BACKGROUND REFERENCES

1) LMC Ch 12.20 Residential Low Density 6,000 District (RL6)
2) LMC Ch 18.21 Residential Low Density 12,000 District (RL12)
3) LMC Ch 18.22 Multifamily Residential District
4) LMC Ch 18.24 Supplementary Residential Districts Regulations
5) HomeAway Wikipedia article
6) Airbnb Wikipedia article
7) Homeshare Wikipedia article

Chapter 18.20
RESIDENTIAL LOW DENSITY 6,000 DISTRICT (RL6)[1]

Sections:

18.20.010 Purpose.
18.20.020 Permitted uses.
18.20.030 Uses requiring a conditional use permit.
18.20.040 Yard requirements – Specifications.
18.20.060 Lot size.
18.20.070 Building height.
18.20.080 Lot coverage.
18.20.090 Off-street parking.

18.20.010 Purpose.
This is a restricted residential district of low density in which the principal use of land is for single-family dwellings, together with recreational, religious, and educational facilities required to serve the community. The regulations for this district are designed and intended to establish, maintain and protect the essential characteristics of the district, to develop and sustain a suitable environment for family life where children are members of most families, and to prohibit all activities of a commercial nature and those which would tend to be inharmonious with or injurious to the preservation of a residential environment. [Ord. 1089 § 1(Exh. A), 1998.]

18.20.020 Permitted uses.
Those uses not listed as permitted or allowed by a conditional use permit are prohibited; provided, that if a proposed use is not specifically listed, the city administrator and/or his/her designee shall determine if the proposed use is similar to one that is already enumerated in the listed permitted uses and may therefore be allowed, subject to the requirements associated with that use and all other applicable provisions of the Leavenworth Municipal Code. In a RL6 district, the following uses and their accessory uses are permitted outright:

A. Single-family dwelling;

B. Accessory building and/or uses as follows:

1. Garage, carport or parking space;

2. Work and/or storage sheds for noncommercial use or equipment;

3. Accessory dwelling unit, meaning a subordinate, habitable living unit added to, created within, or detached from a single-family dwelling that provides basic requirements for living, sleeping, eating, cooking and sanitation, provided the following minimum requirements are met:

a. There shall be no more than one accessory dwelling unit per building lot or home site in conjunction with a single-family structure, even if such structure is built on more than one platted lot;

b. An accessory dwelling unit may be attached to, created within, or detached from a new or existing primary single-family dwelling unit;

c. The accessory dwelling unit will require one off-street parking space, which is in addition to any off-street spaces required for the primary single-family dwelling unit which may be accessed from an alley with the recording of a notice to title of an indemnity agreement regarding alley access and maintenance as provided by the city;

d. The total habitable floor area of any accessory dwelling unit(s) shall in no case exceed 1,200 square feet;

e. An accessory dwelling unit, together with the primary single-family dwelling unit with which it is associated, shall conform to all other provisions of the LMC. Conversions of existing structures to accessory dwelling units shall be allowed in conformance with Chapter 18.68 LMC, Nonconforming Provisions, excepting setbacks whereby the legally established structure may receive an administrative deviation to encroach no more than 20 percent;

f. The accessory dwelling unit shall meet the minimum requirements of the International Building Code, International Fire Code, health district and all other local, state and federal agencies; and

g. The accessory dwelling unit must be connected to the water and sewer utilities, and shall have separate services for accessory dwelling unit greater than 900 square feet in area;

C. Family day care home, provided it is licensed by the state and has a current city business license;

D. Public parks;

E. Mini-day care center home facility, provided it is licensed by the state and has a current city business license;

F. Adult family home. See RCW 70.128.175 for definition;

G. Group A home occupation. Such use shall be secondary to the residential use of the property, and shall be reviewed and approved through the limited administrative review process, provided the following minimum conditions shall apply to the approval of any such application:

1. There shall be no nonresident worker(s). No persons other than the immediate resident(s) of the dwelling/property may be employed in the home occupation;

2. No equipment or employees shall be dispatched from the residential premises, except the owner and owner's vehicle;

3. A maximum of two customers per month shall visit the home occupation;

4. No materials or commodities shall be delivered to or from the residence which are of such bulk or quantity as to require delivery by commercial vehicle or a trailer (vehicles that have a DOT number). Deliveries shall be limited to one per day, regardless of carrier;

5. Not over 20 percent of the total floor area of one floor of the residence shall be used for the home occupation;

6. No article shall be sold or offered for sale on the premises. No stock in trade or commodities kept for sale, which are not produced on the premises, shall be permitted;

7. No parking space shall be obstructed and no additional parking space will be required for the home occupation;

8. A home occupation may be conducted in a detached garage and/or accessory structure with not more than 500 square feet of floor area used for the home occupation; provided, that there shall be only one garage and/or accessory structure on the property and does not eliminate any required parking;

9. No structural alterations shall be allowed to accommodate the home occupation except when consistent with residential construction and occupancy;

10. A certificate of occupancy will be required for buildings constructed after the date of adoption of the ordinance codified in this section (January 28, 2014) prior to issuance of a home occupation permit;

11. No sign(s) advertising the business shall be permitted;

12. No window display and no sample commodities, equipment, vehicles or other materials related to the business shall be displayed or stored outside, with the exception of the owner's vehicle;

13. No materials or mechanical equipment shall be used which will be detrimental to the residential use of the property or adjoining residences because of vibration, noise, dust, smoke, odor, interference with radio or television, or other factors;

14. Any occupation which requires licensing, registration or permits, by state or federal statute or requirements or by city ordinance, must be provided at time of application, and at all times thereafter be appropriately licensed, registered, or have a permit and comply with requirements of all such licenses or permits;

15. For the purposes of this section, any use that is not consistent with the definition of "home occupation," including but not limited to those uses which are similar in nature, shall not be allowed as a home occupation:

a. Outdoor storage and/or display of items for sale or advertising purposes shall be prohibited unless for a garage sale and/or rummage sale of a frequency less than two per calendar year for a maximum of two days per event;

b. Delivery services, equipment/trailer rental services, industry, kennels, motorized/nonmotorized service and repair, welding and fabrication, antique sales, funeral services, groceries sales, secondhand merchandise sales, equipment rental, physicians, dentists, chiropractors, restaurants excepting home cooking or preserving if conducted solely within the residence, veterinarians, any wholesale or retail sales, and any like or similar uses or activities;

c. Transient accommodations;

H. Group B home occupation. Such use shall be secondary to the residential use of the property, and shall be reviewed and approved through the full administrative review process, provided the following minimum conditions shall apply to the approval of any such application:

1. Not over 50 percent of the total floor area of one floor is to be used for the home occupation;

2. A home occupation may be conducted in a detached garage and/or accessory structure with not more than 500 square feet of floor area used for the home occupation; provided, that there shall be only one garage and/or accessory structure on the property and does not eliminate any required parking;

3. Structural alterations consistent with residential development and occupancy shall be allowed which result in compliance with the building, fire safety, and handicap accessibility codes and standards. The structure shall be fully compliant with all applicable laws, including but not limited to building, fire and accessibility codes, prior to occupancy;

4. Prior to issuance of a Group B home occupation permit, a certificate of occupancy will be required for buildings constructed after the date of adoption of the ordinance codified in this section (January 28, 2014);

5. No persons other than the immediate resident(s) of the home and, at any given time, one outside employee may be employed in the home occupation;

6. No equipment or employees shall be dispatched from the residential premises, except the owner and owner's vehicle;

7. No article shall be sold or offered for sale on the premises unless by individual appointment which does not exceed occupancy limits within this section and/or the International Building, Residential and/or Fire Codes;

8. No sign(s) advertising the business shall be permitted;

9. No window display and no sample commodities or related materials shall be displayed or stored outside the building;

10. No outdoor storage of stock and trade shall be permitted;

11. No materials or mechanical equipment shall be used which will be detrimental to the residential use of the property or adjoining residences because of vibration, noise, dust, smoke, odor, interference with radio or television, or other factors;

12. No materials or commodities shall be delivered to or from the residence which are of such bulk or quantity as to require delivery by commercial vehicle or a trailer (vehicles that have a DOT number), and there shall be no parking of customer's vehicles in a manner or frequency as to cause disturbance or inconvenience to nearby residents or so as to necessitate on-street parking;

13. Off-street parking stall shall be provided to accommodate all vehicles associated with the operations of the home occupation;

14. Occupancy shall be limited to the maximum allowed by the adopted International Building, Residential and/or Fire Codes. In addition, the development services department may limit maximum occupancy loads based on impacts and/or infrastructure available to support the home occupation. In general, 10 students, customers, and/or clients within each 12-hour period shall be the maximum without the completion of a traffic, access and/or noise study which demonstrates no impact to neighbors, the community, and/or infrastructure. Class times and/or visitor appointments shall be spaced a sufficient time (minimum of 15 minutes) so that there is not an overlap in pick-up and/or drop-off;

15. Hours of operation shall be limited from 8:00 a.m. to 8:00 p.m.;

16. All classes and activities shall occur indoors in a closed window environment that prevents the passage of noise into the outside atmosphere unless such activity does not generate noise or disturbance;

17. Vehicles shall not be allowed to idle outside of the building;

18. Water and sewer service shall be determined by the city engineer based on the home occupation equivalent residential unit. Water and sewer service shall be connected to the primary residence and shall not be separate. Upgrade of sanitary sewer and water, as necessary, shall be compliant with Chapter 13.04 LMC and other applicable requirements prior to occupancy;

19. Any occupation which requires licensing, registration or permits, by state or federal statute or requirements or by city ordinance, must be provided at time of application, and at all times thereafter be appropriately licensed, registered, or have a permit and comply with requirements of all such licenses or permits;

20. For the purposes of this section, any use that is not consistent with the definition of "home occupation," including but not limited to those uses which are similar in nature, shall not be allowed as a home occupation:

a. Outdoor storage and/or display of items for sale or advertising purposes shall be prohibited unless for

a garage sale and/or rummage sale of a frequency less than two per calendar year for a maximum of two days per event;

b. Events, recitals, performances, promotions, and similar attractions outside of daily operations shall not be allowed unless the applicant completes and obtains approval by the city for a traffic, access and/or noise study which demonstrates no impact to neighbors or the community.

c. Delivery services, equipment/trailer rental services, industry, kennels, motorized service and repair, welding and fabrication, antique sales, funeral services, groceries sales, secondhand merchandise sales, equipment rental, physicians, dentists, chiropractors, restaurants excepting home cooking or preserving if conducted solely within the residence, veterinarians, any wholesale or retail sales, and any like or similar uses or activities;

d. Transient accommodations. [Ord. 1523 § 1 (Att. A), 2016; Ord. 1467 § 1 (Att. A), 2014; Ord. 1423 § 1 (Att. D), 2012; Ord. 1421 § 1 (Att. A), 2012; Ord. 1268 (Exh. D), 2005; Ord. 1089 § 1 (Exh. A), 1998.]

18.20.030 Uses requiring a conditional use permit.

Those uses not listed as permitted or allowed by a conditional use permit are prohibited; provided, that if a proposed use is not specifically listed, the city administrator and/or his/her designee shall determine if the proposed use is similar to one that is already enumerated in the listed conditional uses and may therefore be allowed, subject to the requirements associated with that use and all other applicable provisions of the Leavenworth Municipal Code. In a RL6 district, the following uses and their accessory uses are permitted when authorized in accordance with Chapter 18.52 LMC:

A. Churches, convents and monasteries;

B. Day care center;

C. Educational institutions;

D. Mini-day care center, not in family day care provider's home;

E. Community center buildings, nonprofit;

F. Public libraries and governmental buildings;

G. Public recreation areas;

H. Public museums or art galleries;

I. Golf courses (not including miniature golf courses, professional putting courses, and/or driving ranges);

J. Farming, truck gardening and flower gardening;

K. Educational centers for advanced study and research in an academic field of learning;

L. Temporary subdivision tract offices subject to approval of the Leavenworth design review board;

M. Day nurseries and nursery schools;

N. Two-family dwelling; provided, that the lot size is in conformance with LMC 18.20.060(A), and the project is in compliance with LMC 18.52.130;

O. Hospital;

P. Manufactured home park;

Q. Public utility structures;

R. (Reserved);

S. Bed and breakfast facilities, meaning a single-family residential unit which provides transient lodging, and may include breakfast for guests only, for compensation, by renting up to three rooms within the primary residence, provided the following minimum conditions shall apply to the approval of any such conditional use permit:

1. LMC 18.52.120(A) through (F) shall be complied with;

2. The minimum lot size for a bed and breakfast facility shall be 6,000 square feet; and

3. Existing bed and breakfast facilities annexed into the city after the effective date of the ordinance codified in this chapter which do not fully meet the definition and/or requirements of this section shall be allowed to continue as a nonconforming use;

T. Wireless telecommunications facilities (WTF), in accordance with the requirements of Chapter 18.74 LMC;

U. (Reserved). [Ord. 1467 § 1 (Att. A), 2014; Ord. 1431 § 1 (Att. A), 2012; Ord. 1421 § 1 (Att. A), 2012; Ord. 1285 § 1 (Exh. A § 1(i)), 2007; Ord. 1205 § 2, 2003; Ord. 1089 § 1(Exh. A), 1998.]

18.20.040 Yard requirements – Specifications.
A. Front Yard. There shall be a front yard of not less than 25 feet.

B. Side Yard. There shall be side yards of not less than five feet.

C. Rear Yard. There shall be a rear yard of not less than 15 feet for lots without an alley adjacent to the rear yard, and a rear yard of not less than eight feet for lots with an alley adjacent to the rear yard.

D. For corner lots, 6,000 square feet or greater in size, the street side yard shall be a minimum of 10 feet, and at least one rear yard setback shall be provided. For corner lots less than 6,000 square feet in size, the street side yard shall be a minimum of five feet and at least one rear yard setback shall be provided. For the purposes of this title, street side yard shall be that yard area which is adjacent to a public street right-of-way, but which does not provide the primary access to the residential structure, and/or which does not serve as the street address for the residence. [Ord. 1089 § 1(Exh. A), 1998.]

18.20.060 Lot size.
In a RL6 district, the lot size shall be as follows:

A. The minimum lot area shall be 6,000 square feet for a single-family dwelling and 12,000 square feet for a duplex.

B. The minimum lot width at the front building line for new land divisions shall be 60 feet for an interior lot and 70 feet for a corner lot. [Ord. 1089 § 1(Exh. A), 1998.]

18.20.070 Building height.
In a RL6 district, no structure shall exceed a height of 35 feet. [Ord. 1246 § 2, 2005; Ord. 1089 § 1(Exh. A), 1998.]

18.20.080 Lot coverage.
In a RL6 district, buildings and structures shall not occupy more than 35 percent of the lot area. [Ord. 1089 § 1(Exh. A), 1998.]

18.20.090 Off-street parking.
Off-street parking shall be provided as required in Chapter 14.12 LMC. [Ord. 1146 § 1, 2000; Ord. 1089 § 1(Exh. A), 1998.]

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[1]Prior ordinance history: Ords. 531, 551, 659, 720, 754, 789, 807, 852 and 1057.

Mobile Version

Chapter 18.21
RESIDENTIAL LOW DENSITY 12,000 DISTRICT (RL12)[1]

Sections:

18.21.010 Purpose.
18.21.020 Permitted uses.
18.21.030 Uses requiring a conditional use permit.
18.21.040 Yard requirements – Specifications.
18.21.060 Lot size.
18.21.070 Building height.
18.21.080 Lot coverage.
18.21.090 Off-street parking.

18.21.010 Purpose.
This is a restricted residential district of low density in which the principal use of land is for single-family dwellings, together with recreational, religious, and educational facilities required to serve the community. The regulations for this district are designed and intended to establish, maintain and protect the essential characteristics of the district, to develop and sustain a suitable environment for family life where children are members of most families, and to prohibit all activities of a commercial nature and those which would tend to be inharmonious with or injurious to the preservation of a residential environment. [Ord. 1089 § 2(Exh. B), 1998.]

18.21.020 Permitted uses.
Those uses not listed as permitted or allowed by a conditional use permit are prohibited; provided, that if a proposed use is not specifically listed, the city administrator and/or his/her designee shall determine if the proposed use is similar to one that is already enumerated in the listed permitted uses and may therefore be allowed, subject to the requirements associated with that use and all other applicable provisions of the Leavenworth Municipal Code. In a RL12 district, the following uses and their accessory uses are permitted outright:

A. Single-family dwelling;

B. Accessory building and/or uses as follows:

1. Garage, carport or parking space,

2. Work and/or storage sheds for noncommercial use or equipment,

3. Accessory dwelling unit, meaning a subordinate, habitable living unit added to, created within, or detached from a single-family dwelling that provides basic requirements for living, sleeping, eating, cooking and sanitation, provided the minimum requirements of LMC 18.20.020(B)(3) are met;

C. Family day care home, provided it is licensed by the state and has a current city business license;

D. Public parks;

E. Mini-day care home facility, provided it is licensed by the state and has a current city business license;

F. Adult family home. See RCW 70.128.175 for definition;

G. Group A home occupations, provided the minimum conditions found in Chapter 18.20 LMC shall apply to the approval of any such limited administrative review of applications;

H. Group B home occupations, provided the minimum conditions found in Chapter 18.20 LMC shall apply to the approval of any such full administrative review of applications. [Ord. 1467 § 1 (Att. A), 2014; Ord. 1421 § 1 (Att. A), 2012; Ord. 1268 (Exh. D), 2005; Ord. 1089 § 2(Exh. B), 1998.]

18.21.030 Uses requiring a conditional use permit.
Those uses not listed as permitted or allowed by a conditional use permit are prohibited; provided, that if a proposed use is not specifically listed, the city administrator and/or his/her designee shall determine if the proposed use is similar to one that is already enumerated in the listed conditional uses and may therefore be allowed, subject to the requirements associated with that use and all other applicable provisions of the Leavenworth Municipal Code. In a RL12 district, the following uses and their accessory uses are permitted when authorized in accordance with Chapter 18.52 LMC:

A. Churches, convents and monasteries;

B. Day care center;

C. Educational institutions;

D. Mini-day care center, not in family day care provider's home;

E. Community center buildings, nonprofit;

F. Public libraries and governmental buildings;

G. Public recreation areas;

H. Public museums or art galleries;

I. Golf courses (not including miniature golf courses, professional putting courses, and/or driving ranges);

J. Farming, truck gardening and flower gardening;

K. Educational centers for advanced study and research in an academic field of learning;

L. Temporary subdivision tract offices subject to approval of the Leavenworth design review board;

M. Day nurseries and nursery schools;

N. Two-family dwelling; provided, that the lot size is in conformance with LMC 18.21.060(A), and the project is in compliance with LMC 18.52.130;

O. Hospital;

P. Manufactured home park;

Q. Public utility structures;

R. (Reserved);

S. Bed and breakfast facilities, meaning a single-family residential unit which provides transient lodging, and may include breakfast for guests only, for compensation, by renting up to three rooms within the primary residence, provided the minimum conditions found in LMC 18.20.030(S) shall apply to the approval of any such conditional use permit;

T. Wireless telecommunications facilities (WTF), in accordance with the requirements of Chapter 18.74 LMC;

U. (Reserved). [Ord. 1467 § 1 (Att. A), 2014; Ord. 1431 § 1 (Att. A), 2012; Ord. 1421 § 1 (Att. A), 2012; Ord. 1285 § 1 (Exh. A § 1(i)), 2007; Ord. 1205 § 2, 2003; Ord. 1089 § 2(Exh. B), 1998.]

18.21.040 Yard requirements – Specifications.
A. Front Yard. There shall be a front yard of not less than 25 feet.

B. Side Yard. There shall be side yards of not less than 10 feet.

C. Rear Yard. There shall be a rear yard of not less than 15 feet for lots without an alley adjacent to the rear yard, and a rear yard of not less than eight feet for lots with an alley adjacent to the rear yard.

D. For corner lots, the street side yard shall be a minimum of 15 feet, and at least one rear yard setback shall be provided. For the purposes of this title, street side yard shall be that yard area which is adjacent to a public street right-of-way, but which does not provide the primary access to the residential structure, and/or which does not serve as the street address for the residence. [Ord. 1089 § 2(Exh. B), 1998.]

18.21.060 Lot size.
In a RL12 district, the lot size shall be as follows:

A. The minimum lot area shall be 12,000 square feet for a single-family dwelling and duplex.

B. The minimum lot width at the front building line for new land divisions shall be 80 feet for an interior lot and 90 feet for a corner lot. [Ord. 1089 § 2(Exh. B), 1998.]

18.21.070 Building height.
In a RL12 district, no structure shall exceed a height of 35 feet. [Ord. 1246 § 2, 2005; Ord. 1089 § 2(Exh. B), 1998.]

18.21.080 Lot coverage.
In a RL12 district, buildings and structures shall not occupy more than 35 percent of the lot area. [Ord. 1089 § 2(Exh. B), 1998.]

18.21.090 Off-street parking.
Off-street parking shall be provided as required in Chapter 14.12 LMC. [Ord. 1146 § 1, 2000; Ord. 1089 § 2(Exh. B), 1998.]

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[1]Prior ordinance history: Ords. 1014 and 1057.

Mobile Version

Chapter 18.22
MULTIFAMILY RESIDENTIAL DISTRICT[1]

Sections:

18.22.010 Purpose.
18.22.020 Permitted uses.
18.22.030 Site plan review.
18.22.040 Uses requiring a conditional use permit.
18.22.050 Lot size.
18.22.060 Yard requirements.
18.22.070 Building height.
18.22.080 Lot coverage.
18.22.090 Off-street parking.

18.22.010 Purpose.
This is a medium density residential district designed to accommodate multifamily uses, together with recreational, religious, and educational uses required to serve the community. This district is intended to provide for increased variety and range of cost for housing in Leavenworth. The multifamily district is also intended to serve as a buffer between commercial and single-family districts, and to provide incentive for renewal and redevelopment of older residential areas. [Ord. 1426 § 1 (Att. A), 2012; Ord. 1373 § 1 (Exh. A), 2010; Ord. 1089 § 3(Exh. C), 1998.]

18.22.020 Permitted uses.
In a multifamily residential district, the following uses and their accessory uses are permitted outright:

A. A use permitted outright in the low density residential districts;

B. Two-family and multifamily dwellings, including both rental apartments and condominiums, subject to the provisions of LMC 18.22.030;

C. Boardinghouse, lodginghouse, roominghouse, subject to the provisions of LMC 18.22.030;

D. RCW 35.63.220, Treatment of residential structures occupied by persons with handicaps;

E. Accessory building and/or uses as follows:

1. Garage, carport or parking space;

2. Work and/or storage sheds for noncommercial use or equipment;

3. Accessory dwelling unit, meaning a subordinate, habitable living unit added to, created within, or detached from a single-family dwelling that provides basic requirements for living, sleeping, eating, cooking and sanitation, provided the minimum requirements of LMC 18.20.020(B)(3) are met;

F. Adult family home. See RCW 70.128.175 for definition. [Ord. 1426 § 1 (Att. A), 2012; Ord. 1373 § 1 (Exh. A), 2010; Ord. 1268 (Exh. D), 2005; Ord. 1089 § 3(Exh. C), 1998.]

18.22.030 Site plan review.
Multifamily and roominghouse developments involving three or more units, as provided in LMC 18.22.020, shall be subject to the following minimum landscaping standards:

A. Planting Area. A minimum five-foot-wide planting strip shall be provided adjacent to all street frontages, as directed by the public works director, and along all property lines which front upon a low density residential district. The total landscaped planting area, exclusive of lawns, shall not be less than eight percent of the gross project area.

B. Trees. One tree shall be required for each 250 square feet of required planting area. Trees of two-inch caliper (measured three feet above ground level) are required. At least one out of every four of the required trees shall be planted within the interior (20 feet from any lot line, unless prevented by the structures). Nuisance trees, which are susceptible to breakage, disease, or insect infestation, or which have undesirable growth habits (roots which invade sewer lines, trees which produce messy blooms and/or fruit) should be avoided.

C. Shrubs. The planting area must be 50 percent covered with shrubs which are two feet or higher at maturity.

D. Ground Cover. Ground cover is required to complete the landscaping of the planting areas.

E. Other Areas. All areas not covered by structures, paving or landscaped planting areas shall be maintained in grass.

F. Irrigation and Maintenance. A permanent, underground irrigation system shall be provided for all planting areas and lawns. All plantings shall be the owner's responsibility to maintain and replace as needed. [Ord. 1426 § 1 (Att. A), 2012; Ord. 1373 § 1 (Exh. A), 2010; Ord. 1089 § 3(Exh. C), 1998.]

18.22.040 Uses requiring a conditional use permit.
In a multifamily residential district, the following uses and their accessory uses are permitted when authorized in accordance with Chapter 18.52 LMC:

A. A use permitted as a conditional use in a low density residential district;

B. Club, lodge or fraternal organization;

C. Clinic, hospital or sanitarium;

D. Nursing home, retirement home, rest home or convalescent home;

E. Youth home, juvenile home or orphanage;

F. Public facilities and utilities;

G. Day care center (within existing and new church, public or semipublic buildings only);

H. Underground parking facility in the multifamily zone district to provide parking for a commercial zone district. [Ord. 1373 § 1 (Exh. A), 2010; Ord. 1089 § 3(Exh. C), 1998.]

18.22.050 Lot size.
In a multifamily residential district, the lot size shall be as follows:

A. The minimum lot area for new land divisions shall be 6,000 square feet for up to three units. Two thousand square feet of additional area on the lot is required for each additional dwelling unit. No lot shall be created which is less than 6,000 square feet in size, but multiple lots of 6,000 square feet and larger may be platted.

B. For existing legal lots of record, at a minimum, 2,000 square feet of lot area are required for each dwelling unit.

C. The minimum lot width at the front building line for new land divisions shall be 60 feet for an interior lot and 70 feet for a corner lot. [Ord. 1373 § 1 (Exh. A), 2010; Ord. 1268 (Exh. D), 2005; Ord. 1089 § 3(Exh. C), 1998.]

18.22.060 Yard requirements.

A. The front yard shall be a minimum of 25 feet. On through lots, front yards shall be required on both streets.

B. The side yard shall be a minimum of five feet.

C. The rear yard shall be a minimum of 15 feet for lots without an alley adjacent to the rear yard, and the rear yard shall be not less than eight feet for lots with an alley adjacent to the rear yard.

D. For corner lots, the street side yard shall be a minimum of 10 feet, and at least one rear yard setback shall be provided. For the purposes of this title, street side yard shall be that yard area which is adjacent to a public street right-of-way, but which does not provide the primary access to the residential structure, and/or which does not serve as the street address for the residence. [Ord. 1373 § 1 (Exh. A), 2010; Ord. 1089 § 3(Exh. C), 1998.]

18.22.070 Building height.

In a multifamily residential district, no structure shall exceed a height of 35 feet. [Ord. 1373 § 1 (Exh. A), 2010; Ord. 1246 § 2, 2005; Ord. 1089 § 3 (Exh. C), 1998.]

18.22.080 Lot coverage.

In a multifamily residential district, buildings and structures shall not occupy more than 40 percent of the lot area. [Ord. 1373 § 1 (Exh. A), 2010; Ord. 1089 § 3 (Exh. C), 1998.]

18.22.090 Off-street parking.

Off-street parking shall be provided as required in Chapter 14.12 LMC. [Ord. 1373 § 1 (Exh. A), 2010; Ord. 1146 § 1, 2000; Ord. 1089 § 3 (Exh. C), 1998.]

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[1]Prior ordinance history: Ords. 551, 720, 754, 807, 921, 983 and 1057.

Mobile Version

Chapter 18.24
SUPPLEMENTARY RESIDENTIAL DISTRICTS REGULATIONS[1]

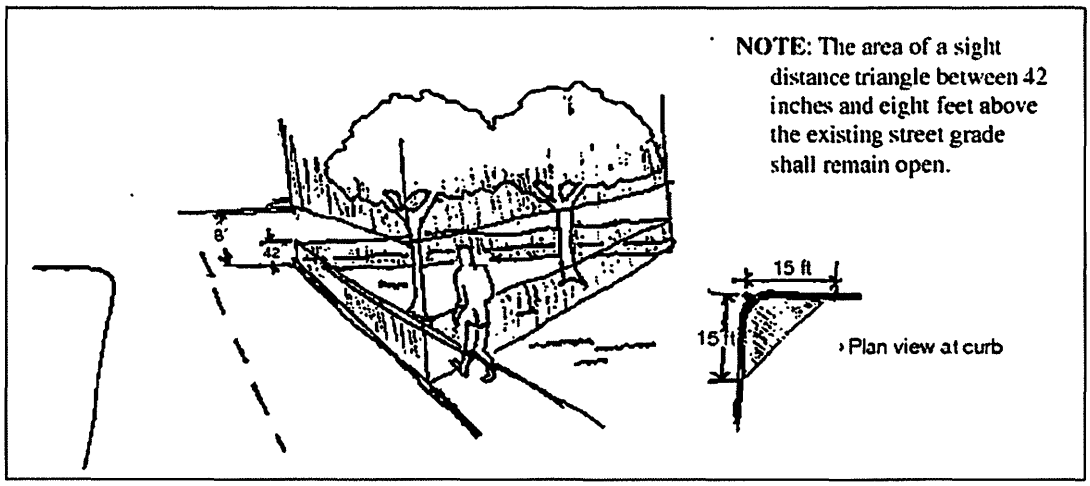
Sections:

18.24.005 **Applicability.**
18.24.010 **Corner lot – Obstructions to visibility prohibited.**
18.24.020 **Fences, walls and hedges – Restrictions.**
18.24.030 **Accessory buildings.**
18.24.040 **More than one principal structure prohibited in low density residential districts.**
18.24.050 **Building height – Exceptions to limits.**
18.24.070 **Major recreational equipment – Use and storage restrictions.**
18.24.080 **Unlicensed vehicles – Parking and storage restrictions.**
18.24.090 **Yard requirements – Modification.**
18.24.100 **Decks, patios and balconies – Restrictions and clarification.**

18.24.005 Applicability.
This chapter applies to all residential districts unless specifically stated otherwise. [Ord. 1089 § 4(Exh. D), 1998.]

18.24.010 Corner lot – Obstructions to visibility prohibited.
Except for utility poles, trunks of approved street trees, and traffic control signs, the following sight distance provisions shall apply to all intersections, roadways, and site access points:

A. A sight distance triangle area as determined by subsection (B) of this section shall contain no view-obscuring fence, berm, vegetation, on-site vehicle parking area, signs or other physical obstruction between 42 inches and eight feet above the existing street grade.



B. The sight distance triangle at:

1. A street intersection shall be determined by measuring 15 feet along both street property lines beginning at their point of intersection. The third side of the triangle shall be a line connecting the endpoints of the first

two sides of the triangle; or

2. A site access point shall be determined by measuring 15 feet along the street lines and 15 feet along the edges of the driveway beginning at the respective points of intersection. The third side of each triangle shall be a line connecting the endpoints of the first two sides of each triangle. [Ord. 1521 § 1 (Att. A), 2016; Ord. 1089 § 4(Exh. D), 1998.]

18.24.020 Fences, walls and hedges – Restrictions.
Notwithstanding other provisions of this title, fences, walls and hedges shall meet the following requirements:

A. Front and Side Street Yards. Six feet maximum height with minimum three-inch visible gaps between board plank fences or cyclone fences without lath interlacing, or three and one-half feet maximum height within 10 feet of the front and/or side street lot lines for solid (view-obscuring) fencing;

B. Side Yards. Six feet maximum height;

C. Rear Yards. Six feet maximum height;

D. It is the property owner's responsibility to accurately locate all property lines. The property owner shall stake the property line prior to fence installation activities, and such stakes shall remain throughout fence installation activities;

E. This chapter applies to all residential districts unless specifically stated otherwise. [Ord. 1521 § 1 (Att. A), 2016; Ord. 1089 § 4(Exh. D), 1998.]

18.24.030 Accessory buildings.
A. No accessory buildings shall be erected in any required yard and no separate accessory buildings shall be erected within five feet of any other building; provided, however, that nonresidential accessory buildings may be located to within eight feet of the rear lot line.

B. Accessory buildings that are smaller than 120 square feet of floor area, such as store-purchased buildings, tool and storage sheds, and play structures shall be allowed within three feet of any side property line which is not a street side yard and/or a rear property line, provided the placement of the building does not inhibit sight distance. [Ord. 1089 § 4(Exh. D), 1998.]

18.24.040 More than one principal structure prohibited in low density residential districts.
Erecting more than one principal structure on a lot is not permitted in the low density residential districts. [Ord. 1089 § 4(Exh. D), 1998.]

18.24.050 Building height – Exceptions to limits.
The building height limitations do not apply to spires, belfries, cupolas, antennas (except as provided in Chapter 18.74 LMC), ventilators, chimneys, or other appurtenances usually required to be placed above the roof level and not intended for human occupancy. [Ord. 1205 § 3, 2003; Ord. 1089 § 4(Exh. D), 1998.]

18.24.070 Major recreational equipment – Use and storage restrictions.
Not more than five pieces of major recreational equipment, excluding motorcycles, shall be parked or stored on any parcel other than in fully enclosed storage in a residential district and not more than two such recreational vehicles shall be habitable type recreational vehicles. No habitable recreational vehicle shall be used for living, sleeping or housekeeping purposes for more than 10 days in any 30-day period, when parked or stored on a residential lot or in any location not approved for such uses; provided, however, that a single habitable recreational vehicle may be occupied for housekeeping purposes for a period, not exceeding six months, by an owner or licensed contractor on a residential lot where a permanent dwelling is under construction. [Ord. 1089 § 4(Exh. D), 1998.]

18.24.080 Unlicensed vehicles – Parking and storage restrictions.
Automotive vehicles or trailers of any kind or type without current license plates shall not be parked or stored on

any residentially zoned property other than in completely enclosed buildings. [Ord. 1089 § 4(Exh. D), 1998.]

18.24.090 Yard requirements – Modification.

A. Where the average natural slope of the front half of a lot is more than one foot rise or fall in five feet horizontal, the front yard may be reduced by not more than five feet.

B. Where the average natural slope of the rear half of the lot is more than one foot rise or fall in five feet horizontal, the rear yard may be reduced to 10 feet.

C. Other provisions of this title notwithstanding, a conforming addition may be made to an existing nonconforming single-family dwelling where such nonconformance is due to inadequate front, side or rear yard setback, providing such single-family dwelling complied with the yard setbacks required by ordinance at the time of construction, or was constructed prior to the adoption of setback requirements. [Ord. 1089 § 4(Exh. D), 1998.]

18.24.100 Decks, patios and balconies – Restrictions and clarification.

A. Decks greater than 12 inches above grade and balconies do not count toward building lot coverage, but do need to meet yard setback requirements.

B. At-grade patios and decks built such that no part of the deck (excluding railings) is greater than 12 inches above grade do not need to meet yard setback requirements and do not count toward building lot coverage. [Ord. 1089 § 4(Exh. D), 1998.]

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[1]Prior ordinance history: Ords. 531, 551, 727, 737, 754, 807, 857 and 989.

Mobile Version

HomeAway

From Wikipedia, the free encyclopedia

HomeAway, Inc. is a vacation rental marketplace with more than 1,000,000[1] vacation rental listings in 190 countries,[2] and has 1588 employees.[3] It has operated through 40 websites in 22 languages as of December 31, 2014. The company offers the most comprehensive selection of rentals[4] for families and groups to find accommodations such as cabins, condos, castles, villas, barns and farm houses.[5] Founded in February 2005 and headquartered in Austin, the company became publicly traded company in 2011.[6] On November 4, 2015, Expedia, Inc. announced its intention to buy HomeAway.

HomeAway.com, Inc.

Type	Subsidiary of Expedia, Inc.
Traded as	NASDAQ: EXPE (http://www.nasdaq.com/symbol/expe) S&P 500 Component
Industry	Travel
Founded	February 2005
Founders	Brian Sharples and Carl Shepherd
Headquarters	Austin, TX, USA
Key people	Brian Sharples (CEO) Carl Shepherd (CDO) Tom Hale (COO) Lynn Atchison (CFO) Mariano Dima (CMO) Jon Gray (CRO) Jeff Hurst (CSO) Lori Knowlton (CPO) Steve Davis (CIO) Jeff Mosler (CSO)
Services	Vacation Rentals
Website	HomeAway.com (http://www.homeaway.com)

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History

HomeAway, Inc. was founded in 2004 as CEH Holdings.[7] The company acquired several sites and consolidated them into a single vacation marketplace, launching HomeAway.com in June 2006.[8]

The acquisitions that HomeAway has made include:

Date	Acquisition	Location
2005	CyberRentals.com	U.S.
2005	GreatRentals.com	U.S.
2005	A1Vacations.com	U.S.
2005	TripHomes.com	U.S.
2005	HomeAway.co.uk	United Kingdom
2005	FeWo-direkt.de	Germany
2006	VRBO.com[9]	U.S.
2007	Abritel.fr[10]	France
2007	VacationRentals.com[11]	U.S.
2007	OwnersDirect.co.uk[12]	United Kingdom
2009	Homelidays.com[13]	France
2010	BedandBreakfast.com[14]	U.S.
2010	AlugueTemporada.com.br[15]	Brazil
2010	Instant Software [16]	US
2010	Escapia [17]	US
2011	RealHolidays.com.au[18]	Australia
2012	Toprural.com[19]	Spain
2013	Travelmob[20]	Singapore
2013	Stayz Australia[21]	Australia
2013	Bookabach.co.nz[22]	New Zealand
2014	Glad to Have You, Inc.[23]	U.S.

HomeAway moved into its new global headquarters in Austin, Texas on October 2, 2009; it was the first mixed-use project and the second company in Austin to achieve LEED Gold certification for Commercial Interior Design.[24]

On November 18, 2009, *Us Weekly* magazine announced that HomeAway would reunite actors Chevy Chase and Beverly D'Angelo in a new short film and advertising campaign based on *National Lampoon's Vacation* (a movie). The HomeAway ad represents the company's first national advertising campaign that debuted during the CBS television network broadcast of Super Bowl XLIV on February 7, 2010.[25]

Before going public in mid-2011, HomeAway raised a total of $405 million in venture-capital which was funded by venture capital firms Austin Ventures, Institutional Venture Partners, Redpoint Ventures, Technology Crossover Ventures and Trident Capital.[26] Currently, Homeaway's valuation is approximately $2.9 billion.[27] Homeaway's IPO stock closed at $40.21 on Nasdaq, up 48.9% from its IPO price of $27. The stock price has since hovered around $35.

On 5 March 2014, the company announced that through an all-cash transaction, it acquired the U.S. mobile application 'Glad to Have You' (GLAD).[28][29][30]

In 2015, HomeAway invested $4.9 million[31] in CanadaStays to increase the number of Canadian properties from less than 10,000 to more than 220,000.[32] The partnership makes HomeAway a minority stakeholder in CanadaStays, who is the largest vacation rental site in Canada and based in Toronto.[33]

A summary of the company's financial information over the last four years:

Year	Revenue	Percentage Increase
2011	$230.2m	-[34]
2012	$280.4m	21.8%[35]
2013	$346.5m	23.6%[36]
2014	$446.8m	28.9%[37]

Business model

Before HomeAway introduced its new performance-based business model in 2013, homeowners paid subscription fees which averaged out to be $442 annually, to list their own property or display their vacation rentals on the company's sites.[3] To promote the vacation rentals, property owners and managers purchase paid listings in advance as a form of advertising to potential travelers on more than one of its website, typically for one year. Paid listings appear in search results when travelers search for vacation rentals, based on their search criteria. As of December 2012, paid listings accounted for 84.9% of HomeAway's revenue.[38]

After the new alternative performance-based system was launched, homeowners now have two options: a pay-per booking model or the longtime subscription-fee model. In the pay-per-booking model, homeowners must now forgo a 10% commission for each booking instead of an annual subscription fee. Besides the commission, guests are not charged for any booking fee.[39] This free listing option saw that the number of listings grew by 20% from 500,000 to over 600,000 within 5 months of its introduction.[40]

HomeAway also introduced a Professional Referral Network of 40 partner companies, of whom include Evolve Vacation Rental Network, Southern California Vacation Rentals and No Worries Vacation Rentals, to work with vacation rental owners in managing their listings, guest inquiries and reservations. This arrangement charges an average of 20% per booking, where partners and owners work together in handling guest-related matters and owners continue to manage their own property.[41]

Financing

HomeAway announced in November 2006 its $160 million in financing to fund global expansion initiatives, including the acquisition of VRBO.com (Vacation Rentals by Owner).[26] On November 11, 2008, HomeAway announced it had completed an additional $250 million equity capital raise.[42] The investment was led by Technology Crossover Ventures (TCV) and with existing investors Austin Ventures, Institutional Venture Partners (IVP) and Redpoint Ventures.[43] In 2010 the *Wall Street Journal* named HomeAway one of the top 10 venture funded companies.[44]

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External links

- Official website (http://www.homeaway.com)

Retrieved from "https://en.wikipedia.org/w/index.php?title=HomeAway&oldid=722530460"

Categories: Travel websites | Vacation rental | Companies listed on NASDAQ | Expedia, Inc. | Real estate services companies of the United States

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Airbnb

From Wikipedia, the free encyclopedia

Airbnb is an online marketplace that enables people to list, find, and rent vacation homes for a processing fee.[1] It has over 1,500,000 listings in 34,000 cities and 191 countries.[2][3][4] Founded in August 2008 and headquartered in San Francisco, California, the company is privately owned and operated.[5]

Airbnb

Type	Private
Founded	2008
Headquarters	San Francisco, California, United States
Key people	Brian Chesky, CEO Joe Gebbia, CPO Nathan Blecharczyk, CTO Laurence Tosi, CFO
Industry	Travel
Website	airbnb.com (https://www.airbnb.com)
Available in	Bahasa Indonesia, Bahasa Melayu, Català, Dansk, Deutsch, English, Español, Ελληνικά, Français, Italiano, Magyar, Nederlands, Norsk, Polski, Português, Suomi, Svenska, Türkçe, Íslenska, Čeština, Русский, ภาษาไทย, 中文 (简体), 中文 (繁體), 日本語, 한국어
Native client (s) on	iOS, watchOS, tvOS, Android

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History

Shortly after moving to San Francisco in October 2007, Brian Chesky and Joe Gebbia created the initial concept for AirBed & Breakfast during the Industrial Design Conference held by Industrial Designers Society of America.[6] The original site offered short-term living quarters, breakfast, and a unique business networking opportunity for attendees who were unable to book a hotel in the saturated market.[7]

Airbnb founder Joe Gebbia (right)

At the time, roommates Chesky and Gebbia could not afford the rent for their loft in San Francisco. They made their living room into a bed and breakfast, accommodating three guests on air mattresses and providing homemade breakfast.[8]

In February 2008, technical architect Nathan Blecharczyk joined as the third co-founder of AirBed & Breakfast.[9] During the company's initial stages, the founders focused on high-profile events where alternative lodging was scarce.[10] The site Airbedandbreakfast.com officially launched on August 11, 2008.[11]

To help fund the site, the founders created special edition breakfast cereals, with presidential candidates Barack Obama and John McCain as the inspiration for "Obama O's" and "Cap'n McCains".[12] In two months, 800 boxes of cereal were sold at $40 each, which generated more than $30,000 for the company's incubation[13] and attracted Y Combinator's Paul Graham.[14]

After its inauguration, the site expanded to include properties in the market between hotels and CouchSurfing.[15] In January 2009, Y Combinator invited Chesky, Gebbia and Blecharczyk to join the incubator's winter session for three months of training.[16] With the website already built, they used the $20,000 Y-Combinator investment to fly to New York to meet users and promote the site.[17] They returned to San Francisco with a profitable business model to present to West Coast investors.

In March 2009, the name Airbedandbreakfast.com was shortened to Airbnb.com, and the site's content had expanded from air beds and shared spaces to a variety of properties including entire homes and apartments, private rooms, castles, boats, manors, tree houses, tipis, igloos, private islands and other properties.[18]

One year later, there were 15 people working from Chesky and Gebbia's loft apartment on Rausch Street in San Francisco. To make room for employees, Brian Chesky gave up his bedroom and lived through the Airbnb service until the company moved into its first office space.[19]

The company continued to experience rapid growth through the year and in November 2010 raised $7.2 million in Series A funding from Greylock Partners and Sequoia Capital, and announced that out of 700,000 nights booked, 80% had occurred in the past six months.[20]

In February 2011, Airbnb announced its 1 millionth booking since its inception in August 2008.[21][22] Then, in January 2012, Airbnb announced its 5 millionth night booked internationally through the service. In June 2012, the company announced 10 million nights booked, doubling business in 5 months.[23][24] Of these bookings, 75% of the business came from markets outside of the continental United States.

