. CEQA Status: Exempt Pursuant to CEQA Guidelines 15301 and 15061(b)(3)

### RECOMMENDATION

Staff recommends that the City Council adopt the first reading of the attached ordinance amending the Planning Regulations in Title 9 of the Emeryville Municipal Code to add Article 21 to Chapter 5 and amend Chapters 2, 3, 5, and 7, allowing and regulating Short-term Rentals in detached single-family houses, and prohibiting other Short-term Rentals. These regulations would apply citywide.

### BACKGROUND

In 2015, the City Council directed staff to report on Short-term Rentals and options for regulating them.

On March 24, 2016, the Planning Commission held a study session. The Commissioners expressed a wide range of opinions, but agreed that Short-term Rentals could be allowed in single family detached houses.

On July 13, 2016, the Housing Committee members commented that short-term rentals in multi-unit complexes create problems with parties in courtyards, noise late at night heard through walls, security issues with non-residents in common areas, and misuse of common areas by short-term tenants. Committee members also noted that short-term rentals convert housing to commercial use and reduce the number of units available for long-term rental, driving up rents. The committee recommended that Short-term Rentals be allowed only in buildings with one to four units in one ownership, hosts be required to obtain a business license and pay Transient Occupancy Tax, Short-term Rentals be limited to 90 days per year, and operators be required to post noise hours and phone numbers for the Fire and Police departments.

On July 19, 2016, the City Council held a study session, heard that managers of condominium and most apartment complexes do not allow Short-term Rentals, and

agreed with the Housing Committee that Short-term Rentals should only be allowed in smaller buildings.

On October 18, 2016, the City Council held a second study session and heard that most but not all property owners prohibit tenants from operating Short-term Rentals. The City Council directed staff to prepare an ordinance that limits Short-term Rentals to single-family detached houses, limits Short-term Rentals of entire houses to 90 days per year, and requires a permit with a fee. The Council directed that the permit requirements should be that the house is the operator's primary residence, the operator has the owner's consent if the operator is not the owner, the property complies with the building code, the operator posts City noise hours and Police and Fire contact information, and the operator obtains a business tax certificate and pays Transient Occupancy Tax.

On January 26, 2017, the Planning Commission voted unanimously to recommend City Council adoption of the code changes set forth in the attached ordinance. The Commission's action included the following modifications to the ordinance: (1) in Section 9-5.2204(a), change the limit on non-hosted rentals from 90 calendar days to 180 calendar days; (2) in Section 9-5.2205, add a lease agreement as proof of residency; and (3) in the recitals of the Planning Commission resolution, eliminate inflammatory language regarding short-term renters, including "and pose threats to safety and welfare of residents because of guests who failed to obey noise restrictions, party restrictions and other house rules in multi-unit family housing" in the second "Whereas", and "including parties and noise late at night in common areas or heard through walls, misuse of common areas by short-term renters, and security problems with non-residents having access to common areas" in the third "Whereas".

## **DISCUSSION**

### *Legal Framework*

It is well-established that cities may regulate short-term rentals as a land use. *Ewing v City of Carmel by the Sea* (1991) 234 Cal.App.3d 1579, 1589 upheld the city's ordinance prohibiting short term rentals (less than 30 days) in areas zoned for single family home residences, which was intended to preserve the residential character of the city's neighborhoods and to mitigate against parking and traffic impacts associated with short-term rentals.<sup>1</sup> Thus, cities may regulate short term rentals to preserve the residential character of neighborhood, to mitigate the parking, noise and traffic impacts associated with short term rentals, and to mitigate against the loss of long term housing stock.

Council had requested information as to why cities, such as San Francisco, were being sued. Enforcement of short-term rental regulations can be burdensome because of the time and cost required to obtain evidence (e.g., documents) of the transaction. In reviewing information about more current lawsuits involving short term-rentals, staff found that cities were being sued when the regulations exceeded the scope of

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<sup>1</sup> *Id.* at 1591.

traditional land use regulations, and attempted to facilitate enforcement. For example, San Francisco's ordinance made it a misdemeanor for a platform (whether online or non-internet based platform) to collect a fee for providing booking services for the rental of an unpermitted unit.<sup>2</sup> Airbnb challenged the ordinance on three grounds: 1) it was preempted by the Common Decency Act (47 U.S.C., § 230), which precludes interactive computer services from being liable for content of its users, 2) it violated First Amendment rights, and 3) it unlawfully imposed strict criminal liability. In another example, South Lake Tahoe was sued by property owners over its fee structure for permit holders, where permittees who had properties that resulted in violations of the regulations had to pay an increased fee.<sup>3</sup> With respect to both lawsuits, the cities won the initial rounds in litigation, but it is unclear whether the parties have resolved the litigation.

