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October 28, 2016

VIA E-MAIL (CITYCLERK@SANDIEGO.GOV)

Council President Lightner and
Members of the City Council
City of San Diego
202 C Street
San Diego, CA 92101

Re: **Special Council Meeting November 1, 2016**
Item-600: Proposed Amendments regarding Visitor Accommodations

Dear Council President Lightner and Members of the City Council:

We represent a coalition of whole-home rental and home sharing hosting platforms, including Airbnb and Home Away, in their efforts to propose reasonable regulations for such activities in the City of San Diego. We have worked diligently for the past 18 months with stakeholders, community leaders, and city staff to come up with mutually beneficial regulations to address the concerns of some individuals primarily located in the beach communities. For that reason, we were surprised to learn that Council President Lightner surreptitiously proposed an ordinance amendment, which would effectively ban whole-home rental and home sharing activities¹ in most zones, with no public participation or consultation with our stakeholders.

As discussed in detail below, we oppose the proposed ordinance (the "Lightner Ordinance") for two primary reasons: 1) contrary to Council President Lightner's public statements, the proposed ordinance would ban both whole-home rental and home sharing activities in most zones; and 2) it won't address potential concerns in the beach communities because it is unlikely to become effective in the Coastal Zone.

¹ Whole-home rental activities, home sharing activities, short term rentals and short term vacation rentals are not defined in the San Diego Municipal Code. For the purposes of this letter, "whole-home rental activities" shall mean the rental of an entire dwelling unit for less than 30 consecutive days and "home sharing activities" shall mean the rental of one or more rooms in a dwelling unit for less than 30 consecutive days where the host remains on-site during the rental term.

Background

Based on the material that was distributed for public review late Wednesday afternoon, it appears the proposed ordinance would consist of amendments to San Diego Municipal Code (“SDMC”) section 131.0112(a)(6)(K) to remove the word “primarily” and to define “visitors and tourists” as transients. It appears the intended effect of the amendment would be to prohibit whole-home rentals and home sharing activities in most zones, including single family residential zones.

Currently, “Visitor Accommodations” are defined as follows:

(K) Visitor Accommodations - Uses that provide lodging, or a combination of lodging, food, and entertainment, primarily to visitors and tourists. (Outside the Coastal Overlay Zone, includes SRO hotels.)

Visitor accommodations are listed in the SDMC’s Use Regulation Table as a subcategory of Commercial Services uses. As shown by the dashes (-) on the Use Table below, visitor accommodations are not allowed in most zones, including single-family residential zones.

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	5
Instructional Studios		-	-												-		-								
Maintenance & Repair		-	-												-		-								
Off-Site Services		-	-												-		-								
Personal Services		-	-												-		-								
Radio & Television Studios		-	-												-		-								
Tasting Rooms		-	-												-		-								
Visitor Accommodations		-	-												-		-								
Separately Regulated Commercial																									

In the past, the City Attorney’s office has opined that “the visitor accommodations ordinance is vague and therefore unenforceable as to short term rentals”² because it could be interpreted to ban many types of rentals, in violation of due process. The Lightner Ordinance seeks to remove the word “primarily” from the definition of visitor accommodations so that it would apply to whole-home rental and home sharing activities even where they aren’t being rented out more than half the time. It also seeks to define “visitors” and “tourists” consistent with the definition of “transients” in SDMC

² The City Attorney Memorandum of Law dated September 12, 2007 defines “short-term vacation rentals” as “the rental of a single-family dwelling for any time period less than 30 consecutive calendar days.

section 35.0102, which is a “[p]erson who exercises Occupancy,³ or is entitled to Occupancy, by reason of concession, permit, right of access, license, or other agreement for a period less than one (1) month.” These amendments appear to be an effort to expand the definition of visitor accommodations to include both whole-home rental and home sharing activities. The practical effect of this expanded definition would be the prohibition of these activities in most zones, including single-family residential zones.

The Lightner Ordinance Would Ban Whole-Home and Home Sharing Activities in Most Zones

Council President Lightner contends that the City of San Diego’s Land Development Code already prohibits short-term vacation rentals in single-family zones and is enforceable today. However, the City Attorney’s office has twice issued memorandums of law that the definition of visitor accommodations is too vague to be enforceable as to short-term vacation rentals. Notably, there is no specific use classification or definition for whole-home rental, home sharing, or similar short term rental uses. For these reasons, Council President Lightner’s contention is inconsistent with the City Attorney’s memorandums.