On May 25, 2011, actor and partner at A-Grade Investments Ashton Kutcher announced a significant investment in the company and his role as a strategic brand advisor for the company.[25]

By October 2013, Airbnb had served nine million guests since its founding in August 2008.[26] In December 2013, the company reported it had over six million new guests in 2013, and nearly 250,000 properties were added in 2013.[27]

In July 2014, Airbnb revealed design revisions to their site and mobile app and introduced a new logo.[28] Some considered the new icon to be visually similar to genitalia,[29] but a consumer survey by Survata showed only a minority of respondents thought this was the case.[30]

In June 2015, Airbnb decided to sponsor Manor F1 Team. Their logo appeared on the cars on the front nose and on other areas. it also appeared on team wear and the drivers overalls.

In October 2015, Jersey City, New Jersey became the first city in the New York metropolitan area to legalize Airbnb, and add it to their existing body of hotels and motels that pay taxes. In the past, businesses were regulated by zoning laws, but Mayor Steven Fulop stated that the city does not have enough inspectors to deal the number of local units being rented out, approximately 300 of which rented through the service as of that date, and that rapid-evolving technology such as Airbnb made doing so impossible. Under the new legislation, Airbnb pays the city 6 percent hotel tax on the residential properties whose owners rent temporary living space to tourists for under 30 days, which is estimated to bring $1 million in revenue to the city, and expand tourist capacity beyond the city's 13 existing hotels. Airbnb will also provide insurance protection to homeowners in the event damage done to their residence by renters. The new laws will not prevent condominium associations from voting to prohibit use of Airbnb in their buildings.[31]

International expansion

In May 2011, Airbnb acquired a German competitor, Accoleo. This acquisition launched the first international Airbnb office in Hamburg.[32] Then, in October 2011, Airbnb established its second international office in London.[33]

Given the growth of international users, Airbnb opened 6 additional international offices in early 2012. These cities include Paris, Milan, Barcelona, Copenhagen, Moscow, and São Paulo.[34] These are in addition to existing offices in San Francisco, London, Hamburg, and Berlin where Airbnb maintains its international presence for the EMEA markets within a German incubator space.[35] Airbnb announced in September 2013 that its European headquarters would be located in Dublin.[36]

At the beginning of November 2012, Chesky announced his focus on Australia, the second largest Airbnb market behind the United States, as well as Thailand and Indonesia. To support this effort, Airbnb opened its 11th office in Sydney.[37] The Australian consumer accounts for one-tenth of the Airbnb user base.[38]

Weeks after announcing the focus on Australia, Airbnb announced its strategy to move more aggressively into the Asian market with the launch of their newest headquarters in Singapore. The company's goal is to acquire an additional 2 million properties within the continent.[39]

Following the Obama administration's easing of restrictions on U.S. businesses to operate in Cuba, Airbnb expanded to Cuba in April 2015, making it one of the first U.S. companies to do so.[40][41]

Corporate information

Location and revenue

The Airbnb founding team acts as the key managerial staff for Airbnb: Brian Chesky, Co-Founder and Chief Executive Officer; Joe Gebbia, Co-Founder and Chief Product Officer; and Nathan Blecharczyk, Co-Founder and Chief Technical Officer.[42]

Airbnb office in Toronto, Canada

In 2016, Airbnb has its nineteen offices in Amsterdam (Netherlands), Barcelona (Spain), Berlin (Germany), Beijing (China), Copenhagen (Denmark), Dublin (Ireland), London (UK), Miami (Florida, USA), Milan (Italy), Moscow (Russia), New Delhi (India), Paris (France), Portland (Oregon, USA), San Francisco (California, USA), São Paulo (Brazil), Seoul (South Korea), Singapore, Sydney (Australia), Tokyo (Japan), and Toronto (Canada).[43]

Airbnb's primary source of revenue comes from service fees from bookings.[44] Fees range between 6% and 12% depending on the price of the booking. Airbnb also charges the host 3% from each guest booking for credit card processing.[45]

In March 2014, the company announced plans to open a new "operational headquarters" for North America in Portland, Oregon but indicated that its main North American headquarters would remain in San Francisco.[46]

Funding

As of July 2011, the company had raised US$119.8 million in venture funding from Y Combinator, Greylock Partners, Sequoia Capital, Andreessen Horowitz, Digital Sky Technologies, General Catalyst Partners[47] and undisclosed amounts from Youniversity Ventures partners Jawed Karim, Keith Rabois, and Kevin Hartz,[48] and from A Grade Investments partners Ashton Kutcher and Guy Oseary.

In April 2014, the company closed on an investment of $450 million by TPG Capital at a valuation of approximately $10 billion.[49]

As of March 2015, Airbnb is raising a new round of funding that will place the company at a $20 billion valuation.[50]

In 2015, Airbnb raised $1.5 billion in funding led by growth equity firm General Atlantic, and joined by Hillhouse Capital Group, Tiger Global Management, Kleiner Perkins Caufield & Byers, GGV Capital, China Broadband Capital, and Horizon Ventures.[51]

Mergers and acquisitions

Since mid-2011, Airbnb has acquired several of its competitors. The first acquisition was Accoleo based out of Hamburg, which became the company's first international office.[52]

Prior to the 2012 Summer Olympics, Airbnb acquired London-based rival CrashPadder, subsequently adding six thousand international listings to its existing inventory.[53] This acquisition made Airbnb the largest peer-to-peer accommodations website in the United Kingdom.[54]

In November 2012, Airbnb acquired NabeWise, a city guide that aggregates curated information for specified locations.[55] This acquisition shifted the company focus toward offering hyperlocal recommendations to travelers.[56]

In December 2012, Airbnb announced the acquisition of Localmind.[57] Localmind is a location-based question and answer platform that allows users to post questions about specific locations online. These questions are then answered in real-time by experts on the specified territories.[58]

Business model

Airbnb is a peer-to-peer accommodation market place that connects hosts (vendors of rooms/accommodations) and travelers via its website. Airbnb enables transactions between these two entities by charging a 'service fee' without directly owning any rooms by itself.[59] This new business model disrupt traditional industries by creating new sources of supply and rely on curation for developing quality and self-attainment of maturity from the vendors, or the people operating on behalf of vendors. Security and safety of the accommodation is not always vetted by Airbnb and are completely left to travelers to choose based on published reviews.[60] Unlike traditional hotels, Airbnb scales not by scaling inventory but by increasing the hosts and travelers and matching them with each other.[61]

Operations

Airbnb is an online marketplace for vacation rentals that connects users with property to rent with users looking to rent the space. Users are categorized as "Hosts" and "Guests," both of whom must register with Airbnb using a variety of means. A valid email address and valid telephone were initially the only requirements to build a unique user profile on the website, however as of April 2013, a scan of a government issued ID is now required.[62]

Profiles include details such as user reviews and shared social connections to build a reputation and trust among users of the marketplace.[63] Other elements of the Airbnb profile include user recommendations and a private messaging system.[64]

In addition to providing personal information, hosts display listing details including price, amenities, house rules, imagery, and detailed information about their neighborhood. Due to the nature of the business, a merit system is in place to allow guests and hosts to leave references and ratings which are displayed to the public in order to provide an evaluation method.[65]

Since 2008, the website has developed to include social connections pulling data from social networking services such as Facebook. As of May 2011, the site uncovered over 300 million connections between Airbnb and the Facebook user groups.[66]

Signup and reservations

Users of the site must register and create a personal online profile before using the site. Every property is associated with a host whose profile includes recommendations by other users, reviews by previous guests, as well as a response rating and private messaging system.[67]

The listing will not go live until the user is ready to publish. Pricing can be determined by the user. Users can charge different prices for nightly, weekly, and monthly stays as well as seasonal pricing. The Titles and Descriptions sections can be used to advertise their space. They can outline house rules or other descriptions regarding the residence. Airbnb allows users to publish up to 24 photographs of the place. For eligible hosts, Airbnb offers free professional photography in most of the listed areas. The beautiful photography is one of the hallmarks of the Airbnb website and app.[68] Profile is a place where the guests can research more about the hosts and is used by hosts to display who they are as well as their philosophies on hosting.[69]

Guests are required to message the user directly through Airbnb to ask questions regarding the property. Users have 100% control over who books their place. When a potential guest puts in a reservation request, the host has at least 24 hours to accept or decline the request.[69]

After the user accepts a reservation, they can coordinate meeting times and contact information with guests. After the reservation is complete, users are encouraged to leave a review. Reviews help build validity and references both for the guests and the host.[69]

Mobile

In addition to the Airbnb website, the company offers mobile applications for iOS and Android customers; also (from September 2014) a version for the Apple Watch.[70] These offer geolocation and much of the functionality of the website, including (which allows faster response times) private messaging.[71]

As of September 2012, users had downloaded the mobile application over 1 million times, and bookings made via the app accounted for over 26% of the company's overall traffic.[72] In December 2012, Apple awarded Airbnb the Editor's Choice award for the Best Mobile Application of 2012 in the UK market.[73] Airbnb was also awarded Most Disruptive Service of 2012.[74]

Security

Airbnb user profiles contain recommendations, reviews, and ratings to build credible online reputations within the platform. Additionally, the site provides a private messaging system as a channel for users to message one another privately before booking and accepting reservations.[75] Hosts are never required to accept a reservation.[76] After the guest has checked out, the parties review one another to build website credibility similar to online marketplaces like eBay.

Airbnb facilitates online payments from guest to host through its Security Payments feature which processes payment transactions 24 hours after check in.[77] This protocol offers a guarantee for guests and helps to uphold host cancellations policies before processing payments. Additionally, the Airbnb website facilitates security deposits and cleaning fees, the former of which is held until the property is vacated. The company's revenue comes from a 6% to 12% commission of the guest payment and 3% of what the host receives.[78]

Any Airbnb host can now require their prospective guests to obtain Verified IDs before booking. Initially trust was tit-for-tat so any host who requests this condition must also get verified. However this has been changed such that **all** guests must have a verified ID before booking.[79]

Wish lists

In June 2012, Airbnb launched a wish list feature offering users the ability to create a curated catalog of desired listing they would like to visit.[80] Co-Founder and Chief Product Officer, Joe Gebbia and his team conceived the idea of changing the website from an online marketplace to a source for inspiration. Users can organise their favorite destinations into organized lists and share these with other users.[81] Since the launch of the Wish List functionality in June 2012, engagement with the Airbnb website increased by 30%. 45% of users engage with Wish Lists and had added over 1 million accommodations to personalized lists.[82]

In creating Wish Lists, the product team designed a proprietary "info scrolling system" which allows users to engage with these lists without the website slowing down the user experience. Additionally, Airbnb open sourced the code, Infinity.js to the software developer community.[83]

Neighborhoods

In November 2012, Airbnb launched the Neighborhoods product.[84] This travel guide helps travelers choose to the ideal neighborhood match based on a series of collaborative filters and attributes such as Great Transit, Dining, Peace & Quiet, Nightlife, Touristy, and Shopping.[85] Currently, the Neighborhoods product is enabled for San Francisco, New York, London, Paris, Berlin, Washington, D.C., and Rio de Janeiro giving in-depth information for selected neighborhoods in these cities through photos, essays, maps, tags from locals, and assessments of public transportation.[86]

The Airbnb product team hand-mapped 300 neighborhoods within these seven cities and had local editors curate content for each neighborhood. Airbnb also added 70 street photographers who generated 40,000 photographs for the project.[87]

Impact

Critical reception

The founders of Airbnb have been praised for tenacity and creativity by Paul Graham (co-founder of Y-Combinator, Airbnb's incubator)[88] and *The Wall Street Journal*.[89]

Airbnb has been compared to Craigslist, HomeAway, Flip Key, WorldEscape, Uproost, and Groupon, other sites that offer spur-of-the-moment rentals.[90] Airbnb won the "breakout app" award at the 2011 South by Southwest conference.[91] Along with Quora and Dropbox, *The New York Times* listed Airbnb among the next generation of multibillion-dollar start-ups.[92] Following Airbnb, other services such as Getaround, Vayable, Guidehop, myTaskAngel and Task Rabbit launched with a similar model.[93]

New York's state legislature passed a law in July 2010 making it illegal to rent out Class A residential space for less than 30 days. However, the bill's sponsor, State Senator Liz Krueger said Airbnb and its competitors are not the law's target.[94]

Cultural impact

In July 2010, the company received more than 300 emails from people who were on the brink of losing their homes through foreclosure due to financial hardship from the economic recession; these people said that they depended on their continued ability to sublet rooms in their residences.[95] Non homeowning users also frequently sublet their homes to renters for prolonged periods - often a breach of tenancy.[96] Yet a July 2014 ruling nixed a landlord's eviction plans after his New York City tenant sublet her unit through Airbnb. The judge found that local laws prohibiting short-term sublets only apply

to landlords, potentially opening the doors to many more sublets through Airbnb in the coming months and years. Though this ruling sets a pro-sublet precedent, landlords who ask tenants to stop their practices will still expect compliance.[97]

Wealthy homeowners who may have been reluctant to rent out their properties over traditional bulletin boards or Internet sites like Craigslist, have reportedly found Airbnb to be a more reliable service for earning revenue from their second homes.[98] This phenomenon has caused much distress for the American Hotel & Lodging Association as short-term private rentals continue to disrupt the hospitality industry.[99] A further incentive for luxury homeowners occurred in August 2015, when Airbnb partnered with Tesla Motors to provide chargers at certain host houses, firstly in California.[100]

In November 2012, Airbnb commissioned HR&A Advisors to conduct a study which measured the market impact of collaborative consumption by users within urban populations. Specifically, the study measured the impact these companies had on the economy of San Francisco.[101] The study found that from April 2011 to May 2012, guests and hosts utilizing the service contributed $56 million in spending within the San Francisco economy, $43.1 million of which supported local businesses.[102] Over 90% of hosts surveyed rented their primary residences to visitors on an occasional basis, and spent nearly half the income they make on living expenses. The study also found the average guest stay was 5.5 days, compared to 3.5 days for hotel guests, and the average guest spent $1,045 during their stay, compared to the $840 spent by hotel guests.[103]

In the aftermath of Hurricane Sandy, Airbnb partnered with New York City Mayor Michael Bloomberg to offer free housing for persons displaced by the storm.[104] Airbnb built a microsite for this effort alone where victims register for housing and meet property owners with free housing.[105] Additionally, Airbnb waived all service fees associated with these listings while maintaining the Host Guarantee for all properties listed.[106]

Sponsorships

The company was the official jersey sponsor for the Australia men's national basketball team at the 2014 Basketball World Cup.[107]

Criticism and controversies

Fair housing implications

The United States Civil Rights Act of 1968 prohibits property owners, financial institutions, and landlords from discriminating based on personal attributes such as race and religion, but there is confusion as to whether someone subleasing a home is subject to these provisions. Users are encouraged to build online profiles to "build" trust, and studies have shown that (after accounting for location and housing quality) non-black hosts charge on average about 12% more than black hosts.[108]

Incidents and host security

In response to property damages claims, Airbnb launched its "Host Guarantee" property protection program in August 2011, which covers property loss and damage due to vandalism and theft for up to $50,000.[109] Additionally, the company initiated a 24-hour customer service hotline, established a taskforce to review suspicious activity, and implemented a suite of security features.[110]

Airbnb recommends that hosts obtain insurance which covers damages caused by guests.[111] Airbnb offers *secondary* insurance, calling it a host guarantee.[112] Airbnb Host Guarantee provides protection of up to USD 1 million in damages to eligible property in the event of guest damages which are not resolved directly with the guests. The countries eligible for the Host Guarantee are Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Malaysia, the Netherlands, Norway, Puerto Rico, Singapore, South Korea, Sweden, Switzerland, Taiwan, Thailand, Turkey, the United Kingdom, and the United States.[113] There was a report of a host who rented his apartment on Airbnb and assaulted a guest.[114]

In July 2011, there were reports of a host who had her apartment burgled and vandalized by an Airbnb guest.[115][116] After 14 hours of no response from Airbnb, the company initially indicated they would not compensate the host for damages.[115][117][118][119] They later reversed this decision amidst public backlash.[115][115] Following the incident, more hosts came forward expressing similar experiences.[119][120]

In March 2014, Ari Teman rented his apartment out through Airbnb. According to reports, under the premise of renting the apartment for the renter's relatives, it was instead rented for the purposes of a sexual orgy. Teman stated that over $87,000 in damages were caused (an amount later revised to $23,817[121]) and that the building is considering his eviction.[121][122][123][124]

Financial, tax, and legal liabilities

A 2011 New York State law prohibits renting residential units for less than 29 days, with certain exceptions.[125][126][127] In May 2013 a New York City judge penalized Airbnb user Nigel Warren with a $2,400 fine.[128] In April 2015, Airbnb asked the state legislature for legalization in return for the collection of hotel taxes.[129][130]

In January 2014 the Federal Court of Germany ruled that a transfer of residence to tourists is not covered by a permission to sublet. In this case the tenant was previously warned by the landlords. A pending new case centers around the question if even a termination without notice is possible if no explicit permission from the landlord is obtained.[131]

In San Francisco, Airbnb's home city, Airbnb hosting was illegal under most circumstances and Airbnb hosts had been fined by the city and received eviction notices from landlords.[132] This situation changed in October 2014, when San Francisco Mayor Ed Lee signed a law legalizing short-term rentals in San Francisco. The law received the moniker of "Airbnb law" as Airbnb was the most affected company.

The law requires renters to register as hosts with the city, carry liability insurance, and pay the city's 14 percent hotel tax.[133] According to a study commissioned by Airbnb itself, in fiscal year 2011-2012, Airbnb should have collected and remitted $1.9 million to the City of San Francisco, but they have yet to do so as of 2014.[134] In 2015, the company put up a set of ads suggesting various ways the city of San Francisco could use the company's tax payments. The ads, which were "undoubtedly aiming to drum up good will" suggested ways which the city could use the taxes it was contributing for social good.[135] They were met with criticism, with readers calling them "tone deaf" and "passive aggressive."[135]

Privacy and terms of use

The new identity verification system "Verified ID" (initially announced in April 2013)[136] has been perceived by many customers as excessively intrusive.[137][138][139] It requires three layers of customer identification: telephone, photo of ID (such as passport or driver's license), and verification of Facebook, Linkedin or Google+ account. It is impossible to use the system if one of these data is not provided.

Linguist Mark Liberman has criticized the extreme length of the legal agreements that Airbnb members are required to accept, with the site's terms of service, privacy policy, and other policies amounting to "55081 words, or about the size of a short novel, though much less readable", requiring several hours of reading time.[140]

Despite having no explicit ban on hosts filming guests, Airbnb updated its terms of use in November 2014 to require that hosts fully disclose the use of surveillance equipment and security cameras to guests.[141] Previously, no such disclosure was required.[142]

Quebec to introduce legislation limiting Airbnb-style home-rental services

On April 29, 2015, Quebec's Tourism Minister Dominique Vien said that the province will crack down on rentals through housing brokers such as Airbnb. Quebec plans to table a bill subjecting Airbnb hosts and guests to the same rules hotels are subjected to.[143]

Enforcement response

In 2016, BNB Shield entered the market to track and report on illegal and unlicensed Airbnb short-term rentals.[144]

Berlin restricts Airbnb rentals

In 2014, Berlin's government passed legislation intending to limit the rentals of entire apartments on Airbnb. The law took affect in April, 2016, and threatens to fine individuals up to €100,000 if found renting without a permit.[145]

Drip pricing

When customers search for accommodation, Airbnb displays per-night prices that exclude its own per-night service charges, and the total price is not revealed until the customer selects an individual property. Furthermore, if the customer searches for properties within a price range, the search returns properties where only part of the price falls within the desired price range rather than where the total price falls within the price range. In late 2015, the Australian Competition and Consumer Commission took action against Airbnb for this form of drip pricing. Consequently, users of Airbnb's Australian web site now see the total price of a stay including all unavoidable charges at every stage of the booking process.[146][147] Airbnb continues to use drip pricing in other markets, whereby it does not allow the consumer to see the total price when displaying multiple accommodation prices simultaneously and continues to display misleading results in price range searches.

Boycott over Israeli settlements

Airbnb is on the Boycott, Divestment and Sanctions list of companies.[148] The company was added following media reports that accommodation listings included settlements in the occupied Palestinian territories that are advertised as being in Israel.[149]

See also

- Online platforms for collaborative consumption
- OYO Rooms
- QiK Stay
- Tripoto
- ZO Rooms

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External links

- Official website (https://www.airbnb.com/)
- Airbnb companies (https://opencorporates.com/corporate_groupings/Airbnb) grouped at OpenCorporates

Wikimedia Commons has media related to ***Airbnb***.

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Categories: 2008 establishments in California | Android (operating system) software | Companies based in San Francisco, California | Freelance marketplace websites | Hospitality companies of the United States | IOS software | Multilingual websites | Online companies | Peer-to-peer | Privately held companies in the United States | Travel websites | TvOS software | Uberisation | Vacation rental | WatchOS software | Y Combinator companies | Real estate services companies of the United States

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Homeshare

From Wikipedia, the free encyclopedia

Homeshare is the exchange of housing for help in the home. A householder, typically an older person with a spare room, offers free or low-cost accommodation to another person in exchange for an agreed level of support. The support may include companionship, shopping, household tasks, gardening, care of pets and, increasingly, help to use the computer. Homeshare thus provides a solution to the needs of two groups of people - those in need of affordable housing, often younger people, and those in need of some support to live at home, usually older people. Homeshare programmes, many run by voluntary bodies, have taken root in at least thirteen countries worldwide, some of them with public funding.

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- 1 Who benefits from homeshare and how?
- 2 How homeshare works
- 3 The history of homeshare
- 4 Homeshare and the public policy agenda
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Who benefits from homeshare and how?

Homeshare was originally set up to benefit older people who needed support to live independently, but the concept is flexible and can be adapted to meet local needs and circumstances. Homeshare is directly benefiting many people across the globe, including:

- People with disabilities or support needs, of all ages
- single parents who need help with child care
- Students who need low-cost accommodation
- Young people and key workers (such as nurses, police officers, teachers) who are priced out of the housing market
- For Students from overseas, living with a host offers the chance to improve their English language skills.

The direct benefits to older/disabled people include help with daily living, companionship and the security of having someone in the house, especially at night. There are even recorded instances of homesharers saving lives (http://homeshare.org/Documents/Autumn_2007.pdf); for example a German homesharer called the emergency services when the householder had a heart attack. Other benefits include breaking down the barriers between generations and different cultures, fostering mutual understanding and tolerance. For instance, in an Australian program, an elderly Italian lady successfully shared her home with a Pakistani Muslim homesharer.

Others benefit indirectly, Families of older people speak of the reassurance that their loved one has someone in the house, looking after their welfare. Public services benefit too, as homeshare can delay the need for costly services such as residential care.

The following case study from the UK indicates how homeshare can benefit an older and a younger person.

> *Josie, in her mid-70s, was referred to a homeshare programme by a hospital after a stroke severely affected her behaviour. The hospital was keen to discharge her if home support could be arranged. She was found a perfect match in Trevor, a young working man who needed accommodation and who handled Josie's erratic ways with great diplomacy. Soon Josie adored him like a grandson and, keen to cook for him, regained all her independence skills. Trevor stayed with her for three years by which time Josie was well enough to live alone again.*

How homeshare works

Homeshare programmes are diverse in terms of how they operate. Some are run on a 'counselling' model, whereby programme co-ordinators screen potential candidates, match them skilfully, negotiate a contract, monitor the outcome and provide ongoing support to both parties (called 'match-up programs' in the USA). Others are run on the 'referral' model, where the programme co-ordinators interview applicants and suggest matches, and it is then up to the applicants to take the arrangements forward. Many USA programs offer both approaches.

Homeshare is usually seen as a free exchange of services, though in some programmes, such as ensemble2generations in France, homesharers pay a modest rent for their room. Typically the homesharers get free accommodation however and in return offer a specified number of hours of support: ten hours per week in the UK is usual, while in Germany the hours of support are related to the size of the homesharer's room. Either or both applicants may pay a fee to the homeshare programme to cover administrative costs.

The history of homeshare

Homeshare has its roots in the USA where the late Maggie Kuhn (founder of the Gray Panthers) set up the first programs in 1972. In the UK, homeshare was taken up in the early 1980s by the late Nan Maitland, who in 1993 launched the first formal programme, in London. In Europe, it is believed that the concept of homeshare was invented quite independently in Spain, where, in 1991 the Alojamiento por Compañia programme was set up in Granada to meet an urgent need for student accommodation. By 1992 the idea had been adopted in Germany where the award-winning Wohnen für Hilfe programme was founded by Professor Anne-Lotte Kreickemeier in Darmstadt, again to meet the need for student accommodation. There are now several programmes in Germany. In France, ensemble2generations, founded in 2006 in the Paris area, is now spreading to other parts of the country.

In 1999 Nan Maitland went on to launch Homeshare International (HI). Homeshare programmes in Sydney and Melbourne, Australia, were launched in 2000 as a direct result of Homeshare International's work.

The concept has now been adopted in many parts of the world.[1] There have been failures too – in Israel

and the Czech Republic in the 1990s for example.

Homeshare and the public policy agenda

Homeshare fits well with the policy agendas of many different countries, where it:

- supports older people in their own homes for longer, delaying or preventing the need for costly residential care (see for example the Ben Carstein (2003) evaluation, detailed below)
- enables hospital discharge and prevents 'bed-blocking'
- is a simple solution: "The consistency and simplicity of a single homesharer is 'heaven sent' compared with the typical highly-complex package of care for older people" (quoted from the report by Patricia Thornton, see below)
- makes better use of housing stock – many older householders are 'under-occupying' their homes
- provides affordable housing for key workers in expensive cities like London, UK
- provides low-cost accommodation for students, primarily in mainland Europe, where universities have increased their intake faster than their student housing programmes
- could contribute to intergenerational programmes, for examples see the Beth Johnson Foundation website (http://www.bjf.org.uk/default.aspx?page=21959)
- contributes to strengthening local communities, such as promoted under the UK's Putting People First agenda (http://www.puttingpeoplefirst.org.uk/BCC/topics/Browse/hottopics/Homeshare/)

Despite the fact that homeshare meets so many policy aims, public authorities have been slow to adopt it. Some programmes are funded by government, for example in Australia, but others struggle with little or no public financial backing. In part this may be policy makers' lack of awareness but another factor may be the perceived risk of homeshare. In the UK for example, policy makers are wary of enabling strangers to move in with vulnerable older people, even though there is no single documented case of abuse taking place. The cost of running homeshare programmes may be another factor that limits the spread of the idea, though there is ample evidence that homeshare can be very cost effective in meeting the needs of older people (see Carstein (2003), below).

Homeshare International and other umbrella organisations

Homeshare International was set up in 1999 to:

- raise awareness of homeshare and its potential contribution to public policy
- foster new programmes round the world
- encourage and support 'good practices'
- encourage practitioners to exchange learning, ideas and information
- stimulate research into the benefits of homeshare
- provide working tools for homeshare practitioners

Run entirely by volunteers, Homeshare International runs a multi-lingual website (http://homeshare.org/default.aspx), which is a major resource for practitioners, publishes a directory of known programmes (also on the website) and runs biennial conferences to enable people to meet and share experiences and learning.

In the UK, Shared Lives Plus, formerly NAAPS(National Association of Adult Placement Services) supports the [1] (http://www.sharedlivesplus.org.uk/intro-to-homeshare), with a membership of the 11 homeshare programmes in England. In the USA, many homeshare programmes are affiliated with the National Shared Housing Resource Center (http://www.nationalsharedhousing.org/index.html). With the support of Oliver Letwin MP and the art historian Anthony Russell, NAAPS is currently pushing for the introduction of Homeshare to Dorset.

Notes

1. As at May 2011: Australia, Austria, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain, Switzerland, UK (England only), USA and in planning stages: Ireland, Japan and Portugal

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External links

- ensemble2generations (http://www.ensemble2generations.fr)
- Homeshare International (http://www.homeshare.org)

- Homeshare ensemble2generations (https://www.youtube.com/watch?v=738SprlZibE) on YouTube, video showing how homeshare works in France
- Un Toit Deux Ages, Belgium (http://www.1toit2ages.be)
- Wohnen Fur Hilfe, Germany (http://www.wohnenfuerhilfe.info)
- National Shared Housing Resource Center, U.S.A. (http://www.nationalsharedhousing.org)
- Shared Lives Plus, the charity representing Homeshare in the UK (http://www.sharedlivesplus.org.uk)
- UK Homeshare Practice Guide developed by Shared Lives Plus (http://www.sharedlivesplus.org.uk/guides-for-homeshare)
- Homeshare Vermont (http://www.youtube.com/HomeShareVermont) - a YouTube video from Vermont, USA
- Homeshare World, the world's most simple "homesharing" database, on the internet (http://www.homeshareworld.com)
- HANZA, Homeshare Australia and New Zealand Alliance (http://www.homeshare.org.au)
- Home Share in the UK (http://stayhomestairlifts.com/what-is-home-sharing-and-is-it-for-me,)
- Mitwohnen.org, in Germany, Austria, Switzerland. Service for Families, Single Parents, the Elderly (http://www.mitwohnen.org)

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Categories: Social programs | International charities

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QUESTION 1 REFERENCES

1) *Welden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (Wash. 1998)
2) *Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn.App 344, 71 P.3d 233 (Wash.App Div 1 2003)
3) *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 351 P.3d 151 (Wash. 2015)
4) Letter from Attorney Wright A. Noel dated June 14, 2016
5) *Ross v. Bennett*, 148 Wn.App. 40, 203 P.3d 383 (Wash.App. Div 1 2008)
6) *Wilkinson v. Chiwawa Communities Association,* 180 Wn.2d 241, 327 P.3d 614 (Wash. 2014).
7) *Acquavella v. City of Seattle*, Case No 08-2-39188-4 SEA
8) *Cope v. City of Cannon Beach*, 317 Or. 339, 855 P.2d 1083 (Or. 1993)
9) *Ewing v. City of Carmel*, 234 Cal.App.3d 1579, 286 Cal. Rptr 382 (Ca.App 1991)
10) *Spilka v. Town of Inlet*, 778 N.Y.S 2d 222, 8 A.D.3d 812 (NY 2004)
11) *City of Venice v. Gywnn*, 76 So.3d 401, 37 Fla. L. Weekly D 47 (Fla.App. 2 Dist. 2011)
12) *Vilas County v. Accola*, 364 Wis.2d 409, 866 N.W. 2d 406 (Wis.App 2015)

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135 Wn.2d 678 (Wash. 1998)

958 P.2d 273

John WEDEN II; John Pfarr and Jamie Pfarr, d/b/a Zzoomers Scooters and Bikes, d/b/a Zzoomers II Wave Venture Tours; Skagityamkaw, Inc., a Washington corporation, d/b/a Skagit Valley Yamaha/Kawasaki; William Cameron; Timothy Fischer; Brian Marble; Ryan Harris; Leonard Moen and Lillian Sigle Moen, D.V.M.; National Marine Manufactures Association on behalf of the Personal Watercraft Industry Association; and The Port of Lopez, Respondents,

v.

SAN JUAN COUNTY acting through its Board Of Commissioners, its County Parks And Recreation Board, and its Superintendent Of Parks And Recreation, Appellants.

No. 64776-3.

Supreme Court of Washington, En Banc.

July 9, 1998

[958 P.2d 274]

Reconsideration Denied September 11, 1998.

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John Arum, Seattle, for Amicus Washington Environmental Council and Olympic Park Associates.

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Rachael Paschal, Michele Osborne, Seattle, for Amicus Center for Environmental Law & Policy.

Joseph Coniff, Olympia, for Amicus Northwest Marine Trade Association.

Randall K. Gaylord, Friday Harbor, Brett & Daugert, Philip Buri, Rand Jack, Bellingham, George Van Cleve, Washington, DC, for Appellants San Juan County, et al.

Williams, Kastner & Gibbs, Jeffrey Johnson, Dennis Reynolds, Margaret Sundberg, Seattle, Christopher Hodgkin, Friday Harbor, for Respondents John Weden, et al.

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JOHNSON, Justice.

In January 1996, San Juan County passed an ordinance that banned the use of motorized personal watercraft, subject to certain limited exceptions, on all marine waters and one lake in that county. We are asked to determine whether that ordinance is unconstitutional or violative of the public trust doctrine. We conclude that it is neither and, consequently, reverse the Whatcom County Superior Court's judgment that the Ordinance is void and of no force and effect and remand for entry of an order granting San Juan County's motion for summary judgment.

FACTS

The Board of Commissioners of San Juan County (Board) held public meetings on September 18 and 19, 1995, for the purpose of discussing what some citizens had identified as a growing problem with the use of motorized personal watercraft (PWC) in San Juan County waters. [1] Following those meetings, the Board conducted a workshop with the San Juan County Prosecuting Attorney "regarding drafting of proposed regulations regarding the use of Personal Watercraft in San Juan County...." Ex. 249, at 2 (Ordinance No. 3-1996). On January 23, 1996, the Board conducted a public meeting on a proposed ordinance that was developed at the workshop. One week later, the Board adopted Ordinance No. 3-1996 (the Ordinance). The Ordinance prohibits the operation of PWC on all marine waters of San Juan County, except:

a. During such time that the Personal Water Craft is being used for or engaged in interstate or foreign commerce; and

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that during such use the Personal Water Craft is following the most direct route practicable;

b. During such time that Personal Water Craft are operating under a permit issued by San Juan County or a United States Coast Guard Permit;

c. For emergency purposes when there is a reasonable belief that such use is necessary to protect persons, animals or property.

Ex. 249, at 12-13 (Ordinance No. 3-1996, § 5). The Ordinance also banned the use of PWC outright on Sportsman Lake in San Juan County.

A personal watercraft is defined in the Ordinance as "a vessel of less than sixteen feet (16') in length that is propelled by machinery, commonly a jet pump, and which is designed to be operated by a person sitting, standing or kneeling on the vessel, rather tha[n] being operated by a person sitting or standing inside the vessel." Ex. 249, at 12 (Ordinance No. 3-1996, § 3). The Ordinance provides that it will expire two years from the date of enactment unless otherwise extended. [2]

The Ordinance contained an extensive list of "legislative findings" regarding the nature of the marine environment in San Juan County and the characteristics of PWC. Regarding the marine environment, the Ordinance states:

7. The marine waters of San Juan County has [sic] many species of threatened **[958 P.2d 277]** and endangered species of marine mammals and birds as visitors, migrants or residents that are sensitive to vessel traffic in and among the San Juan Islands....

....

9. The refuges and other protected areas offer habitat [where] birds nest and rest and seals rest and nurture their

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young. Birds disturbed or panicked by vessels trample eggs and chicks, knock chicks from nests onto waves and rocks, and expose vulnerable offspring to sun, rain, and predators. Newborn seal pups may become separated from their mothers, crushed by a herd of panicked adults or be forced into cold or swift water prematurely. If the disturbances are continued entire refuge areas may be abandoned by wildlife.

Ex. 249, at 4-5 (Ordinance No. 3-1996). The Board also noted that tourism, which is a "major economic factor" in San Juan County, is "heavily dependent" on visitors who seek "tranquillity" and the opportunity "to view marine life and habitat." Ex. 249, at 6 (Ordinance No. 3-1996). It made no findings specifically relating to the use of PWC on Sportsman Lake.

The Board's findings in reference to PWC were as follows:

17. PWCs are capable of high speeds, up to 60 MPH, have a high degree of maneuverability. Operation typically includes rapid changes of direction, rare travel in straight lines, and frequent operation in multiple numbers in a confined area. Operators are expected [to] be in contact with the water either by spray or falling overboard. PWCs are small and have a shallow draft which allows them to be operated at high speeds close to shore.

18. The high speed of a PWC, the rapidity with which it can change direction and the waves and noise it produces cause disruption to other vessels, swimmers and divers and the natural environment. If the operators violate the law, they are almost impossible to apprehend because of the high speed and high maneuverability. Because they rarely travel in straight lines, the vessel speed cannot be easily determined.

Ex. 249, at 8 (Ordinance No. 3-1996).

The Ordinance enumerates multiple effects of PWC about which the Board was concerned:

19. The noise from PWCs interferes with the historical and current uses and enjoyment of the shoreline property. Although unmodified PWC are no louder than other types of

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boats, modifications to PWCs are more common than other vessels. PWCs commonly operate with other PWCs close together for reasons of safety, fun and convenience. As a general rule, additional PWCs operated in the same area will cause the overall noise level to increase. PWC, frequently operate in a small area causing conflict with shoreline users. Finally, part of the fun of PWC use is rapid acceleration, deceleration and the jumping of wakes. These operations create an uneven noise, that is louder when the PWC is out of the water, that is objectionable and has been compared in pitch to the sound of a mosquito. These characteristics are not shared by other vessels operated to reach a destination.

20. The operational characteristics of PWCs make them hazardous and incompatible with destination commercial and recreational vessel traffic in and through San Juan County. The maneuverability and ability to travel close to shore of PWCs make them able to harass wildlife and bird life unlike destination power vessels. These attributes are also inconsistent with the protection and preservation of the wildlife which inhabit the waters and refuges of the County. These attributes are also inconsistent with the tranquil lifestyle quality desired by the tourists and residents of the County.

21. The operation of PWCs is less safe and more damaging in San Juan County marine waterways than in other waters because of cold water temperatures, changeable and unpredictable currents, variable tidal heights exposing rocks at different times, floating deadheads, rocks and reefs, and populations of marine life.

[958 P.2d 278] 22. Accident statistics for PWCs is not yet available for San Juan County, largely because PWC use is only emerging. The evidence from other larger communities where PWC is more established is helpful, however. A report entitled "California Boating Accident Report for 1994" showed that Personal Water Craft made up 13.1 percent of the boating industry, but were involved in 36 percent of all reported boating accidents, 46 percent of the injuries and 17.5 percent of the fatalities and 17 percent of the property damage.

....

24. The high-speed, high-pitched sound, and ability to

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operate close to shore are characteristics that are unique to PWCs. While the effect of such operation on marine life in San Juan County is unknown, it cannot be beneficial and appear [sic] most likely to be deleterious. Although most wildlife is believed to be quick enough to avoid collisions with powerboats, it is unknown whether all marine life of San Juan County can react quickly enough to avoid PWCs. Without additional evidence to support the safety of PWCs, and given the harmful impact that could result to the County from destruction of its marine life it is found that the best policy is one of "prudent avoidance" and prohibition of PWCs within San Juan County.

....

25. The Washington State Legislature has enacted regulations regarding the operation of PWCs, which are inadequate for the unique conditions in San Juan County....

....

27. Although noise is regulated by RCW 88.12.085, that regulation does not address the cumulative noise of vessels operating in the same area, the annoying impact of vessels that are not destination-bound, and other noise characteristics unique to PWCs.

Ex. 249, at 8-11 (Ordinance No. 3-1996).

Shortly after the Board enacted the Ordinance, a group of PWC users, PWC rental and sales businesses, and a PWC industry association (Respondents), brought suit against San Juan County in Whatcom County Superior Court. [3] In their suit they sought a declaratory judgment that "Ordinance 3-1996 is illegal, void and of no force or effect." Clerk's Papers (CP) at 2227. They alleged that the Ordinance violates article XI, section 11 of the Washington Constitution because it conflicts with state vessel registration and safety laws, as well as various other general state laws. Respondents also alleged that the Ordinance violates their right to substantive due process, is unconstitutionally vague, and is violative of the public trust doctrine.

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San Juan County moved for summary judgment, claiming the Ordinance "is a valid exercise of the police power." CP at 2190. Respondents subsequently filed multiple cross motions for summary judgment on various grounds. [4] Following a hearing on the summary judgment motions, the trial court concluded the Ordinance "is in conflict with general laws of the state legislature, including the Recreational Vessel Registration Law, RCW Ch. 88.02" and, thus, violates Wash. Const. art. XI, s11. CP at 13-14. The court thereafter entered an order denying San Juan County's motion for summary judgment and granting Respondents' motion with respect to their "conflict with general laws" argument. CP

at 13. The court denied the motion in respect to Respondents' vagueness argument. The trial court also issued a judgment declaring the Ordinance "invalid, unconstitutional, void and of no **[958 P.2d 279]** force and effect" and enjoining the County from enforcing the Ordinance. CP at 18. The County sought direct review in this court of the trial court's judgment and its order granting summary judgment. Respondents filed a notice of cross appeal of the trial court's order denying their motion with respect to the vagueness challenge. We granted direct review.

ANALYSIS

This court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Greaves v. Medical Imaging Sys., Inc.,* 124 Wash.2d 389, 392, **879 P.2d 276** (1994). An order granting summary judgment is appropriate only if "the pleadings,

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affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party" demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Higgins v. Stafford,* 123 Wash.2d 160, 169, **866 P.2d 31** (1994) (quoting *Peterick v. State,* **22 Wash.App. 163**, 180, **589 P.2d 250** (1977), overruled on other grounds by *Stenberg v. Pacific Power & Light Co.,* 104 Wash.2d 710, **709 P.2d 793** (1985)); see also CR 56(c). "[R]egularly enacted ordinance[s] will be presumed to be constitutional," *Homes Unlimited, Inc. v. City of Seattle,* 90 Wash.2d 154, 158, **579 P.2d 1331** (1978), unless the statute involves a fundamental right or a suspect class, in which case the presumption is reversed. *City of Mobile v. Bolden,* **446 U.S. 55, 100 S.Ct. 1490, 100 S.Ct. 1519**, 64 L.Ed.2d 47 (1980); *State v. Conifer Enters., Inc.,* 82 Wash.2d 94, **508 P.2d 149** (1973). Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. PUGET SOUND L.REV. 491, 508 (1984).

The appeal presents four issues: whether the Ordinance (1) conflicts with chapter 88.02 RCW or various other "general laws" such that it violates article XI, section 11 of the Washington Constitution; (2) is an unreasonable exercise of San Juan County's police power; (3) is violative of substantive due process; or (4) is unconstitutionally vague.

Article XI, Section 11

--Police Power

Article XI, section 11 of the Washington Constitution provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Regarding this "constitutional grant of authority," we stated in *Hass v. City of Kirkland,* 78 Wash.2d 929, **481 P.2d 9** (1971):

This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no legislative sanction for its exercise so long as the

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subject-matter is local, and the regulation reasonable and consistent with the general laws.

Hass, 78 Wash.2d at 932, **481 P.2d 9** (quoting *Detamore v. Hindley,* **83 Wash. 322**, 326, **145 P. 462** (1915)). While there are limits to the police power, the use of police power by government allows the Legislature to enact laws in the interest of the people. As described in *Lawton v. Steele,* **152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385** (1894), the police power is vast:

The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards;

[958 P.2d 280] the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere

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with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton, 152 U.S. at 136-37, 14 S.Ct. 499 (emphasis added) (citations omitted). The above quoted language was adopted by *City of Seattle v. Ford,* 144 Wash. 107, 111-12, 257 P. 243 (1927). We have endorsed a similarly expansive view of the meaning of police power:

[Police power] is defined by the supreme court of Illinois, in the case of *Lake View v. Rose Hill Cemetery,* 70 Ill. 191, as:

"That inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

Many definitions have been announced by the courts, but the above, it seems to us, is so terse and comprehensive that we need look no farther for a definition.

State v. Carey, 4 Wash. 424, 427-28, 30 P. 729 (1892). The police power is firmly rooted in the history of this state, and its scope has not declined. In *Covell v. City of Seattle,* 127 Wash.2d 874, 905 P.2d 324 (1995), we reiterated, "[m] unicipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws....The scope of police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." Covell, 127 Wash.2d at 878, 905 P.2d 324 (quoting *Hillis Homes, Inc. v. Snohomish County,* 97 Wash.2d 804, 808, 650 P.2d 193 (1982) (quoting *State v. City of Seattle,* 94 Wash.2d 162, 165, 615 P.2d 461 (1980))).

We will find the Ordinance consistent with article XI, section 11 of the state constitution unless: (1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the County's police power; or (3) the subject matter of the Ordinance is not local.

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Whether an ordinance is reasonable, local, or conflicts with a general law for purposes of article XI, section 11 is purely a question of law subject to de novo review. See *City of Seattle v. Williams,* 128 Wash.2d 341, 346-47, 908 P.2d 359 (1995); cf. *Washam v. Sonntag,* 74 Wash.App. 504, 507, 874 P.2d 188 (1994) (addressing whether statute violates state constitution as issue of law subject to de novo review). In this case, Respondents bear the burden of persuasion.

A. Conflict with General Laws

Article XI, section 11 requires a local law yield to a state statute on the same subject matter if that statute "preempts the field, leaving no room for concurrent jurisdiction," or "if a conflict exists such that the two cannot be harmonized." *Brown v. City of Yakima,* 116 Wash.2d 556, 559, 561, 807 P.2d 353 (1991). Respondents do not argue that the Legislature has preempted the field of conduct governed by the Ordinance but, rather, contend the Ordinance conflicts with various state laws.

' "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Village of Struthers v. Sokol,* 108 Ohio St. 263, 140 N.E. 519 [(1923)]. Judged by such a test, an ordinance

[958 P.2d 281] is in conflict if it forbids that which the statute permits,' *State v. Carran,* 133 Ohio St. 50, 11 N.E.2d 245, 246 [(1937)].