As discussed in further detail below, the City's proposed ordinance regulating short-term rentals is intended to mitigate against the land use impacts associated with short-term rentals as articulated by the City Council and the City's advisory bodies. Enforcement of the proposed regulations would rely on already existing enforcement tools.

### *Proposed Ordinance*

The purpose of the proposed ordinance is to establish criteria and procedures for rental of all or part of a dwelling unit for fewer than 30 days. The City finds it necessary to establish such requirements to regulate Short-term Rentals in the interest of the public health, safety, and welfare. Specifically, the ordinance has been crafted to allow Short-term Rentals only in single-unit detached houses and to prohibit them elsewhere, which is consistent with existing prohibitions imposed by homeowners' associations and landlords of multi-unit rental properties, and to mitigate impacts as identified above by the Housing Committee.

The attached ordinance includes the provisions directed by the City Council and the Planning Commission, in the form of a new article, and several amendments to existing articles, in the Planning Regulations, as outlined below:

- New Article 21 establishing Short-term Rental regulations, including permit requirements, where and how Short-term Rentals are permitted, standards, application requirements, and procedures for approval, renewal, and revocation. Specifically:
  - Short-term Rental means rental of all or part of a dwelling unit for fewer than 30 days. No person shall establish, operate, or maintain a Short-term Rental without first obtaining a valid Short-term Rental permit.

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<sup>2</sup> *Airbnb, Inc. v. City and County of San Francisco*, Northern District of California, U.S. District Court, Case No. 3:16-cv-03615, Order dated Nov. 8, 2016 (2016 WL 6599821).

<sup>3</sup> Barnwell, Jack. "South Lake Tahoe Vacation Rental Lawsuit Focuses on Fees, Equal Protection", *Tahoe Daily Tribune*, (Oct. 15, 2015).

- Short-term Rentals are permitted ~~only in the RM-Medium-Density Residential zone~~, only in single-unit detached houses, and only as an accessory use. All other short-term rental of dwellings and parts of dwellings is prohibited.
- All Short-term Rentals are subject to the following standards:
  - o Non-hosted Short-term Rental of an entire Single-unit detached house is limited to a total of 180 calendar days per permit term. Portions of calendar days shall count as full days.
  - o Short-term Rental of part of a Single-unit detached house must be hosted; the primary, permanent resident shall continue to occupy the Single-unit detached house in his/her usual manner, while operating the Short-term Rental of a room or other space that is a portion of the dwelling.
  - o The house that includes the Short-term Rental must be the permittee's primary, permanent residence.
  - o If the permittee is not the owner, the permittee must have the owner's written permission to operate a short-term rental on the property.
  - o The dwelling must have a smoke detector, a fire extinguisher, a carbon monoxide detector, and adequate egress, as determined by the Chief Building Official.
  - o The permittee shall post a diagram of exits, fire extinguisher locations, Fire and Police Department phone numbers, the operator's contact information, and the City Noise Ordinance hours.
  - o The permittee must obtain and maintain a current Business Tax Certificate and pay Transient Occupancy Tax as may be required by the Emeryville Municipal Code.
  - o The operator must inform and update the City regarding what advertising platforms are used to advertise the unit or room for Short-term Rental.
  - o The Short-term Rental shall not result in a nuisance.
- Application for a Short-term Rental permit shall be submitted to the Planning Division on a form provided by the Director, accompanied by a fee as set forth in the Master Fee Schedule and application materials as determined necessary by the Director, including proof of residency in the dwelling where the Short-term Rental would occur.
- The Director shall consider applications for Short-Term Rentals in consultation with the Chief Building Official, Fire Marshal, and Police Chief. However, the Director may, instead, refer any application to the Planning Commission for consideration. The Director or Commission, as the case may

be, may approve or disapprove an application or impose conditions of approval which, in his/her/its judgment, are necessary to ensure conformity with the provisions of Article 21. In order to approve a Short-term Rental permit, the Director or the Planning Commission shall find that the proposed Short-term Rental conforms to the above standards. The Director's decision may be appealed to the Planning Commission, or, if the application is referred to the Commission for consideration, the Commission's decision may be appealed to the City Council.