If the Lightner Ordinance is approved, those zones that currently prohibit visitor accommodations would also prohibit whole-home rentals and home sharing activities. In sum, whole-home rentals and home sharing activities would be prohibited in the following zones: OP, OC, OR, OF, AG, AR, RE, RS, RX, RT, RM-1, RM-2, RM-3, CN, CO, CP, IP, IL, IH, IS and IBT. Said a different way, whole-home rentals and home sharing activities would only be permitted in two high-density residential zones and a few mixed-use commercial zones. Implementation of the Lightner Ordinance would result in the elimination of approximately 70% percent of existing whole-home rentals and home sharing activities in the City of San Diego, resulting in a loss to the City of approximately \$5-\$10 million per year in transient occupancy taxes.

In addition, Council President Lightner has argued⁴ that the proposed ordinance would not apply to home sharing activities because home sharing activities are already regulated by the Boarder and Lodger Accommodations ordinance.⁵ Not only is this interpretation also inconsistent with the City Attorney memorandums of law and the City’s historical enforcement practices, but it is inconsistent with the Lightner Ordinance as it relates to visitor accommodations and the definition of transients.

³ Based on the definition of “transient,” which references the definition of “occupancy” in SDMC section 35.0102, there is a good argument that a transient can only occupy a hotel, space in a recreational vehicle park, or campground and, therefore, the term “transient” is being inappropriately applied in the context of visitor accommodations. This is another example of how the proposed ordinance is being hastily brought forth for consideration without appropriate public participation and review.

⁴ Although the Council Executive Summary and Report to City Council appear to indicate that home sharing activities would be considered visitor accommodations under the proposed ordinance, Council President Lightner publicly stated on October 25, 2016 at the Community Planners Committee meeting and at a press conference on October 28, 2016 that home sharing activities are not subject to the proposed ordinance because they regulated as Board and Lodger Accommodations.

⁵ See San Diego Municipal Code (“SDMC”) § 141.0301. If applied to home sharing activities, the Boarder and Lodger Ordinance would require a 30-night minimum stay in all zones, except the RM zone, which would require a 7-night minimum stay.

Under the Lightner Ordinance, visitor accommodations would include, by definition, lodging for those who exercise occupancy by reason of concession or other agreement for a period of less than a month. This definition does not distinguish between those engaged in whole-home rental activity and those engaged in home sharing activity. Therefore, we believe the expanded definition of visitor accommodations would apply to home sharing activities and would preclude home sharing activities in almost all zones.

A different interpretation would likely result in enforceability issues. According to the City Attorney Memorandum of Law dated December 21, 2015, in order for a zoning law to be enforceable, it must be clear and devoid of vagueness. “Due process requires that statutes forbidding or requiring an act must be set forth in such terms that people of common intelligence do not need to guess at its meaning, or differ as to its application.”⁶ This flaw is an example of the practical problems associated with the Lightner Ordinance.

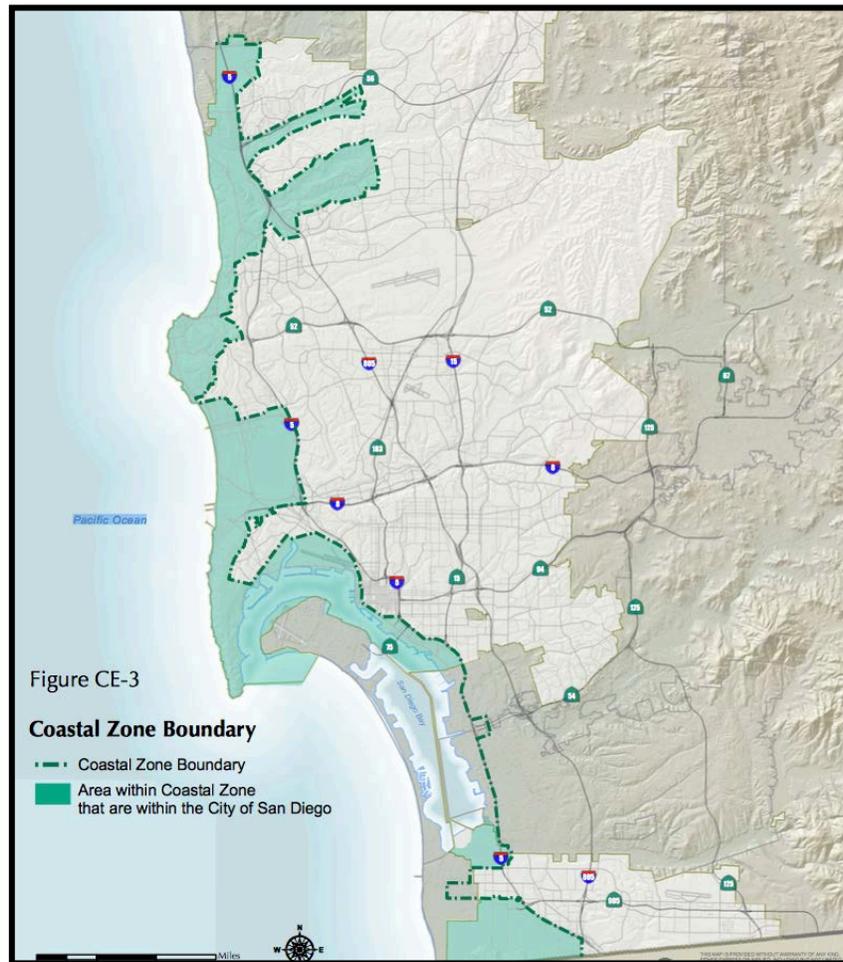
The Lightner Ordinance Will Not Address Potential Concerns within the Beach Communities Because it is Inconsistent with the Coastal Act