City of Bellingham v. Schampera, 57 Wash.2d 106, 111, 356 P.2d 292, 92 A.L.R.2d 192 (1960). An ordinance must yield to state law only "if a conflict exists such that the two cannot be harmonized." Brown, 116 Wash.2d at 561, 807 P.2d 353; accord Schampera, 57 Wash.2d at 111, 356 P.2d 292 ("Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail. *Bodkin v. State*, [132 Neb. 535], 272 N.W. 547 [(1937)]."). In this case, we must examine whether the Ordinance conflicts with chapter 88.02 RCW, chapter 88.12 RCW, chapter 90.58 RCW, chapter 43.99 RCW, or the public trust doctrine.

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The trial court found the Ordinance conflicted with chapter 88.02 RCW, the state vessel registration statute. In essence, the trial court found that the Ordinance forbid an activity the statute impliedly allowed.

We have previously addressed a similar argument and established an analysis to be followed. In *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wash.2d 106, 594 P.2d 448 (1979), we reviewed a Snohomish County ordinance that prohibited the use of internal combustion motors on "certain lakes" in Snohomish County. Schillberg, 92 Wash.2d at 107, 594 P.2d 448. A person charged with violating the statute challenged the law "on the ground that it conflict[ed] with [chapter 88.12 RCW]." Schillberg, 92 Wash.2d at 107, 594 P.2d 448. We found no conflict and stated:

The provisions of [chapter 88.12 RCW] are concerned with safe operation of motor boats and do not in any way grant permission to operate boats in any place. A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated....

There being no express statement nor words from which it could be fairly inferred that motor boats are permitted on all waters of the state, no conflict exists and the ordinance is valid.

Schillberg, 92 Wash.2d at 108, 594 P.2d 448 (citations omitted). Schillberg certainly lays to rest any claim that the Ordinance conflicts with chapter 88.12 RCW. However, we hold Schillberg controls the discussion of whether the Ordinance conflicts with the state's vessel registration statute, chapter 88.02 RCW.

The Legislature did not enact chapter 88.02 RCW to grant PWC owners the right to operate their PWC anywhere in the state. The statute was enacted to raise tax revenues and to create a title system for boats. See RCW 88.02.120. RCW 88.02.020 provides, in pertinent part: "Except as provided in this chapter, no person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration

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number and a valid decal in accordance with this chapter...." [5] On its face, the statute prohibits operation of an unregistered vessel. Nowhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate PWC in all waters throughout the state.

Registration of a vessel is nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration. Statutes often impose preconditions which do not grant unrestricted permission to participate in an activity. Purchasing a hunting license is a precondition to hunting, but the license certainly does not allow hunting of endangered species, RCW 77.16.120, or hunting inside the Seattle city limits, see Seattle Municipal Code 12A.14.071 (banning discharge of a firearm). Reaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires.

Schillberg states that the Legislature must expressly indicate an intent to preempt a particular field. In this case, the registration statute does not contain language preempting the regulation of this activity to the State. See RCW 46.08.020. We "will not interpret a statute to deprive a [958 P.2d 282] municipality of the power to legislate on particular subjects unless that clearly is the legislative intent." *Southwick, Inc. v. City of Lacey*, 58 Wash.App. 886, 891-92, 795 P.2d 712 (1990). The San Juan County Ordinance does not conflict with the state's vessel registration statute; it is a routine application of the police power.

The Ordinance does not conflict with other statewide statutes and laws, specifically chapter 90.58 RCW, chapter 43.99 RCW, and the public trust doctrine. Although the trial court found it unnecessary to address these issues, the parties have thoroughly briefed and argued these issues, and "[w]e may affirm or reverse the summary judgment of the trial court based on our own resolution of the

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constitutional issues." *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wash.App. 225, 230, 660 P.2d 1124 (1983) (citing *Simpson v. State*, 26 Wash.App. 687, 615 P.2d 1297 (1980)).

The waters of San Juan County are among those regulated by the Shoreline Management Act of 1971(SMA), chapter 90.58 RCW. However, banning the use of PWC is consistent with the aims of that chapter. Our conclusion is supported by a policy statement in the SMA, which provides in part:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance.

RCW 90.58.020 (emphasis added). The ban of a certain type of activity is consistent with the "limited reduction of rights" allowed by the statute. Moreover, there is additional language in RCW 90.58.020:

The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the state-wide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

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(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline.

Here, the Board concluded that "[t]he maneuverability and ability to travel close to shore of PWCs make them able to harass wildlife and bird life unlike destination power vessels." Ex. 249, at 9 (Ordinance No. 3-1996). It also found that such attributes of PWC are "inconsistent with the protection and preservation of the wildlife which inhabit the waters and refuges of the County." Ex. 249, at 8-11 (Ordinance No. 3-1996). Thus, the Ordinance appropriately favors "the resources and ecology of the shoreline" over recreational interests, RCW 90.58.020, and is consistent with the statute's purposes.

The Ordinance does not conflict with chapter 43.99 RCW, the Marine Recreation Land Act of 1964, and its implementing regulations, which are set forth in Title 286 of the Washington Administrative Code. In enacting RCW 43.99.110, the Legislature created the interagency committee for outdoor recreation (IAC) for the purpose of expending the portion of unreclaimed fuel taxes paid by boaters to "aqui[re] or improve[] marine recreation land on the ... fresh and salt waters of the state." RCW 43.99.010(2) (summarizing "mission" of IAC). According to Respondents, because the County has received substantial funds from the IAC, it must keep facilities open to "all motorized vessels." See Br. of Resp'ts at 55-56 (citing [958 P.2d 283] CP at 1759-71; CP at 1133-36) (IAC Guidelines § 4.08(15)(A-D)). The document that Respondents cite as support for this proposition is an agreement accompanying a project grant from the IAC to the Washington State Parks and Recreation Commission for the purpose of developing boating facilities in San Juan County. Although the agreement states that all facilities covered by it "shall be kept open for public use at reasonable hours and times of the year," it contains no language

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indicating that the County may not otherwise restrict the manner in which the public uses the facilities. CP at 1763. Moreover, the agreement provides that subject facilities are to be operated "in accordance with all applicable ... local laws and regulations." CP at 1763. We do not find the Ordinance inconsistent with this agreement.

Since as early as 1821, the public trust doctrine has been applied throughout the United States "as a flexible method for judicial protection of public interests in coastal lands and waters." Ralph W. Johnson et al., The Public Trust Doctrine and Coastal Zone Management in Washington State, 67 WASH. L. REV . 521, 524 (1992). The doctrine protects "public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality." Johnson, supra, at 524. The doctrine reserves a public property interest, the jus publicum, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership. Johnson, supra, at 524. "The state can no more convey or give away this jus publicum interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.' " *Caminiti v. Boyle,* 107 Wash.2d 662, 669, **732 P.2d 989** (1987) (quoting *Illinois Cent. R.R. v. Illinois,* 146 U.S. 387, 453, **13 S.Ct. 110, 36 L.Ed. 1018** (1892), aff'd, 154 U.S. 225, 14 S.Ct. 1015, **38 L.Ed. 971** (1894)). Due to the "universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands," courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, "as if they were measuring that legislation against constitutional protections." Johnson, supra, at 525, 526-27.

This court did not expressly adopt the public trust doctrine until 1987, but indicated then that the doctrine has always existed in Washington law. See Caminiti, 107 Wash.2d at 669-70, **732 P.2d 989**. The doctrine in Washington "prohibits the State from disposing of its interest in the waters of the state in

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such a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public." *Rettkowski v. Department of Ecology,* 122 Wash.2d 219, 232, **858 P.2d 232** (1993).

The test of whether or not an exercise of legislative power with respect to tidelands and shorelands violates the 'public trust doctrine' is found in the following language of the United States Supreme Court:

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Accordingly, we must inquire as to: (1) whether the State, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.

Caminiti, 107 Wash.2d at 670, **732 P.2d 989** (quoting in part Illinois Cent. R.R., 146 U.S. at 453, **13 S.Ct. 110**) (footnote omitted).

We have previously acknowledged that the jus publicum interest encompasses the "rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." Caminiti, 107 Wash.2d at 669, **732 P.2d 989** (emphasis added) (citing *Wilbour v. Gallagher,* 77 Wash.2d 306, 316, **462 P.2d 232**, 40 A.L.R.3d 760 (1969)). Nevertheless, we agree with the County that the Ordinance does not violate the public trust doctrine because the County has not given up its right of control over its waters. Although the Ordinance prohibits a particular form of recreation,

[958 P.2d 284] the waters are open to access by the entire public, including owners of PWC who utilize some other method of recreation.

While the Ordinance governs activities more appropriate for general state legislation, the State has failed to act. The San Juan County Ordinance cannot conflict

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with state laws that do not exist. Further, the Ordinance is consistent with the goals of statewide environmental protection statutes. Finally, it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state.

B. Reasonable Exercise of Police Power

The Ordinance must be a "reasonable" exercise of the County's police power in order to pass muster under article XI, section 11 of the state constitution. *City of Seattle v. Montana,* 129 Wash.2d 583, 591, **919 P.2d 1218** (1996). "A law is a reasonable regulation if it promotes public safety, health or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued." Montana, 129 Wash.2d at 592, **919 P.2d 1218**; accord *Thurston County Rental Owners Ass'n v. Thurston County,* **85 Wash.App. 171**, 181, **931 P.2d 208**, review denied, 132 Wash.2d 1010, **940 P.2d 655** (1997). "[T]he wisdom, necessity and expediency of the law are not for judicial determination," and an enactment may not be struck down as beyond the police power unless it "is shown to be clearly unreasonable, arbitrary or capricious." *Homes Unlimited, Inc. v. City of Seattle,* 90 Wash.2d 154, 159, **579 P.2d 1331** (1978).

In *State ex rel. Faulk v. CSG Job Ctr.,* 117 Wash.2d 493, **816 P.2d 725** (1991), we announced a two-part test to be employed when determining the validity of a statute passed pursuant to the police power. First, the statute must promote the health, safety, peace, education, or welfare of the people. CSG Job Ctr., 117 Wash.2d at 504, **816 P.2d 725**. Second, the requirements of the statute must bear some reasonable relationship to accomplishing the purpose underlying the statute. CSG Job Ctr., 117 Wash.2d at 504, **816 P.2d 725**.

The Ordinance indicates the ban on PWC is intended to prevent "disruption to other vessels, swimmers and divers and the natural environment," prevent interference "with the historical and current uses and enjoyment of the shoreline property," ensure the safety of "destination commercial and recreational vessel traffic," protect "wildlife

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and bird life," and further the tourism-based economy. See Ex. 249, at 8, 9 (Ordinance No. 3-1996). The plain language of article XI, section 11, which provides that counties may enact laws to promote "peace," and "safety," encompasses two of the objectives enumerated above.

In *State v. Satiacum,* 50 Wash.2d 513, 520, **314 P.2d 400** (1957), we recognized that a "plenary right" is vested in the state under its police power to enact general laws for "regulation and conservation of wildlife." Similarly, we found in *CLEAN v. State,* 130 Wash.2d 782, 806, **928 P.2d 1054** (1996), that the Legislature was within its purview in enacting legislation to "improve[] the economy of the state ... and enhance[] the fabric of life." Thus, the ban does promote the purpose of the underlying statute.

Once an ordinance is found to serve a "legitimate public purpose," we examine whether the Ordinance uses "means that are reasonably necessary to achieve that purpose." *Rivett v. City of Tacoma,* 123 Wash.2d 573, 581, **870 P.2d 299** (1994) (quoting *Presbytery of Seattle v. King County,* 114 Wash.2d 320, 330, **787 P.2d 907** (1990)). A law must "bear[] a reasonable and substantial relation to" [6] or "be reasonably necessary to protect" [7] the public health, safety, morals, or general welfare.

Respondents argue that " '[c]ommunity displeasure,' 'generalized complaints' or 'public distaste for certain activities' cannot be the basis for governmental action." Br. of Resp'ts at 37 (citing *Maranatha Mining, Inc. v. Pierce County,* **59 Wash.App. 795**, 804, **801 P.2d 985** (1990)). Respondents urge us to follow the reasoning of *Steier v. Batavia*

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Park Dist., **283 Ill.App.3d 968, 219 Ill.Dec. 327, 670 N.E.2d 1215** (1996), appeal denied, **171 Ill.2d 586, 222 Ill.Dec. 438, 677 N.E.2d 972** (1997), in which the Illinois Court of Appeals considered whether an ordinance prohibiting PWC from using a boat launch violated language in an Army Corps of Engineers' permit under which the launch had been constructed. In

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concluding the ban violated the permit's requirement that the city allow "the full and free use by the public of all navigable waters at or adjacent to the [launch]," [8] the Steier court stated:

We recognize the defendant has a legitimate interest in preventing noise, wake, and wildlife problems. However, the Ordinance unreasonably singles out one type of watercraft in an effort to eliminate the deleterious effects that excessive noise and speed create. The problems of excessive noise and speed are not solely related to personal watercraft. We believe it is unreasonable to deny the use of the Batavia launch to users of personal watercraft and continue to allow all other watercraft of the same class to use the launch. Instead of singling out one type of watercraft, the defendant should enact appropriate ordinances which apply to all watercraft. The defendant has the right to regulate, but a regulation applies equally to all. Because the Ordinance singles out one type of watercraft, it is unreasonable and thus violates the permit issued by the Corps.

Steier, 283 Ill.App.3d at 974, 219 Ill.Dec. 327, 670 N.E.2d 1215 (citations omitted).

We find Steier unpersuasive. The issue there was whether the ban contradicted the Army Corps of Engineers' permit or violated a state statute that prohibited "shut[ting] off the access to any public dock or landing thereon," [9] not whether the PWC ban was within the legislative police power. Moreover, San Juan County has determined that singling out PWC is, in fact, a logical distinction. Paragraphs 26 and 27 of the Ordinance state:

26. Existing regulations do not address the location o[r] operation of PWCs, nor do they deal with distances from machine to shoreline, speed zones, time of operation and operator safety training. The regulations also do not provide sufficient funding for enforcement, education and training. Existing laws present problems for enforcement, and create

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uncertainties with respect to the impact of the PWCs on marine sealife.

27. Although noise is regulated by RCW 88.12.085, that regulation does not address the cumulative noise of vessels operating in the same area, the annoying impact of vessels that are not destination-bound, and other noise characteristics unique to PWCs.

Ex. 249, at 11 (Ordinance No. 3-1996). These and other findings set forth in the Ordinance indicate that the County determined PWC are distinguishable from other vessels and that banning them was the most prudent policy in light of the concerns enumerated. We believe a determination such as this is best left to a legislative body. If we accept the Board's conclusion that PWC are inherently distinguishable from other watercraft, then it logically follows that the ban is reasonable in light of the Ordinance's purported objectives.

While replete with evidence of "displeased citizens," the record also contains evidence of problems purportedly caused by PWC, including expert testimony regarding the harm such vessels cause to the marine environment. See, e.g., Ex. 216, at 2 (Letter from Richard Osborne, Curator of Science Services, The Whale Museum) ("The ways which PWCs appear to be different from most other vessels include: 1) speed (up to 60 mph), 2) maneuverability, which facilitates erratic, unpredictable travel paths, 3) their function, or primary use, and 4) both air and underwater noise frequencies and amplitudes. All of these variables have implications in terms of their potential for impacting our water surface-dependent wildlife...."); Ex. 216, at 4 ("If PWCs were numerous in San Juan [958 P.2d 286] County waters they would logically present a negative impact to 49 species of seasonally resident marine birds and mammals"); CP at 440 (declaration by University of Washington Zoology professor that "San Juan County's ban on jetskis will promote the health and success of the seabird populations in the area"); CP at 443, 444 (testimony of research wildlife biologist with National Oceanic and Atmospheric Administration

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that PWC "have a high potential for creating sounds aversive to both humans and mammals" and "pose a substantial risk of noise and visual disturbance to the marine mammals which reside in San Juan County"). In sum, we find the Ordinance serves a legitimate public purpose, is supported by evidence, and is reasonable in light of the findings.

Bans of PWC have been held reasonable in other jurisdictions. In *Personal Watercraft Indus. Ass'n v. Department of Commerce*, 48 F.3d 540 (D.C.Cir.1995), the court considered a National Oceanic and Atmospheric Administration (NOAA) regulation that limited the use of PWC to 14 of the 4,000-square nautical miles that compose the Monterey Bay National Marine Sanctuary. The Personal Watercraft Association had argued that treating PWC differently than all other vessels was "arbitrary and unsupported by the factual record" and, therefore, beyond the authority of NOAA, which is authorized to enact rules for the sanctuary that are "necessary and reasonable." Personal Watercraft Indus. Ass'n, 48 F.3d at 544, 546. Nevertheless, the court concluded the regulation was "not arbitrary and capricious:"

Maybe the presence of other vessels was a cause for concern; as we shall see, NOAA thought it might be. This scarcely means that NOAA had to regulate them if it was to do anything about thrill craft. An agency does not have to "make progress on every front Before it can make progress on any front." *United States v. Edge Broadcasting Co., U.S.* , 434, 113 S.Ct. 2696, 2707, 125 L.Ed.2d 345 (1993). Agencies often must contend with matters of degree. Regulations, in other words, are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem.

Personal Watercraft Indus. Ass'n, 48 F.3d at 544.

Although the Board's findings here are certainly debatable, it concluded that banning PWC was necessary to further a list of public interests. Support for this conclusion was provided by the testimony of business owners, wildlife

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experts, and other individuals. "In determining whether ... particular legislation tends to promote the welfare of the people of the State of Washington, [the court] must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts." *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wash.2d 493, 504, 816 P.2d 725 (1991) (citing *State v. Conifer Enters., Inc.*, 82 Wash.2d 94, 97, 508 P.2d 149 (1973)).

Many times we have noted our reluctance to substitute our judgment for that of the Legislature where there is competing expert testimony in the record. See *State v. Dickamore*, 22 Wash.App. 851, 855, 592 P.2d 681 (1979) ("[S]o long as scientists disagree about the effect of marijuana, the legislature is free to adopt the opinions of those scientists who view marijuana as harmful. We will not substitute our judgment for that of the legislature where the statute in question bears a rational relationship to a legitimate legislative purpose."); see also CLEAN, 130 Wash.2d at 806, 815, 928 P.2d 1054. In light of the evidence supporting the Board's findings, albeit contested by Respondents and their experts, and the Board's determination that PWC possess characteristics not shared by other watercraft, we are satisfied that the Ordinance constitutes a means reasonably necessary to achieve a legitimate public purpose.

C. Local

Article XI, section 11 of the Washington Constitution is a direct delegation of the police power to cities and counties, and the power delegated is as extensive within their sphere as that possessed by the *Legislature. Petstel, Inc. v. King County*, 77 Wash.2d 144, 159, 459 P.2d 937 (1969). The previous discussion of police power under article XI, section 11 establishes the general [958 P.2d 287] scope of counties' ability and authority to act. While a municipality cannot exercise its police power outside its boundaries, municipal legislation will not be found to violate the police power if its effect outside the county is only incidental. Petstel, 77 Wash.2d at 159, 459 P.2d 937. The prohibition of the use of PWC within the physical

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boundaries of San Juan County is purely local. The argument that the Ordinance has some tangential effects on interests or individuals lying geographically outside of San Juan County does not mean the Ordinance is not local, nor does the existence of the incidental effects provide the appropriate "test." If the test required an ordinance to only affect local residents, no ordinance could be local because all laws affect, at least to some degree, individuals visiting a county or city. A ban on hunting within a city is a valid exercise of the police power. The fact that nonresidents must comply with the law does not invalidate the law or make it "not local" for purposes of the police power. The bottom line is this PWC Ordinance only affects the type of activity allowed within the county. The Ordinance does not preclude San Juan County residents from using PWC outside the County, nor does it regulate activities beyond geographical limits. As Respondents bear the burden on this issue, we reject their assertion that the subject matter of the Ordinance is not local.

Substantive Due Process

In the final prong of our analysis, we must examine whether the Ordinance violates substantive due process. We ask whether the enactment is "unduly oppressive." This inquiry "lodges wide discretion in the court and implies a balancing of the public's interest against those of the [person regulated]." *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 331, 787 P.2d 907 (1990). The purpose of this analysis is to prevent excessive police power regulations that would require an individual "to shoulder an economic burden, which in justice and fairness the public should rightfully bear." *Orion Corp. v. State*, 109 Wash.2d 621, 648-49, 747 P.2d 1062 (1987); see also *Guimont v. Clarke*, 121 Wash.2d 586, 610-11, 854 P.2d 1 (1993); *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 22, 829 P.2d 765 (1992); *Robinson v. City of*

Seattle, 119 Wash.2d 34, 55, 830 P.2d 318 (1992). In Presbytery, we listed several nonexclusive factors relevant in determining whether an ordinance restricting property rights was unduly oppressive. These included "the

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nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner." Presbytery, 114 Wash.2d at 331, 787 P.2d 907 (citing Orion Corp., 109 Wash.2d at 655 n. 24, 747 P.2d 1062).

Applying these considerations to the Ordinance at issue here, we conclude the PWC ban is not unduly oppressive. The test simply does not apply to the present case. In Sintra, the housing preservation ordinance required developers who demolished or changed the use of low income housing to pay large fees to a city fund used to construct low income housing. The ordinance was found to be unduly oppressive because it placed upon a discrete group of individuals and developers the responsibility of solving the society-wide problem of homelessness. This was accomplished by levying exorbitant fees, even though the developers were not responsible for the problem. Sintra, 119 Wash.2d at 22, 829 P.2d 765. The PWC owners are not being forced to bear a financial burden or solve a societal problem not created by PWC. To the contrary, unlike the developers in Sintra, the PWC owners are directly responsible for the problems created by the use of their machines. It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm.

Vagueness

We will hold an ordinance to be unconstitutionally vague if a challenger demonstrates the ordinance either (1) fails to define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is proscribed," or (2) does not provide "ascertainable standards of guilt to protect against arbitrary enforcement." *City of Spokane v. Douglass,* 115 Wash.2d 171, 178, 795 P.2d 693 (1990). The test for whether an ordinance is sufficiently definite is "common [958 P.2d 288] intelligence" and does not "demand impossible standards of specificity." Douglass, 115 Wash.2d at 179, 795 P.2d 693. Likewise, an ordinance is not unconstitutionally

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vague merely because it "may require a subjective evaluation by a police officer to determine whether the enactment has been violated." Douglass, 115 Wash.2d at 181, 795 P.2d 693. "[T]he enactment is unconstitutional only if it invites an inordinate amount of police discretion." Douglass, 115 Wash.2d at 181, 795 P.2d 693.

The County contends that because Respondents' vagueness claim is a facial challenge that does not implicate their First Amendment rights, we should not even address it. "A facial vagueness challenge to an ordinance is a challenge that the terms of the ordinance 'are so loose and obscure that they cannot be clearly applied in any context.' " Douglass, 115 Wash.2d at 182 n. 7, 795 P.2d 693 (quoting *Basiardanes v. Galveston,* 682 F.2d 1203, 1210 (5th Cir.1982)). In *State v. Carver,* 113 Wash.2d 591, 781 P.2d 1308, 789 P.2d 306 (1989), we noted that "[u]nless First Amendment freedoms are involved, this court generally will only determine whether a statute is unconstitutional as applied to the facts of the case." Carver, 113 Wash.2d at 599, 781 P.2d 1308, 789 P.2d 306 (emphasis added). Respondents counter that our use of the term "generally" indicates that we may, in certain situations, consider facial vagueness challenges outside of the First Amendment context. In a later case, however, we clearly rejected this proposition:

The rule regarding vagueness challenges is now well settled. Vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. Consequently, when a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness. Rather, the ordinance must be judged as applied. Accordingly, the ordinance is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope.

Douglass, 115 Wash.2d at 182-83, 795 P.2d 693 (citations omitted). Respondents have not been cited for violating the Ordinance. Thus, theirs is a facial challenge and not appropriate for consideration.

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Respondents nevertheless argue that "the factual record here is sufficient to allow the Court to assess how the Ordinance has affected [R]espondents and others who lost the recreational, travel and commercial use of navigable public waters located within the County." Reply Br. of Resp'ts on Cross Appeal at 5. Respondents fail to explain, however,

in what manner the record Before us demonstrates that the Ordinance insufficiently describes what conduct is proscribed, or fails to provide "ascertainable standards of guilt to protect against arbitrary enforcement." Douglass, 115 Wash.2d at 178, **795 P.2d 693**. To the contrary, the portions of the record that Respondents cite are declarations indicating that Respondents were in fact quite certain the PWC ban applied to them. See, e.g., CP at 1720 ("But for the ban, I would have used our personal watercraft...."); CP at 1733 ("But for the total ban during 1996, I would have used my personal watercraft in San Juan County waters...."). Respondents have not demonstrated that the Ordinance is vague as applied to them.

CONCLUSION

In sum, we conclude that the Ordinance does not conflict, for purposes of article XI, section 11 of the Washington Constitution, with RCW 88.02.020, chapter 88.12 RCW, the Marine Recreation Land Act of 1964, the Shoreline Management Act of 1971, or the public trust doctrine. The Ordinance is reasonably necessary to further the County's legitimate public purposes and not unduly oppressive; it is a reasonable exercise of the County's police power and not inconsistent with Respondents' due process rights. Finally, we are unable to consider Respondents' vagueness claim because it constitutes a facial challenge not implicating First Amendment rights.

Having concluded that the trial court erred in granting summary judgment in favor **[958 P.2d 289]** of Respondents, we must next determine whether the appropriate remedy at this stage of the proceedings is reversal or remand for trial.

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Although the rejection of one party's cross motion for summary judgment does not compel a court to grant the opposing party's cross motion for summary judgment, we hold that to be the appropriate remedy in this case. The County moved for summary judgment on grounds that the Ordinance was a valid exercise of its police power under article XI, section 11. Having rejected Respondents' claim that the Ordinance is not local, reasonable, or related to a subject within the scope of the County's police power, we hold as a matter of law that the Ordinance is a valid exercise of the County's power enumerated in article XI, section 11 of the Washington Constitution. We will not substitute our judgment for that of a legislative body. We reverse the decision of the trial court and remand for entry of summary judgment in favor of the County on Respondents' action for declaratory judgment. The trial court's decision granting summary judgment in favor of the County on the Respondents' vagueness challenge is affirmed.

DURHAM, C.J., and DOLLIVER, SMITH, GUY, MADSEN and TALMADGE, JJ., concur.

SANDERS, Justice (dissenting).

The issue is whether a local San Juan County ordinance which absolutely prohibits state licensed and regulated motorized personal watercraft (PWC) from the state's marine waters violates Washington Constitution article XI, section 11.

As the majority recognizes (Majority at 280), this section of our constitution delegates limited legislative authority to counties for matters (1) local in nature, (2) not in conflict with the general laws, and (3) otherwise within the police power. I concur with the learned trial judge that this ordinance exceeds the constitutional grant of authority.

Washington Constitution article XI, section 11, provides:

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

As "[i]t is the function of the judiciary to test legislation

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against constitutional restrictions," *Petstel, Inc. v. King County,* 77 Wash.2d 144, 151, **459 P.2d 937** (1969), each aspect of the text tests the ordinance by a separate and independent constitutional requirement. Therefore, the failure of the ordinance to surmount any one of the three hurdles necessarily yields invalidity.

I. Subject Matter of the Ordinance is Not Local

The majority provides little analysis to support its conclusion the ordinance is "purely local":

The prohibition of the use of PWC within the physical boundaries of San Juan County is purely local.... The bottom line is this PWC Ordinance only affects the type of activity allowed within the county.

Majority at 286-287.

The majority apparently equates the term "local" with the truism that county ordinances are necessarily restricted in their reach to that which lies within the geographical boundaries of the county itself. I disagree.

Although Weden makes a strong argument that interests outside the county have been affected, the more fundamental point of disagreement is the majority's implicit assumption that ordinances which apply only within the geographical limits of a county are necessarily "purely local." Majority at 286-287. Such cannot be the rule even in theory because it is inconsistent with our State's constitutional text. Nor can it be the rule in this specific application because it ignores the physical facts and legal attributes of the marine waters of this State, as well as the state interest in the regulation of PWCs--all of which speak to general, not purely local, concerns.

A. Constitutional Text: "Limits" vs. "Local"

As we have previously observed, "Appropriate constitutional analysis begins with the text and, for most purposes, should end there **[958 P.2d 290]** as well." *Malyon v. Pierce County,* 131 Wash.2d 779, 799, **935 P.2d 1272** (1997). When construing the

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constitution, we are bound by the ordinary meaning of the words as they were understood on the date of popular ratification in 1889. *State v. Brunn,* 22 Wash.2d 120, 139, **154 P.2d 826**, 157 A.L.R. 1049 (1945) (when construing the constitution it is standard practice to inquire: "What was the accepted meaning of the words used at the time the provision was adopted?"), superseded by statute as stated in *State v. Jubie,* **15 Wash.App. 881, 552 P.2d 196** (1976) and overruled in part on other grounds by *State v. Matuszewski,* **30 Wash.App. 714**, 717, **637 P.2d 994** (1981); *Westerman v. Cary,* 125 Wash.2d 277, 288, **892 P.2d 1067** (1994) ("We will presume the language [of our constitution] carries its ordinary and popular meaning, unless shown otherwise."); Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L.Rev. 491, 511-12 (1984).

The very text of article XI, section 11, makes the critical distinction between the geographical "limits" of county legislation and the "local" nature of that legislation ("Any county ... may make and enforce within its limits all such local police ... regulations....). Const. art. XI, § 11 (emphasis added). Were we to conclude, as does the majority, "local" simply means that which is within the political boundaries of the county, the word "local" would be robbed of any meaning independent of the word "limits," rendering it superfluous. But such a construction violates the maxim which requires we give each word of the text a reasonable and independent meaning. *Washington Econ. Dev. Fin. Auth. v. Grimm,* 119 Wash.2d 738, 746, **837 P.2d 606** (1992) ("We have, however, consistently stated that statutes or constitutional provisions should be construed so that no clause, sentence or word shall be superfluous, void, or insignificant."). Compare Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 72 (6th ed. 1890) ("[T]he courts must ... lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.

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This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication.") (footnote omitted).

Indeed, on previous occasions we have recognized that just because a matter of legislative concern is situated entirely within the geographical boundaries of a local unit of government, such does not necessarily render the matter "local" in the constitutional sense. For example in *Yarrow First Assocs. v. Town of Clyde Hill,* 66 Wash.2d 371, 376, **403 P.2d 49** (1965), the court reversed municipal vacation of a street lying entirely within municipal boundaries, holding

[T]he residents of a particular town possess no proprietary rights to the use of its streets, in priority to or exclusion of the general public. They may not use their power to the detriment of other citizens or municipalities of the state.

Id. at 376, 403 P.2d 49. In so concluding, we reasoned "the power to regulate streets is not the power to prohibit their use by nonresidents." *Id.* (citations omitted). Similarly, matters of court procedure, even though limited to the geographical limits of a municipality, are "a matter of state rather than local concern." *City of Spokane v. J-R Distribs., Inc.*, 90 Wash.2d 722, 727, 585 P.2d 784 (1978). Cf. Petstel, Inc., 77 Wash.2d at 159, 459 P.2d 937 (Local price fixing upheld because effect on business outside the county was only "incidental.").

Thus I would posit the term "local" when used in this context references not only that which is confined within the geographical limits of the political boundaries, but also connotes a qualitative interest which is of uniquely local, as distinguished from general, concern. Compare Black's Law Dictionary 938 (6th ed. 1990) ("Local. Relating to place, expressive of place; belonging or confined to a particular

place. Distinguished from 'general,' 'personal,' 'widespread,' and 'transitory.' ").

[958 P.2d 291] B. Physical Facts Demonstrate Marine

Waters are Not "Local"

We have long subscribed to the rule that when "[P]hysical facts are uncontroverted and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ." *Bohnsack v. Kirkham*, 72 Wash.2d 183, 190, 432 P.2d 554 (1967) (quoting *Mouso v. Bellingham & N. Ry. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919)). The physical facts of San Juan County in general, and those relevant to the application of this ordinance in particular, speak volumes about whether the subject of this ordinance is indeed "purely local."

Some geographic facts highlight the general, not local, nature of the subject. With a land mass of but 179.3 square miles and an estimated population of 12,400, [1] this county is the smallest in land area and one of the smallest in population (0.2 percent) of any county in the State. Notwithstanding, the county almost triples its area by capturing within its boundaries an additional 320 square miles of navigable waters, stretching from the Canadian border to the Strait of Juan de Fuca, adjacent to 375 miles of shoreline of "state-wide significance." [2] Clerk's Papers (CP) at 673 (Ordinance 3-1996, § 2).

The scant county population emphasizes the democratic importance we must attribute to the "local-general" dichotomy in the context of this case: To the degree this county government is representative of the interests of its county residents, it must necessarily be unrepresentative of the interests of 99.8 percent of the remaining residents of this State who have no voice whatsoever in county affairs.

I submit this constitutional provision serves, at least in part, to protect all people of the State from action taken by local governments on subjects more appropriate for general state legislation.

We must also judicially notice, as an indisputable physical reality, the single most distinguishing attribute of San Juan County is the marine water within its political boundary; while recalling this water is neither restricted nor constricted by that political boundary in any manner. Unlike lakes locked within a county land mass, this water ebbs and flows with the change of the tide as it exchanges between Budd Bay near Olympia, Washington, and the Bay of Bengal off the shores of India. In physical reality, it is a highway for man and beast to travel near and far, defying all political boundaries, save and except those coincident with a shoreline quite beyond political dictation. Such marine waters are certainly not "local" in any physical sense of the word: They are transitory, ubiquitous, and simply beyond the political fiat of mortal man.

C. Public Use of These Marine Waters Not of Just Local Concern

Yet the very nature and use of these marine waters are the specific focus of the ordinance in question. The ordinance details in 27 factual findings many considerations of truly statewide, not merely local, importance. These findings include reference to the physical dimensions of the county (Finding 1); statistics regarding land mass and shoreline (Finding 2); intercounty (and international) ferry lanes (Finding 5); marine life which migrates to and from county waters and other state and international waters (Findings 6 to 7); wildlife-protected areas under state and federal jurisdiction (Finding 8); the presence of international shipping lanes within county boundaries (Finding

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10); [3] recreational uses of the marine waters, including fishing, scuba diving, recreational boating, etc. (Finding 11); as well as attributes favorable to destination tourism originating from outside the county, such as marine recreation, fishing, and sightseeing, all of which make this county and its marine waters a statewide, if not national, recreational **[958 P.2d 292]** destination and resource (Findings 12 through 15).

As this ordinance directly prohibits significant use of these marine waters, it is, by its terms, neither "local" in express scope nor "local" by necessary implication. The factual findings supporting this ordinance, on their face, stand in stark contradiction to the majority's conclusion that the regulation of these watercraft within county boundaries is a matter of "purely local" (Majority at 287) concern.

D. Public Trust Doctrine and Constitution Itself Mandate

State Waters are State Resource for All People of the State

Discussing the public trust doctrine (Majority at 283-284), the majority correctly acknowledges the legal status of these waters as held in trust for all the people of the State, although it fails to draw the necessary legal conclusion that use of these waters, therefore, is of truly general, not merely local, concern. In this regard the majority itself recognizes the broad public interest and ownership associated with these waters by observing " '[t]he state can no more convey or give away this jus publicum interest than it can "abdicate its police powers in the administration of government and the preservation of the peace." ' " Majority at 283 (quoting *Caminiti v. Boyle,* 107 Wash.2d 662, 669, **732 P.2d 989** (1987), cert. denied, **484 U.S. 1008, 108 S.Ct. 703,** 98 L.Ed.2d 654 (1988) (citations omitted) (emphasis added)). And the majority even quotes approvingly from precedent to the effect that the public trust doctrine " 'prohibits

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the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired...." Majority at 283 (quoting *Rettkowski v. Department of Ecology,* 122 Wash.2d 219, 232, **858 P.2d 232** (1993)) (emphasis added) (citations omitted). Elsewhere it acknowledges the jus publicum [4] interest encompasses the " 'rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.' " Majority at 283 (quoting Caminiti, 107 Wash.2d at 669, **732 P.2d 989**). The jus publicum interest in these waters and their use is of statewide interest to all the people of this State, not just a purely local interest to island residents.

Such considerations of generalized importance are entitled to yet added emphasis, if not prescriptive importance, according to provisions of the constitution, including article XV, which specifically require the Legislature to appoint a harbor commission and specifically enjoin the State from relinquishing any of its rights to control marine waters outside of harbors; and article XVI, section 1, which specifically provides, "All the public lands granted to the state are held in trust for all the people ...."; not to mention article XVII, section 1, which flatly mandates, "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows...."

One would be hard pressed to imagine a more definitive and explicit declaration of public trust and generalized constitutional concern than that these marine waters are of general, not purely local, concern that represented by the public trust doctrine coupled with express provisions in the Constitution itself.

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Perhaps the point would be illustrated if San Juan county were to ban all boating from its waters. The difference then between that scenario and this ordinance would be mere degree, not kind, with respect to issues of locality. Similarly, what if Pierce County closed the Narrows to pleasure boating--would the majority opine that to be a purely local interest as well--even though the county would have cut the Sound in half politically?

This court has no prerogative to ignore the public trust doctrine or these constitutional **[958 P.2d 293]** provisions because the constitution itself plainly provides, "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Const. art. I, § 29. I posit the constitution itself tells us we are dealing with anything but a purely "local" subject.

E. State Statutes Dictate Marine Waters are of General, Not

Purely Local, Concern

Without regard to claims of preemption, discussed under another heading, many state statutes plainly provide that the shorelines of the state, and the marine waters of the state, are of general, not just local, significance.

The Shoreline Management Act of 1971(Act), RCW 90.58, clearly references the "shorelines of the state" in the context of a statewide, general concern. By its terms this statute requires counties to propose plans for the management of their shorelines to the Department of Ecology for statewide approval. And RCW 90.58.020 recites:

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance....

(Emphasis added.)

Elsewhere the Act defines the shoreline of San Juan County as a "Shoreline[] of state-wide significance," RCW 90.58.030(2)(e)(ii)(E)(iii) (emphasis added), and summarizes the first purpose served by the Shoreline Management Act of 1971 is to:

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1) Recognize and protect the state-wide interest over local interest;

RCW 90.58.020 (emphasis added). Yet this ordinance closes 375 miles of significant state-wide shoreline to PWCs. Is this not a matter of statewide importance?

Other statutes also reference the marine waters of the State in the context of a statewide general, not local, concern. For example, RCW Title 75 provides for state regulation of food, fish, and shellfish and defines "State waters" as "all marine waters and fresh waters within ordinary high water lines and within the territorial boundaries of the state," RCW 75.08.011(8), and elsewhere asserts the overriding state concern to manage this resource. See, e.g., RCW 75.08.012 and .013. This statute establishes a state commission, the authority of which "extends to all areas and waters within the territorial boundaries of the state...." RCW 75.08.070. There is also a Recreational Salmon and Marine Fish Enhancement Program statute codified at RCW 75.54 with much the same provisions.

Once again, the conclusion seems inescapable that regulation of these waters is a matter of statewide concern.

F. Regulation of Power Vessels in General, and PWCs in

Particular, is a Matter of Statewide Concern

This county ordinance applies directly, and almost exclusively, to the marine waters of the State and, by its terms (with few exceptions), absolutely prohibits upon those waters a certain class of vessels duly licensed by the State pursuant to RCW 88.02.020. "Personal watercraft" is expressly regulated statewide in detail by RCW 88.12 and is specifically defined under RCW 88.12.010(15). These state regulations are uniform and general throughout the State and are not in the least "local." The regulations include requirements for mufflers and underwater exhaust systems (RCW 88.12.085), use of personal flotation devices (RCW 88.12.095), as well as various other very specific requirements relating to the operation of "personal watercraft"

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codified in RCW 88.12.145 (personal flotation device required, use of lanyard-type engine cutoff switch, no operation during darkness, no operation by person under 14 years of age, reckless operation prohibition, rental to person under 16 years of age prohibition, etc.).

Here it is essential to recall the ordinance in question does not merely supplement or add to these regulations, it simply prohibits any use of these personal watercraft on state waters within San Juan County's boundaries. Such a prohibition makes the state regulations utterly pointless because all such regulations are premised on the existence and

operation, not prohibition, of such craft. Whether or not this ordinance is in "conflict with general laws," at an irreducible minimum it is an ordinance which deals directly,

[958 P.2d 294] forcefully, and broadly with a subject matter of intrinsically general, not just local, concern as evidenced by statewide affirmative licensure and regulation of these craft.

II. The Ordinance is in Conflict with the General Laws of the State

The trial court concluded this ordinance, which absolutely prohibits personal watercraft from the marine waters of San Juan County, conflicts with the general laws of the State and is, therefore, in excess of that legislative authority delegated to the county by constitution article XI, section 11. I agree.

A county or local ordinance conflicts with state law when it "permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.' " *City of Bellingham v. Schampera,* 57 Wash.2d 106, 111, 356 P.2d 292, 92 A.L.R.2d 192 (1960) (citations omitted). Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright. *Compare Second Amendment Found. v. City of Renton,* 35 Wash.App. 583, 589, 668 P.2d 596

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1983); [5] 6A Eugene McQuillin, The Law of Municipal Corporations § 24.54, at 150 (3d rev. ed.1997) ("that which is allowed under state law cannot be prohibited by ordinance"). [6]

For example in Second Amendment Foundation the City of Renton regulated handguns in taverns and bars. In response to a challenge that the regulation of handguns conflicted with state licensing of concealed weapons, the court opined, "While an absolute and unqualified local prohibition against possession of a pistol by the holder of a state permit would conflict with state law, an ordinance which is a limited prohibition reasonably related to particular places ... is not preempted by state statute." 35 Wash.App. at 589, 668 P.2d 596. [7]

Here the State Legislature has enacted a comprehensive system of licensing and regulation of PWCs. PWCs must be registered with the State and all PWCs must display current registration decals. See RCW 88.02.020 ("[N]o person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration number and a valid decal in accordance with

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this chapter."). RCW 88.02.020 is generically a licensing provision as a license is permission "granted by some authority to do an act which, without such license, would be unlawful." *Diamond Parking, Inc. v. City of Seattle,* 78 Wash.2d 778, 780, 479 P.2d 47 (1971). This state statute first makes it unlawful to operate a PWC in state waters but then expressly invites same by offering a license to do exactly that. RCW 88.02.020. As the trial court correctly concluded, "When the state adopts statutes which indicate that Before somebody can use a particular vessel on the navigable waters of the state that they must register that vessel[,] the corollary of that is that once registered, the state is granting a license to use [958 P.2d 295] those on state waters." Court's Oral Decision at 4-5 (Sept. 30, 1996).

As this ordinance defeats the state license by completely banning all PWCs from the marine waters of the very county most appropriate for the very activity the State has seen fit to license, the state license is robbed of its only purpose (to allow use of the craft) as the county ordinance now renders the state permit a license to do nothing at all. One doesn't need a license for that (I hope).

In addition to licensing, state statutes provide broad statewide, uniform regulation of the design and operation of PWCs. For example, no one may operate a PWC anywhere in state waters during darkness (RCW 88.12.145(3)); nor while under age 14 (RCW 88.12.145(4)); nor without certain equipment (RCW 88.12.145(1) and .145(2)); nor recklessly (RCW 88.12.145(5)). Further, PWCs are subject to all other state marine-craft regulations including noise muffler regulations (RCW 88.12.085) and prohibitions on operation while under the influence (RCW 88.12.025).

These state statutes license and regulate the use of PWCs in Washington. Even assuming localities may further tailor or supplement state regulations, an absolute prohibition of the subject of the state regulation nullifies the very purpose of the regulation--which is to affirmatively permit and

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tailor PWC operation, not prohibit it. [8] If a county ordinance forbids an activity which is licensed by state statute, it conflicts with the statute. Schampera, 57 Wash.2d at 111, 356 P.2d 292. This does.

This ordinance broadly bans the use of PWCs in all marine waters within the territorial boundaries of San Juan County. Such waters stretch offshore for hundreds of square miles and include international ferry lanes. There are no meaningful exceptions to the ban within the county's marine waters--PWCs are prohibited everywhere. Further, the ban applies around the clock every day of the year. The ban is as absolute as absolute can be. The ordinance conflicts with RCW 88.02.020 because it prohibits that which the State allows. It therefore fails the second test under article XI, section 11, because it conflicts with the general laws.

III. Ordinance Exceeds Police Power

Article XI, section 11, substantively delegates legislative authority to local units of government to make and enforce "local police, sanitary, and other regulations...."

This ordinance is particularly susceptible to the challenge that it exceeds the legitimate scope of the police power because it is so broad and absolutely prohibitory. Were the ordinance limited in effect to specific conduct in specific areas of real concern for safety or the environment, a constitutional challenge under article XI, section 11, might be most problematic; however, to prohibit the use of personal watercraft adjacent to every square foot of 375 miles of county shoreline surrounding 172 named islands [9] for several miles offshore into and including international shipping lanes stretches the judicial test of "reasonableness" well out to sea.