- A Short-term Rental permit shall expire on December 31st of the calendar year in which it was issued or renewed. A valid permit which has not been surrendered, suspended, or revoked may be renewed for subsequent periods of no longer than one year. The Director shall review the renewal application in consultation with the Chief Building Official, Fire Marshal, and Police Chief, to ensure the Short-term Rental's continued compliance with the provisions of Article 21 and any conditions of approval, and to assess any outstanding violations or complaints. Upon completion of the review, the Director shall determine whether to renew the application. In renewing the Short-term Rental permit, the Director may modify or delete any existing conditions of approval, and impose any new conditions of approval, as he/she deems appropriate. If the permit is not renewed, the Director shall provide a written explanation to the renewal applicant detailing the reasons for the non-renewal. If the permit is not renewed, the renewal applicant shall immediately cease operating the Short-term Rental.
  - A Short-term Rental permit shall be subject to suspension, revocation, or modification for the violation of any provisions of the Emeryville Municipal Code or for any grounds which would warrant the denial of the issuance of the original permit. The Director may issue a notice of violation for any failure to comply with any requirement of Article 21 or any condition of the permit. The notice shall set forth the action necessary to come into compliance and a time frame for compliance. If the noncompliance is not abated, corrected, or rectified within the time specified by the Director in the notice, the Director may revoke, suspend, or modify the permit, upon 30 days' notice. If the Director decides to revoke or suspend the permit, the operator shall cease operation of the Short-term Rental immediately. A decision by the Director to revoke, suspend, or modify a Short-term Rental permit may be appealed to the Planning Commission. The decision of the Planning Commission shall be final. If the Commission decides to revoke or suspend the permit, the operator shall cease operation of the Short-term Rental immediately.
- Other amendments to the Planning Regulations include:

- Changes to Section 9-2.333 Lodging replacing “Bed and Breakfast” with “Short-term Rentals” and clarifying length of stay for hotels and motels
- New Section 9-2.702 adding Short-term Rentals to the list of uses that are always accessory uses
- Deletion of “Bed and Breakfast” from Table 9-3.202 Uses Permitted, Conditionally Permitted, and Prohibited
- Deletion of Section 9-5.206 Bed and Breakfast of the chapter on Citywide Use and Development Regulations
- Addition of a Short-term Rental row in Table 9-7.202 Decision Making, Public Hearings and Notice Requirements

As noted above, one of the proposed standards is that the unit within which the rental is to occur must be the operator’s primary residence. This is intended to prevent removal of units from the long-term rental market to mitigate against the shortage of housing for long-term, permanent residents. It is also intended to avoid encouraging the use of dwellings as second homes, by prohibiting renting out the second home while the owner or tenant is away.

## **FINDINGS**

Emeryville Municipal Code Section 9-7.1305 provides that the City Council, in approving amendments to the Planning Regulations, must make the following findings:

- (a) The proposed amendment is consistent with the General Plan.
- (b) The proposed amendment is necessary for public health, safety and welfare or will be of benefit to the public.
- (c) The proposed amendment has been reviewed in compliance with the requirements of the California Environmental Quality Act.

In the Planning Commission’s view, these findings can be made, as detailed in the attached draft Ordinance.

## **FISCAL IMPACT**

The Finance Department plans to bring amendments to the Master Fee Schedule to the City Council on March 21, the date when the second reading of this ordinance is likely to occur. The amendments will include the addition of fees for Short-term Rental Permits.

Costs of administering the ordinance include staff time and expenses to notify property managers, answer questions, enforce the ordinance, issue business licenses, receive fines, and collect Transient Occupancy Tax. It is anticipated that existing City staff will

be able to absorb these additional tasks. To the extent that there is compliance, the City will receive revenue from registration, business tax certificates (also known as business licenses), and Transient Occupancy Tax.

## **ENVIRONMENTAL IMPACT**

The proposed amendment is exempt from the requirements of the California Environmental Quality Act (CEQA) under Section 15301 of the State CEQA Guidelines regarding existing facilities, specifically operation and leasing of existing structures, and under the “general rule” at Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the ordinance may have a significant effect on the environment.

## **CONCLUSION**

Staff recommends that the City Council take the following actions:

1. Introduce the Ordinance after a motion to read by title only.
2. Take public testimony regarding the Ordinance.
3. Adopt the first reading of the Ordinance.

**PREPARED BY:** Diana Keena, Associate Planner

**APPROVED AND FORWARDED TO THE  
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



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Carolyn Lehr, City Manager

Attachment:

1. Proposed Ordinance