Council President Lightner has stated that the proposed ordinance would not require review by the California Coastal Commission (“Coastal Commission”) prior to implementation in the beach communities because it doesn’t explicitly amend the use tables of the Land Development Code. This position is wrong.

The Coastal Commission is an independent, quasi-judicial state agency that regulates, in partnership with local governments, the use of land in the coastal zone pursuant to the California Coastal Act of 1976 (“Coastal Act”). Local governments prepare Local Coastal Programs (“LCPs”) which include a land use plan as well as implementing zoning ordinances. After a LCP is approved by the local government, it is submitted to the Coastal Commission for review and certification for consistency with Coastal Act requirements. The Coastal Commission also reviews and certifies any amendments to previously certified LCPs.

In the City of San Diego, the Coastal Commission has certified LCPs for each community located within the city’s Coastal Zone. Generally in San Diego, the LCPs take the form of community plans and the implementing zoning ordinance consists of the City’s Land Development Code. Any time a coastal community plan is updated or amended or the Land Development Code is updated or amended, it must be reviewed and certified by the Coastal Commission before it takes effect in the Coastal Zone. The Lightner Ordinance would amend Chapter 13 of the Land Development Code and would have the same effect as an amendment to the use tables contained in Chapter 14. For that reason, we are confident review by the Coastal Commission for consistency with the Coastal Act would be required before the Lightner Ordinance would take effect in the beach communities. A map of the City of San Diego’s Coastal Zone is shown below.

⁶ 58 Cal. Jur. 3d, *Statutes* § 21 (2004)(Emphasis added).



The Lightner Ordinance is inconsistent with the Coastal Act. The Coastal Act requires protection of low cost visitor accommodations to facilitate coastal access opportunities for everyone. It also explicitly prioritizes visitor-serving facilities over private residential development. Across the state, the Coastal Commission has recognized whole-home rental and home sharing activities as high priority visitor serving uses because they provide affordable options for family accommodations. In 2015, the Coastal Commission weighed in on the City of San Diego’s proposal to require a minimum 21-night stay for whole-home rentals in the single-family residential zone, stating that it was “too restrictive” because it would not expand visitor opportunities for visitors. The Lightner Ordinance, which prohibits whole-home rentals and home sharing activities in many zones including the single-family residential zone, is even more restrictive than the City’s original proposal. Therefore, it is highly implausible that Coastal Commission would certify the Lightner Ordinance. As a result, the communities with individuals who have been most vocal about their potential concerns with whole-home rental and home sharing activities would not be afforded any relief.

As recently as October 21, 2016, the Coastal Commission weighed in on a proposed short-term rental ordinance in the Central Coast. It reaffirmed its position that whole-home rental and home sharing activities within private residences are an important source of visitor accommodations in the coastal zone. It offered the following suggestion:

At this juncture we would suggest that the City work with us to develop regulations that serve to ensure Coastal Act-required protections are in place to address any potential concerns. Commission staff has experience in working with local governments to draft and implement such regulations, including recent LCP requirements associated with vacation rentals for both Santa Cruz and San Luis Obispo Counties.² In place of prohibitions, which the Commission has historically not supported, these coastal communities instead were able to find a balanced middle ground that helps to ensure that vacation rentals are regulated, including for transient occupancy tax and rules and regulations purposes, and limited as necessary to avoid oversaturation of such rentals in any one neighborhood or locale. These programs have proven successful in Santa Cruz and San Luis Obispo Counties, and we would suggest that their approach can serve as a model for the City moving forward. We look forward to working with the City on potential LCP language that meets the City's specific needs and coastal contexts consistent with the Coastal Act.

Contrary to the hasty and non-transparent approach associated with the Lightner Ordinance, our coalition is eager to continue to work with both the City and the Coastal Commission to develop meaningful regulations that are consistent with the important policies of the Coastal Act to address potential concerns.

Conclusion

For the reasons outlined above, we urge you to deny the Lightner Ordinance and/or any attempts to direct staff to draft such an ordinance. We look forward to the opportunity to continue to work with stakeholders, community members, staff and members of the City Council to develop meaningful regulations.

Very truly yours,



Robin M. Madaffer

cc: Shannon Thomas, Deputy City Attorney
Deborah Lee, District Manager, California Coastal Commission