The majority opines that this delegation of state authority

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is limited by a judicial reasonableness test. Majority at 284. Thus, by inference, it would appear to be the majority's position that the authority delegated to local units of government by article XI, section 11, to enact police regulations is either (1) absolute in scope or (2) absolute at least to the point where it deprives one of "life, liberty, or property, without due process of law." Const. art. I, § 3. [10]

[958 P.2d 296] Although this view is not without recent precedential support, [11] and its practical effect must depend on the substantive application of article I, section 3, I posit this approach has the viscerally unsatisfactory result of denying article XI, section 11's reference to police regulations any independent textual significance. Compare *Washington Econ. Dev. Fin. Auth. v. Grimm,* 119 Wash.2d 738, 746, 837 P.2d 606 (1992) ("We have, however, consistently stated that statutes or constitutional provisions should be construed so that no clause, sentence or word shall be superfluous, void, or insignificant."). Given our oft-stated adherence to that self-evident rule of constitutional interpretation which requires us to construe the constitution by its ordinary language as understood at the time of its ratification, I posit the term "police ... regulation," as originally understood is a relevant subject of inquiry.

A. Original Understanding of Police Power

As evidenced by treatises, legal precedent, and complementary constitutional provisions, the original understanding of "police power" prevalent and popular at the dawn of our constitution in 1889 defined the legitimate role of the State as the protector of persons and property. This

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understanding is best summarized in the Latin maxim sic utere tuo ut alienum non laedas. [12] Thus "police power," as originally understood, conveyed not only a grant of authority, but its limitation as well.

Historically it must be concluded such was the understanding even prior to statehood in Washington territorial days as the Territorial Court interpreted the Organic Act which granted the territorial legislative power extending to "all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States" (9 Stat. 325, § 6

(1848)) to imply "that there are some subjects of legislation that are not rightful." *Maynard v. Valentine, 2 Wash. Terr. 3,* 14, 3 P. 195 (1880). [13]

Few men were closer to birth of the Washington Constitution than Theodore Lamm Stiles, first elected to serve on the Washington State Supreme Court by the same electorate which ratified the constitution itself in 1889. Justice Stiles played a leading role at the constitutional convention, chairing the committee on county, township, and municipal organizations while also serving on the rules, judiciary, and public lands committees. He soon developed "a reputation as a scholar and as the state's leading authority on the Washington Constitution." Charles H. Sheldon, The Washington High Bench: A Biographical History of the Supreme Court, 1889-1991, at 327 (1992). In an address to the Washington State Bar Association, Justice Stiles set

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forth, in colorful language, that founder's commitment to jealously maintain traditional limitations of police regulation against threats of radical expansion:

Laws have been passed in one state and another abridging the right of contract, the right to sell merchandise, the right to labor upon public works, the right to labor more than a certain number of hours, the right to freely come and go, the right to pursue legitimate trades, and a mass of others. Some of these laws go directly to the point, but the majority proceed by indirection. Too many succeed in evading the decree of unconstitutionality and bear oppressively on natural rights. The selfish interest of **[958 P.2d 297]** classes ever anxious to push on their own fortunes, reckless of what destruction is wrought to others, is their moving cause. Legislatures, pliantly serviceable to the demands of influential cliques and unchecked by weak-kneed governors, spread them on the statute books, and there they stand, discouraging prophecies of the decadence of popular rights under democracy. They hide in swarms, behind the newly coined phrase, "police power," and that other more venerable phrase, "the public welfare," both of which, like "public policy," are often, if one may use such an expression, liveries of heaven stolen to serve the devil in.

C.S. Reinhart, History of the Supreme Court of the Territory and State of Washington 49-50 (n.d.).

A further exemplar and early explanation of the limited nature of the police power is aptly set forth in *City of Seattle v. Ford,* 144 Wash. 107, 111, 257 P. 243 (1927):

"It is to be observed, therefore, that the police power of the government, as understood in the constitutional law of the United States, is simply the power of government to establish provisions for the enforcement of the common as well as civil-law maxim, sic utere tuo ut alienum non laedas . ... Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.

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....

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. .... [The Legislature's] determination as to what is a proper exercise of its police powers, is not final or conclusive, but is subject to the supervision of the courts.

Id. at 111-12, 257 P. 243 (emphasis added) (quoting Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States 4-5 (1900)).

Recognition of the limitation of a state's plenary police power is further evidenced in the earliest history of our nation. See, e.g., *Calder v. Bull, 3 U.S. (3 Dall.)* 386, 387-88, 1 L.Ed. 648 (1798) (Chase, J., seriatim) ("I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state.... The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.... There are acts which the federal, or state legislature cannot

do, without exceeding their authority."). In fact, this recognition predates the establishment of the American Republic. Laurence H. Tribe, American Constitutional Law § 8-1, at 560 (2d ed.1988).

The majority notes that the scope of the state's police power "has not declined." Majority at 280. I would not argue with that assertion; however, the problem is more nearly the opposite. Without benefit of any formal amendment to the constitutional text, we have allowed "police power," as a substantive limitation on governmental

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authority, to significantly erode from its point of origin: [14] "While originally it was used as a rule to indicate the protective function of the government, its development of late years has been in the direction of the function of the state that cares for the general **[958 P.2d 298]** welfare," *City of Tacoma v. Boutelle,* 61 Wash. 434, 443, 112 P. 661 (1911), and we have opined it "is not a rule, it is an evolution," allowing its redefinition as often as changed conditions require or compel. *State v. Mountain Timber Co.,* 75 Wash. 581, 588, 135 P. 645 (1913), aff'd, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917). Notwithstanding, we have also occasionally [15] repaired to its origin:

The germ of police power, in so far as it assumes to interfere with private rights, is to be found in the power of the state to suppress nuisances. This right was forced upon the state in the exercise of its functions, or rather duty, to preserve that equilibrium of relative right which must be preserved wherever society is organized.

Id. at 584, 135 P. 645. Such "equilibrium" is the process by which the rights of one individual are protected against the trespasses of another.

This original understanding of the "police power," as an expression of the core but limited governmental purpose and function to protect lives and property, is certainly consistent with, and confirmed by, Constitution article I, section 1, which similarly provides: "Governments ... are established to protect and maintain individual rights."

Even under the most expansive definitions of potential plenary power it is clear that where, as here, the acts of

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the county exceed the State's constitutional delegation the act nevertheless exceeds legitimate authority. See, e.g., *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-20, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (noting the plenary power of the president in international relations "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."); *Southcenter Joint Venture v. National Democratic Policy Comm.,* 113 Wash.2d 413, 443, 780 P.2d 1282 (1989) (State's plenary power as sovereign is limited by the state's own constitution).

Applying the principle of sic utere tuo ut alienum non laedas to the case at bar we would ask: What individual right is abridged by the continued use of personal watercraft on the marine waters of San Juan County?

B. Due Process Test

In a similar vein, the majority would ask in the name of that process which is due whether the ordinance is aimed at achieving a legitimate public purpose, whether it uses means reasonably necessary to achieve that purpose, and finally whether it is unduly oppressive upon individuals. Majority at 279-280; 286-287. Although there may be differences in outcome depending upon which of the two police power tests may be employed in any given situation, I posit this ordinance exceeds the legitimate scope of the police power under either formulation.

Such is a judicial question in at least the same sense as would be any alleged transgression of government beyond its constitutionally defined limitations. See, e.g., *Marbury v.*

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Madison, 5 U.S. 137, 176-80, 1 Cranch 137, 2 L.Ed. 60 (1803) (Marshall, C. J.). [16]

1. No Legitimate Public Purpose

I have no doubt that the use or misuse of personal watercraft is quite capable of invading private rights and public interests in a particular, as well as a global, sense under a host of imaginable circumstances. However **[958 P.2d 299]** we must shape the answer to fit the parameters of the question posed by this particular ordinance.

At the threshold the court must recognize the ordinance is a two-year temporary measure passed coincident with a resolution to study the effects of personal watercraft in San Juan County. Resolution 19-1996, ex. 250. However since the ordinance constitutes a virtual prohibition of such watercraft, it seems illogical in the sense that it clears the laboratory of the very specimen alleged to be the object of study. Thus a negative inference flows that this ordinance is not based upon a demonstrable police power interest, at least one sufficiently broad in scope to justify to total prohibition, but rather a possible interest not sufficiently identified absent further study.

From this inauspicious beginning one notes the ordinance affirmatively finds that the effect of PWC "operation on marine life in San Juan County is unknown." Ordinance Finding 24. Although there is no constitutional rule which requires the ordinance to include findings, Petstel, 77 Wash.2d at 151, **459 P.2d 937**, I know of no rule of law which requires us to disregard findings which have in fact been made. Certainly the majority does not. (Majority at 276-278.) I would therefore posit a demonstrably "unknown" effect on an interest of

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otherwise legitimate concern to the police power is no basis for its exercise.

We are then left to consider the effect of PWC operation on shoreline property owners or, possibly, other marine craft. Although these craft admittedly make noise, that noise is strictly regulated by state statute in the same manner as any other watercraft, and there is nothing in this ordinance to support discrimination between the two. Moreover, this ordinance does not purport to regulate noise. Of course, these personal watercraft might be problematic if operated adjacent to coastal residents; however, the ordinance does not prohibit only that but absolutely prohibits the operation of these craft even where there are no residents to be found and even when operated at considerable distance from shore in the most reasonable manner. Nor does the ordinance require any particular reasonable mode of operation. Its prohibitions are absolute.

Thus, I would conclude the ordinance lacks a legitimate purpose to protect a private interest, or even a public one, as I am unable to articulate one, or even imagine one, as broad in scope as is the prohibition which must be justified.

Here I must acknowledge my imagination is somewhat challenged by the perception that an exercise of the police power, to be proper, must be at least hypothetically protective of a legitimate interest. Not all interests, however, are indeed legitimate for police power purposes. For example, courts have held community displeasure cannot be a legitimate constitutional predicate for governmental action. *Maranatha Mining, Inc. v. Pierce County,* **59 Wash.App. 795**, 804, **801 P.2d 985** (1990); *Marks v. City of Chesapeake,* **883 F.2d 308**, 311 (4th Cir.1989) (" '[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect' " (citations omitted)). *Cf. Anderson v. City of Issaquah,* **70 Wash.App. 64**, 82, **851 P.2d 744** (1993) ("[W]hether a community can exert control over design issues based solely on accepted community aesthetic values is far from 'settled' in Washington case law.") (citing *Polygon Corp. v. City of Seattle,* 90 Wash.2d 59, 70,

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578 P.2d 1309 (1978) and *Duckworth v. City of Bonney Lake,* 91 Wash.2d 19, 30, **586 P.2d 860** (1978)).

If the purpose of the ordinance were in reality an effort to enforce the cultural preferences of the island majority to the "quiet prosperity" (Ordinance Finding 13) of island living at the expense of the recreational preferences of those less prosperous, I would also find a paucity of legitimate police power.

Such a prohibition on this economical means of recreation brings to mind those sumptuary laws imposed on the display of a pauper's wealth during the middle ages. Such laws purported to limit extravagance in expenditures "[a]nd the common people were subjected to the control of these sumptuary laws, in order that by reducing their consumption **[958 P.2d 300]** they may increase the sum of enjoyment of the privileged classes." Christopher G. Tiedeman, supra, at 187.

The existence of such laws caused Judge Cooley to remark:

[T]he ideals which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law.

Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 476-77 (5th ed. 1883); Christopher G. Tiedeman, supra, at 187.

In the same vein it might well be argued this ordinance by design, or at least effect, reserves and prohibits the use of a public resource, marine waters, simply to appease the cultural or aesthetic values of the riparian landowners or interior residents. If so, such would exceed the legitimate scope of the police power, as well. If there are other legitimate police power objectives served by this ordinance, I am

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unenlightened by the majority opinion as to their existence.

2. Unreasonable Means

If the purpose of the ordinance is to preserve public safety, abate a nuisance, or preserve the environment, I cannot find the means employed by this ordinance reasonably necessary to accomplish its objective. If the ordinance is related to study of a possible problem with an eye toward possible future action, then I would find the prohibit-now and study-later provision irrational. If the ordinance is aimed at alleviating a problem associated with shoreline residents, then I would expect it would limit its scope, at the least, to regulation of operation close to a populated shoreline. If its purpose is to save the environment (notwithstanding an affirmative ordinance finding that the effect of PWCs on the environment is unknown), then I would expect that the ordinance would focus its regulation upon areas of particular environmental concern.

But the scope of the ordinance knows no boundaries and, concomitantly, the requirement that it promote its legitimate objectives is similarly boundless. To find this absolute sweeping ban necessary to promote a legitimate police power interest is an act of fantasy reserved for the majority.

IV. Conclusion

Thus, it is my view that this ordinance fails the constitutional test as posited by article XI, section 11, because it is not local in scope, conflicts with the general laws, and exceeds the police power as well. As this constitutional provision is as much a part of the constitution as any other, this court must yield to the constitutional mandate that "[t]he provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Const. art. I, § 29. Therefore I dissent.

ALEXANDER, Justice (concurring in the result reached by the

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dissent).

I entirely agree with Justice Sanders that San Juan County's ordinance is not local in nature. Although the Legislature might well pass a statute banning personal watercraft on the waters of the state, it has not done so and it has not authorized counties to do so by ordinance. The fact that San Juan County's ordinance is not local in nature is, by itself, a sufficient basis for striking it down. Consequently, I concur in the result reached by Justice Sanders in his dissent.

Notes:

[1] The Board reported receiving a petition signed by 1,479 people requesting that PWC be banned or restricted.

[2] We recognize the Ordinance may have essentially run its course by the time this appeal is complete. If it is not reenacted, the issues Before us are arguably moot. Nevertheless, we may decide a moot case if it "involves matters of continuing and substantial public interest." Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd., 131 Wash.2d 345, 351, 932 P.2d 158 (1997) (citing In re Swanson, 115 Wash.2d 21, 24, 793 P.2d 962, 804 P.2d 1 (1990)). This is such a case.

[3] See RCW 36.01.050 ("All actions against any county may be commenced in the superior court of such county, or of the adjoining county....").

[4] See CP at 488 ("Cross-Motion for Summary Judgment Re Conflict with General Laws"); CP at 534 ("Cross-Motion for Summary Judgment Re: Invalidity of Park Ban"); CP at 554 ("Cross-Motion for Summary Judgment Re: Vagueness"). Respondents' motion regarding the park ban refers to an incident in which the County's Parks Board Superintendent, in response to a request by two of the Respondents to use a boat launch, "unilaterally decided to prohibit commercial launching of personal watercraft from all San Juan County parks." CP at 535. Pursuant to a stipulation by the parties, the trial court entered an order on November 6, 1996, invalidating the park ban. The County has not assigned error to that decision and, consequently, we do not address it here.

[5] PWC are "vessels" for purposes of chapter 88.02 RCW. See RCW 88.02.010(1).

[6] Montana, 129 Wash.2d at 592, 919 P.2d 1218.

[7] Homes Unlimited, Inc., 90 Wash.2d at 158, 579 P.2d 1331.

[8] Steier, 283 Ill.App.3d at 973, 219 Ill.Dec. 327, 670 N.E.2d 1215 (quoting conditions of permit issued by the Army Corps of Engineers).

[9] Steier, 283 Ill.App.3d at 974, 219 Ill.Dec. 327, 670 N.E.2d 1215 (quoting 70 Ill. Comp. Stat. 1205/11-5 (West 1994)).

[1] 1997 Washington State Yearbook: A Guide to Government in the Evergreen State 137.

[2] RCW 90.58.030(2)(e)(ii)(E)(iii); see discussion of Shoreline Management Act of 1971, at 14-16 ante.

[3] "There is a high volume of commercial and recreational vessels that use the marine waters of the county ranging in size from multi-ton seagoing vessels to one-person kayaks." Ordinance Finding 10.

[4] Jus publicum "implies a right in a sovereign or public capacity to be exercised for the interest or benefit of the state or the public, as distinguished from the exercise in a proprietary capacity of a right of the sovereign or a right possessed by an individual in common with the public." Black's Law Dictionary 862 (6th ed.1990) (emphasis added).

[5] See also Yarrow First Assocs. v. Town of Clyde Hill, 66 Wash.2d 371, 376, 403 P.2d 49 (1965) wherein this court struck down a town's closure of a road noting cities may regulate roads within their boundaries but may not entirely prohibit their use ("the power to regulate streets is not the power to prohibit their use"). In striking the local road closure this court noted "[e]very citizen of the state has an equal right to use the streets." *Id.*; cf. Allen v. City of Bellingham, 95 Wash. 12, 38, 163 P. 18 (1917) (wherein this court upheld a local ordinance regulating jitney busses because the ordinance regulated without prohibiting state licensed activity ("[T]he highways shall not be denied altogether to the use of the vehicles described.")).

[6] This principle dates back to the earliest days of statehood. See Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 741 n. 2 (6th ed. 1890) ("[I]f the municipal authority should assume to declare something which was entirely lawful by the law of the State to be a nuisance, the declaration would be a mere nullity because in conflict with the superior law.").

[7] The attorney general reached the same conclusion a year earlier noting the "distinction between the validity of (a) an absolute, unqualified, local prohibition against possession of a concealed handgun by the holder of a state concealed

weapon permit--at any time or place--and (b) a limited prohibition related only to particular times and places. The former is invalid under state law but the latter is not." 14 Op. Att'y Gen. 8 (1982).

[8] For example, while RCW 88.12.085 requires mufflers and regulates the maximum engine noise of PWCs and other vessels, that section expressly allows a local government to enact more stringent noise regulation. RCW 88.12.085(11).

[9] See Ordinance Finding 2.

[10] Also see Majority at 279-280 " 'To justify the state in thus interposing its authority in behalf of the public, it must appear--First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishments of the purpose, and [third, that it is] not unduly oppressive upon individuals.' " (quoting Lawton v. Steele, 152 U.S. 133, 136-37, 14 S.Ct. 499, 38 L.Ed. 385 (1894)).

[11] See, e.g., CLEAN v. State, 130 Wash.2d 782, 806, 928 P.2d 1054 (1996) ("[I]t is certainly within the general police power of the State to construct a publicly owned baseball stadium.").

[12] "[O]ne should use his own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed.1990).

[13] A legislature with undefined powers has all legislative powers. It can lay down the law in every direction, moulding all persons and things, and each particular person and thing conclusively to what it says, determining absolutely and finally every question by its fiat. Its voice is the voice of the governing power, and the voice of the governing power is the voice of God. From that there is no appeal. Great Britain's Parliament is an example of such a Legislature ... American legislatures are different, simply because limited. Higher legislation than any one of them is capable of has [sic] at one breath called them into being and circumscribed their activities. The National and State legislatures have their bounds set by what the people have enacted in the National and State constitutions.

Maynard, 2 Wash. Terr. at 13-14, 3 P. 195.

[14] "What has time, what have men, done with these wonders?" Victor Hugo, The Hunchback of Notre Dame 7 (Barnes & Noble 1996).

[15] Compare, e.g., Christianson v. Snohomish Health Dist., 133 Wash.2d 647, 946 P.2d 768, 778 (1997) (Talmadge, J., concurring) (" 'This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim sic utere tuo ut alienum non laedas.' ") (quoting Munn v. Illinois, 94 U.S. 113, 124-25, 4 Otto 113, 24 L.Ed. 77 (1876) (citation omitted)).

[16] "The powers of legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.... If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it were a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on." Marbury v. Madison, 5 U.S. 137, 176-80, 1 Cranch 137, 2 L.Ed. 60 (1803) (Marshall, C.J.)

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71 P.3d 233

EDMONDS SHOPPING CENTER ASSOCIATES, a Washington limited partnership; MBPH, Inc. d/b/a Marty's Public House, a Washington corporation; and Albert and Margaret Ryan-Dykes, husband and wife, Appellants,

v.

CITY OF EDMONDS, a Washington municipal corporation, Respondent.

No. 50815-6-I.

Court of Appeals of Washington, Division 1.

June 23, 2003.

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Robert M. Tull, Langabeer, Tull & Lee, P.S., Heather A. Wolf, Brownlie & Evans LLP, Bellingham, WA, for Appellant.

Joseph Z. Lell, Walter Scott Snyder, Ogden Murphy Wallace, P.L.L.C., Seattle, WA, for Respondent.

COX, A.C.J.

Edmonds Shopping Center Associates, MBPH, Inc. d/b/a Marty's Public House, and Albert Dykes and Margaret Ryan-Dykes (collectively "Dykes") appeal the trial court's grant of summary judgment substantially in favor of the City of Edmonds concerning its adoption of Ordinance 3328. The ordinance

[71 P.3d 235] prohibits cardrooms and addresses other issues that we describe later in this opinion.

We hold that section 1 of the ordinance is a proper exercise of the police power of the City. Moreover, state law preempts the field of the other activities that the ordinance purports to affect. The City's exercise of its police power divested Dykes of the claimed vested right to operate a cardroom. The ordinance does not operate to take property in the constitutional sense, and there were no violations of substantive or procedural due process rights. Accordingly, we affirm the trial court's decision as to section 1 of the

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ordinance, but reverse the decision to the extent that it validates portions of section 2.

Albert Dykes and Margaret Ryan-Dykes own and operate Marty's Public House ("Marty's"). Marty's is a restaurant, bar, and cardroom facility located in Edmonds. Marty's has an E-5 gambling permit from the Washington Gambling Commission. This authorizes social card games as "commercial stimulants" to the selling of food and drink for consumption on the premises, as provided by law. [1]

In September 1998, Dykes applied to the Commission for an E-15 gambling permit to expand the cardroom to 15 tables. In order to obtain this license, Dykes needed to renovate Marty's. Dykes applied to the City for a building permit in February 2000. The City granted the permit in March 2000.

In September 2000, citizens presented an initiative petition to the Edmonds City Council that called for a ban on cardrooms and further provided for a phase out of existing cardrooms. The City Council adopted the initiative without modification, enacting Ordinance 3328.

Dykes sued the City, seeking a declaratory judgment against the ordinance. Following cross motions for summary judgment, the trial court substantially granted the City's motion. But the court also ruled that certain portions of the ordinance were invalid.

Dykes appeals and the City cross-appeals.

We may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. [2] We review questions of law de novo. [3]

Here, both sides expressly concede there are no genuine issues of material fact. We agree. Thus, our focus is on the

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legal question of whether the City was entitled to a judgment as a matter of law.

ARTICLE XI, SECTION 11

Dykes argues that Ordinance 3328 conflicts with article XI, section 11 of the state constitution because it is not a reasonable exercise of the City's police power. Because case and statutory authority is to the contrary, we reject this unpersuasive argument.

Section 1 of the Ordinance states:

Chapter 3.24 *Taxation and Regulation of Gambling* is hereby amended by the enactment of a new Section 3.24.015 *Cardrooms Prohibited* to read as follows:

3.24.015 Cardrooms Prohibited.

The conduct or operation of social card games as commercial stimulants as defined in RCW 9.46.0217 and 9.46.0282 shall be prohibited.

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." [4] An ordinance is inconsistent with article XI, section 11 if (1) the ordinance conflicts with some general law; (2) the ordinance is not a reasonable exercise of the City's police power; or (3) the subject matter of the ordinance is not local. [5] "Whether an ordinance is reasonable, local, or conflicts with a general law for purposes of article XI, section 11 is purely a question of law subject to de novo review."

[71 P.3d 236] [6] The second of the three above criteria is at issue here.

Reasonable Exercise of Police Power

Dykes argues that Ordinance 3328 is not a legitimate exercise of the City's police power because the City has failed

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to demonstrate that the ordinance was enacted to protect the health, safety, or general welfare of the public. Specifically, he contends there is no evidence in the record that licensed cardrooms negatively affect the community and there is no public policy to reduce or eliminate lawful gambling. We hold that the ordinance is a reasonable exercise of the City's police power.

A two-part test applies to determine whether a law is a reasonable exercise of the police power. First, the regulation "must promote the health, safety, peace, education, or welfare of the people." [7] Second, the requirements of the regulation "must bear some reasonable relationship to accomplishing the purpose underlying the statute." [8] An ordinance may only be struck down as beyond the police power if it is shown that it is "clearly unreasonable, arbitrary or capricious." [9]

The first question is whether the ordinance promotes the health, safety, peace, education or welfare of the people. We resolve that question by comparing the ordinance in question with the provisions of article XI, section 11. [10]

Case law and statutes make clear that the regulation of gambling is a valid exercise of a municipality's police power. [11] Municipal police power is as extensive as that of the state. [12] And there can be no doubt that the regulation of gambling, whether licensed or not, is within the police power specified in article XI, section 11. Furthermore, RCW 9.46.010 sets forth a legislative declaration of policy

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respecting gambling. Among other things, it states the policy of this state is to limit the nature and scope of gambling activities and further states a policy of strictly regulating and controlling such activities.

Dykes cites no authority for the novel proposition that evidence in the record is required for a municipality to affect, within constitutional and statutory limitations, the business of gambling. Because he has cited no authority, we must presume he has found none. [13]

Because Dykes cannot and does not argue that his activity is exempted from regulation, and the case and statutory authority does not support his claim, he fails to demonstrate that he is entitled to relief under the first prong of the analysis.

We move to the second prong. Once we determine that an ordinance serves a legitimate public purpose, we must next examine whether the ordinance uses "means that are reasonably necessary to achieve that purpose." [14]

While it is unclear whether and to what extent Dykes focuses his argument on the second prong of the governing test, we will assume that he claims that the record must evidence some sort of showing to support the City's actions. Thus, he focuses on evidence in the record that a police chief's survey of [71 P.3d 237] the Puget Sound region indicated that there was little peripheral crime associated with cardrooms. However, that report is not dispositive.

"The State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures

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are necessary for the protection of such interests." [15] "In determining whether ... particular legislation tends to promote the welfare of the people of the State of Washington, [the court] must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts." [16] the record makes clear that while the City's decision may have been debatable, it used reasonable means to effectuate that

decision. First, the ordinance was passed pursuant to a state statute that specifically authorized the municipality to exercise a local option to ban cardrooms. Dykes does not argue that the statute is invalid. Thus, it is difficult to see why the City's exercise of the express authority granted to it by statute does not satisfy the second prong of the test we apply in this case. Second, the record shows that prior to its decision, the City formed a task force to study the question of whether cardrooms should be allowed in Edmonds. The task force considered three aspects of cardroom gambling: law enforcement concerns, taxes and revenue, and the effects on neighborhoods. That task force considered various studies on these subjects and surveyed members of the community. Some council members expressed their strong beliefs that gambling negatively affected the local community and one concluded that the City should not use gambling to generate revenue. The council member noted that the City did not want to rely on revenue from gambling, potentially five to ten percent of the City's revenue, because that might give one or two businesses substantial control over the City's revenue base. Simply because there is no clear consensus on the benefits or harms associated with an activity does not make a move

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to ban that activity inherently unreasonable. [17] As the cases hold, a determination on this issue "is best left to a legislative body." [18] Dykes fails to demonstrate entitlement to relief under the second prong of the test.

The City's exercise of its police power to regulate gambling was reasonable.

Preemption

Dykes also argues that sections 1 and 2 of Ordinance 3328 are preempted by state law. He argues that section 1 is preempted because it revokes a license that only the Gambling Commission can revoke, in violation of **RCW 9.46.295**. He argues that section 2 alters the scope of his gambling license, also in conflict with **RCW 9.46.295**. The City agrees that state law preempts the phasing out schedule in section 2. We hold that state law preempts section 2, but not section 1 of the ordinance.

A person challenging a statute bears the burden of proving beyond a reasonable doubt that it is unconstitutional. [19] Preemption occurs when the Legislature states its intention either expressly or by necessary implication to preempt the regulated field. [20] The test for determining whether an ordinance is in conflict with a general law is whether the

[71 P.3d 238] ordinance permits that which the statute forbids, or forbids that which the statute permits. [21]

RCW 9.46.285 expressly preempts any licensing and regulatory functions of gambling by any entity other than

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the state, "except as to the powers and duties of any city, town, city-county, or county which are specifically set forth in this chapter."

RCW 9.46.295 states:

> Any license to engage in any of the gambling activities authorized by this chapter as now exists or as hereafter amended, and issued under the authority thereof shall be legal authority to engage in the gambling activities for which issued throughout the incorporated and unincorporated area of any county, *except that a city located therein with respect to that city, or a county with respect to all areas within that county except for such cities, may absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued.* [22]

We construe statutes as a whole to give effect to all the language and to harmonize all provisions. [23] The construction of a statute is a question of law that we review de novo. [24] In considering a statute, we must "assume that the legislature means exactly what it says," [25] and we will "give words in a statute their plain and ordinary meaning." [26] We will construe statutes to avoid strained or absurd results. [27]

Dykes's argument that the ordinance revokes a license that only the Gambling Commission can revoke is unpersuasive. Section 1 of Ordinance 3328 states, "[t]he conduct or operation of social card games as commercial stimulants as defined in RCW 9.46.0217 and 9.46.0282 shall be prohibited." RCW 9.46.295 clearly allows the City to "absolutely prohibit ... gambling activities for which the

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license *was issued*." [28] There is no room to argue that a city can prohibit only future gambling activities; the use of the language "was issued" controls. The interpretation offered by Dykes would lead to the illogical result that a city could only prohibit future gambling activities, but would have to allow existing activities.

Dykes also argues that section 1 applies only to future cardrooms and that this is an invalid regulation, as opposed to an outright prohibition, on gambling activities. Dykes's reasoning is that, because section 2 applies only to existing cardrooms, section 1 must only apply to future cardrooms.

First, the plain language of section 1 gives no indication that it is limited to future cardrooms. Second, as will be discussed below, state law preempts section 2. Thus, there is no conflict between section 2 and section 1 that would force the conclusion that section 1 applies only to future cardrooms.

Dykes next argues that section 2 is preempted in its entirety by RCW 9.46.295. The City agrees that state law preempts the phasing out of the activities in subpart F, section 2. We, too, conclude that state law preempts the entirety of section 2 because it regulates, rather than prohibits gambling outright.

Section 2 states in pertinent part,

> All land uses operating social card games which are currently in existence within the City, which were legally established under land use regulations in effect at the time of the establishment, and which have current gambling licenses issued by the State Gambling Commission may continue to operate [71 P.3d 239] at a current level provided that such level is authorized by the current gambling license. All such land uses operating social card games:
>
> A. Shall be considered legal nonconforming uses under this act.
>
> B. Shall not be expanded or intensified by the addition of tables at which social card games are played beyond the numbers authorized by current gambling license.

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> C. Shall permanently cease operations upon revocation or failure to renew license issued by the Washington State Gambling Commission.
>
> D. Shall permanently cease operation of any table for social card games where operation is discontinued for more than 30 days.
>
> E. Shall permanently cease operation if site or tables for social card games are relocated, reconstructed or redeveloped.
>
> F. Shall permanently cease operation five years after this ordinance is enacted.

The trial court determined that subparts A, C, D, and E were preempted by state law. Neither party challenges that conclusion on appeal. Accordingly, subparts B and F only are at issue.

RCW 9.46.295 allows cities only to "absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued." Instituting a schedule to phase out existing gambling activities is not absolutely prohibiting gambling activities. Rather, it is regulation. We also agree that Dykes and the City are correct that differentiating between existing and future uses is more regulatory in nature, thus violating RCW 9.46.295. We conclude that state law preempts the phase out schedule in subpart F.

Dykes argues that all of Section 2 changes the scope of his license, in violation of RCW 9.46.295, because it purports to do that which the Gambling Commission has the sole authority to do--regulate the scope of gambling activities. This argument is persuasive. The introductory paragraph of section 2 gives special authorization for existing

cardroom activities to continue. RCW 9.46.295 does not give municipalities the authority to prohibit selectively gambling activities. Specifically, the ordinance authorizes these gambling activities to continue to operate at their "current level." But any regulation pertaining to the scope of gambling activities is under the sole authority of the Gambling Commission. If gambling activities continue, it is in the sole discretion of the Gambling Commission whether to allow

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expansion, intensification, or the revocation of a license. Similarly, subparts A through F, of which subpart B is a part, attempt to regulate the scope of gambling, rather than merely prohibiting it. We conclude that state law preempts the entirety of section 2.

VESTED RIGHT TO CARDROOM

Dykes next argues that Ordinance 3328 violates a vested right to operate a cardroom in conjunction with Marty's eating and drinking establishment. Specifically, Dykes argues that the February 2000 filing of the building permit application to remodel the establishment vested a constitutional right to operate under land use regulations then in effect. Accordingly, Dykes maintains that the later enactment of the ordinance does not bar expansion of the cardroom. We hold that any claim to a vested right by virtue of the filing of the application for a permit was extinguished by the City's later exercise of its police power by enactment of the ordinance.

"Under Washington's 'vested rights doctrine' developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application." [29] The purpose of the vested rights doctrine is to "fix" the rules that will govern land development with reasonable certainty. [30]

[71 P.3d 240] But the vested rights doctrine does not allow a business to operate exempt from later-enacted police power regulations in furtherance of a legitimate public goal. [31] "This doctrine provides only a right to have the application processed under existing rules; it does not provide a right to

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have any particular law or regulation apply to the location or use after the application is approved." [32] The development must then comply with later-enacted police power regulations that are limited only by constitutional safeguards. [33] argues that the filing of a building permit application to remodel the eating establishment vested a constitutional right to operate under the land use regulations in place at the time. This argument suggests that filing for expansion of the cardroom license with the Commission and the land use application for expanding the cardroom somehow created a vested right to operate a cardroom.

Although Dykes characterizes his claim as one to a "vested right," we need not decide whether Dykes had such a right by the filing of his application. Assuming without deciding that Dykes had such a right, "[m]unicipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal." [34] For example, the court in *West Main* observed, "under the State Environmental Policy Act of 1971 a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance." [35] Here, we have a statute that allows municipalities to prohibit all gambling and a valid exercise of the City's police power under that statute.

Dykes fails to address why this reasoning does not apply here. Dykes filed a building permit application that disclosed his plan to expand the cardroom at Marty's. The City approved the application. Six months later the City, in a valid exercise of its police power, and under the statutory

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authority of RCW 9.46.295, banned all cardrooms in the city. Dykes does not challenge RCW 9.46.295. Any vested right Dykes may have had was extinguished with the passage of Ordinance 3328.

Dykes misplaces reliance on *Noble Manor Co. v. Pierce County.* [36] In that case, a developer argued that its right to develop its land in the manner described in its short plat application vested on the same day as the short plat application itself. [37] Subsequent development regulations would have made it impossible for the developer to develop the land as contemplated on the day the application for short platting was filed. [38] The Court held that the vested rights doctrine, and its codification in the short plat context in **RCW 58.17.033**, included the right to develop consistent with the land use and zoning laws in place on the day the county received the short plat application. [39]

Noble Manor is distinguishable. There, the court applied the vested rights doctrine to preserve a developer's expectations as to land use ordinances *existing* at the time of the application. The case does nothing to overcome the rule articulated in *West Main* that a police power regulation *subsequent* to an application can extinguish a vested right.

Finally, we need not address the Citys argument that WAC 230-04-175 controls the question of whether Dykes had a vested right. It states, [t]he issuance of any license **[71 P.3d 241]** by the commission shall not be construed as granting a vested right in any of the privileges so conferred. The City claims this language is broad enough to require its application here, in the land use and vested rights context.

The trial court did not err in granting summary judgment to the City on this issue.

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TAKINGS

Dykes contends that because Ordinance 3328 does not advance a legitimate state interest, it constitutes a taking under the Washington State and United States Constitutions. Dykes fails to persuade us that any unconstitutional taking of property occurred in this case. [40]

Guimont establishes the revised analysis for a takings challenge following *Lucas v. South Carolina Coastal Council* [41] and our state's previous jurisprudence set forth in *Presbytery.* [42] The case authority establishes two threshold questions. First, whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property. [43] If the landowner claims less than a "physical invasion" or a "total taking" and if a fundamental attribute of ownership is not otherwise implicated, we proceed to the second question. That question is whether the challenged regulation safeguards the public interest in health, safety, the environment, or the fiscal integrity of an area or whether the regulation "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit." [44]

If the answer to both threshold questions is no, then there is no taking. If the answer to one or both questions is yes,

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then additional analysis is required. This additional analysis includes consideration of two additional points. First, whether the regulation advances a legitimate state interest. Second, a balancing test to determine if the state interest in the regulation is outweighed by its adverse economic impact to the landowner, with particular attention to the regulation's economic impact on the property, the extent the regulation interferes with investment-backed expectations, and the character of the government action. [45] does not argue that the ordinance imposes the burden of providing an affirmative public benefit. Nor does he argue that all economic value has been taken or that he has been deprived of an attribute of ownership. Rather, Dykes challenges whether the ordinance is a legitimate exercise of power for the public interest in health, safety, or welfare.

Dykes argues that nothing in the record suggests that the ordinance was motivated by any concern that cardrooms lead to "negative secondary impacts" on the community. This assertion is at odds with the record, as we previously observed in this opinion. The council president indicated that half of the people he spoke with found gambling to be offensive. Another councilmember said she too found that half of the citizens she talked to did not want cardrooms in the City. Furthermore, Dykes fails to account for the fact that **RCW 9.46.295** allows municipalities to "absolutely

prohibit" gambling activities. Dykes concludes that in order to justify the cardroom ban, the City must demonstrate that the prohibition implements the public policy of "keeping the criminal element out of [71 P.3d 242] gambling" or "restraining professional gambling activities" as discussed in RCW 9.46.010. This argument makes no sense. The City cannot regulate professional gambling or the criminal element in gambling. The City is limited only to absolutely prohibiting gambling activities or doing nothing at all, under RCW 9.46.295.

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Because the ordinance protects the public health, safety, and welfare and neither destroys a fundamental attribute of ownership nor imposes a private burden for a public benefit, no taking has occurred. Accordingly, we proceed to determine whether the regulation violates substantive due process. [46]

SUBSTANTIVE DUE PROCESS

Dykes argues that Ordinance 3328 violates his substantive due process rights because it fails the due process test of reasonableness. Again, we disagree.

"Even if a regulation is not susceptible to a takings challenge, under our *Presbytery* framework, it is next subject to substantive due process scrutiny for reasonableness." [47] Washington courts apply the three-pronged test stated in *Presbytery* to determine whether a regulation violates substantive due process. There the court stated the test as "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." [48] The purpose of this analysis is to prevent the use of excessive police power that would require an individual "to shoulder an economic burden, which in justice and fairness the public should rightfully bear." [49] Legislative enactments are presumed constitutional, and the challenging party bears the burden of proving beyond a reasonable doubt that it is unconstitutional. [50]

Dykes maintains that Ordinance 3328 fails any constitutional reasonableness test because it does not

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achieve a legitimate public purpose. As noted above, this argument is not persuasive. Based on the evidence presented at the council meeting, there was a significant public interest in prohibiting gambling in the city. The ordinance was a legitimate expression of this public interest. Dykes's arguments that some studies find little peripheral crime associated with cardrooms are insufficient to overcome the presumption that this regulation is constitutional. Furthermore, in light of the historical acceptance of the regulation of gambling as a valid exercise of the police power, [51] and the explicit authorization by the Legislature in RCW 9.46.295 to permit municipalities to prohibit gambling absolutely, this argument must fail.

As to the second prong, Dykes argues that the City has many options to address its concerns about gambling. This is not true. The City can either prohibit gambling activities or do nothing under RCW 9.46.295. Furthermore, Dykes fails to address how a prohibition on cardrooms is not a reasonably necessary means to achieve the public purpose of stopping cardroom activity.

Finally, Dykes argues that the ordinance is unduly oppressive. To determine whether a regulation is unduly oppressive on the landowner, courts must balance the public's interests against those of the regulated landowner. The *Presbytery* court listed several interests for the courts to consider, including the nature of the harm sought to be avoided, the availability and effectiveness of less drastic protective measures, the economic loss suffered by the property owner, and the property owner's ability to anticipate the regulation. [52]

[71 P.3d 243] Applying these factors, we conclude that the prohibition on gambling is not unduly oppressive. The public has a significant interest in abating an activity that many find to be offensive or damaging to the community. That the

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community perceived gambling to be a significant problem is supported by the fact that the ordinance was brought about through a citizen initiative. No less restrictive means are available because **RCW 9.46.295** allows municipalities to either totally prohibit gambling or to not act at all. Municipalities are not allowed to simply regulate particularly offensive aspects of gambling. Dykes has failed to address what, if any, economic losses he has suffered due to the ordinance. Furthermore, Dykes is not being required to bear a financial burden or solve a social problem that is not created by gambling itself. As observed in *Weden*, "[i]t defies logic to suggest an ordinance is unduly oppressive when it regulates only the activity which is directly responsible for the harm." [53] Finally, Dykes should have anticipated the ordinance because he knew that, under **RCW 9.46.295**, the possibility existed for the City to prohibit gambling activities.

Nevertheless, Dykes maintains that the destruction of a legitimate business is unduly oppressive. Dykes cites to *City of Seattle v. McCoy*. [54] *McCoy* is distinguishable.

In *McCoy*, the trial court found a restaurant to be a drug nuisance under chapter 7.43 RCW because of the drug activity that was taking place on the property, despite the owners' best efforts to stop it. [55] This court reversed and concluded that the drug nuisance statute, as applied, constituted a taking and violated due process. [56] But the cardroom at Marty's is not being shut down due to activities outside of Dykes's control. It is being closed because the City has decided that it does not want cardrooms. The ordinance does not require that Marty's, a restaurant, bar and cardroom, be closed completely. Dykes's attempt to equate Marty's to the restaurant in *McCoy* is not persuasive. We conclude that there is no substantive due process violation.

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PROCEDURAL DUE PROCESS

Dykes also argues that the City should have given him special notice and a hearing because this was a quasi-judicial action. We reject this claim as well.

Both the Washington and U.S. Constitutions provide that no person shall be deprived of "life, liberty, or property, without due process of law." [57] State deprivation of these protected interests is unconstitutional unless accompanied by adequate procedural safeguards. [58] Our supreme court has held that our due process protection is largely coextensive with that of the U.S. Constitution. [59]

In looking at the degree of process that will be afforded, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures and the probable value of additional or substitute procedural safeguards; and (3) the government's interest in maintaining the procedures. [60]

The private interest here is Dykes's interest in maintaining the cardroom facility within the bar and restaurant at Marty's. Despite Dykes's characterization, the ordinance does not result in the complete termination of his business. The space planned for the expanded cardroom could be used for many other functions, and the restaurant and bar remain unaffected.

The risk of erroneous deprivation is low because the ordinance was the product of a **[71 P.3d 244]** citizen initiative that prohibited cardroom gaming throughout the city. Despite

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Dykes's characterization to the contrary, this was not a quasi-judicial action, but a legislative one. Area-wide actions involving the exercise of the legislative body's policy-making power are generally legislative. [61] The legislative process provides all the process that is due. [62] "And such actions are not made quasi-judicial simply because they affect specific individuals, even if the method chosen by the legislative body to acquire input from property owners allows the owners to specifically discuss their own properties." [63] the government's interest in maintaining the procedure, the citizen initiative process, is quite high. It would be unduly burdensome on the City to provide an individualized hearing

for each party affected by a city-wide, legislative enactment. Thus, Dykes was entitled to no more process than he received in this legislative action by the City.

Dykes next argues that because the ordinance affects land uses, the City was required to comply with the public participation requirements of the Growth Management Act in RCW 36.70A.035. There is no indication in the record that Ordinance 3328 is Growth Management Act legislation. The ordinance was promulgated under the authority of RCW 35.17.260, not chapter 36.70A RCW. RCW 36.70A.035 is not applicable.

In sum, we conclude that Ordinance 3328 does not violate Dykes's procedural due process rights.

We affirm the summary judgment order in part and reverse in part.

BECKER, C.J., and SCHINDLER, J., concur.

Notes:

[1] RCW 9.46.070(2).

[2] CR 56(c).

[3] *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 813, 854 P.2d 1072 (1993).

[4] Article XI, section 11 of the Washington Constitution.

[5] *Weden v. San Juan County*, 135 Wash.2d 678, 692, 958 P.2d 273 (1998).

[6] *Weden*, 135 Wash.2d at 693, 958 P.2d 273.

[7] *Weden*, 135 Wash.2d at 700, 958 P.2d 273 (citations omitted).

[8] *Weden*, 135 Wash.2d at 700, 958 P.2d 273 (citations omitted).

[9] *Weden*, 135 Wash.2d at 700, 958 P.2d 273 (quoting *Homes Unlimited, Inc. v. City of Seattle*, 90 Wash.2d 154, 159, 579 P.2d 1331 (1978)).

[10] *See Weden*, 135 Wash.2d at 700-701, 958 P.2d 273 (comparing the challenged ordinance with article XI, section 11 to determine whether the first prong of the test was satisfied).

[11] *Weden*, 135 Wash.2d at 691, 958 P.2d 273 (quoting *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894)).

[12] *Weden*, 135 Wash.2d at 692, 958 P.2d 273 (citing *Covell v. City of Seattle*, 127 Wash.2d 874, 905 P.2d 324 (1995)).

[13] *State v. Young*, 89 Wash.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (courts may assume that where no authority is cited, counsel has found none after search).

[14] *Weden*, 135 Wash.2d at 701, 958 P.2d 273 (quoting *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 330, 787 P.2d 907 (1990)).

[15] *Weden*, 135 Wash.2d at 691, 958 P.2d 273 (quoting *Lawton*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385).

[16] *See Weden*, 135 Wash.2d at 705, 958 P.2d 273 (quoting *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wash.2d 493, 504, 816 P.2d 725 (1991)).

[17] *See Weden*, 135 Wash.2d at 704-705, 958 P.2d 273; *See also* Jim Springer, Norm Maleng & Mike Lowry, *Pro/Con: Should Washington Take The Big Gamble?*, The Seattle Times, April 6, 2003, at C1 (the public policy questions associated with gambling in Washington, including the effect on state and local revenues, and who benefits from gambling income, are debated).

[18] *Weden*, 135 Wash.2d at 703, 958 P.2d 273.

[19] *State v. Labor Ready, Inc.*, 103 Wash.App. 775, 779, 14 P.3d 828 (2000) (citing *City of Seattle v. Montana*, 129 Wash.2d 583, 589, 919 P.2d 1218 (1996)).

[20] *Kennedy v. City of Seattle*, 94 Wash.2d 376, 383, 617 P.2d 713 (1980).

[21] *Weden*, 135 Wash.2d at 693, 958 P.2d 273 (citing *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923)).

[22] (Italics ours.)

[23] *City of Seattle v. Fontanilla*, 128 Wash.2d 492, 498, 909 P.2d 1294 (1996).

[24] *Rettkowski v. Dep't of Ecology*, 128 Wash.2d 508, 515, 910 P.2d 462 (1996).

[25] *Morgan v. Johnson*, 137 Wash.2d 887, 891-92, 976 P.2d 619 (1999).

[26] *State v. Keller*, 98 Wash.App. 381, 383-84, 990 P.2d 423 (1999), *cert. denied*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002).

[27] *State v. Akin*, 77 Wash.App. 575, 580, 892 P.2d 774 (1995).

[28] (Italics ours.)

[29] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1, 16, 959 P.2d 1024 (1998) (citing *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 51, 720 P.2d 782 (1986)); RCW 19.27.095.

[30] *West Main*, 106 Wash.2d at 51, 720 P.2d 782

[31] *West Main*, 106 Wash.2d at 53, 720 P.2d 782 (citing *Hass v. Kirkland*, 78 Wash.2d 929, 481 P.2d 9 (1971)).

[32] *Skamania County v. Woodall, et al.*, 104 Wash.App. 525, 537, 16 P.3d 701, *review denied*, 144 Wash.2d 1021, 34 P.3d 1232 (2001) (citation omitted).

[33] *Rhod-A-Zalea*, 136 Wash.2d at 16, 959 P.2d 1024.

[34] *West Main*, 106 Wash.2d at 53, 720 P.2d 782.

[35] *West Main*, 106 Wash.2d at 53, 720 P.2d 782.

[36] 133 Wash.2d 269, 943 P.2d 1378 (1997).

[37] *Noble Manor*, 133 Wash.2d at 274, 943 P.2d 1378.

[38] *Noble Manor*, 133 Wash.2d at 272, 943 P.2d 1378.

[39] *Noble Manor*, 133 Wash.2d at 278, 943 P.2d 1378.

[40] Dykes fails to brief the *Gunwall* factors, and does not argue that the state constitutional provisions of article 1, section 16 are more protective than the federal constitutional provisions. Accordingly, we follow the same analysis applied in *Guimont* and other cases. *See Guimont v. Clarke*, 121 Wash.2d 586, 602-04, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176, 114 S.Ct. 1216, 127 L.Ed.2d 563 (1994).

[41] 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[42] 114 Wash.2d 320, 787 P.2d 907; *Guimont*, 121 Wash.2d at 600, 854 P.2d 1.

[43] *Guimont*, 121 Wash.2d at 602, 854 P.2d 1.

[44] *Guimont*, 121 Wash.2d at 603, 854 P.2d 1.

[45] *Guimont*, 121 Wash.2d at 604, 854 P.2d 1.

[46] *See Guimont*, 121 Wash.2d at 594, 854 P.2d 1.

[47] *Guimont*, 121 Wash.2d at 608, 854 P.2d 1.

[48] *Presbytery*, 114 Wash.2d at 330, 787 P.2d 907.

[49] *Weden*, 135 Wash.2d at 706, 958 P.2d 273 (quoting *Orion Corp. v. State*, 109 Wash.2d 621, 648-49, 747 P.2d 1062 (1987)).

[50] *Erickson & Assocs. v. McLerran*, 123 Wash.2d 864, 869, 872 P.2d 1090 (1994).

[51] *See Weden*, 135 Wash.2d at 691, 958 P.2d 273.

[52] *Girton v. City of Seattle*, 97 Wash.App. 360, 368, 983 P.2d 1135 (1999), *review denied*, 140 Wash.2d 1007, 999 P.2d 1259 (2000).

[53] *Weden*, 135 Wash.2d at 707, 958 P.2d 273.

[54] 101 Wash.App. 815, 4 P.3d 159 (2000).

[55] *McCoy*, 101 Wash.App. at 823, 4 P.3d 159.

[56] *McCoy*, 101 Wash.App. at 844, 4 P.3d 159.

[57] U.S. Const. amend. XIV, 1; Wash. Const. art. I, 3.

[58] *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[59] *State v. Manussier,* 129 Wash.2d 652, 679-80, 921 P.2d 473 (1996), *cert. denied,* 520 U.S. 1201, 117 S.Ct. 1563, 137 L.Ed.2d 709 (1997).

[60] *Rivett v. City of Tacoma,* 123 Wash.2d 573, 583, 870 P.2d 299 (1994) (citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

[61] *Holbrook, Inc. v. Clark County,* 112 Wash.App. 354, 365, 49 P.3d 142 (2002), *review denied,* 148 Wash.2d 1017, 64 P.3d 649 (2003).

[62] *In re Personal Restraint of Metcalf,* 92 Wash.App. 165, 176, 963 P.2d 911 (1998), *cert. denied,* 527 U.S. 1041, 119 S.Ct. 2405, 144 L.Ed.2d 803 (1999).

[63] *Holbrook,* 112 Wash.App. at 365, 49 P.3d 142.

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183 Wn.2d 219 (Wash. 2015)

351 P.3d 151

Cannabis Action Coalition et al., Plaintiffs,

Steve Sarich et al., Petitioners,

v.

The City of Kent et al., Respondents

No. 90204-6

Supreme Court of Washington, En Banc

May 21, 2015

Argued February 24, 2015

Appeal from King County Superior Court. 12-2-19726-1. Honorable Jay V. White.

David S. Mann (of *Gendler & Mann LLP*), for petitioners.

Thomas C. Brubaker, City Attorney, and *Arthur M. Fitzpatrick* and *David A. Galazin, Assistants*, for respondents.

Noah G. Purcell, Managing Assistant Attorney General, and *Jeffrey T. Even, Assistant Attorney General*, on behalf of the State of Washington, amicus curiae.

Sarah A. Dunne, Mark M. Cooke, and *Jared Van Kirk* on behalf of American Civil Liberties Union of Washington, amicus curiae.

AUTHOR: Justice Debra L. Stephens. WE CONCUR: Chief Justice Barbara A. Madsen, Justice Charles W. Johnson, Justice Susan Owens, Justice Mary E. Fairhurst, Justice Charles K. Wiggins, Justice Sheryl Godron McCloud, Justice Mary I. Yu. AUTHOR: Justice Steven C. González.

OPINION

Debra L. Stephens, J.

[351 P.3d 152]

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¶ 1 Under the Washington State Medical Use of Cannabis Act (MUCA), chapter 69.51A RCW, qualifying

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patients may participate in " collective gardens" to pool resources and grow medical marijuana for their own use. RCW 69.51A.085(1). [1] However, MUCA grants cities and towns the power to zone the " production, processing, or dispensing" of medical marijuana. RCW 69.51A.140(1). Given this state law, the city of Kent enacted a zoning ordinance that prohibits collective gardens within its city limits. City of Kent Ordinance 4036 (June 5, 2012) (codified at Kent City Code 15.02.074, 15.08.290) (Ordinance).

¶ 2 This case requires us to determine whether MUCA preempts the Ordinance. We hold it does not and affirm the Court of Appeals. The Ordinance is a valid exercise of the city of Kent's zoning authority recognized in RCW 69.51A.140 (1) because the Ordinance merely regulates land use activity.

I. BACKGROUND

A

¶ 3 In 1971, the Washington Legislature enacted the Uniform Controlled Substances Act, chapter 69.50 RCW. That statute made it a crime to manufacture, deliver, and possess marijuana. RCW 69.50.401-.445. The same activities are criminalized under federal law. 21 U.S.C. ch. 13. But Washington has had subsequent legal developments concerning medical marijuana and recreational marijuana.

[351 P.3d 153] In 1998, the people adopted Initiative 692, Laws Of 1999, ch. 2, to provide protections for medical marijuana use. And in 2012, the people adopted Initiative 502, Laws of 2013, ch. 3, to create a system for the licensed distribution of recreational marijuana and to legalize the possession of marijuana

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in certain circumstances. *See* RCW 69.50.4013(3). Initiative 502 is not relevant to this case because no party seeks to produce marijuana pursuant to a recreational marijuana producer's license. *See* RCW 69.50.325(1). This case concerns Washington's medical marijuana system.

¶ 4 Washington's medical marijuana system is codified as MUCA, chapter 69.51A RCW. Initially, the statute provided qualifying medical marijuana users an affirmative defense to criminal prosecutions. Former RCW 69.51A.040(2) -(3) (2010). That defense was satisfied upon compliance with the terms of the chapter, such as meeting the definition of being a " qualifying patient," having " valid documentation" from a " health care professional," having the appropriate quantity of marijuana, and satisfying other conditions. *Id.*; former RCW 69.51A.010(2) (2010).

¶ 5 The legislature amended MUCA in 2011. *See* Laws of 2011, ch. 181. But the bill the legislature passed differs significantly from the enacted law because Governor Gregoire vetoed 36 of the bill's 58 sections. *See id.* at 1374-76 (governor's veto message). As passed by the legislature, the bill would have created a comprehensive regulatory scheme under which all patients, physicians, processors, producers, and dispensers could be securely and confidentially registered in a database maintained by the Washington Department of Health. *See id.* § 901 (later vetoed). Registration would have been optional. *Id.* § 901(6) (later vetoed). If a patient registered, the patient would not be subject to state prosecution or civil consequences for marijuana-related offenses. *Id.* § 401 (codified at RCW 69.51A.040). But if the patient did not register, the patient would be entitled to only an affirmative defense to marijuana prosecutions. *Id.* § 402 (codified at RCW 69.51A.043).

¶ 6 In addition to the registration system, the bill authorized collective gardens and clarified that local jurisdictions retain their zoning power over medical marijuana activities. Under the bill, qualifying patients could establish collective gardens for the purpose of growing medical marijuana

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for personal use. *Id.* § 403 (codified at RCW 69.51A.085). Participating in a collective garden involves " sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use," such as by providing real estate, equipment, supplies, or labor for the collective garden. *Id.* § 403(2) (codified at RCW 69.51A.085(2)). Last, the bill clarified that local governments retain authority to regulate the production, processing, or dispensing of medical marijuana through zoning, business licensing, health and safety requirements, and business taxes. *Id.* § 1102 (codified at RCW 69.51A.140).

¶ 7 After the legislature passed the bill and sent it to Governor Gregoire for her approval, the United States attorneys for the Eastern and Western Districts of Washington wrote the governor a letter. It warned that the legislature's bill authorized conduct illegal under federal law, noted that Washington State employees who administered the registry would not be immune from federal prosecution, and threatened such prosecution. *Coal. v. City of Kent*, **180 Wn.App. 455**, 464, **322 P.3d 1246** (2014). Governor Gregoire vetoed all of the bill's sections that could have subjected state employees to federal charges, most importantly the establishment of the bill's centerpiece, the registration system. She did not veto the provision concerning collective gardens, RCW 69.51A.085, or the provision concerning local zoning requirements, RCW 69.51A.140. She explained her decision in an official veto message. Laws of 2011, ch. 181, at 1374-76.

¶ 8 Against this state law backdrop, in 2012 the city of Kent enacted the Ordinance at issue. Styled as a zoning ordinance, it prohibits collective gardens (largely as defined in RCW 69.51A.085) in every zoning district within the city and deems any violation a nuisance per se that shall be abated by the city attorney. Kent City Code 15.02.074, 15.08.290. The city may enforce the Ordinance

[351 P.3d 154] with criminal and civil sanctions. *Id.* ch. 1.04.

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B

¶ 9 The Cannabis Action Coalition, Steve Sarich, Arthur West, John Worthington, and Deryck Tsang (collectively plaintiffs) sued the city of Kent, its city council, and its mayor Suzette Cook (collectively Kent) in King County Superior Court, seeking to have the Ordinance declared preempted and invalid. On competing motions for summary judgment, the superior court ruled in Kent's favor and upheld the Ordinance. It also dismissed the claims of Sarich, West, and Worthington for lack of standing because these plaintiffs did not reside or operate a collective garden in the city of Kent. The court determined that Tsang had standing because he currently participates in a collective garden in the city of Kent's limits. The court enjoined all plaintiffs from violating the Ordinance.

¶ 10 Sarich, Worthington, and Tsang appealed. Recognizing that Tsang's standing to appeal was never in doubt, the Court of Appeals held that Sarich and Worthington also had standing to appeal because they were burdened by the trial court's injunction prohibiting them from violating the Ordinance. *Cannabis Action Coal.*, 180 Wn.App. at 469 n.11. On the merits, the Court of Appeals affirmed the superior court and held state law does not preempt the Ordinance. *Id.* at 469-83. We granted the plaintiffs' petitions for review. *Coal. v. City of Kent*, **181 Wn.2d 1022**, **336 P.3d 1165** (2014).

II. ANALYSIS

A

¶ 11 The Washington Constitution grants every local government the power to " make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. This court has established that an ordinance is

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valid under this provision " unless: (1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the [local government's] police power; or (3) the subject matter of the Ordinance is not local." *Weden v. San Juan County*, **135 Wn.2d 678**, 692-93, **958 P.2d 273** (1998). Under this test, " a heavy burden rests upon the party challenging [the ordinance's] constitutionality" and " '[e]very presumption will be in favor of constitutionality.'" *HJS Dev., Inc. v. Pierce County*, **148 Wn.2d 451**, 477, **61 P.3d 1141** (2003) (quoting *Lenci v. City of Seattle*, **63 Wn.2d**

664, 668, 388 P.2d 926 (1964)). " Whether an ordinance is reasonable, local, or conflicts with a general law for purposes of article XI, section 11 is purely a question of law subject to de novo review." *Weden*, 135 Wn.2d at 693.

¶ 12 The plaintiffs do not contend that the Ordinance is unreasonable or nonlocal. They contend only that MUCA is a general law in conflict with the Ordinance--i.e., that MUCA preempts the Ordinance. A state statute may preempt a local ordinance in two ways: it will " preempt[ ] an ordinance on the same subject if the statute occupies the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the statute and the ordinance may not be harmonized." *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010).

B

¶ 13 A statute preempts the field and invalidates a local ordinance within that field " if there is express legislative intent to preempt the field or if such intent is necessarily implied ... from the purpose of the statute and the facts and circumstances under which it was intended to operate." *Id.* Because MUCA has no express preemption clause, we must consider whether field preemption is implied.

¶ 14 We have recognized that when a state statute expressly provides for local jurisdiction over a subject, state

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law does not impliedly preempt the field of that subject. In *Lawson*, we held the Manufactured/Mobile Home Landlord-Tenant Act (MHLTA), chapter 59.20 RCW, did not preempt a local ordinance that prohibited recreational vehicles in mobile home parks. *Lawson*, 168 Wn.2d at 677. We reasoned **[351 P.3d 155]** that the MHLTA did not preempt the field of manufactured/mobile home regulations because " certain provisions of the MHLTA expressly contemplate some local regulation of manufactured/mobile home tenancies." *Id.* at 680. Likewise here, MUCA expressly contemplates local regulation of medical marijuana. It provides that cities and towns may adopt and enforce " any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes." RCW 69.51A.140(1). Given this express state law recognition of local jurisdiction over medical marijuana regulation, we must conclude that MUCA does not impliedly preempt the field of medical marijuana. *Lawson*, 168 Wn.2d at 680.

C

¶ 15 Under our conflict preemption precedents, a state law preempts a local ordinance " when an ordinance permits what state law forbids or forbids what state law permits." *Id.* at 682. We will find state law to preempt an ordinance only if the ordinance " 'directly and irreconcilably conflicts with the statute.'" *Id.* (internal quotation marks omitted) (quoting *HJS Dev., Inc.*, 148 Wn.2d at 482). Though the rule may be easily stated, the analysis is often nuanced. *Compare, e.g., Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 105 P.3d 985 (2005), *and Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), *with Lawson*, 168 Wn.2d 675, *and Weden*, 135 Wn.2d 678.

¶ 16 Whether MUCA conflicts with the Ordinance turns on the scope of Kent's power to zone medical

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marijuana activities under RCW 69.51A.140(1). Kent argues RCW 69.51A.140(1) authorizes the Ordinance because the Ordinance is a zoning regulation of " the production, processing, or dispensing" of medical marijuana. The plaintiffs respond that RCW 69.51A.140(1) is irrelevant to collective gardens because RCW 69.51A.140(1) applies only to " *commercial* producers, processors, or dispensaries *that would have been licensed* under the proposed regulatory scheme." Tsang's Suppl. Br. at 17. Thus, in the plaintiffs' view, MUCA irreconcilably conflicts with the Ordinance because MUCA grants a right to engage in a collective garden under RCW 69.51A.085, yet the Ordinance prohibits the same activity. Ultimately, Kent is correct. A city's zoning power under RCW 69.51A.140(1) is not limited to commercial, licensed producers. RCW 69.51A.140(1)'s plain text, and its statutory context, demonstrate that it provides local jurisdictions the authority to enact zoning requirements pertaining to the land use activity of participating in a collective garden.

¶ 17 RCW 69.51A.140(1)'s relevant text draws no distinction between commercial and noncommercial operations. Its terms are undefined, so we give them their plain and ordinary meaning. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998). The plain and ordinary meaning of RCW 69.51A.140(1)'s provision that a city may adopt zoning requirements for the " production, processing, or dispensing" of medical marijuana provides no reason to limit these concepts to only commercial activities. *See* Webster's Third New International Dictionary 653 (2002)

(defining " dispense" to include " to deal out in portions : distribute, give, provide" ; " to deal with : handle" ; and " to prepare and distribute (medicines) to the sick"); *id.* at 1808 (defining " process" to include " to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result"), 1810 (defining " produce" to include " to ... create, or bring out by intellectual or physical effort"). No doubt, these

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words can carry a commercial meaning, but they can also carry the broader meanings quoted above. Because the legislature choose to use these capacious words without providing textual limitations to them, such as " *commercial* production" or " *licensed* production," we give effect to the broad meaning of the words chosen. Someone growing medical marijuana in a collective garden " produc[es]," " process[es]," and " dispens[es]" (RCW 69.51A.140(1))

[351 P.3d 156] medical marijuana just the same as someone in a commercial operation does, albeit not to seek a profit but rather to grow, share, and use the marijuana within the small community of collective garden participants. [2]

¶ 18 Indeed, elsewhere RCW 69.51A.140(1) *does* distinguish between licensed and nonlicensed producers. In a later sentence not directly at issue here, RCW 69.51A.140(1) provides that a city's zoning requirements cannot " preclude the possibility of siting *licensed dispensers* within the jurisdiction." (Emphasis added.) Yet RCW 69.51A.140(1)'s first sentence, which is at issue in this case, makes no limitation that a city's zoning requirements pertaining to the " production, processing, or dispensing" of medical marijuana must be limited to only " licensed dispensers." Where the language of a statute differs, we presume the difference is intentional and give the difference effect. *State*

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v. Tracer, **173 Wn.2d 708, 718, 272 P.3d 199** (2012). Accordingly, the statute's first sentence is not limited to zoning requirements over only licensed producers. [3]

¶ 19 The statutory context also refutes the plaintiffs' contention that a city's zoning powers under RCW 69.51A.140(1) do not include imposing zoning requirements for collective gardens. Under MUCA, a collective garden exists when individuals " participate in collective gardens for the purpose of *producing*, *processing*, transporting, and delivering cannabis for medical use." RCW 69.51A.085(1) (emphasis added). Thus, because RCW 69.51A.140(1) authorizes a city to enact zoning requirements pertaining to the " production" and the " processing" of medical marijuana, and because collective gardens are defined to include " producing" and " processing" medical marijuana, the statutory context strongly confirms that a city's power under RCW 69.51A.140(1) is not limited to commercial or licensed producers but also includes noncommercial collective gardens. *State v. Coley*, **180 Wn.2d 543, 553, 326 P.3d 702** (2014) (noting that we must consider the context of the statute, related provisions, and the statutory scheme as a whole).

[351 P.3d 157]

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¶ 20 In sum, we reject the plaintiffs' argument that RCW 69.51A.140(1) reaches only commercial activities. Instead, this provision recognizes that a city may enact zoning requirements pertaining to all production, processing, and dispensing of medical marijuana.

¶ 21 The remaining question is whether the Ordinance is otherwise consistent with state law. Because the legislature ensured that cities **[351 P.3d 158]** have the power to adopt " zoning requirements" --but did not grant carte blanche to opt out of all medical marijuana activity--a city's ordinance under RCW 69.51A.140(1) must concern a land use. Here, the Ordinance does concern a land use. It adopts zoning requirements for " the growing, production, processing, transportation, and delivery of cannabis" in a collective garden, if seven conditions defining a collective garden are satisfied. Kent City Code 15.02.074, 15.08.290. As Kent concedes, the Ordinance does " not address personal use of medical marijuana." Suppl. Br. of City of Kent at 4. Instead, the Ordinance concerns only collective gardens wherein up to 10 individuals pool resources to grow medical marijuana in potentially large operations of up to 45 plants and 75 ounces of usable marijuana. Kent City Code 15.02.074(A)-(C). [4] Tsang reports that his collective garden is " located within leased property at the north end of ... an area zoned M1 for Industrial Park. The building is safe and secured with 24-hour video surveillance, alarm monitoring, electric striking door, and neighbors ... a private security firm." Tsang's Pet. for Review at 6. Such an operation to produce marijuana, potentially on a large scale, is a land use

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activity. Accordingly, Kent has properly exercised its authority under RCW 69.51A.140(1) to zone the land use activity involving collective gardens. The Ordinance is consistent with state law and is not preempted.[5]

III. CONCLUSION

¶ 22 Consistent with RCW 69.51A.140(1), a city may adopt zoning requirements pertaining to the land use activity of collective gardens. The Ordinance falls within this local authority and is not preempted by state law. We affirm the Court of Appeals.

Madsen, C.J., and Johnson, Owens, Fairhurst, Wiggins, Gordon McCloud, and Yu, JJ., concur.

DISSENT

Gonzá lez, J. (dissenting)

¶ 23 I agree with the majority that under the Washington State Medical Use of Cannabis Act (MUCA), chapter 69.51A RCW, " a city may enact zoning requirements pertaining to all production, processing, and dispensing of medical marijuana." Majority at 231. But while a city may regulate consistent with MUCA, it may not completely ban what the state permits. Since the majority concludes otherwise, I respectfully dissent.

¶ 24 As the majority recognizes, " state law preempts a local ordinance 'when an ordinance permits what state law forbids or forbids what state law permits.'" Majority at 227 (quoting *Lawson v. City of Pasco*, **168 Wn.2d 675, 682, 230 P.3d 1038** (2010)). The majority declines to determine whether participation in collective gardens is " 'illegal subject to an affirmative defense'" or is generally " 'legal'" under state law. Majority at 232 n.5. Instead, the majority

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holds that " [b]ecause the legislature ensured that cities have the power to adopt 'zoning requirements'--but did not grant carte blanche to opt out of all medical marijuana activity--a city's ordinance under RCW 69.51A.140(1) must concern a land use." Majority at 231. Finding that City of Kent Ordinance 4036 (June 5, 2012) (codified at Kent City Code 15.02.074, 15.08.290) (Ordinance) concerns a land use, the majority deems the Ordinance constitutional. *Id.* While the majority's sweeping analysis is logical, the simple fact is that this Ordinance " forbids what state law permits." *Lawson*, 168 Wn.2d at 682. While cities may make zoning regulations that apply to collective gardens, completely prohibiting state protections related to them, whether done directly or in the guise of a zoning regulation, goes too far.

¶ 25 In cases in which the legislature intended to allow local governments to completely prohibit activities allowed by the state, the legislature has been clear. *See, e.g., Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, **117 Wn.App. 344, 356, 71 P.3d 233** (2003) (analyzing RCW 9.46.295, which allows local governments to " absolutely prohibit" state-licensed gambling activities). Given that " '[e]very presumption will be in favor of constitutionality'" of a local ordinance, MUCA's lack of clarity on this issue is not dispositive here. *HJS Dev., Inc. v. Pierce County*, **148 Wn.2d 451, 477, 61 P.3d 1141** (2003) (quoting *Lenci v. City of Seattle*, **63 Wn.2d 664, 668, 388 P.2d 926** (1964)). A further analysis shows, however, that the Ordinance is nonetheless unconstitutional.

¶ 26 If MUCA grants a right to participate in collective gardens, the Ordinance is unconstitutional. A local ordinance is unconstitutional when state law specifically entitles one to engage in an activity prohibited by the local ordinance. *See Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, **153 Wn.2d 657, 664, 105 P.3d 985** (2005) (finding that a local ordinance imposing a complete ban on smoking was invalid because it " prohibits what is permitted by state law: the ability of certain business owners and

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lessees to designate smoking and nonsmoking locations in their establishments"); *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, **151 Wn.2d 428, 433, 90 P.3d 37** (2004) (finding that a local ordinance requiring water fluoridation " is a local regulation that prohibits what state law permits: the ability of water districts to regulate the content and supply of their water systems expressly granted to them by statute"). If MUCA provides a right for people to participate in collective gardens, the Ordinance improperly denies that right and therefore is unconstitutional.

¶ 27 I recognize that generally, when the state creates a licensing system for participation in an activity but does not provide an entitlement to engage in that activity, a local ordinance may completely prohibit that activity. " The fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998); *see Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998). [6] For example, in *State ex rel. Schillberg v. Everett District Justice Court*, we found that a county ordinance completely prohibiting the use of internal combustion motors on certain lakes in the county did not irreconcilably conflict with a state statute setting out licensing requirements for using internal combustion motors on lakes because the statute did not provide that people are entitled to use internal combustion motors on all waters of the state. 92 Wn.2d 106, 108, 594 P.2d 448 (1979). Similarly, in *Weden*, we found that a state statute setting forth license requirements for operating motorized personal watercraft did not grant the right to operate such watercraft on all waters of the state and, therefore, a county was

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able to completely prohibit the operation of such watercraft in the county. 135 Wn.2d at 694-95.

¶ 28 Unlike the licensing provisions at issue in *Schillberg* and *Weden*, however, even [351 P.3d 159] if MUCA provides only that participation in collective gardens is protected as an affirmative defense, the affirmative defense is provided to all Washington citizens and a local ordinance may not eliminate that protection. MUCA provides in relevant part that

> [a] qualifying patient or designated provider who is not registered with the registry established in section 901 of this act, but who presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis, may assert an affirmative defense to charges of violations of state law relating to cannabis ... .

RCW 69.51A.043(2) (reviser's note omitted). Clearly participation in collective gardens, addressed in RCW 69.51A.085, is one of the " violations of state law relating to cannabis" protected by an affirmative defense in RCW 69.51A.043(2).

¶ 29 The city of Kent, its city council, and its mayor (collectively Kent) argue that, as the Court of Appeals found, because medical marijuana is generally illegal under state law, a city may entirely prohibit the activity because " [w]ithout question, a municipality's plenary powers include the power to 'enact ordinances prohibiting and punishing the same acts which constitute an offense under state laws.'" *Coal. v. City of Kent*, 180 Wn.App. 455, 482, 322 P.3d 1246 (2014) (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 109, 356 P.2d 292 (1960) and citing *State v. Kirwin*, 165 Wn.2d 818, 826-27, 203 P.3d 1044 (2009)); *see* Suppl. Br. of City of Kent at 7. Neither *Schampera* nor *Kirwin* address a local ordinance that prohibits what is also an offense under state law but concurrently eliminates a state law affirmative defense. Here, Kent intends to enforce the Ordinance with criminal and civil sanctions and warned Deryck Tsang that it may " seek civil and/or criminal remedies in the courts" in relation to his collective garden, without allowing the

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MUCA affirmative defense to be raised. Clerk's Papers at 732-33; Kent City Code ch. 1.04. Furthermore, the Ordinance renders MUCA's affirmative defense to state prosecution worthless because a collective garden participant who operates illegally loses the protection of the affirmative defense and the Ordinance causes all collective garden participation in the city of Kent to be illegal. RCW 69.51A.085(3). The Court of Appeals' analysis is flawed because it overlooks that the Ordinance not only prohibits participation in collective gardens, it also eliminates a state law right to assert an affirmative defense in relation to participation in collective gardens. By eliminating the MUCA affirmative defense available to all Washington citizens, the Ordinance unconstitutionally " forbids what state law permits." *Lawson*, 168 Wn.2d at 682.

¶ 30 Kent may not eliminate protection provided by the state. Accordingly, I would reverse the Court of Appeals and I respectfully dissent.

Notes:

[1]While this appeal was pending, the legislature enacted comprehensive reform concerning the regulation of medical marijuana in Washington. Laws of 2015, ch. 70. That new law repeals the two statutory provisions at issue in this case. *See id.* § 48 (repealing RCW 69.51A.140), § 49 (repealing RCW 69.51A.085). This opinion concerns the law as it existed

prior to the 2015 enactment. All references to statutes in this opinion refer to the statutes as they existed prior to the 2015 enactment.

[2]Though vetoed by Governor Gregoire, the legislature's original bill defined " dispense," " process," and " produce" in their broadest sense. *See* Laws of 2011, ch. 181, § 201(8), (21), (23); *id.* ch. 181, at 1374 (governor's veto message). The vetoed definition of " process" (" to handle or process cannabis in preparation for medical use") and of " produce" (" to plant, grow, or harvest cannabis for medical use") plainly are not limited to a commercial context. *Id.* § 201(21), (23). And the vetoed definition of " dispense" (" the selection, measuring, packaging, labeling, delivery, or retail sale of cannabis by a licensed dispenser to a qualifying patient or designated provider") also includes various activities that occur in the noncommercial context of a collective garden, for example measuring and packaging marijuana. *Id.* § 201 (8). Moreover, its definition expressly uses " licensed dispensers" as a modifier of only *one* meaning of " dispense," not the others. *Id.* Nonetheless, we need not and cannot rely on these definitions because upon being vetoed, they " 'now mean[ ] nothing whatsoever. In exercising the veto power, the governor acts as a part of the legislative bodies, and the act is to be considered now just as it would have been if the vetoed provisions had never been written into the bill at any stage of the proceedings.'" *Hallin v. Trent*, 94 Wn.2d 671, 677, 619 P.2d 357 (1980) (quoting *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 408, 25 P.2d 91 (1933)).

[3]As Governor Gregoire noted in her veto statement, it appears true that RCW 69.51A.140(1)'s second sentence--i.e., that zoning requirements cannot preclude the possibility of licensed dispensers within the jurisdiction--is " without meaning in light of the vetoes of sections providing for such licensed dispensers." Laws of 2011, ch. 181, at 1375. Nonetheless, the governor's choice to not veto the entire section of RCW 69.51A.140 signifies that she intended the remaining portions to retain their natural effect. Contrary to the plaintiffs' view that the entirety of RCW 69.51A.140 " is an orphaned section without effect," Tsang's Suppl. Br. at 17, we will not interpret the rest of the section in a manner that renders it superfluous, *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 217, 340 P.3d 223 (2014). In other words, had Governor Gregoire intended that a local jurisdiction's zoning power cover *only* licensed operations and *not* cover nonlicensed collective gardens, she simply would have vetoed the entire section. But she did not do so, demonstrating that she intended local jurisdictions to have the power to zone nonlicensed medical marijuana land uses. Indeed, elsewhere in her veto statement, Governor Gregoire endorsed local zoning of medical marijuana. Laws of 2011, ch. 181, at 1376 (stating she remains open to new exemptions from state prosecutions, " conditioned on compliance with *local government location* and health and safety *specifications* " (emphasis added)).

[4]For example, the first condition in the Ordinance's definition of a " collective garden" is that no more than 10 qualifying patients may participate in the collective garden. Kent City Code 15.02.074(A). If 11 qualifying patients were to participate in a collective garden in the city of Kent, the Ordinance would not govern the activity. Thus, Kent correctly concedes that in scenarios where the Ordinance's definition of a " collective garden" is not met, only state law enforcement would be able to prosecute the activity (for potentially exceeding RCW 69.51A.085's authorized definition of a " collective garden"). *See* Wash. Supreme Court oral argument, *Sarich v. City of Kent*, No. 90204-6 (Feb. 24, 2015), at 24 min., 26 sec. through 25 min. 3 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://tvw.org.

[5]For the same reasons we conclude that RCW 69.51A.140(1) authorizes the Ordinance, we reject the plaintiffs' argument that RCW 69.51A.085 grants a " stand-alone" or " absolute" right to engage in a collective garden. Also given our conclusion under RCW 69.51A.140(1), we need not determine here whether medical marijuana use is " illegal subject to an affirmative defense" or is generally " legal" under state law.

[6]The *Weden* majority did not yield to the dissent's position that " [w]here a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright" because an ordinance banning the activity " renders the state permit a license to do nothing at all." *Weden*, 135 Wn.2d at 720, 722 (Sanders, J., dissenting).

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June 14, 2016

VIA Email

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Re: City of Leavenworth's Improper Attempts to Limit Vacation Rentals

Dear Mayor Farivar, City Administrator Walinski, and Leavenworth City Council:

This firm represents a coalition of homeowners and property managers that owns or manages vacation rentals ("Come Stay In Our Village Coalition") within the City of Leavenworth's jurisdiction. I am writing to outline the reasons why the City's recent efforts to ban vacation rentals are contrary to existing Washington law, and to let you know that my clients are open to discussing reasonable regulations of vacation rentals that will benefit the City, allow the many families that use Leavenworth vacation rentals to safely enjoy your wonderful city, keep the numerous individuals and business that rely on vacation rentals in business, and allow my clients to continue to use their properties for the purposes for which they were purchased.

A. The City is improperly attempting to limit individuals' use of their homes.

Washington Courts have long held that home owners have the right to rent their homes and that the rental of a home for less than a month is no different that renting a home for more than a month. The Court in *Ross v. Bennett,* 148 Wn. App. 40 (2008), expressly held that an owner's use of property as a residence, long-term rental, or short-term rental are identical. To quote the Court: "The owners' receipt of rental income either from short- or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant."

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The Washington Supreme Court in *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241 (2014), confirmed the *Bennett* rulings. The Supreme Court explained that "residential use," without more, has been "consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode." *Id. at 252,* quoting *Lowden v. Bosley,* 395 Md. 58, 909 A.2d 261, 267 (2006). The Court continued by stating that if a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is "residential, not commercial, no matter how short the rental duration." The Court rejected any argument that the receipt of money changed the nature of the property:

> The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character.

Id. at 252-53.

Washington is entirely consistent with other states on this issue. *Lowden v. Bosley*, 395 Md. 58, 909 A.2d 261, 267 (2006) (holding that as long as the property is used for living purposes, it does not cease being "residential" simply because such use is transitory rather than permanent); *see also Mullin v. Silvercreek Condo. Owner's Ass'n*, 195 S.W.3d 484, 490 (Mo. Ct. App. 2006); *Pinehaven Planning Board v. Brooks,* 138 Idaho 826, 70 P.3d 664, 667–68 (2003) (renting a property to people who used it for residential purposes, whether short or long term does not change the nature of the use); *Slaby v. Mountain River Estates Residential Ass'n,* 100 So.3d 569, 579 (Ala. Civ. App. 2012) ("[P]roperty is used for 'residential purposes' when those occupying it do so for ordinary living purposes. Thus, so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities ... they are using the [property] for residential purposes."); and *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 2015 COA 113, ¶ 18, 360 P.3d 255, 259 (2015) (using residence for ordinary living purposes does not change its function whether rented on a short term or long term basis.)

The above definitions do not apply to hotels, motels, and bed and breakfasts because those businesses do not rent space to individuals. Rather, those businesses grant guests a license. As a result, those businesses continue to have access to the rooms, there is a more limited expectation of privacy, and the guest can be removed by the sheriff for violating the terms of the license. In contrast, a person renting a house for a day or a year can only be removed by following the procedures outlined in the Residential Landlord-Tenant Act. RCW 59.18.

1. Short term rentals are allowed in Leavenworth's Residential and Multifamily Residential Districts.

Leavenworth allows rentals within Residential and Multifamily districts. As a result, rentals of less than a month are also allowed within those districts. This is the issue that was decided by the

Washington Courts in *Bennett* and *Chiwawa*. This makes sense as there is no rational basis on which to distinguish between a home that is rented for 29 days and one that is rented for 31 days. Both homes will be used to eat, sleep, prepare food, rest, and enjoy family time. While the complaint is often heard that vacation rentals have more noise issues, parking issues, and garbage issues, there is no evidentiary basis to support these assertions. I encourage you to ask the sheriff providing services to Leavenworth whether he or she is concerned with vacation rentals, and furthermore whether vacation rentals require a higher level of enforcement activity than do other residential uses such as long-term rentals.[1] And I further request that you ask to to see the evidence that forms the basis of the opinion if the sheriff or anyone else cites concerns.

Based on the above, my clients request that the City cease and desist attempting to prohibit vacation rentals in multifamily and residential districts. For example, see the letter dated May 13, 2016 to the Ahrens. While I understand the Ahrens have resolved their issue, I provide this as an example. And the phone calls being made by the planning department to vacation rental owners.

If the City assesses fines against vacation rental owners or operators, or takes other steps to try to prohibit vacation rentals within multifamily and residential districts, my clients will be forced to contest that action in court. When my clients prevail, they will seek to recover their costs and attorney fees as the enforcement of the restrictions would violate their constitutional rights. *Robinson v. City of Seattle,* 119 Wn.2d 34 (1992); and *Norquest/RCA-W Bitter Lake Partnership v. City of Seattle,* 72 Wn. App. 467 (1994).

B. My clients are open to reasonable regulations and want to cooperate with the City in drafting and implementing such regulations.

Vacation rentals provide hundreds of thousands of dollars to Leavenworth's annual economy. Vacation rentals cater to a segment of tourism that is different and generally not serviced by the hotel and bed-and-breakfast industry. Vacation rentals cater to families wanting to enjoy one house together. These can be family reunions or core nuclear families. They do not want to stay in a hotel generally as hotels do not provide the familiar setting of a home. Hotels also do not allow guests to prepare meals and the types of family activities that are available when gathered in a home. If vacation rentals are not available in Leavenworth, the families will visit somewhere else. They generally will not switch to a hotel in Leavenworth.

The families staying in vacation rentals spend hundreds of thousands of dollars in the local economy each year. They shop at the local grocery store for their food. They take their families on white-water trips and local tours. They shop for souvenirs, clothes, and sporting equipment. And while they enjoy cooking at the house, they also regularly eat at local restaurants. In addition, the owners of vacation rentals employ maid services, hot tub/pool services, and handyman services to maintain their properties. Restricting vacation rentals to a commercial zone will eliminate the vast majority of vacation rentals. This will result in Leavenworth losing tens of thousands of dollars in tourism dollars annually, many small business suffering significant lost income and closing their doors, and the City losing an opportunity for this significant and regular source of income.

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[1] While my clients take every step possible to make sure their guests are respectful and lawful, unfortunately at times guests are not that way. But those guests are gone relatively soon. In contrast, Leavenworth citizens that rent to people for a year also on occasion rent to irresponsible people. In contrast, those renters will be in the city for a year or more.

The City should not ban vacation rentals. Rather, my clients believe that properly regulated vacation rentals can be a steady source of income for the City, a safe place for families to enjoy Leavenworth and all it has to offer, and a contribute to a diverse neighborhood. Many municipalities enjoy income from vacation rentals while implementing reasonable regulations such as requiring local individuals be responsible for interacting with guests, providing notices to guests regarding noise and parking regulations, and registering with the city to ensure collection of taxes and compliance with the regulations.

We encourage you the join the U.S. Conference of Mayors and the State of Arizona in embracing vacation rentals as a contributing and vital part of a city's tourism package. I am attaching the resolution of the US Conference of Mayors. Please let me know if you would like to discuss vacation regulations. As I said, my clients would be happy to be involved in that process.

Sincerely,

CARSON & NOEL PLLC

Wright A. Noel

cc: Clients

US Conference of Mayor Resolution

PROMOTION OF ECONOMIC DEVELOPMENT THROUGH THE VISITORS INDUSTRY

WHEREAS, communities throughout the United States rely on local hotel taxes to promote travel and tourism and support the local visitors industry; and

WHEREAS, local hotel taxes often fund convention and visitors bureaus, convention centers, sports arenas and sports teams; and

WHEREAS, local hotel taxes often support local cultural programs including music, film, gaming, visual arts, dance and more; and

WHEREAS, short-term rental of homes can often be subject to hotel taxes; and

WHEREAS, short-term rental of homes can provide a flexible housing stock that allows family travelers spending longer periods of time in a community a safe accommodation while contributing to the local economy; and

WHEREAS, short-term rental of homes can provide homeowners an opportunity to hold property as an investment, for a better sales market, or for future planning; and

WHEREAS, fair regulation of short-term rentals ensures greater compliance and greater receipt of local hotel taxes; and

WHEREAS, regulations of short-term rentals that establish a reliable way for a municipality to identify and contact the short-term rental owner, make the tax collection and remittance obligation clear and treat the short-term rental owner the same as long-term rental owners can achieve the highest level of compliance; and

WHEREAS, onerous regulations of short-term rentals can drive the industry underground, thus evading local regulations and local hotel taxes;

NOW, THEREFORE, BE IT RESOLVED, that the U.S. Conference of Mayors urges support for economic development opportunities through

the visitors industry by encouraging regulations of the short-term rental industry that (1) establish a reliable way for the municipality to identify and contact the short-term rental owner; (2) make the tax collection and remittance obligations clear to the short-term rental owner; and (3) treat short-term rental tenants the same as long-term rental tenants. Regulations that accomplish all three can achieve a high level of compliance, and are highly effective.

148 Wn.App. 40 (Wash.App. Div. 1 2008), 61414-2, Ross v. Bennett /**/ div.c1 {text-align: center} /**/

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148 Wn.App. 40 (Wash.App. Div. 1 2008)

203 P.3d 383

Marilyn ROSS and Robert Schwartzberg, husband and wife, Respondent/Cross-Appellant,

v.

Mark BENNETT, a single man, Appellant/Cross-Respondent.

No. 61414-2-I.

Court of Appeals of Washington, Division 1.

December 29, 2008

As Amended Jan. 27, 2009.

[203 P.3d 384]

Wright A. Noel, 5tacy Goodman, Carson & Noel PLLC, Issaquah, WA, for Appellant/Cross-Respondent.

Donald E. Eaton, Attorney at Law, Friday Harbor, WA, for Respondent/Cross-Appellant.

APPELWICK, J.

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¶ 1 A restrictive covenant requires homes in Cattle Point Estates, a subdivision on San Juan Island, Washington, to be used for " residence purposes only." Residential purposes explicitly allows for tenants. No provision explicitly restricts the duration of the tenancy. We hold that short-term rental of the property for residential purposes is not prohibited. We reverse.

FACTS

¶ 2 In 1997 Marilyn Ross and Robert Schwartzberg, a married couple, bought a house in Cattle Point Estates (" CPE"), located on San Juan Island. Mark Bennett purchased property in CPE in March 2004.

¶ 3 Both properties are subject to the protective covenants and restrictions of CPE (" CPE Covenant"). For purposes of this appeal, the CPE Covenant contains two

Page 44

pertinent provisions. Article II, section 2 limits use such that " [a]ll parcels within said property shall be used for residence purposes only and only one single family residence may be erected on each such parcel." Article VI, section 3 of the covenant also provides that " [a]ny member may delegate, in accordance with the By-Laws [sic], his right of enjoyment to the common areas and facilities to the members of his family, friends and tenants."

¶ 4 In 2002, the CPE Owners Association issued a transient rentals policy stating that a lease/rental shall not be for a period of less **[203 P.3d 385]** than 30 days. On June 21, 2004, Bennett applied to San Juan County for a conditional use permit, proposing that the property be used as a vacation rental property, with stays of less than 30 days. Ross and Schwartzberg submitted a letter opposing the permit request. The County granted Bennett's conditional use permit application.

¶ 5 From 2004-2006, Bennett rented the property four times, deriving $1,150 in total rental

revenue. In order to rent his property, Bennett registered with the Washington State Department of Revenue. The Department of Revenue lists Bennett as sole proprietor of a business located at 33 Pond Pl., Friday Harbor, WA 98250, the address of his CPE home. The database lists the business type as " 721199," which corresponds to " All Other Traveler Accommodation." The record indicates that Bennett paid excise taxes to the Department of Revenue for rental income. But, the State waived collecting any tax, because he only rented twice in 2005.

¶ 6 The record also indicates that other owners in CPE rented their property for periods lasting less than 30 days. For example, in 1996 or 1997, prior to buying a home, Ross and Schwartzberg rented a home in the community for one week. In August 2006, at least two of the homes were being used as rentals. In addition to home rentals, at least two property owners worked from home.

¶ 7 On May 25, 2007, the Ross' filed a complaint in the Superior Court for San Juan County seeking declaratory

and injunctive relief to prevent Bennett from renting his property for less than 30 days. Bennett answered, arguing that rentals were permissible.

¶ 8 On October 10, 2007, Bennett moved for summary judgment, which was supported by the declaration of Glenn A. Wahlbrink.

¶ 9 The trial court found that Bennett's lot, number 18, is subject to the CPE Covenant. Further, the court found the CPE Covenant limits the use of all lots to residential use. The trial court also found that Bennett used his property to generate income by renting to persons for less than 30 days. It concluded that rentals for less than 30 days constituted a business use not a residential use; and all business uses of property in CPE, including rentals of less than 30 days, are violations of the covenant. The trial court then permanently enjoined Bennett from renting his property in CPE for periods of time less than 30 days. Bennett appeals the summary judgment ruling.

¶ 10 The trial court also made several evidentiary rulings. First, it granted Bennett's motion to strike portions of both Ross and Schwartzberg's declarations, because they contained inadmissible hearsay, irrelevant and prejudicial information, and legal opinion. Second, the trial court granted Ross and Schwartzberg's motion in limine regarding the Wahlbrink declaration, because it contained inadmissible evidence of the covenant drafter's subjective intent. The parties appeal these evidentiary rulings.

DISCUSSION

I. *Admissibility of Declarations*

¶ 11 An appellate court reviews a trial court's evidentiary ruling made in conjunction with a summary judgment motion de novo. *Warner v. Regent Assisted Living,* 132 Wash.App 126, 135, 130 P.3d 865 (2006); *Folsom v. Burger King,* 135 Wash.2d 658, 663, 958 P.2d 301 (1998); *Seybold v. Neu,* 105 Wash.App. 666, 678, 19 P.3d 1068 (2001).

¶ 12 In construing a covenant, the primary task of a court is to determine the drafter's intent.

Extrinsic evidence is admissible " to determine the meaning of [the] specific words and terms used in the covenants." *Hollis v. Garwall, Inc.,* 137 Wash.2d 683, 696, 974 P.2d 836 (1999). " Only in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances." *Mountain Park Homeowners Ass'n, Inc. v. Tydings,* 125 Wash.2d 337, 344, 883 P.2d 1383 (1994). However, admissible extrinsic evidence does not include: 1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; 2) evidence that would show an intention independent of the instrument; or 3) evidence that would vary, contradict or modify the written word. *Hollis,* 137 Wash.2d at 695, 974 P.2d 836; *See also* **[203 P.3d 386]** *In re Marriage of Schweitzer,* 132 Wash.2d 318, 326-27, 937 P.2d 1062 (1997); *U.S. Life Credit Life Ins. Co. v. Williams,* 129 Wash.2d 565, 569-70, 919 P.2d 594 (1996); *Nationwide Mut. Fire Ins. Co.,* 120 Wash.2d 178, 189, 840 P.2d 851 (1992).

A. *Wahlbrink Declaration*

¶ 13 Bennett offered the declaration of Glenn Wahlbrink in support of his motion for summary judgment. On appeal, he claims the trial court erred when it granted Ross and Schwartzberg's motion in limine to exclude the Wahlbrink declaration. He argues that the Wahlbrink declaration is admissible evidence of the circumstances when the covenant was drafted.

¶ 14 The Wahlbrink declaration contained the following:

1. I am over the age of 18 and competent to testify to the following facts based on my personal knowledge. 2. I was one of the original owners and developers of the real property on San Juan Island that is now known as Cattle Point Estates. The other original owners were all my relatives. 3. As the developers of the property we drafted protective covenants that would apply to all of the lots in Cattle Point Estates. Those restrictive covenants are attached hereto as Exhibit A.

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4. I remember the discussions regarding what we as the developers were concerned with and what we were trying to prevent when we adopted the restricted covenants. 5. Any activities that the drafters were concerned about prohibiting on the lots, was specifically addressed in the restrictive covenants. 6. When we drafted the restrictive covenants drafted [sic] one of our primary concerns was with regard to people using camping trailers and other mobile structures on their lots. That issue was addressed in paragraph 11 of Section II. 7. It is my understanding that one of the issues in the above captioned case is whether the restrictive covenants prohibit lot owners from renting their homes out on a short term basis. 8. The restrictions in paragraph 2 of Section II were not intended to prohibit summer rentals. The restriction for residence purposes only was intended to prohibit brick and mortar business from being run from one of the lots in Cattle Point Estates. 9. When the covenants were signed in 1978 the drafters were aware of the summer or short term rental issue. At that time property on the island was being rented for less than 30 days particularly in the summer for vacationers. We did not intent [sic] to prohibit such rentals when we drafted the covenants. 10. In fact we modeled the restrictive covenants after covenants in neighboring community established by friends. Those friends were at that time renting out property in their community for vacation rentals. 11. We never discussed prohibiting summer or short term rentals. 12. We would not have wanted to prohibit such rentals as it would have decreased the

marketability of the lots. It was anticipated that people might want to buy the lots as vacation homes and then rent them out when they were not occupying the homes. 13. We specifically anticipated people renting their homes within Cattle Point Estates as vacation or long term rentals. Because we anticipated owners renting their

Page 48

property to vacation renters, we included ' tenants' as individuals that were entitled to use the common areas and facilities of Cattle Point Estates.

¶ 15 We agree with the trial court that paragraphs 4, 5, 6, 8, 12, 13 are inadmissible statements of subjective intent, prohibited under *Hollis.* 137 Wash.2d at 696, 974 P.2d 836. Likewise, we hold that the last sentence in paragraph 9 is subjective evidence of intent. We conclude, however, that the trial court erred in excluding paragraphs 1, 2, 3, 7, 10, 11, and the first two sentences **[203 P.3d 387]** of paragraph 9. These portions of the declaration are admissible evidence of the context in which the covenant was formed or admissible statements about the current case.

B. *Ross Declaration*

¶ 16 Ross and Schwartzberg claim the court erred when it struck portions of the Ross declaration. Paragraph 7 of the Ross declaration was excluded, because it included unauthenticated documents. Indeed, exhibit A, which the paragraph references includes two letters to a government agency. These letters are uncertified. The trial court did not *err* in excluding this portion of the declaration.

¶ 17 Paragraphs 8-15 were excluded because they contained legal opinion, were irrelevant, and prejudicial. Indeed, Ross describes her own involvement with the CPE Association including her own understandings about the covenant's restrictions. Ross argues that it shows the CPE Association actively resisted short term rentals. But, the declaration speaks of Ross' own involvement, not that of the board more generally. The trial court did not err in striking those portions of the declaration.

C. *Bornholdt Declaration*

¶ 18 Ross and Schwartzberg argue that the trial court abused its discretion when it granted Bennett's motion to strike portions of the Bornholdt declaration. Bornholdt was a member of the CPE Association Board. In his declaration,

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Bornholdt recalls that the board passed a policy on rentals, which was not intended to change or modify the CPE Covenant. Additionally, the Bornholdt declaration refers to conversations between board members about the legal effect of the CPE Covenant. The trial court did not err in holding the content to include inadmissible hearsay.

II. *Covenant*

¶ 19 A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). The burden is on the moving party to show there is no genuine issue of material fact. *Vallandigham v. Clover Park School Dist. No. 400,* 154 Wash.2d 16, 26, 109 P.3d 805 (2005). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Atherton*

Condo. Apartment-Owners Ass'n Board of Directors v. Blume Dev. Co., 115 Wash.2d 506, 516, 799 P.2d 250 (1990). " If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Id.* Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. *Vallandigham,* 154 Wash.2d at 26, 109 P.3d 805. This court reviews a trial court's summary judgment order de novo. *Folsom v. Burger King,* 135 Wash.2d at 663, 958 P.2d 301.

¶ 20 When we construe restrictive covenants, our primary task is to determine the drafter's intent. *Wimberly v. Caravello,* 136 Wash.App. 327, 336, 149 P.3d 402 (2006). While interpretation of the covenant is a question of law, the drafter's intent is a question of fact. *Id.* We examine the language of the covenant and consider the instrument in its entirety. *Bauman v. Turpen,* 139 Wash.App. 78, 89, 160 P.3d 1050 (2007). We review questions of law de novo. *Bauman* 139 Wash.App. at 86, 160 P.3d 1050. Questions of fact are reviewed for substantial evidence. *Bauman,* 139 Wash.App. at 87, 160 P.3d 1050. But where reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.

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Owen v. Burlington N. and Santa Fe R.R. Co., 153 Wash.2d 780, 788, 108 P.3d 1220 (2005).

¶ 21 Historically, Washington courts have also held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land. *Burton v. Douglas County,* 65 Wash.2d 619, 622, 399 P.2d 68 (1965). But, in conflicts between homeowners as to interpretation of restrictive covenants, courts should place special emphasis on arriving at an interpretation that protects homeowners' collective interest. *Lakes at Mercer Island Homeowners Ass'n v. Witrak,* 61 Wash.App. 177, 181, 810 P.2d 27(1991).

[203 P.3d 388] ¶ 22 Bennett argues that the trial court erred in granting summary judgment and enjoining his short-term rental of his house when it concluded that rentals of less than 30 days are business uses, not residential uses, which are prohibited under the CPE restrictive covenant. The trial court found " [s]aid Protective Covenants and Restrictions limit the use of all lots in Cattle Point Estates to residential purposes only." Having found that the covenant prohibits non-residential/commercial uses, the trial court considered whether Bennett's use of the property was commercial or residential in nature. It concluded that " [r]entals for periods of less than Thirty (30) days constitute a business use and not a residential use." Further, " [a]ll business uses of property in Cattle Point Estates, including rentals for periods of less than Thirty (30) days, are a violation of the Protective Covenant and Restrictions of Cattle Point Estates." Bennett contends that because the CPE Covenant expressly allows for rentals, a rental for any period of time is permissible.

¶ 23 Ross and Schwartzberg acknowledge that the CPE Covenant permits a homeowner to rent his or her property for use as a residence. But, they contend that a critical distinction exists between a homeowner renting a home for

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long term use as a residence and as short-term vacation rental business used to generate income.

¶ 24 Ross and Schwartzberg argue that the term " residential" or " residence purposes" in a restrictive covenant prohibits any business use. *Metzner v. Wojdyla,* 125 Wash.2d 445, 886 P.2d

154 (1994) (operation of licensed child daycare facility violated covenants restricting use of property to residential purposes only); *Mains Farm Homeowners Ass'n v. Worthington,* 121 Wash.2d 810, 854 P.2d 1072 (1993) (for profit adult family home violated covenant stating " lots ... shall be used for single family residential purposes only" due to the commercial nature of the use); *Hagemann v. Worth,* 56 Wash.App. 85, 91, 782 P.2d 1072 (1989) (defendant was enjoined from operating a business providing foster care to elderly people on property when restrictive covenant prohibited " business, industry or commercial enterprise of any kind or nature"). The cases cited by Ross and Schwartzberg, do not compel this court to conclude that a vacation rental is a business use. Bennett proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant.

¶ 25 Second, Ross and Schwartzberg argue that vacation rentals are businesses, subject to State excise tax. We disagree that because vacation rentals, unlike long-term rentals, are subject to excise tax, they are prohibited by the CPE Covenant. Ross and Schwartzberg fail to establish that Washington business classifications for tax purposes were relied on by the drafters of the covenant. Likewise, whether the short-term rental is subject to state tax does not alter the nature of the use. We decline to read a distinction between long and short-term rentals into the CPE Covenant, where none expressly exists.

¶ 26 We agree with Bennett that the trial court erred in finding that short-term vacation rentals were prohibited by

the CPE Covenant. On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status. This is consistent both with the evidence of context and with preserving the free use of the land.

¶ 27 We reverse the trial court's order granting summary judgment to Ross and Schwartzberg and remand for entry of judgment in favor of Bennett.

WE CONCUR: SCHINDLER, C.J., and BECKER, J.

180 Wn.2d 241 (Wash. 2014), 86870-1, Wilkinson v. Chiwawa Communities Ass'n /**/ div.c1 {text-align: center} /**/

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180 Wn.2d 241 (Wash. 2014)

327 P.3d 614

Ross Wilkinson et al., Respondents,

v.

Chiwawa Communities Association, Appellant

No. 86870-1

Supreme Court of Washington, En Banc

April 17, 2014

Argued March 19, 2013.

[327 P.3d 615]

Philip A. Talmadge (of *Talmadge / Fitzpatrick*); *Yen B. Lam* (of *Galvin Realty Law Group*); and *Emmelyn Hart* (of *Lewis Brisbois Bisgaard & Smith LLP*), for appellant.

Dennis W. Jordan, for respondents.

Leslie J. Garrison on behalf of Gold Beach Community Club, amicus curiae.

AUTHOR: Justice Debra L. Stephens. WE CONCUR: Justice Charles W. Johnson, Justice Mary E. Fairhurst, Justice James M. Johnson, Justice Steven C. González. AUTHOR: Chief Justice Barbara A. Madsen. AUTHOR: Justice Sheryl Gordon McCloud. WE CONCUR: Justice Susan Owens, Justice Charles K. Wiggins.

OPINION

[327 P.3d 616]

Stephens, J.

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¶ 1 Chiwawa Communities Association (Association) appeals the trial court's grant of summary

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judgment to owners of homes in the Chiwawa River Pines community. Respondents Ross and Cindy Wilkinson et al. asked the trial court to invalidate a 2011 amendment to the community covenants prohibiting rental of their homes for less than 30 days. We must decide if short-term vacation rentals conflict with the covenants in place prior to 2011, if the Association validly amended the covenants to prohibit them, and if the trial court erred by striking portions of the offered evidence. We hold short-term rentals do not violate the covenants barring commercial use of the property or restricting lots to single-family residential use. We also hold the Association exceeded its power to amend the covenants when it prohibited short-term vacation rentals in 2011, and the trial court did not err by granting in part motions brought by the Wilkinsons to strike evidence. Accordingly, we affirm the trial court. [1]

FACTS

¶ 2 Chiwawa River Pines (Chiwawa) is a planned residential community located in **[327 P.3d 617]** Chelan County. Clerk's Papers (CP) at 54-55. The community is comprised of a mix of permanent and vacation residents. CP at 134.

¶ **3** As developer Pope & Talbot Inc. completed each of the development's six phases, it recorded a separate set of covenants that purported to establish a " general plan of

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development" for the community. *See, e.g.*, CP at 55. Under the Pope & Talbot covenants, ownership of the property in Chiwawa automatically carries a right of membership in the Association. CP at 63, 67, 72, 75, 78. In 1988, a majority of the Association's members voted to consolidate the Pope & Talbot covenants into a single set of covenants governing all six phases of the development (1988 covenants). CP at 178, 186. The 1988 covenants preserved much from the earlier Pope & Talbot covenants, including the right of membership in the Association for all landowners, CP at 84, and the power " to change these protective restrictions and covenants in whole or in part" by majority vote, CP at 83. The 1988 covenants also carried over earlier restrictions on construction and land use from phases three through six, CP at 55-57, and restrictions on signage from phase two, *compare* CP at 63-64, *with* CP at 82. In 1992, the Association voted to eliminate the clause permitting construction of " one guest cottage" on Chiwawa lots, *compare* CP at 81, *with* CP at 85, but made no other material amendments. Thus, the resultant 1988/1992 covenants provide in pertinent part:

4. LAND USE. Lots shall be utilized solely for *single family residential use consisting of single residential dwelling* and such out-buildings (garage, patio structure), as consistent with permanent or recreational residence. All habitable structures must be located not nearer than 20 feet to the front lot line. Structures shall be of new construction and shall not be commenced until building permit of appropriate public body is obtained. ... 5. NUISANCE OR OFFENSIVE USE. No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, *nor shall any lot be utilized for industrial or commercial use* (excepting only appropriate real estate sale signs in sale of lots, grantor further reserving to itself, its successors and assigns, the right to operate a conventional real estate sales or agency office upon an unsold lot within such plat), nor as a dump, nor shall there be kept animals or stock of any kind other than conventional, domestic pets with the

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exception of horses, etc. stabled on the lot for short-term recreational activities complying with non-road usage in Chiwawa River Pines, except for entrance and exit. Lot owners retaining animals must confine their animals from wandering off the lot and must maintain cleanliness of grounds to eliminate animal offensive wastes, odors, flies, etc. at all times. ... 6. TRASH DISPOSAL. ... No sign of any kind shall be displayed to the public view on any lot, tract or subdivision thereof in the plat, except one sign of not more than 3 feet square giving the names of the occupants of the lot, tract, or approved subdivision thereof, and *one sign of not more than 6 square feet advertising the property for sale or rent* .

CP at 85-86 (emphasis added). The 1988/1992 covenants remained unchanged until the Association sought to amend them in 2008 and again in 2011 to prohibit short-term rentals.

¶ **4** Chiwawa residents have rented their homes to unrelated persons on a short-term, for-profit basis for decades without controversy. [2] CP at 59. However, as the number of homes available for short-term rental and the frequency of rentals increased, the Association noted rising concerns

among members about vacation rentals. CP at 655, 689.

¶ 5 In response to member complaints, in 2007 the Association distributed a survey to gauge interest in barring what it characterized as

[327 P.3d 618] " nightly rentals." CP at 135. A majority favored such a prohibition and, in September 2008, voted to bar all rentals of less than six months as prohibited commercial uses. CP at 135-36.

¶ 6 In a predecessor case, Ross and Cindy Wilkinson and other homeowners (collectively Wilkinsons) successfully challenged the 2008 amendment in superior court. *Wilkinson v. Chiwawa Cmtys. Ass'n*, noted at 162 Wn.App. 1005. The trial court granted

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summary judgment in their favor, declaring the prohibition on rentals invalid and unenforceable. *Id* . at *8. The trial court also fashioned sua sponte a new covenant that barred rentals of less than one month in duration. *Id.* at *12. The Wilkinsons successfully appealed this judicial rewriting. *Id.* at *13-14. The Court of Appeals held that the trial court lacked authority to rewrite the covenants except on motion, and approved, in dicta, the trial court's invalidation of the 2008 amendment. *Id.* at *12-14. No review of the decision was sought in this court.

¶ 7 Shortly after the Court of Appeals issued its decision, a majority of the Association again voted to amend the covenants, this time to prohibit rentals " for less than one month[or] 30 continuous days." CP at 160-61, 173, 175 (2011 amendment). The Wilkinsons again filed suit in superior court to invalidate the 2011 rental restriction. CP at 3, 60-61. Both sides moved for summary judgment, CP at 88, 442; and the Wilkinsons additionally moved to strike portions of the evidence offered by the Association in support of its motion, CP at 906-07, 1077-80.

¶ 8 The trial court granted the Wilkinsons' motion for summary judgment in full, holding the 2011 bar on short-term rentals invalid and unenforceable. CP at 1087-89; Verbatim Report of Proceedings (Dec. 15, 2011) (1 VRP) at 34-35. The court concluded that the Pope & Talbot and 1988/1992 covenants " contemplated that there could be rentals" and that " [t]here were no limitations on those rentals." 1 VRP at 34. The trial court granted the Wilkinsons' motion for summary judgment, holding the 2011 amendment was invalid. 1 VRP at 35. The trial court rejected the Association's arguments that residential rentals of any duration are a " commercial" use of land and that renting a home to unrelated persons violates the single-family residential use covenant. *See* CP at 1087-89; 1 VRP at 35-37. The court also granted the Wilkinsons' evidentiary motions in part, striking comments from the 2007 member survey and portions of declarations by three Chiwawa residents. CP at 1101-02; 1 VRP at 35-36.

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¶ 9 The Association sought direct review in this court under RAP 4.2(a)(3) and (4). *See* Statement of Grounds for Direct Review at 14. The Association argues that the trial court wrongly ruled that short-term vacation rentals are consistent with single-family residential uses, that a majority of Chiwawa homeowners cannot amend the governing covenants to prohibit short-term vacation rentals, and that the 2007 survey and testimony from several homeowners were inadmissible. Br. of Appellant at 13-15. This court accepted direct review. Order, No. 86870-1 (Wash. Oct. 9, 2012).

ANALYSIS

¶ 10 We review a trial court's order on cross motions for summary judgment and related evidentiary rulings de novo. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). We will affirm the trial court's order granting summary judgment " if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011); CR 56(c). " Here, the parties largely agree[ ] on the material facts." Br. of Appellant at 15 n.7.

I. Vacation Rentals Are Not Commercial Uses and Are Consistent with Single-Family Residential Use Provisions

¶ 11 The Association argues that short-term vacation rentals are inconsistent with **[327 P.3d 619]** the governing restrictive covenants prohibiting commercial use and restricting lots to single-family residential use. *See id.* at 13. We disagree.

¶ 12 Interpretation of a restrictive covenant presents a question of law. *Wimberly v. Caravello*, 136 Wn.App. 327, 336, 149 P.3d 402 (2006). We apply the rules of contract interpretation. *Id.* While Washington courts once strictly construed covenants in favor of the free use of land, we no

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longer apply this rule where the dispute is between homeowners who are jointly governed by the covenants. *Riss v. Angel*, 131 Wn.2d 612, 621-24, 934 P.2d 669 (1997). This change in approach was driven by the recognition that " '[s]ubdivision covenants tend to enhance, not inhibit, the efficient use of land.'" *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993) (quoting Robert D. Brussack, *Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 Ga. L. Rev. 33, 42 (1981); *see also Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn.App. 665, 683, 151 P.3d 1038 (2007). Rather than place a thumb on the scales in favor of the free use of land, " [t]he court's goal is to ascertain and give effect to those purposes intended by the covenants." *Riss*, 131 Wn.2d at 623. Courts " place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'" *Id.* at 623-24 (quoting *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn.App. 177, 181, 810 P.2d 27 (1991)).

¶ 13 Thus, our primary objective in contract interpretation is determining the drafter's intent. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999); *Riss*, 131 Wn.2d at 623; *Mains Farm*, 121 Wn.2d at 815. " While interpretation of the covenant is a question of law, the drafter's intent is a question of fact." *Ross v. Bennett*, 148 Wn.App. 40, 49, 203 P.3d 383 (2008) (citing *Wimberly*, 136 Wn.App. at 336). " But where reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Id.* at 49-50 (citing *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005)). In determining the drafter's intent, we give covenant language " its ordinary and common use" and will not construe a term in such a way " so as to defeat its plain and obvious meaning." *Mains Farm*, 121 Wn.2d at 816; *Riss*, 131 Wn.2d at 623. We examine the language of the restrictive covenant and consider the instrument in its entirety. *Hollis*, 137 Wn.2d at 694 (quoting *Mountain Park Homeowners*

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Ass'n v. Tydings, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)); *Wimberly*, 136 Wn.App. at 336. The lack of an express term with the inclusion of other similar terms is evidence of the drafters' intent. *See Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965). " Extrinsic evidence is ... used to illuminate what was written, not what was intended to be written." *Hollis*, 137 Wn.2d at 697. We, however, do not consider extrinsic " [e]vidence that would vary, contradict or modify the written word" or " show an intention independent of the instrument." *Id.* at 695.

¶ 14 As the text of the Chiwawa covenants demonstrates, the drafters included detailed provisions outlining what residents cannot do. From this it is evident that had the drafters wanted to prohibit rentals of a particular duration, they would have done so. The 1988/1992 covenants specify the rights and duties of Chiwawa residents in painstaking detail, spelling out, inter alia, the animals residents may keep, the minimum distance houses must be set back from the front lot line, the size of name signs residents may display, and their authority to bring enforcement actions. *See* CP at 81-82, 85-86. Most apparently, the drafters specifically anticipated and permitted rentals when they restricted the size of rental signs residents could hang. CP at 82, 86. Indeed, the limit on rental signage proves not just that the Pope & Talbot and 1988/1992 covenants allow some rentals but that the drafters anticipated rentals and consciously decided not to limit their duration, restricting just the appearance of rental signs.

[327 P.3d 620] **¶ 15** The dissent argues that the restriction on rental signage merely establishes that the drafters intended to permit some rental activity and that it remains a question of fact to determine, based on extrinsic evidence, whether the drafters contemplated long-term or transient rentals, or both. Dissent (Gordon McCloud, J.) at 273-74, 275 n.13, 276-77. This argument misapprehends Washington law. While extrinsic evidence can be " used to illuminate what was written," *Hollis*, 137 Wn.2d at 697, it cannot be

used to " show an intention independent of the instrument." *Id.* at 695. Had the covenants expressed a durational limitation, such as specifying long-term rentals, then extrinsic evidence would be admissible to elucidate the meaning of the word " long-term." *See Bauman v. Turpen*, 139 Wn.App. 78, 90, 160 P.3d 1050 (2007) (permitting extrinsic evidence to clarify the meaning of the term " one story"); *Wimberly*, 136 Wn.App. at 331, 337 (permitting extrinsic evidence to clarify the phrase " simple, well-proportioned structures"); *Day v. Santorsola*, 118 Wn.App. 746, 750, 758, 76 P.3d 1190 (2003) (considering extrinsic evidence to determine whether a covenant that restricted homes to two stories addressed height as opposed to view). Such was the circumstance in all the cases that the dissent relies upon as support that we should admit extrinsic evidence in this instance. *See* dissent (Gordon McCloud, J.) at 276 n.15. Despite the dissent's belief, silence as to duration does not create ambiguity. *Id.* at 273-74. " 'It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.'" *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

¶ 16 Based on the drafters' detailed discussion about what Chiwawa homeowners could not do, their clear expression that rentals were permissible uses, and the absence of any durational restriction on such rentals, reasonable minds could reach but one conclusion--that the drafters

intended to permit rentals without any durational limitation. It was therefore proper for the trial court to determine the issue of the drafter's intent as a matter of law.

¶ 17 Not only is it manifestly clear that the drafters intended to permit vacation rentals without any durational limitation, such rentals are consistent with the prohibition on commercial use. If a vacation renter uses a home " for the purposes of eating, sleeping, and other residential purposes," this use is residential, not commercial, no matter how short the rental duration. *Ross*, 148 Wn.App. at 51-52

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(holding rental use was residential not commercial because such use " is identical to [the homeowner's] use of the property, as a residence, or the use made by a long-term tenant"). " The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant." *Id.* at 51. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character. *See id* . (determining that " whether the short-term rental is subject to state tax does not alter the nature of the use").

¶ 18 The Association argues that we created in *Mains Farm* and reaffirmed in *Metzner v. Wojdyla*, 125 Wn.2d 445, 866 P.2d 154 (1994), " a bright line rule ... that prohibits *any* commercial or business use of a property subject to a residential use restriction." Reply Br. of Appellant at 7-8. The Association reads these cases too broadly. In *Mains Farm*, " [w]e caution[ed] that the interpretation of a particular covenant is largely dependent upon the facts of the case at hand." 121 Wn.2d at 827. We held the operation of an adult family home violated a covenant restricting use to " 'single family residential purposes only'" because it was " 'more institutional in nature than ... familial'" ; " '[t]he single-family residential nature of defendant's use of her home [was] destroyed by the elements of commercialism and around-the-clock care.'" *Id.* at 813, 821 (emphasis omitted). Similarly, in *Metzner*, we held the operation of a child day care violated a provision requiring properties " 'be used for residential purposes only'" because it involved **[327 P.3d 621]** the exchange of money for care of persons unrelated to the homeowner. 125 Wn.2d at 447, 451 (emphasis omitted).

¶ 19 The Wilkinsons' short-term rental of their properties is distinguishable from the commercial uses in *Mains Farm* and *Metzner* . Both the operations in *Mains Farm* and *Metzner* provided some form of on-site service that the Wilkinsons do not provide to their guests. Thus, the Wilkinsons'

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short-term rentals do not, without more, violate the 1988/1992 covenant prohibiting commercial use. [3]

¶ 20 Nor does the 1988/1992 covenants' " single family residential use" restriction limit to whom vacation rentals may be rented. Reading the restriction, as the Association does, to prohibit unrelated persons from residing within Chiwawa would require us to read the provision out of context. The " single family, residential use" restriction is incorporated into a provision that restricts the type of structures that can be built and how far from the front line they must be built. Read in context, the single-family covenant restricts only the type and appearance of buildings that may be constructed on the lot, not who may reside there. This reading is preferred as it " protects the

homeowners' collective interest" and is consistent with how other states interpret single-family covenants. *See generally* Mark S. Dennison, Annotation, *Construction and Application of " Residential Purposes Only" or Similar Covenant Restriction to Incidental Use of Dwelling for Business, Professional, or Other Purposes*, 1 A.L.R.6th § 5, at 135 (2005).

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¶ 21 Moreover, reading the provision to prohibit unrelated persons from residing together would produce absurd results. Under the Association's reading, Chiwawa residents would violate their covenants whenever they host a sleepover for their children's playmates, share their homes with friends for a weekend, or cohabitate with a partner outside of marriage. We reject " forced or strained" interpretations of covenant language if they lead to absurd results. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 122, 118 P.3d 322 (2005).

¶ 22 We emphasize that our holding does not prohibit residential communities from prohibiting short-term rentals. We merely hold that the Chiwawa River Pines community did not do so through covenants allowing rentals while prohibiting commercial uses and limiting homes to single-family structures.

II. A Simple Majority Sought To Deprive Chiwawa Landowners of Their Property Rights, Inconsistent with the General Plan of Development.

¶ 23 A prohibition on short-term rentals is unrelated to the 1988/1992 covenants and therefore cannot be adopted by a simple majority vote. We do not hold that homeowners can never limit the duration of rentals, as the dissent believes, just that a **[327 P.3d 622]** majority of Chiwawa homeowners cannot force a new restriction on a minority of unsuspecting Chiwawa homeowners unrelated to any existing covenant. Dissent (Gordon McCloud, J.) at 272. While Chiwawa homeowners knew that existing restrictive covenants could be *changed* by majority vote so long as the changes were consistent with the general plan, they did not buy into the creation of *new* restrictions unrelated to existing ones.

¶ 24 In Washington, the authority of a simple majority of homeowners to adopt new covenants or amend existing

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ones in order to place new restrictions on the use of private property is limited. When the governing covenants authorize a majority of homeowners to *create* new restrictions unrelated to existing ones, majority rule prevails " provided that such power is exercised in a reasonable manner consistent with the general plan of the development." *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 273-74, 883 P.2d 1387 (1994). However, when the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants. *See Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn.App. 787, 793, 150 P.3d 1163 (2007); *Meresse v. Stelma*, 100 Wn.App. 857, 865-66, 999 P.2d 1267 (2000); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 459 N.E.2d 1164, 77 Ill.Dec. 68 (1984). This rule protects the reasonable, settled expectation of landowners by giving them the power to block " 'new covenants which have no

relation to existing ones'" and deprive them of their property rights. *Meresse*, 100 Wn.App. at 866 (emphasis omitted) (quoting *Lakeland*, 459 N.E.2d at 1169). As the Court of Appeals observed, " '[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land.'" *Id.* (quoting *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610, 617 (1994)).

¶ 25 While we recognize, as does the dissent, that no Washington case has described the precise contours of when an amendment would be " consistent with the general plan of development," we need not provide that guidance here because the Chiwawa general plan did not authorize a majority of owners to adopt new covenants. The Chiwawa general plan of development merely authorized a majority of owners " to change these protective restrictions and covenants in whole or in part." CP at 83; *see Lakeland*, 459 N.E.2d at 1167, 1169 (interpreting a covenant that permitted

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changes to " 'the said covenants in whole or in part'" as permitting changes " not the add[ition] of new covenants which have no relation to existing ones"); *see also Meresse*, 100 Wn.App. at 864-66 (emphasizing that its analysis of a covenant allowing a majority " 'to change or alter [the covenants] in full or in part'" was in accord with *Lakeland*, which interpreted a similar provision as allowing changes but not the addition of new covenants unrelated to existing ones (emphasis omitted)). Thus, for amendments by majority vote to be valid in Chiwawa, such amendments must be consistent with the general plan of development *and* related to an existing covenant.

¶ 26 As determined earlier, the Chiwawa general plan of development allows homeowners to rent their homes without any durational limitation. Homeowners who took title under these covenants were not on notice that short-term rentals might be prohibited without their consent. The Association defends its actions as consistent with the general plan because it did not ban *all* rentals, just *some* rentals. *See* Reply Br. of Appellant at 5. The Association, however, misses the distinction between contracts that permit *changes* to existing covenants by majority vote and those that allow the *creation* of new covenants by majority vote. In distinguishing between these types of contracts, we respect the expectation of the parties and the contract they entered. While it is true that in *Shafer*, the court upheld the adoption of new restrictions on outdoor storage of inoperative motor vehicles and commercial fishing, even though no such rule had previously existed, the court did so only because the dissenting homeowners " had notice of the reservation of power" that allowed the homeowner **[327 P.3d 623]** corporation to create new covenants that benefited the community. 76 Wn.App. at 270, 272, 277. The Chiwawa homeowners did not. We reject the Association's position in favor of protecting the reasonable and settled expectation of landowners in their property.

¶ 27 The dissent makes a similar mistake. The dissent contends that we must remand this case for a factual

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inquiry to determine whether the 2011 amendment was " 'consistent with the general plan of development'--by looking to 'the language of the covenants, their apparent import, and the surrounding facts'" as required by *Meresse* . Dissent (Gordon McCloud, J.) at 279, 280 (emphasis omitted) (internal quotation marks omitted) (quoting *Meresse*, 100 Wn.App. at 865). While it is true that when determining whether an amendment is consistent with the general plan of development

we look to the language of the covenants, their apparent import, and the surrounding facts, the dissent misapprehends the inquiry at issue in *Meresse* . Unlike the covenants in *Shafer*, the covenants in *Meresse* did not allow a majority to create new covenants but only to change existing ones. 100 Wn.App. at 864-65. Thus, for the amendment in *Meresse* to be valid, it had to be both consistent with the general plan of development and related to an existing covenant. Accordingly, the homeowners argued that the amendment regarding the relocation of an access road was not a new wholesale restriction but rather a change to the preexisting " 'road maintenance'" covenant regarding road " 'construction'" and " 'repair.'" *Id.* at 864. Consequently, the court's inquiry was whether the amendment was sufficiently related to the existing road maintenance covenant. The court ultimately determined it was not because the restriction imposing a duty on homeowners to remove obstructions " d[id] not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority's whim." *Id.* at 866-67.

¶ 28 Like the covenants in *Meresse*, the Chiwawa covenants prohibiting nuisance or offensive uses or the display of excessive rental signs would not have placed Chiwawa homeowners on notice that short-term rentals would be prohibited. Thus, the 2011 amendment was unrelated to any existing covenant. The Association could not adopt the restriction without unanimous consent. This is the contract into which the parties bought and the expectation that we must uphold.

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III. The 2007 Survey Comments and Testimony of Residents Were Properly Excluded

¶ 29 We also affirm the trial court's exclusion of the homeowners' comments in the 2007 survey and portions of the declarations of three Chiwawa residents: Judy Van Eyk, James Padden, and Gloria Fisk.

a. 2007 Survey Comments

¶ 30 The 2007 survey comments were inadmissible hearsay. *See Smith v. Sturm, Ruger & Co.*, 39 Wn.App. 740, 749, 695 P.2d 600 (1985) (surveying opinion-polling cases and noting survey answers given by interested parties describing past events " have consistently been held to be double hearsay"). The 2007 survey comments discussed homeowner support or rejection of the Association's proposed ban on nightly rentals and projections about the impact short-term rentals have had on the community. *See* CP at 153-57.

¶ 31 The Association does not dispute that the 2007 survey comments were hearsay but argues that they fall within the judge-made exception followed in *Simon v. Riblet Tramway Co.*, 8 Wn.App. 289, 505 P.2d 1291 (1973). Br. of Appellant at 35-36. This is incorrect. *Simon* rests on a hearsay exception fashioned in *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 632-34, 453 P.2d 619 (1969), [4] regarding the **[327 P.3d 624]** inherent trustworthiness and reliability of surveys compiled by disinterested authorities in published materials. In *Nordstrom*, this court held a published industry manual on the safety of ladders was

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admissible, although hearsay, because it was " produced by persons or groups having special knowledge regarding the subject under discussion, and having no motive to falsify, but having rather every reason to state the facts as they are known to the author or authors." *Id.* at 633. Similarly, in *Simon*, the National Society of Professional Engineers' survey of salaries among

engineers was " trustworthy and reliable" because it was " published by a reputable society ... without any apparent reason to falsify it." *Simon*, 8 Wn.App. at 294. In contrast, here, the 2007 survey comments were made by interested homeowners as part of a contentious vote over property rights and compiled by an organization that was interested in the outcome. As such, the comments do not have the hallmarks of inherently reliable evidence. We affirm the trial court's decision to strike these hearsay comments.

b. Individual Residents' Declarations

¶ 32 The trial court also properly struck various portions of declarations by Judy Van Eyk, James Padden, and Gloria Fisk. An affidavit supporting a motion for summary judgment " shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence." CR 56(e). A lay witness may testify to her opinions and inferences, but this testimony must be " rationally based on the perception of the witness." ER 701.

¶ 33 The trial court properly excluded portions of Ms. Van Eyk's and Mr. Padden's declarations because they lacked personal knowledge. In her declaration, Ms. Van Eyk comments that homeowners who rent their residences " make more money renting weekends this time of year and do not want a full-time tenant," states that her long-term tenant had a friend that was willing to pay a premium for a three-month term rental, and opines that " [p]laintiffs' goal in this lawsuit is to protect their businesses and bottom line." CP at 1082-83. Mr. Padden's declaration similarly

consists of opinions. Mr. Padden conjectures that " it was clear that the developer, Pope & Talbot, intended to create a community of single families" ; that in the early days of the development, " [n]o one ... was renting" or " advertising their homes" or " had a commercial license for their rental businesses" ; that " [t]he community's focus was on providing an enjoyable refuge for families, not to provide an opportunity to make money" ; and that the current state of affairs " is not [what] the developer intended." CP at 1085-86. Neither the developers' intent, the activities of all other residents, the motivations of other Chiwawa homeowners, nor the desires of strangers to move into the community are within Ms. Van Eyk's or Mr. Padden's personal knowledge or perceptions. Therefore, the trial court correctly struck them.

¶ 34 The trial court also properly excluded Ms. Fisk's statement that the board had threatened enforcement action against a homeowner for renting out his property " for less than one month--the same type of activity at issue in this lawsuit." CP at 992. Although Ms. Fisk, as the Association's then-president, had personal knowledge of the threatened action, her statement was false and misleading. The record shows that the Board sent this homeowner a letter advising him that *daily* rentals would violate the covenants, CP at 180, 221; *see Wilkinson*, which is not " the same type of activity at issue in this lawsuit." CP at 992. The trial judge did not err by excluding Ms. Fisk's misleading statements.

CONCLUSION

¶ 35 The trial court properly excluded inadmissible testimony offered by the Association and granted summary judgment in favor of the Wilkinsons. The covenants in effect before the 2011 amendment allowed Chiwawa homeowners to rent their homes without limitations on duration. Such short-term rentals do not violate the ban on commercial use **[327 P.3d 625]** or the

requirement that structures be suitable for single-
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family residential use. Because a durational restriction on rentals would be inconsistent with the 1988/1992 covenants, it cannot be adopted by a simple majority vote of Chiwawa homeowners. Therefore, the 2011 amendment barring short-term rentals was invalid. We affirm.

C. Johnson, Fairhurst, J.M. Johnson, and González, JJ., concur.

DISSENT

Madsen, C.J. (dissenting)

¶ 36 The issue is whether the Chiwawa Communities Association (Association) validly amended the communities' restrictive covenants to prohibit the homeowners within the communities from renting their homes for less than 30 days at a time (short-term rentals). The majority decides as a matter of law that an existing restriction limiting the number and size of " for Rent" signs that a resident may display on the property conclusively proves intent that rentals of any duration were consciously considered when the covenants were written. I cannot agree with this incredible supposition.

¶ 37 The majority also concludes as a matter of law that the covenants did not reserve authority to a majority of association members to ban rentals of under 30 days because this durational restriction is " unrelated" to any existing covenant. " Relatedness" to an existing covenant involves an artificial distinction between changes to restrictive covenants and creation of new restrictive covenants. Although some courts recognize the distinction, the better analysis is presented by courts that have wisely rejected it. This court should reject the distinction as well.

¶ 38 Both the question of what the existing covenants mean in regard to duration, if anything, and the question whether the covenants reserved power to a majority to impose a durational ban on rentals should be remanded so that the parties may submit extrinsic evidence, if any is available, to illuminate the meaning of the covenants.

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Discussion

¶ 39 The questions posed by this case are twofold: What, if anything, did the restrictive covenants say about renting property for short terms prior to adoption of the explicit ban on short-term rentals, and did the reservation of power provision in the covenants authorize a majority of homeowners to adopt the ban on short-term rentals.

¶ 40 The primary responsibility of a court when faced with a dispute about the meaning of restrictive covenants is to determine the intent of the parties who established the covenants. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). The court examines the language used as indicating the parties' intent, with the language given its ordinary and common meaning. *Id.*; *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993). [5]

Whether the existing covenants addressed duration of rentals

¶ 41 The existing covenants recognized that property may be rented. A covenant restricting the number and size of " for Rent" signs that homeowners may place on their property says in part: No sign of any kind shall be displayed to the public view on any lot, tract or subdivision thereof in

the plat, except one sign of not more than 3 feet square giving the names of the occupants of the lot, tract, or approved subdivision thereof, and one sign of not more than 6 square feet advertising the property for sale or rent.
Clerk's Papers (CP) at 86.

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¶ 42 This restriction begins with a general rule--no signs allowed--and then lists certain **[327 P.3d 626]** specific, detailed exceptions for signs of limited size and number. The obvious purpose is to prevent multiple or large signs and the immediate concern is also obvious--addressing the appearance (aesthetics) of the properties and the residential neighborhoods. This interpretation is fortified by the placement of the restrictive language in a covenant titled " TRASH DISPOSAL" that also provides that " [n]o trash, garbage, ashes or other refuse may be thrown, dumped, or otherwise disposed of on any lot, vacant or otherwise." *Id.* Plainly, the covenant is concerned primarily with property upkeep and appearance.
¶ 43 The restriction also implicitly acknowledges that home rentals may occur. On its face, however, this is all it does.
¶ 44 But, astonishingly, the majority concludes that the sign restriction " *proves* ... that the drafters anticipated rentals and *consciously decided* not to limit their duration." Majority at 251 (emphasis added). The majority's reading is not consistent with the ordinary language used and is far from reasonable. The specific reference to " for Rent" signs reflects the fact that both selling and renting homes are common occurrences in residential neighborhoods when homeowners decide not to live in their homes and predictably will place signs on their property to advertise its availability.
¶ 45 To interpret the reference to " for Rent" signs to mean *as a matter of law* that rentals were considered and allowed for any duration, including short-term rentals (vacation rentals), is truly extraordinary.
¶ 46 Nonetheless, the reference to rent is in the restriction and because no more is apparent from the restriction itself, deciding whether the parties to the covenants intended anything by it about the duration of rentals will
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depend on extrinsic evidence. As with other contracts, extrinsic evidence may be admissible to aid in determining the intended meaning of restrictive covenants under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and its progeny. In *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999), the court held that extrinsic evidence may be relevant to determining the intent of restrictive covenants provided that the extrinsic evidence is relevant in giving meaning to the words used in the covenants. In applying the *Berg* principles in this context, just as with other contracts, such evidence cannot include evidence of a party's unilateral or subjective intent, evidence to show intent independent of the written document, or evidence that would alter or contradict what is written. *Id.* [6]
¶ 47 Remand to allow the parties an opportunity to submit extrinsic evidence about what was intended by the language regarding signs and whether it is relevant to duration is necessary before any conclusion can be made about intent to address length of rentals.

¶ **48** When extrinsic evidence is to be considered under the *Berg* line of cases, it is generally for the trier of fact. In *Berg*, 115 Wn.2d at 667, the court adopted *Restatement (Second) of Contracts* § 212 (1981), which provides:

" (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings *in the light of the circumstances*, in accordance with the rules stated in this Chapter. " (2) A question of interpretation of an integrated agreement is to be determined by the *trier of fact* if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law."

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Berg, 115 Wn.2d at 667-68 (emphasis added) (quoting Restatement § 212).

¶ **49** Whether the trier of fact must make these determinations does *not* require that ambiguity appear on the face of the document.

[327 P.3d 627] " [A] party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous. Extrinsic evidence is not admissible, however, to show intention independent of the contract." *Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 775-76, 202 P.3d 960 (2009) (citation omitted) (citing *Berg*, 115 Wn.2d at 667-69; *Hollis*, 137 Wn.2d at 695).

¶ **50** In summary on this issue, I very strongly disagree with the majority's conclusion that the restriction on the size of " for Rent" signs *proves* a *conscious decision* to permit rentals of any duration. The sign restrictions do not on their face disclose anything about duration of permitted rentals. If relevant intent is to be found in the restrictive covenants prior to adoption of the ban, it must be found by a trier of fact based on extrinsic evidence.

Whether the reservation of power in the covenants authorized a majority of the members of the association to adopt a ban on short-term rentals

¶ **51** The second question is whether the Association had the authority to adopt the ban on short-term rentals by majority vote. At the outset, I do not agree with the Court of Appeals' artificial distinction in *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000), which dictates a difference in reserved authority depending on whether a change in covenants or a new restriction is at issue. This is the ill-advised theory adopted by the majority.

¶ **52** For this theory, *Meresse* relies on *Lakeland Property Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 459 N.E.2d 1164, 1167, 1169, 77 Ill.Dec. 68 (1984). *Meresse*, 100 Wn.App. at 859. Referring to *Lakeland Property Owners* and

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other cases, the Colorado Supreme Court recognized a split in jurisdictions on the matter. *Evergreen Highlands Ass'n v. West*, 73 P.3d 1, 4-7 (Colo. 2003).

¶ **53** The relevant language in the covenants here authorizes a majority of the association members to agree " to change these protective restrictions and covenants in whole or in part." CP at 87. Instead of reading this language to mean that the reserved authority extends only to making changes to the existing covenants, the Colorado court said that such a construction " seems illogically narrow." *Evergreen Highlands*, 73 P.3d at 6. The court explained that " from a linguistic

standpoint, the *Lakeland* conclusion that 'change or modify' can only apply to the alteration of existing covenants, and not the addition of new and different ones, is not well-founded. Webster defines 'change' as 'to make different.'" *Id.* (quoting Webster's Third New International Dictionary 373 (1986)); *see also Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n*, 177 Cal.App.3d 726, 223 Cal.Rptr. 175, 179 (1986) (" the words 'changed' and 'modified' include any alteration whether involving an increase or decrease") " [C]ovenants could certainly be changed or made different either by the addition, subtraction, or modification of a term." *Evergreen Highlands*, 73 P.3d at 6. [7]

¶ 54 I do not agree with the majority's view that we should treat reservation of power provisions differently depending on whether a change or amendment is made to an existing restriction or is by way of a new restriction. In either case, a modification is made to the covenants, and in the latter case, the modification is to the entire set of restrictions. Moreover, the distinction followed by the majority is flawed because the result can be that a relatively minor new restriction can be precluded if there is no unanimous agreement, while a major change can be made by a simple majority vote.

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¶ 55 The important guideline is that the change or addition must be reasonably consistent with the general plan of development, and it should make no difference whether a change is made to an existing restriction or a new restriction is added.

[327 P.3d 628] **¶ 56** Here, the question is whether the restrictive covenants, as they existed before the ban, permitted a majority of the homeowners to approve a restriction limiting the minimum period for which homeowners may rent their houses in the communities. When covenants reserve power to less than all of the affected homeowners to adopt additional restrictions, then less than all may adopt restrictions provided this power is exercised in a reasonable manner and is consistent with the general plan of development. *E.g.*, *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 273-74, 883 P.2d 1387 (1994)). The reason for this rule is that

[i]n a sense, there is an inherent inconsistency between an elaborate set of restrictive covenants designed to provide for a general scheme or plan of development (generally considered to be for the benefit of the respective grantees), and a clause therein whereby the grantor reserves to itself the power at any time in its sole discretion to change or even arbitrarily abandon any such general scheme or plan of development (a power which is solely for the benefit of the grantor).

Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc., 303 So.2d 665, 666 (Fla. App. 1974), quoted in *Lakemoor Cmty. Club, Inc. v. Swanson*, 24 Wn.App. 10, 15, 600 P.2d 1022 (1979); *see also Shafer*, 76 Wn.App. at 273. Or, to put it another way, the rule ensures that a neighborhood will retain its essential nature and character as originally developed. Homeowners' legitimate expectations based on the covenants governing at the time they acquired their property will in general be protected.

¶ 57 As Justice Gordon McCloud's dissent notes, there may be circumstances where a court may be able to make this determination as a matter of law. But in many cases

extrinsic evidence will be available that bears on the matter of whether an amendment to the restrictive covenants is reasonably consistent with the covenants. Under *Berg* 's context rule, such evidence includes " the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations. *Berg*, [115 Wn.2d] at 667-69." *Shafer*, 76 Wn.App. at 275.

¶ 58 The trial court realized that extrinsic evidence may well be relevant and admissible, but there is no indication that such evidence was considered here. In particular, evidence of surrounding facts may be highly relevant, i.e., in what environment were the restrictive covenants written. Particularly where the propriety of short-term rentals is concerned, the nature and character of the area and of other nearby developments may shed light on what is reasonably consistent with the restrictive covenants and what the property owners could reasonably expect.

¶ 59 If, for example, the development is in an area where short-term rentals are usually allowed in nearby, similar developments because of recreational activity in the vicinity that homeowners can take advantage of by making short-term rentals, it will be less likely that a ban on short-term rentals is reasonably consistent with the restrictive covenants.

¶ 60 The court should acknowledge the possibility that there will be insufficient evidence to draw any conclusions about durational limits in the existing covenants or whether they are reasonably consistent with the existing covenants. If this proves to be the case, then the ban adopted by the Association cannot be given effect because it is in excess of the authority reserved by the covenants.

¶ 61 But at this point, remand for consideration of the question of consistency with the existing covenants, including whether possible extrinsic evidence sheds light on this question, is appropriate as well.

¶ 62 I turn next, briefly, to another concern.

Whether a ban on short-term rentals is relevant to the restriction that lots must be utilized solely for single family residential use

¶ 63 Although not my reason for writing separately, I am troubled by the conclusion that because renters for short terms live,

[327 P.3d 629] eat, sleep, and so on, in the residence, there is no distinction to be drawn between a short-term rental, essentially renting to others for vacation use, and longer-term rentals where renters use the home as their primary residence. Individuals on vacation are not limited by constraints of the same kind as other renters. It seems odd to ignore the fact that many people equate vacations with freedom to act in ways outside their normal conduct. It is to be expected that spirits may be higher and conduct more uninhibited. Noise levels, for example, could well be higher as a consequence. Vacationers might not be as considerate of neighbors and their neighbors' peace and quiet as if they were residents on a more permanent basis. It cannot be gainsaid that some on vacation consume alcoholic beverages to a greater degree than they ordinarily would, with consequent effects on their behavior. I do not doubt that many of these behaviors occur with residents as well as vacationers, but it seems to be to be putting blinders on

to conclude that there is no meaningful distinction relevant to the commercial versus residential uses distinction. Certainly, in any given case, the vacationer may behave in every significant respect like a resident. But over the course of a year, over the course of seasonal changes, there will undoubtedly be a cumulative effect of noise, traffic, and disruption of neighborhoods from successive short-term rentals.

¶ 64 I recognize that many courts have refused to accept the distinction, and without factual, almost scientific evidence, my view is not likely to prevail. Nonetheless, I think it almost disingenuous to act as if rentals for under 30 days are the same as renting to persons who use homes in the communities as their primary residences.

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¶ 65 In conclusion, remand should be directed to permit submission of extrinsic evidence on the questions of whether the reference to rent signs in the covenants shows any intent about rental duration and whether the ban on short-term rentals is reasonably consistent with the existing covenants.

¶ 66 For the reasons stated, I dissent.

Gordon McCloud, J. (dissenting)

¶ 67 The original restrictive covenants in this case permitted future amendments by majority vote. The homeowners knew that when they bought in. The original restrictive covenants also limited rental advertising, prohibited nuisances and offensive uses, and barred commercial and nonresidential uses. The homeowners also knew that when they bought in. A majority of the homeowners then voted to amend their covenants to limit short-term rentals.

¶ 68 The question presented by this case is whether the homeowner-majority can do that or whether this amendment is so inconsistent with the original covenants that the court should require homeowner unanimity to make this change. The majority answers this with a broad legal holding that all rental activity--presumably including hourly rentals--is protected by covenants like the ones at issue here, which certainly contemplated some rental activity but are actually silent on the topic of rental duration. This extremely broad holding ignores the limited and fact-specific nature of the question presented in this case. Because I would remand for a proper factual inquiry, I respectfully dissent.

1. The majority's holding is so broad that it prospectively invalidates any limit on the duration of rentals

¶ 69 Before I address the majority opinion in detail, I pause to note the breadth of the trial court order it affirms. The majority characterizes this dispute as limited to the validity of the 2011 amendment prohibiting rentals of less

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than 30 days, majority at 248, but in fact, the Wilkinsons sought and obtained four separate rulings from the trial court:

(A) That the Plan of Development of Chiwawa River Pines (hereinafter " the Plan") for phase 2 and for phases 3-6 each allow residential rentals of any duration - including residential rentals of less than 30 days. (B) That specifically the Pope & Talbot Protective Covenants and the 1988 and

1992 Protective Covenants allow residential **[327 P.3d 630]** rentals of any duration - including residential rentals of less than 30 days. (C) That a prohibition on commercial uses of lots as expressed by the Protective Covenants as set forth in the Pope & Talbot Covenants for phase [2] and for phases 3-6 and the 1988 and 1992 Covenants described above does not include residential rentals of any duration - including residential rentals for less than 30 days. (D) That to the extent that the 2011 Amendment ... seeks to bar residential rentals of any duration, including those of less than 30 days, it is unenforceable.

Clerk's Papers (CP) at 442-43. By affirming the trial court's order in its entirety, the majority not only invalidates the 2011 amendment barring rentals of less than 30 days, it also prospectively invalidates *any* limit on the duration of rentals in Chiwawa River Pines. [8]

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2. The majority errs in holding that it is manifestly clear as a purely legal matter that the original covenants, which are silent on the topic of rental duration, allow rentals of any duration

¶ 70 As the majority correctly observes, a court's primary objective in interpreting restrictive covenants is to determine the drafter's intent, [9] and if that intent is not clear from the covenants' plain language, then the **[327 P.3d 631]** court may

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consider extrinsic evidence. [10] According to the majority, however, the language of the covenants makes it " manifestly clear that the drafters [of the Chiwawa River Pines covenants] intended to permit vacation rentals." Majority at 252.

¶ 71 I disagree. Instead, those covenants make it manifestly clear that the drafters intended to permit *some* rental activity, but it is not clear what type of rental activity the drafters contemplated--long-term, transient, or both. Because the covenants are ambiguous in this respect, extrinsic evidence is admissible to, in the majority's words, " 'illuminate what was written.'" Majority at 251 (quoting *Hollis*, 137 Wn.2d at 697).

¶ 72 Further, because extrinsic evidence is admissible to clarify an ambiguity in a restrictive covenant, the meaning of the ambiguous language is at least in part a question of fact. Some lower courts, however, have erroneously characterized the interpretation of a restrictive covenant as solely a question of law. [11] Both the trial court and the majority made that error here.

¶ 73 In the trial court, the Wilkinsons argued that any amendment " seek[ing] to bar residential rentals of any duration, including those of less than 30 days ... is unenforceable" under *Ross v. Bennett*, 148 Wn.App. 40, 52, 203 P.3d 383 (2008). CP at 442-43, 466-67. They reasoned that because *Ross* held that " short-term vacation rentals" were consistent with the residential use covenant at issue in *that case*, [12] short-term rentals must also be consistent with the Chiwawa River Pines covenants, which limit lots to

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" single family residential use." [13] The trial court agreed, concluding that " there really [we]ren't any facts ... in dispute, particularly when one reads the *Ross* case" and granted summary judgment for the plaintiffs. Verbatim Report of Proceedings (Dec. 15, 2011) (1 VRP) at 34-35.

¶ 74 The trial court thus treated the meaning of a residential use provision as a question of law

and foreclosed any factual inquiry into the intent embodied in the Pope & Talbot and 1988/1992 Chiwawa River Pines covenants. The majority repeats this error by stating that under *Ross*, " [i]f a vacation renter uses a home 'for the purposes of eating, sleeping, and other residential purposes,' this use is residential, not commercial, no matter how short the rental duration." Majority at 252 (quoting *Ross*, 148 Wn.App. at 51-52).

¶ 75 The majority misapprehends *Ross* 's significance to this case and to the law of restrictive covenants in general. *Ross* was not a broad holding applicable to every covenant that distinguishes residential from commercial activity. The *Ross* court held only that a particular restrictive covenant limiting property use to " residence purposes only" was consistent with short-term vacation rentals. And it based that holding on a highly fact-specific record. [14] That record contained a declaration by one of the covenant's drafters showing that the drafters had " 'modeled'" the disputed covenants on those from a neighboring community where " 'vacation rentals'" did occur. *Ross*, 148 Wn.App. at 47-48. Thus, the *Ross* court did not hold that restrictive covenants limiting lots to " residential" use are always consistent with vacation rentals. Rather, the *Ross* court held that a residential use provision is not so plainly incompatible with vacation

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rentals that it will override clear evidence **[327 P.3d 632]** that the drafters *intended* to permit such rentals.

¶ 76 In contrast to the *Ross* court, the trial court in this case had very little evidence before it regarding the intent embodied in the original Pope & Talbot and 1988/1992 Chiwawa River Pines covenants. The trial court therefore ruled as a matter of law that short-term vacation rentals are always consistent with residential and single-family use.

¶ 77 Had this in fact been the question presented, the trial court's decision might well be correct. [15] But the question before the trial court was different. It was whether the Association could validly limit short-term rentals pursuant to the Pope & Talbot and 1988/1992 restrictive covenants, which prohibited nuisances and offensive uses, banned commercial and nonresidential uses, permitted limited rental signage, restricted lots to " single family" use, and reserved to the Association the power to adopt new land-use restrictions by majority vote. CP at 13, 30. These covenants clearly permit some rental activity, because they allow residents to post signs advertising their properties for rent. They also clearly contemplate restrictions on rental

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advertising, because they limit rental signage to one sign per lot. For the most part, however, these covenants raise questions: what constitutes a nuisance; what constitutes an offensive use; when rentals might conflict with single-family residential usage; and whether there are any specific limits on the majority's power to amend the covenants.

¶ 78 To answer these questions, a court cannot simply rely on a prior appellate court's interpretation of one similar covenant provision in a case with different facts. Rather, the court must consider the disputed covenants in their entirety, along with any extrinsic evidence relevant to their interpretation. The majority refuses to acknowledge the admissibility of any extrinsic evidence at all in this case, because it concludes (apparently as a matter of law) that the drafters of the original and 1988/1992 Chiwawa River Pines covenants " anticipated rentals and

consciously decided not to limit their duration." Majority at 251 (emphasis added). This constitutes a major departure from precedent. [16]

3. Whether the homeowner-majority had the authority to amend the restrictive covenants here is, instead, a question of fact.

¶ 79 For at least a decade, Washington courts have held that where a set of restrictive covenants empowers residents to adopt amendments by majority vote, those amendments **[327 P.3d 633]** are valid only so long as they are adopted " 'in a reasonable manner [and are] consistent with the general plan of the development.'" Majority at 256 (quoting *Shafer*

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v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc., 76 Wn.App. 267, 273-74, 883 P.2d 1387 (1994)). Our courts have also recognized that an amendment is unreasonable as a matter of law where it imposes an obligation that differs fundamentally from those contemplated in the original covenants. *Meresse*, 100 Wn.App. at 866-67 (amendment authorizing access road's " relocation" unreasonable where original covenants addressed only " 'maintenance, repairs'" and " 'additional constructions'" involving said road, and the clause permitting future amendments was limited to certain topics).

¶ 80 In applying these holdings, our cases have never distinguished between amendments that " change" existing covenants and amendments that " create new restrictions." Majority at 2564 (emphasis omitted). But in today's opinion, the majority adopts that distinction as a new rule. This new rule contrasts covenants that permit homeowners to " change" existing covenants with covenants that permit homeowners to " create new" covenants. Majority at 256 (emphasis omitted). [17] According to the majority, where a set of restrictive covenants permits a majority of homeowners to create new covenants, these covenants need have " no relation to [the]

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existing covenants." *Id.* By adopting this rule, the majority is able to distinguish this case from *Shafer*, in which the Court of Appeals found the creation of an entirely new covenant to be " consistent with the general plan of development." *Shafer*, 76 Wn.App. at 274. I would not depart from precedent in this manner.

¶ 81 Instead, I would stick with current precedent, which holds that a court determines whether a restrictive covenant amendment is permissible--that is, whether it is " 'consistent with the general plan of development'" --by looking to " the language of the covenants, their apparent import, *and the surrounding facts* ." *Meresse*, 100 Wn.App. at 865 (emphasis added and omitted) (quoting *Shafer*, 76 Wn.App. at 274). In some cases, a court will be able to ascertain the reasonableness of a disputed amendment as a matter law, without undertaking any factual inquiry. [18] For the reasons outlined above, however, this is not such a case.

[327 P.3d 634] **¶ 82** In its oral summary judgment ruling, the trial court below acknowledged the factual component of the " reasonable and consistent" inquiry. [19] That court's orders, however, do not reveal any consideration of the facts " surrounding" the drafting of the original Pope & Talbot covenants or their consolidation in 1988/1992. This omission may reflect a need for guidance; unfortunately, the majority provides none. I would take this opportunity to clarify what "

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surrounding facts" are relevant to the " reasonable and consistent" inquiry.

¶ 83 While no Washington case precisely describes the scope of the " surrounding facts" inquiry, the North Carolina Supreme Court provides a useful guide:

A disputing party will necessarily argue that an amendment is reasonable if he believes that it benefits him and unreasonable if he believes that it harms him. However, the court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, *including the nature and character of the community* . For example, it may be relevant that a particular geographic area is known for its resort, retirement, or seasonal " snowbird" population. Thus, it may not be reasonable to retroactively prohibit rentals in a mountain community during ski season or in a beach community during the summer. Similarly, it may not be reasonable to continually raise assessments in a retirement community where residents live primarily on a fixed income. Finally, a homeowners' association cannot unreasonably restrict property rental by implementing a garnishment or " taking" of rents (which is essentially an assessment); although it may be reasonable to restrict the frequency of rentals to prevent rented property from becoming like a motel.

Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 559-60, 633 S.E.2d 78 (2006) (emphasis added). This approach rightly focuses on landowners' reasonable expectations. " The character of the community" necessarily informs these expectations; it should therefore inform a court's assessment of what is reasonable and consistent with the covenants by which a community's members agreed to abide. [20]

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Conclusion

¶ 84 The trial court erred in concluding that the meaning of the disputed covenants in this case was a question of law controlled by prior precedent. The majority makes the same error. This deprives the parties of an opportunity to present evidence on how to interpret the original covenants and how to determine the homeowners' reasonable expectations about how those covenants might be amended. This also substitutes the values of this court's majority for the values of the drafters and homeowners. Instead, I would remand for a proper factual inquiry. I therefore dissent.

Owens and Wiggins, JJ., concur with Gordon McCloud, J.

Reconsideration denied June 17, 2014.

Notes:

[1]The dissent complains that by affirming the trial court as to the limited decisions the Association asked us to review, we have somehow affirmed the trial court's order in its entirety. Dissent (Gordon McCloud, J.) at 2-72. This is simply not true. Although the Association assigned error to the trial court's order granting summary judgment to the respondent homeowners, the Association *did not* take issue with every ruling made therein. Br. of Appellant at 3-4. Rather, the Association asked us to consider whether short-term vacation rentals are consistent with the governing restrictive covenants of the Chiwawa River Pines community, whether a majority of Chiwawa

homeowners could amend the governing restrictive covenants to prohibit short-term vacation rentals, and whether the testimony of certain Chiwawa homeowners and the comments of other homeowners in response to a 2007 survey were admissible evidence. *See id* . Our holding is consequently limited to these issues and the trial court's corresponding decisions. RAP 12.1(a) (" [T]he appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.").

[2]The court notes that there were instances when the Association sought to terminate " lodging facilities and transient nightly rentals," Br. of Appellant at 6, but not weekend, weekly, or monthly rentals.

[3]The dissent criticizes us and the trial court for relying on *Ross*, arguing that the *Ross* court " held only that a particular restrictive covenant limiting property use to 'residence purposes only' was consistent with short-term vacation rentals," and that this holding was based " on a highly fact-specific record." Dissent (Gordon McCloud, J.) at 275. But *every* case is rooted in its facts; the question is whether the relevant facts in *Ross* are different from the facts here. They are not. Just as in this case, the residents in *Ross* leased their homes to short-term renters and the homeowners' association argued that they were making commercial use of the land, rather than residential use. 148 Wn.App. at 51. The court held unequivocally that a residential renter, no matter how short the rental duration, does not violate a restrictive covenant requiring that " '[a]ll parcels within said property shall be used for residence purposes only and only one single family residence may be erected on each such parcel'" because that use is residential, not commercial. *Id.* at 44, 52 (alteration in original). The court explained that the single-family residence restriction " merely restricts use of the property to residential purposes," *id.* at 52, which is consistent with a residential renter who uses a home " for the purposes of eating, sleeping, and other residential purposes," *id.*, because that use " is identical to [the homeowner's] use of the property, as a residence, or the use made by a long-term tenant." *Id.* at 51. The court was not concerned with whether the drafters intended to permit vacation rentals, which the dissent emphasizes, but with whether the vacation rentals constituted a prohibited commercial use. This was the case because extrinsic evidence cannot be used to " vary, contradict or modify the written word." *Hollis*, 137 Wn.2d at 695.

[4]Although both *Simon* and *Nordstrom* predate the adoption of Washington's Evidence Rules, they are based on principles " substantially in accord with" ER 803(a)(17), Robert H. Aronson, The Law of Evidence in Washington § 803.02, at 803-8.1 (4th ed. 2012), which creates a hearsay exception for " [m]arket quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations," *id.* at § 803.01, at 803-5.

[5]There is no rule that requires construing the restrictive covenants here favorably to the free use of land. By the time this court decided *Riss*, 131 Wn.2d 612, that rule had been either disregarded or questioned in a number of cases. In *Riss*, the court expressly held that in cases involving disputes " among homeowners in a subdivision governed by the restrictive covenants [the] rule[ ] of strict construction ... in favor of the free use of land [is] inapplicable." *Riss*, 131 Wn.2d at 623. Headnote 7 (regional reporter) in *Viking Properties, Inc. v. Holm*, 118 P.3d 322 (2005),

accordingly, is incorrect.

[6] *Berg* addresses parol evidence (extrinsic evidence) used to interpret the meaning of what is actually contained in a contract. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). In contrast, " the 'parol evidence rule' precludes use of parol evidence [(extrinsic evidence)] to add to, subtract from, modify, or contradict the terms of a fully integrated written contract." *Id.*

[7]The Colorado court speculated that the differing outcomes in the cases were actually based on the different factual circumstances and the severity of the consequences presented rather than merely on the distinction between a change to a covenant and creation of a new covenant. *Evergreen Highlands*, 73 P.3d at 6.

[8]According to the majority, the Association has asked us to consider only part of the trial court's order, and the majority has accordingly limited its opinion consistent with Rule of Appellate Procedure (RAP) 12.1(a), which states that " the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs." *See* majority at 245 n.1. Unfortunately, the majority does not tell us which parts of the trial court's order it has declined to address. This is sure to cause considerable confusion, both as to the meaning of the majority's opinion and as to the purpose and effect of RAP 12.1(a).

The purpose of RAP 12.1(a) is to encourage efficiency and fairness and to give parties a certain degree of control over the theory of their case. To these ends, RAP 12.1(a) prevents an appellate court from finding an error that the parties did not assign. *State v. Hubbard*, 103 Wn.2d 570, 573-74, 693 P.2d 718 (1985). It also prevents appellate courts from deciding legal issues the parties have not argued " [unless] necessary to reach a proper decision." *Harris v. Dep't of Labor & Indus.* , 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993) (citing *Alverado v. Wash. Pub. Power Supply Sys.* , 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988)); *see also* RAP 12.1(b). But RAP 12.1(a) does not require this court to ignore portions of the summary judgment order to which the Association assigned error in this case.

This is so for two reasons. First, as the majority concedes, the Association assigned error to the trial court's *entire* summary judgment order. *See* majority at 245 n.1 (citing Br. of Appellant at 3-4). Having done so, the Association will surely be surprised to learn that the majority has decided not to address every issue in that order. As noted above, the trial court's summary judgment order stated that " to the extent that the 2011 Amendment ... seeks to bar residential rentals of *any duration*, including those of less than 30 days, it is unenforceable." CP at 443 (emphasis added). Clearly, the Association hoped that this court would recognize its authority to ban rentals of 30 days. I see no indication that it wanted this court, in the event that we upheld the trial court's ruling on the 30-day rental ban, to quietly leave in place the *rest* of the trial court's order banning rental limits of " any duration." *Id.* Certainly, RAP 12.1(a) is not a license to do so.

Second, despite the majority's protestations to the contrary, its reasoning *does* affirm the trial court's summary judgment in its entirety. The effect of this reasoning is a blanket prohibition on any amendments to the Chiwawa River Pines covenants that limit rental activity *by duration* . The majority leaves open the possibility that vacation rental activity may be limited in Chiwawa River Pines in other ways--perhaps by a ban on the provision of room service because that is too "

commercial" under *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993)--but it absolutely prohibits any purely durational limit.

This is so because the majority's decision turns entirely on the " use" to which the property is put during the rental term. According to the majority, if that use is " 'eating, sleeping, and other residential purposes,'" it is permitted " 'no matter how short the rental duration.'" Majority at 252 (quoting *Ross v. Bennett*, 148 Wn.App. 40, 51-52, 203 P.3d 383 (2008)). Thus, according to the majority, there is no legal distinction in this case between a 30-day residential rental and a 1-night residential rental.

If the majority believes that shorter term bans can be distinguished from bans on 30-day rentals, it should explain how. The Association came to this court assigning error to the trial court's contrary ruling, and this court accepted review.

[9]Majority at 250 (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999); *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997)).

[10]Majority at 251 (quoting *Hollis*, 137 Wn.2d at 697).

[11] *See Wimberly v. Caravello*, 136 Wn.App. 327, 336, 149 P.3d 402 (2006); *Meresse v. Stelma*, 100 Wn.App. 857, 864, 999 P.2d 1267 (2000); *Parry v. Hewitt*, 68 Wn.App. 664, 668, 847 P.2d 483 (1992). *But see Ross*, 148 Wn.App. at 46.

[12]The covenants at issue in *Ross* provided that " '[a]ll parcels within said property shall be used for residence purposes only and only one single family residence may be erected on each such parcel.'" *Ross*, 148 Wn.App. at 44 (alteration in original). They also authorized " '[a]ny member [to] delegate ... his right of enjoyment to the common areas and facilities to the members of his family, friends and tenants.'" *Id.* (first alteration in original).

[13]CP at 85.

[14]Indeed, the *Ross* court acknowledged the factual nature of the question before it, noting that " [w]hile interpretation of the covenant is a question of law, the drafter's intent is a question of fact." *Ross*, 148 Wn.App. at 49.

[15]Both *Ross* and persuasive out-of-state authority indicate that short-term vacation rentals may be consistent with covenants limiting members to " single family" and " residential" use. *See Ross* , 148 Wn.App. at 52; *see, e.g.*, *Slaby v. Mountain River Estates Residential Ass'n*, 100 So.3d 569, 578-79 (Ala. Civ. App. 2012) (holding that " property is used for 'residential purposes' when those occupying it do so for ordinary living purposes" and therefore " so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities ..., they are using the cabin for residential purposes"); *Applegate v. Colucci*, 908 N.E.2d 1214, 1220 (Ind.Ct.App. 2009) (holding rental use is residential use because the occupants " use the structures for eating, sleeping, and other typical activities associated with a residence or dwelling place"); *Lowden v. Bosley*, 395 Md. 58, 69, 909 A.2d 261 (2006) (holding that " [w]hen property is used for a residence, there simply is no tension between such use and a commercial benefit accruing to someone else"); *Mullin v. Silvercreek Condo. Owner's Ass'n*, 195 S.W.3d 484, 490 (Mo. Ct. App. 2006) (" The plain and ordinary meaning of 'residential purposes' is 'one in which people reside or dwell, or which they make their homes, as distinguished from one which is used for commercial or business purposes.'" (quoting *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d

407, 408 (Mo. 1986))). While we acknowledge this authority, however, we reiterate that the legitimacy of the amendment at issue in this case is a question of fact.

[16] *See, e.g.*, *Ross*, 148 Wn.App. at 50 (permitting extrinsic evidence to clarify the terms " residential" and " residence purposes" in restrictive covenant); *Bauman v. Turpen*, 139 Wn.App. 78, 87-90, 160 P.3d 1050 (2007) (permitting extrinsic evidence to clarify the meaning of the term " one story" in restrictive covenant); *Wimberly*, 136 Wn.App. at 331, 407 (permitting extrinsic evidence to clarify the phrase " simple, well-proportioned structure"); *Day v. Santorsola*, 118 Wn.App. 746, 755-57, 76 P.3d 1190 (2003) (to determine whether restrictive covenant provision addressed " height" as opposed to " view," the trial court properly considered extrinsic evidence of the way the provision had historically been enforced).

[17]The majority cites *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn.App. 787, 793, 150 P.3d 1163 (2007), and *Meresse*, 100 Wn.App. at 865-66, for this distinction. Majority at 256. The majority's theory is that the court in *Meresse* applied a different--and more restrictive--rule than that articulated in *Shafer*, because the covenants in *Shafer* permitted more radical innovations than does a generic amendment provision. *Id.* at 258. But *Meresse* in fact addresses *Shafer* at length, relying extensively on its reasoning and rule statement and pausing to " add a caveat appropriate to the different facts [at hand]." *Meresse*, 100 Wn.App. at 865. Significantly, that caveat does not distinguish the language of the covenants at issue in *Shafer* . See *id.* at 865-66. Rather, it distinguishes the " nature" of the disputed amendment, i.e., its relation to existing covenants. *Id.* (" In *Shafer*, the existing covenants were extended to a restriction of a similar nature. ... *Shafer* does not address changes in restrictive covenants that differ in nature from those already in existence.") And in *Ebel*, any seeming distinction between changes and new covenants is dicta. *Ebel* 's reasoning makes clear that it regards *Meresse* and *Shafer* as two cases applying the same rule, according to which an amendment is permissible so long as it is reasonable and consistent with the general plan of development. *See Ebel*, 136 Wn.App. at 793 (citing *Meresse* and *Shafer* for the rule that " an amendment may not create a new covenant that has no relation to the existing covenants"). That is the rule I would apply here.

[18]An amendment is unreasonable as a matter of law if, for example, it plainly contradicts language in the original covenants. *See Wright v. Cypress Shores Dev. Co.*, 413 So.2d 1115, 1118, 1124 (Ala. 1982) (" cancellation of the [residential use] restrictions so as to permit the construction of a convenience store" was " unreasonable exercise of [developer's] authority" to " annul, cancel, modify or amend" restrictive covenants). It is also unreasonable if it differs fundamentally from the obligations described in the original covenants. *Meresse*, 100 Wn.App. at 866-67 (amendment authorizing access road's " relocation" unreasonable where original covenants addressed only " 'maintenance, repairs'" and " 'additional constructions'" involving said road, and the clause permitting future amendments was limited to certain topics). But where an amendment is not unreasonable as a matter of law, its validity can be determined only in light of " the surrounding facts." *Id.* at 865 (citing *Shafer*, 76 Wn.App. at 271).

[19] *See* 1 VRP at 31-32 ("[I]n assessing what constitutes a reasonable manner consistent with the general plan of development, a court should look to the language of the covenants, their apparent import, and the surrounding facts.").

[20]In light of the need to protect the property owners' legitimate expectations, courts have considered the " character of the community" at the time the property was purchased and whether the covenants were enforced so as to maintain this character over time. *Se. Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 597-98, 683 S.E.2d 366 (2009) (considering character of the community " at the time the plaintiff property owners purchased their lots" and noting that this character was maintained " consistently since the first lots were sold"); *Armstrong*, 360 N.C. at 560 (considering the character of the community at the time the plaintiffs purchased their properties).

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

MICHELLE AND JAMES ACQUAVELLA, Petitioners, vs. CITY OF SEATTLE, Respondent, and BARRY AND LINDA ANDREWS, ROBERT AND LESLIE FISCHER, JOHN GARDNER, S. DON GARRISON, ROBERT AND OLESIA GREENE, ALEX AND WANDA HORNBECK, ROBERT LANGDON AND PATRICIA NARASIMHAN, CASEY MACDONALD, LUIS SALAS, REBECCA SNELLENBERG, HENRY STOCKBRIDGE AND COLEEN WRIGHT, Additional Parties.	No. 08-2-39188-4 SEA FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came on for trial before this Court on the Land Use Petition brought by Petitioners Michelle and James Acquavella ("Acquavella"). Trial was held April 24, 2009. Petitioner Acquavella was represented by Courtney Kaylor, McCullough Hill, P.S. Respondent City of Seattle ("City") was represented by Patrick Downs, Assistant City Attorney, Seattle City Attorney's Office.

The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

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I. FINDINGS OF FACT

1. This action is a Land Use Petition filed under the Land Use Petition Act ("LUPA") (RCW 36.70C).

2. Acquavella owns and manages condominium units in the The Elektra Condominiums ("Elektra"), located at 1400 Hubbell Place in Seattle. Transcript of Proceedings Before the Hearing Examiner City of Seattle ("TR") 6:18-7:2. The Covenants, Conditions, Restrictions and Reservations ("CC&Rs") for the Elektra, recorded in 1997, expressly permit rental for periods of three days or more. Documentary Record ("DR"), Tab 12:74. Specifically, the CC&Rs state that "no Unit Owner shall be permitted to Lease his or her Unit for transient purposes which shall be deemed as Renting for any period less than three (3) days." *Id.*

3. The Elektra building was designed and constructed as a multi-family residential building. DR Tab 6:13. The building entrance is not open to the general public. TR 10:23-26. The building garage is not available for general public parking but each condominium is assigned an individual parking space in the garage. TR 10:23-11:2. Each condominium has the physical characteristics of an independent residence, including a full kitchen, living area and bedroom. TR 10:9-12. Each condominium has a separate mail box, telephone line and utilities for the exclusive use of its occupants. TR 10:12-14, 11:15-21; DR Tab 6:13.

4. The condominium units owned and managed by Acquavella have been used for owner occupancy and both long and short term rental. Acquavella testified before the Hearing Examiner that her tenants have an expectation of privacy and dominion over the rental unit. TR 11:8-9. Acquavella does not enter the condominiums except in emergencies (such as when a repair is needed) and then only after providing notice consistent with landlord tenant law. TR 11:9-14. Acquavella regards all of her

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rentals as residential. TR 11:7-8. A rental agreement is entered into prior to occupancy by Acquavella's tenants. TR 11:4-6.

5. Acquavella testified that she does not provide housekeeping service, room service or transportation service. TR 10:11-12, 11:22-26. Acquavella's tenants may contract for outside utility services, such as cable or internet service. TR 11:15-18. Acquavella's tenants receive a front door key and access the building as any other resident does. TR 10:23-26. Acquavella's tenants are given a garage door opener to access their parking space. TR 10:23-11:2. They are given a key to the mail box associated with the unit and, at their option, may receive mail at this mail box. TR 10:15-17. Acquavella's tenants have included persons working in Seattle, receiving medical treatment in Seattle, and visiting Seattle for other reasons. TR 12:24-13:19.

6. The undated Sea to Sky Rentals rental agreement included in the City's code enforcement file is consistent with Acquavella's testimony. DR Tab 101:514-517. The rental agreement gives the tenant exclusive possession and use of the condominium. The rental agreement provides, "[w]hen you rent the unit, you assume responsibility for it and its contents." DR Tab 101:516. The rental agreement does not permit Acquavella to enter the condominium except to make required repairs at the request of the tenant. *Id.* The rental agreement states the condominiums are rented furnished (including kitchen equipment and linens). *Id.* However, "[h]ousekeeping services are not provided with your rental." *Id.* Clean linens are provided only once at the request of the tenant. *Id.* Tenants are responsible for long distance telephone charges. *Id.* The rental agreement requires a nonrefundable cleaning fee and provides that tenants are liable for damages to the condominium. DR Tab 101:515. The rental agreement allows eviction (the common term for an unlawful detainer action) for violation of the rental agreement. DR Tab 101:514. The rental agreement refers to "guests," "check in," "reservation," and recommends travel insurance. DR Tab 101:514-515.

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7. The City issued a Notice of Violation ("NOV") to Acquavella stating that her rental activities constituted an impermissible lodging use. DR Tab 58:242-244.

8. The City issued NOVs to other property owners in the Elektra as well. DR Tab 58:254-256. One of these property owners, the Mummerys, submitted a six month lease agreement to the City in response to the NOV. DR Tab 40:178-183. The lease agreement used the Seattle Suites rental agreement form. *Id.* This rental agreement form contains many terms that are similar to ones in the Sea to Sky rental agreement that the City argues are characteristic of lodging. The Seattle Suites agreement states that violation of the agreement will result in immediate termination (DR Tab 40:179); smoking, repeated neighbor complaints, pets, parties or excessive noise will all result in immediate termination (DR Tab 40:179, 182); payment can be made by credit card (DR Tab 40:181); the tenant's credit card may be charged for damages (DR Tab 40:180); the landlord pays for basic utilities but the tenant is responsible for payment for long distance telephone calls and upgraded utilities (*id.*); the terms "guests," "reservation" and "check in/out" are used (DR Tab 40:181-182); and housekeeping is not typically provided but may be provided for an additional fee (DR Tab 40:183). However, contrary to the City's current position, City staff determined that a six month lease using this rental agreement form constituted a residential use, not a lodging use. DR Tab 39:177.

9. Acquavella sought reconsideration of the NOV issued to her. DR Tab 51:229-230. The City then issued a Land Use Order of the Director, which upheld the NOV. DR Tab 42:188-197. Subsequently, the City entered into an agreement with Acquavella that provided that Acquavella would submit a request for a Code Interpretation regarding whether her rental activities constitute a residential use. DR Tab 31:152-156.

10. Acquavella submitted the request for a Code Interpretation to the City. DR Tab 9:34-60. The City then issued the Code Interpretation, which concluded that rental of condominium units in the

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Elektra for less than 30 days is a lodging use. DR Tab 10:61-69. The Code Interpretation also concluded that short term rental is not permitted as an accessory use to a primary residential use of property. *Id.* Acquavella appealed the Code Interpretation to the City's Hearing Examiner. DR Tab 30:147-151.

11. The Hearing Examiner held a quasi-judicial hearing on the appeal. DR Tab 6:12. Andy McKim, a Land Use Planner with more than 20 years of experience with the City, testified that the City's prior practice was to use a 30 day "rule of thumb" for distinguishing between lodging and residential uses. TR 16:20-23; TR 29:15-17; DR Tab 6:13. Following the hearing, on October 23, 2008, the Hearing Examiner issued a decision ("Hearing Examiner Decision") reversing the Code Interpretation. DR Tab 6:17. The Hearing Examiner concluded that the 30 day rule announced in the Code Interpretation is not supported by the Seattle Municipal Code ("City Code" or "SMC") and cannot be used by the City. DR Tab 6:16. No party appealed this portion of the Hearing Examiner Decision.

12. In addition, the Hearing Examiner found that the Elektra was permitted as a multifamily residential building and that the building and its operations have not been modified. DR Tab 6:13. The Hearing Examiner also concluded that "[e]ach condominium unit fits the definition of 'dwelling unit' because the unit itself consists of a group of rooms within a structure designed, arranged, and intended to be occupied by not more than one household as independent living accommodations." DR Tab 6:16. No party appealed this finding or conclusion.

13. Nevertheless, the Hearing Examiner concluded that "to be considered a 'housekeeping unit,' the person or persons who rent a condominium unit on a short term basis would have to be authorized during their occupancy to manage the unit itself ('the house') and affairs associated with it ('home affairs')." DR Tab 6:16. The Hearing Examiner based this determination on the definition of "housekeeping" in Webster's Dictionary but did not consider the related definition of "housekeep" in the

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same dictionary. DR Tab 6:15. The Hearing Examiner concluded that there was not enough evidence in the record to determine whether Acquavella's rental activities are a residential use. DR Tab 6:16.

14. In addition, the Hearing Examiner determined that Acquavella's rentals are not accessory to a primary residential use of property. DR Tab 6:17.

15. Following the Hearing Examiner decision, the City refused to withdraw the NOV or Director's Order. Instead, the City indicated that it was forwarding the matter to the City's Law Department with a request that enforcement actions be filed. DR Tab 33:160.

16. Acquavella timely filed this action under LUPA appealing portions of the Hearing Examiner Decision.

17. In a LUPA action this Court sits in an appellate capacity and reviews the factual record created before the City. In this case, the Court supplemented the factual record created before the Hearing Examiner with the City's code enforcement file. In its briefing and argument, the City relied almost exclusively on documents in the code enforcement file. The City cited only one exhibit from the Hearing Examiner record. The Hearing Examiner did not consider the documents in the code enforcement file. Acquavella had no opportunity to cross examine witnesses whose statements are contained in these documents or otherwise dispute the accuracy or relevance of the information contained in them. Also, many of the documents relate to other property owners or to short term rental generally. DR Tab 40, 49, 63, 65, 75, 100, 102. In addition, many of the documents are outdated, with many created more than a year before the Hearing Examiner proceedings. DR Tab 56 (field notes dated 10/29/07), Tab 63 (anonymous correspondence dated 9/19/07), Tab 64 (correspondence dated 9/19/07), Tab 65 (correspondence dated 9/19/07), Tab 67 (correspondence dated 9/19/07), Tab 74 (correspondence dated 9/13/07), Tab 75 (correspondence dated 9/7/07), Tab 88 (correspondence dated 8/31/07), Tab 101 (Sea to Sky web pages, many outdated), Tab 103 (outdated vrbo.com web pages), Tab

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104 (outdated vacationhomrerentals.com web pages), Tab 105 (outdated roadsideamerica.com web pages), Tab 106 (outdated vacationrentals inamerica.com web pages), Tab 108 (outdated trails.com web pages). Notably, the Sea to Sky rental agreement in the code enforcement file is undated. DR Tab 101:514-517.

18. Acquavella makes three alternative requests for relief. First, Acquavella requests that the Court reverse the Hearing Examiner Decision and determine that her rental activities are residential. Primarily, Acquavella argues that her rental activities are residential under the plain language of the City Code. Acquavella also argues that the "control test" used by the City is not relevant to the question before the Court, which is whether Acquavella's rental activities are a residential use under the City Code, because the "control test" does not appear in the City Code. Even if the "control test" were relevant, Acquavella argues that her rental activities would constitute a residential use under this test. In addition, Acquavella argues that the City Code is unconstitutionally vague as interpreted and applied to Acquavella by the City.

19. Second, in the alternative, if the Court determines that the "control test" is relevant, then Acquavella requests that the Court remand this matter to the Hearing Examiner for an evidentiary hearing.

20. Third, in the alternative, Acquavella requests that the Court determine that her rental activities are a permitted accessory use.

II. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court enters the following Conclusions of Law:

Jurisdiction and Standard of Review

1. This Court has jurisdiction over this action under RCW 36.70C.040.

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2. The Court may grant relief if one of the standards set out in RCW 36.70C.130 is met. These standards are: (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless; (b) the land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; (c) the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; (d) the land use decision is a clearly erroneous application of the law to the facts; (e) the land use decision is outside the authority or jurisdiction of the body or officer making the decision; or (f) the land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

3. Whether a decision is an erroneous interpretation of the law is a question of law reviewed *de novo*. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). If an agency's interpretation of its code is not a matter of preexisting policy, as in this case, no deference is due to that interpretation. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 647, 151 P.2d 990 (2007). Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness" of the decision. *Schofield, supra*, 96 Wn. App. at 586. A decision is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* Acquavella bears the burden of proof in this matter.

4. In this case, the portions of the Hearing Examiner Decision under appeal are an erroneous interpretation of the law, not supported by substantial evidence and a clearly erroneous application of the law to the facts.

<u>Principles of Statutory Interpretation</u>

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5. In interpreting a statute, the Court's objective is to ascertain and carry out the legislative intent. *Delyria v. Wash. State School for the Blind*, 165 Wn.2d 559, 563, 199 P.3d 980 (2009). If the statute's meaning is plain on its face, then the Court must give effect to the plain meaning as an expression of legislative intent. *Id.* The dictionary may be used to define the plain meaning. *Sleasman, supra,* 159 Wn.2d at 643. The interpretation of local ordinances is governed by the same principles as the interpretation of statues. *Griffin v. Thurston County Board of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008).

6. Agencies do not have the authority to make rules which amend or change legislative enactments. *Washington Federation of State Employees v. State Personnel Board*, 54 Wn. App. 305, 308, 773 P.2d 421 (1989). Instead, the City must interpret and enforce the City Code as written, without adding new criteria on a case-by-case basis. *Schroeder v. Bellevue*, 83 Wn. App. 188, 193, 920 P.2d 1216 (1996).

First Claim: Acquavella's Rental Activities Are Residential

7. SMC 23.45.004 states that "multifamily structures" are a principal use permitted outright in all multifamily zones. The Elektra is located in a multifamily zone. DR Tab 6:12.

8. "Residential" means "a use within a structure intended to be occupied as a dwelling." SMC 23.84.032. Residential uses include multifamily structures, which are structures containing two or more dwelling units. *Id.* The Hearing Examiner found and the City acknowledged in it briefing that the Elektra is a multifamily structure. DR Tab 6:13.

9. A dwelling unit is "a room or rooms located within a structure, designed, arranged, occupied or intended to be occupied by not more than one (1) household as living accommodations." SMC 23.84.008. The Hearing Examiner concluded that the condominiums in the Elektra are dwelling units and no party appealed this conclusion. DR Tab 6:16.

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10. Based on this conclusion, the Court need not address the subsidiary term "household" or its subsidiary term "housekeeping unit." Nevertheless, based on the record before the Court, Acquavella's tenants qualify as households and housekeeping units.

11. A household is a "housekeeping unit" consisting of a limited number of people (any number of related persons; eight or fewer non-related, nontransient persons; or eight or fewer related and non-related nontransient persons). SMC 23.84.016. In its briefing, the City acknowledged that this definition focuses on the number of residents and Acquavella's tenants do not exceed the eight-person limit.

12. The SMC does not define "housekeeping unit." According to Webster's Dictionary, "housekeep" means "to perform the routine duties (as cooking and cleaning) of managing a house" and "housekeeping" means "the management of a house and home affairs." Merriam Webster's Collegiate Dictionary (10th ed. 1993). The American Heritage Dictionary provides a similar definition, stating that "housekeeping" means "[p]erformance or management of household tasks." The American Heritage Dictionary of the English Language (4th ed. 2000).

13. Under the definitions of "housekeep" and "housekeeping" in Webster's Dictionary and the American Heritage Dictionary, authority or control over the condominium is not required. Instead, under these dictionary definitions, the term "housekeeping unit" means only an individual or group of people who perform routine household tasks (such as cooking and cleaning).

14. Acquavella's rental of condominiums in the Elektra is a permitted residential use under the plain language of the City Code.

15. This conclusion is consistent with the recent decision of the Court of Appeals, Division I, in *Ross v. Bennett*, 148 Wn. App. 40, ___ P.3d ___ (2008). In that case, the Court construed the plain meaning of the term "residential" in a property covenant. The Court held that short term vacation rental

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qualifies as a residential use. This Court, like the Court in *Ross*, is construing the plain meaning of the term "residential."

16. The City Code defines "lodging" as "a retail sales and service use in which the primary activity is the provision of rooms to transients." SMC 23.84.024. The City Code does not define "transients." The dictionary definition of this term is "passing with time; transitory"; "remaining in a place only a brief time." American Heritage College Dictionary (4th ed. 2004).

17. In determining what constitutes a "brief time" with regard to rentals at the Elektra, the Court may reasonably look to the Elektra CC&Rs. The CC&Rs define "transient" rentals as those less than three days. DR Tab 12:74. Acquavella's rentals are all for three days or more. DR Tab 6:12. Therefore, they are not "transient."

18. In addition, rentals less than 30 days occur only an average of 41% of the time in the condominiums rented by Acquavella. TR 12:12-14. The Court cannot ignore the time that the condominiums are vacant for purposes of calculating this percentage because the record does not show what time period the Acquavella condominiums are vacant. Further, the City has acknowledged that the residential use of an owner or long term tenant does not terminate in his or her absence. TR 43:17-15. Therefore, even if rentals less than 30 days are considered "transient," these rentals are not the "primary activity" in the condominiums.

19. Lodging includes bed and breakfasts, hotels and motels. SMC 23.84.024. A hotel is a building in "which a majority of the rooms are provided to transients for a fee on a daily or short-term basis." *Id.* No party claims that the Elektra is a bed and breakfast or motel. The Elektra is also not a hotel. The Elektra has 200 condominiums but only approximately 25 condominiums are rented on a short term basis. DR Tab 6:12; TR 12:18-24.

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20. The "control test" used by the City is not relevant to the determination of whether Acquavella's rentals are a permitted use under the City Code. The "control test" does not appear in the City Code. While the City Council could adopt the "control test," it has not done so, and both the City and the Court are bound to apply the City Code as written. *Washington Federation of State Employees, supra,* 54 Wn. App. at 308; *Schroeder, supra,* 83 Wn. App. at 193.

21. In addition, the Court lacks jurisdiction to determine the nature of the relationship between Acquavella and her renters. The issue before the Court is whether Acquavella's rentals qualify as a permitted use under the City's Land Use Code (Title 23 of the City Code). The Land Use Code establishes the rules for the City's regulation of land; it does not determine relationships between private parties.

22. Even if the "control test" were relevant, Acquavella's rentals would qualify as residential. In *Mercer Island v. Steinman*, 9 Wn. App. 479, 513 P.2d 80 (1973), the Court determined that a residential tenant (distinguished from a lodger) "has exclusive legal possession of premises and is responsible for their care and condition." The record shows that Acquavella's tenants have exclusive legal possession during their tenancy. TR 11:8-14; DR Tab 101:514-517. In addition, they are responsible for the care and condition of the condominium during their tenancy. TR 10:9-12, 11:22-26; DR Tab 6:13; DR Tab 101:516. Therefore, they are residential tenants.

23. The Court in *Mercer Island* also identified six factors that are "indicative of tenancy":

> (1) the exclusive possession of the rooms by the occupiers without a right of control or entry in the owner during the occupancy, (2) the separateness of each living unit from the remaining areas of the structure, (3) the existence of private outside entryways for each living space with keys possessed privately by the occupiers, (4) the absence of commonly shared cooking, eating and bathing facilities or other areas, (5) the arrangement of rental on a landlord-tenant basis, and (6) the absence of the performance of cooking, cleaning, garbage removal and telephone services for the occupiers by the owner.

Mercer Island, supra, 9 Wn. App. 484-485.

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24. The evidence in the record shows that Acquavella's tenants have all these indicia of residential tenancy. First, they have exclusive possession of the condominiums during the tenancy without the right of entry by the landlord. TR 11:8-14; DR Tab 101:514-517. Second, each condominium unit is a separate and independent living unit. TR 10:12-18; DR Tab 6:13. Third, Acquavella's tenants have keys to not only the condominium units that they are renting, but also to the building, which has a controlled entrance not open to the public. TR 10:22-26. Fourth, there are no commonly shared cooking, eating, or bathing facilities. TR 10:9-12; DR Tab 6:13.

25. Fifth, Acquavella's rentals are arranged on a landlord tenant basis. Acquavella regards all of her rentals as residential rentals. TR 11:7-8. Acquavella's rental agreement includes the hallmark of residential tenancy, exclusive use and possession by the tenant. DR Tab 101:514-517; TR 11:8-14. The fact that it refers to tenants as "guests," allows payment by credit card, recommends travel insurance, and refers to "check in" and "check out" is not controlling. The rental agreement is generally consistent with landlord tenant law, including provisions requiring Acquavella to make repairs if needed, allowing eviction (a common term for unlawful detainer) and providing that the tenant is responsible for damages caused by the tenant. DR Tab 101:514-515; RCW 59.18.060(5) (duty to repair); RCW 59.18.150 (right of entry to repair); RCW 59.18.140 (tenant duty to conform with reasonable obligations in rental agreement), RCW 59.18.180 (substantial noncompliance grounds for unlawful detainer action); RCW 59.18.285 (nonrefundable fees permitted); SMC 22.206.160.A (duty to repair); SMC 22.206.170.F (right of entry for repair); SMC 22.206.160.C.1.c (noncompliance with material term of rental agreement grounds for eviction). If any of the terms of the rental agreement violate landlord tenant law, the result is not that the rental is not residential, but rather that these terms cannot be enforced against the tenant.

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26. Sixth, Acquavella does not provide cooking or cleaning services for the tenants as part of the lease agreement. TR 11:22-26; DR Tab 101:516. Fresh towels may be provided only once on request. DR Tab 101:516. Tenants are responsible for complying with City requirements for separation of recyclables for garbage removal. *Id.* The cost of local, but not long distance, telephone service is included in the rent. *Id.*

27. The City's claim that the Acquavella rentals are lodging under the "control test" is not consistent with the City's established practice and is not entitled to deference. *Sleasman, supra,* 159 Wn.2d at 647. The City's historic practice has been to distinguish residential from lodging uses based on a 30-day rule of thumb, not the "control test." TR 16:20-23; TR 29:15-17; DR Tab 6:13. In addition, the Seattle Suites rental agreement contains many of the terms that the City identifies as characteristics of lodging. DR Tab 40:179-183. However, the City determined that a six month lease using the Seattle Suites rental agreement constituted a residential use. DR Tab 39:177.

28. The decision in *Benham v. Morton & Furbish Agency*, 929 A.2d 471, 2007 ME 83 (2007) has no precedential value in this case because it is not a Washington case. In addition, it is not persuasive because it conflicts with Washington precedent. *Hughes v. Chehalis School District No. 302*, 61 Wn.2d 222, 377 P.2d 642 (1963) (a lease can be as short as one evening); *Ross, supra*, 148 Wn. App. 40 (vacation rental is a residential use).

29. Acquavella argues that the City Code is unconstitutionally vague as interpreted and applied to Acquavella by the City. In light of the Court's conclusion that Acquavella's rentals are residential under the plain language of the City Code, the Court does not reach this issue. The City Code is not susceptible to challenge on this basis on the record before the Court. This ruling does not preclude Acquavella from bringing such a challenge in the future based on additional facts.

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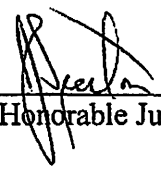
30. Also, in light of the conclusion that the Acquavella rentals are residential, the Court does not reach Acquavella's alternative claims that this matter should be remanded to the Hearing Examiner or that her rental activities are a permitted accessory use.

III. JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Acquavella's rental activities are a permitted residential use.

Dated this 5th day of May, 2009



The Honorable Judge Julie Spector

Judge Julie Spector
King County Superior Court
516 Third Avenue
Seattle WA 98104
(206) 296-9160

317 Or. 339 (Or. 1993), SC S39657, Cope v. City of Cannon Beach /**/ div.c1 {text-align: center} /* */

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317 Or. 339 (Or. 1993)

855 P.2d 1083

Gene COPE, Harriet Cope, Colleen Donnelly, Robert Donnelly,
Carlyn R. Draneas, John H. Draneas, Mary Gartshore, Peter
Gartshore, Jack G. Kaady, Marsha LaFarge, Jack Stutzman,
Sharon Stutzman, Betty Wilson, and Lloyd Wilson, Petitioners below,
William G. Hay, Georgiana F. Hay, William J. Allred, and
Hallmark Inns & Resorts, Inc., Petitioners on Review,
v.
CITY OF CANNON BEACH, Respondent on Review.
LUBA 92-019, 92-020; CA A75091; SC S39657.
Supreme Court of Oregon, En Banc
August 5, 1993

Argued and Submitted May 6, 1993.

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Dean N. Alterman, of Kell, Alterman & Runstein, Portland, argued the cause and filed the petition for petitioners on review.

Timothy J. Sercombe, of Preston Thorgrimson Shidler Gates & Ellis, Portland, argued the cause for respondent on review. With him on the response were Edward J. Sullivan and Mark J. Greenfield.

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GRABER, Justice.

The issue in this case is whether a municipal zoning ordinance took petitioners' property without just compensation, in violation of the Fifth and Fourteenth **[855 P.2d 1084]** Amendments to the Constitution of the United States. [1]

Until November 5, 1987, the City of Cannon Beach (the city) prohibited the rental of dwelling units in certain residential zones within the city for less than 14 days. On November 5, 1987, Cannon Beach Ordinance 87-12 went into effect, permitting each property owner to rent one residential property in the city for less than 30 days.

In 1992, the city adopted Ordinance 92-1, the ordinance challenged by petitioners in this case. Ordinance 92-1 defines "transient occupancy" as rental for less than 14 days, prohibits the creation of new transient occupancy uses, and requires existing transient occupancy uses to end by 1997. Ordinance 92-1 also includes a "hardship" provision. It provides an exemption for property owners "who can substantiate that an investment made exclusively in the nonconforming use of a dwelling for transient occupancy can not be adequately amortized" within the five-year period between adoption of the ordinance and the required termination date.

Petitioners own rental properties in the city. They appealed the adoption of Ordinance 92-1 to the Land Use Board of Appeals (LUBA), arguing, among other things, that the ordinance works a

taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments. LUBA upheld the ordinance. With respect to petitioners' constitutional claim, LUBA held that petitioners could not establish a taking until they applied for, and were

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denied, the hardship relief provided in the ordinance. Cope v. City of Cannon Beach, 23 Or. LUBA 233, 240-41 (1992).

On judicial review, [2] the Court of Appeals agreed with *LUBA. Cope v. City of Cannon Beach,* 115 Or.App. 11, 14, 836 P.2d 775 (1992). Petitioners sought review in this court, claiming that "the challenged ordinance on its face works a taking of the property rights of petitioners and others to continue their uses, in violation of the Fifth and Fourteenth Amendments to the United States Constitution." [3] We affirm on other grounds. We hold that the challenged ordinance does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States in the manner asserted by petitioners.

In deciding a claim that a governmental regulation constitutes a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments, this court applies principles established by the Supreme Court of the United States. We first note that petitioners challenge the constitutionality of the ordinance on its face. See *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992) (allegation that an ordinance is unconstitutional no matter how it is applied is a facial challenge). That being so, petitioners' challenge is "ripe" for review. See ibid. (ripeness of a facial challenge does not depend on the extent to which the property owners are deprived of the economic uses of their particular pieces of property or the extent to which the property owners are compensated); *Hodel v. Virginia Surface Mining & Recl. Assn.,* 452 U.S. 264, 101 S.Ct. 2352, 69

[855 P.2d 1085] L.Ed.2d 1 (1981) (where a takings claim arose in the context of a facial challenge to a statute and thus presented no concrete controversy concerning the application of the statute or its

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effect on specific parcels of land, the Court considered on the merits whether the mere enactment of the act constituted a taking); *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (same). [4] We turn, then, to the merits of petitioners' claim.

In Agins v. Tiburon, supra, property owners challenged municipal zoning ordinances, adopted after the owners acquired their property, that restricted the number of houses that could be built on the undeveloped land. The Supreme Court of the United States held that the zoning ordinances, on their face, did not take the owners' property without just compensation. 447 U.S. at 259, 100 S.Ct. at 2141. The Court explained that a land use regulation

"effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. * * *

"In this case, the zoning ordinances substantially advance legitimate governmental goals. * * * The specific zoning regulations at issue are exercises of the city's police power to protect the residents of [the city] from the ill effects of urbanization. Such governmental purposes have long been recognized as legitimate.

" * * * The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property * * *. There is no indication that the [property owners'] tract is the only property affected by the ordinances. [The property owners] therefore will share with other owners the benefits

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and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in market value that the [property owners] might suffer." Id. at 260-62, 100 S.Ct. at 2142 (emphasis added; citations and footnote omitted).

The Court also determined that the ordinances permitted some, albeit limited, residential development of the property. Id. at 262, 100 S.Ct. at 2142. See also *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, ---- - ----, 112 S.Ct. 2886, 2893-94, 120 L.Ed.2d 798 (1992) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"; Supreme Court cited and applied Agins test, whereby the Fifth Amendment is violated when a land use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of the land); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987) (citing and applying Agins test, Court noted that it has "long recognized" that a land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of the land); *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 485, 107 S.Ct. 1232, 1241-42, 94 L.Ed.2d 472 (1987) (restating and applying test established in Agins, Court concluded that enactment **[855 P.2d 1086]** of state land conservation statute at issue did not effect a taking of the plaintiff's property); *Dolan v. City of Tigard,* 317 Or. 110, 116-21, 854 P.2d 437 (1993) (citing and applying Nollan and Agins test, this court held that the regulation in question did not take the petitioners' property without just compensation in violation of the Fifth Amendment); *Stevens v. City of Cannon Beach,* 317 Or. 131, 141-48, 854 P.2d 449 (1993) (citing and applying Lucas and Agins test, this court upheld administrative rules and ordinances against a facial challenge to their validity under the Takings Clause of the Fifth Amendment).

In *Yee v. City of Escondido, Cal.,* supra, 503 U.S. at ----, 112 S.Ct. at 1529, the Supreme Court held that a regulation affecting the relationship between landlord and tenant (in that case, an ordinance placing a ceiling on rents that a landowner could charge) is a land use regulation, to which the Supreme Court will apply its usual analysis in determining whether a regulatory taking has occurred. We therefore apply the two-part test

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established by the Supreme Court in the cited "regulatory takings" cases to Ordinance 92-1.

We first ask whether the challenged regulation substantially advances legitimate governmental interests. Ordinance 92-1 was adopted by the city as an amendment to its

comprehensive plan for community development. Goals of the comprehensive plan include the provision of affordable housing for permanent residents and the preservation of the residential character of certain neighborhoods. [5] In a 1991 study, the city's planning commission determined that, by encouraging the construction and ownership of housing units intended for the transient occupancy market, the 1987 ordinance permitting those rentals had diminished the availability of affordable housing for permanent residents. The planning commission also determined that the presence of transient occupants in residential zones adversely affected the "character" and "integrity" of residential areas by, for example, resulting in increased traffic and noise levels in those areas. The planning commission concluded that permitting transient occupancy of dwelling units in residential zones had "substantial" and "unmitigatable" adverse impacts on those zones that were "inconsistent" with the purposes of the city's comprehensive plan. In response to those concerns, the city adopted Ordinance 92-1.

We conclude that Ordinance 92-1 substantially advances legitimate governmental interests. See *Agins v. Tiburon,* supra, 447 U.S. at 260, 100 S.Ct. at 2141 (stating first part of test). The interests in securing affordable housing for permanent residents and in preserving the character and integrity of residential neighborhoods are legitimate governmental interests, and the challenged ordinance has a substantial nexus to the achievement of those aims. See *Nollan v. California Coastal Comm'n,* supra, 483 U.S. at 835, 837, 107 S.Ct. at 3147-48, 3148-49 (the Supreme Court has "made clear" that a broad range of governmental purposes and regulations are "legitimate," including those related to "landmark preservation," "scenic zoning," and "residential zoning"; Court looks for a sufficient "nexus" between the

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regulation and the interest intended to be served); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 129, 98 S.Ct. 2646, 2661-62, 57 L.Ed.2d 631 (1978) (Supreme Court "has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city").

We next consider whether Ordinance 92-1, by prohibiting transient occupancy, denies property owners economically viable use of their properties. See *Agins v. Tiburon,* supra, 447 U.S. at 260, 100 S.Ct. at 2141 (stating second part of test). We conclude that it does not. On its face, Ordinance 92-1 permits rentals of dwellings for periods of 14 days or more. The ordinance also permits the owners **[855 P.2d 1087]** themselves to reside in the dwellings. Although those uses may not be as profitable as are shorter-term rentals of the properties, they are economically viable uses.

Petitioners argue that, because "[t]he right to continue an existing legal use is a property right," removal of that existing use is a taking without regard to other economically viable uses. Petitioners' focus is too narrow. In *Keystone Bituminous Coal Assn. v. DeBenedictis,* supra, 480 U.S. at 497, 107 S.Ct. at 1248, the Supreme Court of the United States held that the "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." The Court went on to note that, " 'where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.' " Ibid. (quoting *Andrus v. Allard,* 444 U.S.

51, 65-66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979)). In Penn Central Transp. Co. v. New York City, supra, the Supreme Court observed:

"Zoning laws generally do not affect existing uses of real property, but 'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." 438 U.S. at 125, 98 S.Ct. at 2660; see also id. at 125-27, 98 S.Ct. at 2659-61 (listing examples).

In summary, we hold that Ordinance 92-1 meets the two-part test established by the Supreme Court of the United

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States in its regulatory takings cases involving facial challenges. Ordinance 92-1 substantially advances legitimate governmental interests, and it does not deny property owners economically viable use of their properties.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed on other grounds.

FADELEY, Justice, specially concurring.

The only issue in this case is whether an ordinance of the City of Cannon Beach "takes" the residential real property of petitioners. Petitioners contend only that their property is taken without just compensation in violation of the takings component of the Fifth Amendment that applies to state and city government through the Fourteenth Amendment to the Constitution of the United States.

The city's comprehensive plan states that no additional land shall be zoned RM (residential-motel). The city's planning commission found that permitting residential housing to be used and rented as if the houses were motels drove up the price of residences in Cannon Beach, thereby contravening an applicable land use goal that requires each city's comprehensive plan to permanently provide an adequate supply of affordable housing.

The property involved is already developed as residential housing. That was its character and use before the ordinance was enacted. It retains that character and permitted use after enactment of the challenged ordinance.

I write separately because I do not consider that federal cases involving undeveloped property are controlling authority here, yet the lead opinion relies on them in part. The "any-viable-economic use" standard touted in undeveloped property cases does not apply in this case. Other standards do.

No physical invasion or easement is involved, nor are the owners compelled to permit a governmentally imposed use of their property. No preexisting use for residential rental purposes is terminated, albeit the level of rental income very likely has been reduced. There is no claim that the government is planning to use the property. The effect of laws reducing rental income has been held by the Supreme Court

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of the United States to be no taking, even when combined with other laws interfering with an owner's unfettered use of property. *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 112 S.Ct. 1522,

118 L.Ed.2d 153 (1992).

[855 P.2d 1088] Therefore, I join in the result reached on the federal question before the court.

Notes:

[1] The Takings Clause of the Fifth Amendment to the Constitution of the United States provides: "[N]or shall private property be taken for public use, without just compensation."

That clause of the Fifth Amendment is made applicable to the states by the Fourteenth Amendment. Nollan v. California Coastal Comm'n, 483 U.S. 825, 827, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677 (1987).

Petitioners raise no claim under the Oregon Constitution. We therefore limit our analysis to federal law.

[2] ORS 197.850 provides for judicial review of a final order of the Land Use Board of Appeals (LUBA). ORS 197.850(9) provides:

"The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:

"(a) The order to be unlawful in substance or procedure * * *;

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record * * *."

[3] Petitioners did not seek review of the Court of Appeals' holdings on several other issues, and we do not consider those issues here.

[4] Petitioners are not precluded, in the future, from challenging the application of Ordinance 92-1 to their specific properties. However, those challenges, should petitioners choose to bring them, will not be ripe for judicial resolution until petitioners seek, and are denied, relief under the "hardship" provision of the ordinance. See Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 297 & n. 40, 101 S.Ct. 2352, 2371 n. 40, 69 L.Ed.2d 1 (1981) (Supreme Court noted that, although the statute at issue in that case, on its face, did not work a taking of the plaintiff's property, the plaintiff was not precluded from showing that the application of the statute to his property, including the statute's variance and waiver provisions, effected a taking).

[5] The city's comprehensive plan is, in turn, designed to be consistent with the requirements of Oregon's Statewide Planning Goals, including Goal 2 (Land Use Planning), Goal 8 (Recreational Needs), Goal 9 (Economic Development), and Goal 10 (Housing).

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234 Cal.App.3d 1579, H007702, Ewing v. City of Carmel-By-The-Sea /**/ div.c1 {text-align: center} /**/

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234 Cal.App.3d 1579

286 Cal.Rptr. 382

John W. EWING, et al., Plaintiffs and Appellants,

v.

CITY OF CARMEL-BY-THE-SEA, Defendant and Respondent.

No. H007702.

California Court of Appeal, Sixth District

Oct. 9, 1991.

Review Denied Jan. 8, 1992.

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[Copyrighted Material Omitted]

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[Copyrighted Material Omitted]

Page 1582

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Michael Masuda, Noland, Hamerly, Etienne & Hoss, Salinas, for plaintiffs and appellants.

Donald G. Freeman, City Atty., City of Carmel-By-The-Sea, for defendant and respondent.

Daniel J. Curtin, Jr., Ann R. Danforth, McCutchen, Doyle, Brown & Enersen, Walnut Creek, Louise H. Renne, City Atty., Burk E. Deventhal, Asst. City Atty., City and County of San Francisco, for amici curiae California Cities.

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ELIA, Associate Justice.

Plaintiff homeowners challenge the constitutionality of a zoning ordinance prohibiting transient commercial use of residential property for remuneration for less than 30 consecutive days. The trial court upheld the ordinance. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are owners of single-family, residential property zoned R-1 in the City of Carmel-by-the-Sea. Plaintiffs challenge Ordinance No. 89-17, unanimously adopted by the Carmel City Council in May 1989. The Ordinance prohibits the "Transient Commercial Use of Residential Property for Remuneration ... in the R-1 District."

The Ordinance defines the "transient commercial use of residential property" as "the commercial use, by any person, of Residential Property for bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging uses where the term of occupancy, possession or tenancy of the property by the person entitled to such occupancy, possession or tenancy is for less than thirty (30) consecutive calendar days." The Ordinance defines "remuneration" as "compensation, money, rent, or other bargained for consideration given in return for occupancy,

possession or use of real property."

The Ordinance provides that "[a]ny Person acting as agent, real estate broker, real estate sales agent, property manager, reservation service or otherwise who arranges or negotiates for the use of Residential Property ..." and "[a]ny Person who uses, or allows the use of, Residential Property in violation [of the ordinance] is guilty of an infraction for each day in which such Residential Property is used, or allowed to be used...." To enforce the Ordinance, "[t]he City Attorney may seek legal, injunctive, or other equitable relief...."

Plaintiffs filed this action in June 1989, seeking declaratory and injunctive relief, as well as an award of damages for violation of their civil rights under 42 U.S.C. § 1983 and an award of attorney fees under 42 U.S.C. § 1988. In August 1989, the trial court preliminarily enjoined Carmel from enforcement of the Ordinance. In October 1990, after trial, the court lifted the preliminary injunction and entered judgment for Carmel, finding the Ordinance to be "valid and enforceable."

Plaintiffs appeal.

DISCUSSION

Plaintiffs contend the doctrine of collateral estoppel bars Carmel from adopting and litigating the validity of Ordinance No. 89-17. Assuming alternatively that collateral estoppel does not apply, plaintiffs contend the Ordinance is constitutionally infirm in several respects. They maintain that it violates their rights of privacy and association, substantive and procedural due process, and equal protection.

We begin with plaintiffs' argument regarding collateral estoppel. A decade ago, Carmel enacted a series of ordinances by which it sought to regulate transient rentals. While the final version adopted in 1981 was worded quite differently from the version at issue here, the intent and effect were essentially the same. The 1981 ordinance, like Ordinance No. 89-17, prohibited the rental of residential property for fewer than 30 days.

Some of the same homeowners involved in this suit challenged the earlier ordinances. The trial court permanently enjoined enforcement of the 1981 ordinance, finding it to be "unconstitutional as it invades the rights of association, privacy, and due process. The Court further finds that the Ordinance is over-broad and does not substantially effect its stated goals." Carmel did not appeal. Plaintiffs maintain that Carmel is collaterally estopped from relitigating the matter.

Given the difference in wording of the two ordinances, we think it doubtful the doctrine of collateral estoppel applies. In any event, we conclude that this case comes within the public interest exception to application of the doctrine.

In Louis Stores, Inc. v. Department of Alcoholic Beverage Control (1962) 57 Cal.2d 749, 22 Cal.Rptr. 14, the district liquor control administrator instituted successive proceedings seeking to revoke the beer and wine wholesale license of a chain of retail grocery stores. The first proceeding was resolved in the stores' favor. The second proceeding challenged the stores' operations during a different period of time and under a revised statute. But the stores argued that the administrator was collaterally estopped from relitigating the matter because neither the statute nor the stores' methods of operation had significantly changed since the first proceeding. The Supreme Court

observed that res judicata should not be applied when it may have an adverse effect on third parties or when public interest requires that relitigation not be foreclosed. (Id. at p. 758, 22 Cal.Rptr. 14.) "In the present case both of these factors, i.e., public interest and effect upon third persons, strongly indicate that the prior determination of the board should not operate to preclude either the department or the courts from reexamining the statute

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and applying the correct interpretation...." (Ibid.) The court noted that the statute "concers the public interest in an industry requiring close supervision and that it is an important part of an integrated and rather complex licensing and price regulating system." (Ibid.)

In Chern v. Bank of America (1976) 15 Cal.3d 866, 872, 127 Cal.Rptr. 110, the Supreme Court again "acknowledge[d] ... a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest." The court approved plaintiff's relitigation of certain banking practices, noting that federal and state statutes "evidence[ ] a strong interest in protecting the public through ... comprehensive scheme[s] of banking and financial regulations." (Ibid.) The court concluded: "Given the quality and intensity of the public interest involved, a reexamination of the legal significance of recurring factual events in which the same plaintiff is involved should not be foreclosed under collateral estoppel principles." (Id. at p. 873, 127 Cal.Rptr. 110; see also City of Sacramento v. State of California (1990) 50 Cal.3d 51, 64-65, 266 Cal.Rptr. 139; Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, 902, 160 Cal.Rptr. 124.)

Similarly, a city and its residents have an abiding and continuing interest in zoning. And a zoning ordinance that does not pass muster today may--due to changed circumstances, changed language, or changed goals--pass muster only a decade later. We conclude that, even if the doctrine of collateral estoppel were otherwise applicable, the public interest exception to the doctrine permits a zoning authority to try again.

We turn to the constitutionality of Ordinance No. 89-17, beginning with plaintiffs' argument that the Ordinance constitutes a "taking" in violation of the Fifth Amendment. (U.S. Const., 5th Amend. ["No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."]; Chicago, Burlington & c. R'D v. Chicago (1897) 166 U.S. 226, 235-241, 17 S.Ct. 581, 584-586, 41 L.Ed. 979 [Fifth Amendment applies to the states through the Fourteenth Amendment].) Although plaintiffs offer their "taking" argument almost as an afterthought by way of supplemental briefing, we view it as the logical starting point for our constitutional analysis.

The dawn of the twentieth century marked the beginning of zoning laws in this country. (Euclid v. Ambler Co. (1926) 272 U.S. 365, 386, 47 S.Ct. 114, 117, 71 L.Ed. 303.) Until then, "urban life was comparatively simple...." (Ibid.) But the "great increase and concentration of population" and "the advent of automobiles and rapid transit street railways"

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2cents= created problems necessitating land use regulation. (Id. at pp. 386-387, 47 S.Ct. at 117-118.) In Euclid v. Ambler Co., the Supreme Court confronted for the first time a comprehensive zoning scheme, dividing the Village of Euclid, Ohio, into six use districts, which

were further divided according to the permissible size of lots and height of buildings. Plaintiff landowner sought to enjoin enforcement of the Euclid ordinances, contending they deprived him of liberty and property without due process of law and deprived him of equal protection of law.

The Supreme Court declared that zoning regulations must find their justification in the police power, asserted for the public welfare. (Euclid v. Ambler Co., supra, 272 U.S. at p. 387, 47 S.Ct. at p. 118.) The Court noted that the extent of the police power "varies with circumstances and conditions." (Ibid.) Likewise, "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." (Ibid.)

The Supreme Court examined the reasons for comprehensive zoning and, particularly, for setting aside residential districts. In fact, in the Court's view, "[t]he serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded." (Euclid v. Ambler Co., supra, 272 U.S. at p. 390, 47 S.Ct. at p. 119.) The Court observed that non-residential uses may have an increasingly deleterious impact on a residential district "until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed." (Id. at p. 394, 47 S.Ct. at p. 121.)

The Supreme Court upheld the Euclid ordinances as a proper exercise of the police power. The Court concluded that even if Euclid's reasons for adopting the scheme, such as the preservation of residential areas, "do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (Euclid v. Ambler Co., supra, 272 U.S. at p. 395, 47 S.Ct. at p. 121.)

Shortly before Euclid was decided, the California Supreme Court dealt with zoning ordinances in Miller v. Board of Public Works (1925) 195 Cal. 477. The City of Los Angeles issued plaintiff a permit for construction of a four-family flat. The City then revoked the permit pending adoption of a comprehensive zoning plan that would prohibit construction of a four-family flat on plaintiff's land. Plaintiff challenged the City's authority to enact zoning ordinances.

Like the Court in Euclid, the court in Miller stressed the elasticity of the police power: "as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power." (Miller v. Board of Public Works, supra, 195 Cal. at p. 484; see current Cal. Const., art. XI, § 7 [a city may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general

laws"].) After concluding that zoning is indeed within the police power, the Miller court found that the Los Angeles zoning scheme was reasonably necessary to the public health, safety, morals or general welfare and that the scheme of districting and classification was fair and impartial. (195 Cal. at p. 489.)

The Miller court set forth what it considered to be the critical question regarding zoning: "whether or not there may be legally established, as a part of a comprehensive zoning plan, strictly private residential districts from which are excluded and absolutely prohibited general business enterprises, apartments, tenements, and like structures." (Miller v. Board of Public Works, supra, 195 Cal. at p. 490.) Not only was the Miller court's question nearly the same as the "serious question" set forth in Euclid, but so also was the answer. "We are of the opinion that it may be done; that the establishment of [residential] districts as a part of a systematic and carefully considered and existing zoning plan is a legitimate exercise of the police power delegated to the municipality." (Ibid.)

As we near the end of the twentieth century, the courts continue to confront a myriad of zoning disputes. The issues have evolved, often reflecting the increased affluence and mobility of some elements in our modern society. The law has also evolved, but the basic principles survive. Zoning ordinances are still presumptively constitutional. (Goldblatt v. Hempstead (1962) 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130; Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 604-605, 135 Cal.Rptr. 41.) But "[t]he application of a general zoning law to particular property effects a taking if

the ordinance does not substantially advance legitimate state interests, see Nectow v. Cambridge, 277 U.S. 183, 188 [48 S.Ct. 447, 448, 72 L.Ed. 842] (1928), or denies an owner economically viable use of his land, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36 [98 S.Ct. 2646, 2666, n. 36, 57 L.Ed.2d 631] (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see Kaiser Aetna v. United States, 444 U.S. 164 [100 S.Ct. 383, 62 L.Ed.2d 332] (1979), the question necessarily requires a weighing of private and public interests." (Agins v. Tiburon (1980) 447 U.S. 255, 260-261, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106.)

In passing Ordinance No. 89-17, Carmel sought to implement goals set forth in its 1988 Revised General Plan. (See Gov.Code, § 65860 [zoning ordinance must be consistent with general plan].) Objective O1-12 states, for example: "Intensify enforcement of zoning codes to maintain the residential character of the city." Policy P1-37 provides: "Review and develop measures to restrict commercial short term rental of single family residences in the R-1 district." Policy P3-12 provides: "Preserve existing permanent housing and maintain the vital residential character of Carmel-by-the-Sea. Prohibit expansion of visitor oriented commercial uses such as transient rentals." Policy P3-18 provides: "Encourage the conversion of commercial transient housing to housing for permanent residents."

In the Findings and Purposes appended to Ordinance No. 89-17, the City Council observed:

"The purpose of the R-1 District is to provide an appropriately zoned land area within the City for permanent single-family residential uses and structures and to enhance and maintain the residential character of the City." The Council found that the use of single-family residential property for transient lodging was a commercial use inconsistent with the purpose of the R-1 District. Moreover, "[c]ommercial use of single-family residential property for such purposes create unmitigatable, adverse impacts on surrounding residential uses including, but not limited to, increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City. Such commercial use may increase demand for public services, including, but not limited to, police, fire, and medical emergency services, and neighborhood watch programs."

Plaintiffs submit declarations intended to show that transient use of R-1 property does not create the "unmitigatable, adverse impacts" cited by the Council. A paralegal reports she examined the Carmel Police Department's press log for the past two years and found just one "disturbing the peace" complaint and only five complaints of "blocked driveway" in the R-1 District. Page 1590

She found no complaints regarding "light and glare," "noise," or "transient rental use." The operator of a residential housecleaning service in the R-1 District for the past two years declares that he cleans "vacation homes" no differently from "permanent homes." He parks his car in the driveway of the house being cleaned and makes no more noise than would a homeowner cleaning his own house. He has never had any complaints from neighbors or from Carmel regarding activities connected to his service. John W. Ewing, the lead plaintiff in this action, declares that his home in the R-1 District is vacant approximately 40 to 50% of the time. When rented through a broker, it is occupied for at least one week by no more than one family or two couples. No maid, linen, or food service is provided. Ewing has never had complaints from his neighbors or from Carmel regarding use of his property.

While plaintiffs have presented some evidence to counter the Council's finding that transient rentals increase traffic, parking demand, light and glare, noise, and the need for public services, they have not met Carmel's chief purpose in adopting Ordinance No. 89-17--"to provide an appropriately zoned land area within the City for permanent single-family residential uses and structures and to enhance and maintain the residential character of the City."

In Miller and Euclid, the highest courts of this state and of the land recognized that maintenance of the character of residential neighborhoods is a proper purpose of zoning. The California Supreme Court employed language now a bit dated yet plainly relevant to the case at hand: "[W]e think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not

only of community life but of the life of the nation as a whole." (Miller v. Board of Public Works, supra, 195 Cal. at p. 493.) The court observed that with home ownership comes stability, increased interest in the promotion of public agencies, such as schools and churches, and "recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment." (Ibid.)

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It stands to reason that the "residential character" of a neighborhood is threatened when a significant number of homes--at least 12% in this case, according to the record--are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. 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.

Plaintiffs attempt to equate this case with Parr v. Municipal Court (1971) 3 Cal.3d 861, 92 Cal.Rptr. 153, in which the Supreme Court confronted a Carmel zoning ordinance prohibiting, among other things, sitting or lying upon public lawn. The ordinance was accompanied by a "Declaration of Urgency" explaining that it was geared toward " 'an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as "hippies"....' " (Id. at p. 863, 92 Cal.Rptr. 153.) The court concluded that the ordinance violated appellant's right of equal protection by discriminating against a social class. Plaintiffs quote from the concurrence in Building Industry Assn. v. City of Camarillo (1986) 41 Cal.3d 810, 825, 226 Cal.Rptr. 81: "An impermissible elitist concept is invoked when a community constructs a legal moat around its perimeter to exclude all or most outsiders." Plaintiffs argue that the ordinance challenged in Parr and Ordinance No. 89-17 demonstrate Carmel's desire to build a legal moat. The ordinance challenged in Parr was struck down; thus, plaintiffs reason, Ordinance No. 89-17 should meet the same fate.

We view the Ordinance here as very different from that in Parr, in which Carmel sought to ban entirely a certain element from the community. By Ordinance No. 89-17, Carmel does not seek entirely to ban short-term visitors. Indeed, we suspect that short-term visitors provide an economic boon that Carmel would be loath to eliminate. Rather, Carmel wishes simply to confine the accommodations for short-term visitors to areas outside the R-1 District--where, according to the record, there are approximately 950 such transient units.

Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city. We believe that this reason alone is

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"sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." (Euclid v. Ambler Co., supra, 272 U.S. at p. 395, 47 S.Ct. at p. 121.)

A zoning ordinance does not constitute a taking simply because it narrows a property owner's options. In fact, "[m]any zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." (Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470, 498, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472; see, e.g., Griffin Development Co. v. City of Oxnard (1985) 39 Cal.3d 256, 217 Cal.Rptr. 1 [condominium conversion ordinance]; Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 130 Cal.Rptr. 465 [rent control law].) Justice Holmes stated the test in Penna. Coal Co. v. Mahon (1922) 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."

Ordinance No. 89-17 leaves plaintiffs with several economically viable uses of their property. Plaintiffs may live in their homes permanently or occasionally. They may rent their homes for remuneration for at least 30 days. They may allow others to use their homes, without remuneration, for any length of time. They may sell their homes or otherwise encumber them. The only thing they may not do, under the terms of Ordinance No. 89-17, is operate their homes as "bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging...." The intrusion into plaintiffs' bundle of ownership rights--"the extent of the diminution," in Justice Holmes' words--is minimal and far outweighed by the public interest in enhancing and maintaining permanent residential areas.

Plaintiffs insist, however, that Carmel has acted arbitrarily by restricting transient commercial use of residential property while other commercial uses are allowed. Carmel Ordinance No. 17.24.020 permits home occupations in the R-1 District, including "painting and related graphics, music, dance, dramatics, sculpture, writing, photography, weaving, ceramics,

needlecraft, jewelry, glass and metal crafts." Carmel Ordinance No. 17.24.030 allows the issuance of use permits for private kindergartens and nursery schools in the R-1 District. Plaintiffs contend that these uses result in even greater "unmitigatable, adverse impacts" than the uses prohibited by Ordinance No. 89-17.

Whether or not home occupations increase traffic and parking problems and other adverse impacts, they do not threaten the basic character of a residential neighborhood. Rather, they strengthen the community by fostering the talents of its residents. (See County of Butte v. Bach (1985) 172 Cal.App.3d 848, 865, 218 Cal.Rptr. 613 [home occupation exception in a zoning

ordinance "implicitly premised upon expectations that the number and distribution of such encroachments will not be intolerable and that persons who live where they work are likely to have less detrimental impact than nonresidents"].) Similarly, local kindergartens and nursery schools keep toddlers close to home, enhancing the quality of life and the stability of the community.

Plaintiffs also complain that Carmel has drawn the line arbitrarily by permitting rentals of 30 consecutive days but not 29. Line drawing is the essence of zoning. Sometimes the line is pencil-point thin--allowing, for example, plots of 1/3 acre but not 1/4, buildings of 3 floors but not 4, beauty shops but not beauty schools. In Euclid, the Supreme Court recognized that "in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." (Euclid v. Ambler Co., supra, 272 U.S. at p. 389, 47 S.Ct. at pp. 118-119.) Nonetheless, the line must be drawn, and the legislature must do it. Absent an arbitrary or unreasonable delineation, it is not the prerogative of the courts to second guess the legislative decision. (See Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 8, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797; Berman v. Parker (1954) 348 U.S. 26, 35-36, 75 S.Ct. 98, 104, 99 L.Ed. 27.)

In this case, it appears that Carmel did not wish to discourage month-to-month tenancies. Indeed, long-term tenants may create as stable a community as resident homeowners. Through Ordinance No. 89-17, Carmel wished to curtail only short-term occupancies for remuneration. We believe that the 30-day cutoff is not arbitrary but, rather, reasonably linked to that goal. (See Rev. & Tax. Code, § 7280 [establishing 30-day cutoff for city or county tax upon short-term occupancy in "hotel, inn, tourist home or house, motel, or other lodging"]; Civil Code, § 1943 [tenancy presumed to be month-to-month unless otherwise designated in writing].)

Plaintiffs offer yet another Fifth Amendment argument, contending that Ordinance No. 89-17 is unconstitutionally vague and overbroad.

Indeed, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." (Connally v. General Const. Co. (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.) In Grayned v. City of Rockford (1972) 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, the Supreme Court observed that a vague law may offend "several important values." First, the person of ordinary intelligence should have a reasonable opportunity to know what is prohibited. A vague law may trap the innocent by not providing fair warning. Second, a vague law impermissibly delegates the legislative job of defining what is prohibited to policemen, judges, and juries, creating a danger of arbitrary and discriminatory application. Third, a vague law may have a chilling effect, causing people to steer a wider course than necessary in order to avoid the strictures of the law.

Yet, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." (Grayned v. City of Rockford, supra, 408 U.S. at p. 110, 92 S.Ct. at p. 2300, fn. omitted.) "Often the requisite standards of certainty can be fleshed out from otherwise vague statutory language by reference to any of the following sources: (1) long established or commonly accepted usage; (2) usage at common law; (3) judicial interpretations of the statutory language or

of similar language; (4) legislative history or purpose. [Citation.] While the dangers of discriminatory enforcement and ex post facto punishment posed by vague penal provisions must be considered in construing statutory language [citation], liberal regard will be given to legislative intent so as to give effect to the salutary objects of the particular law. [Citations.] Zoning regulations are no exception to the foregoing principles. [Citation.]" (Sechrist v. Municipal Court (1976) 64 Cal.App.3d 737, 745, 134 Cal.Rptr. 733.) "In fact, a substantial amount of vagueness is permitted in California zoning ordinances...." (Novi v. City of Pacifica (1985) 169 Cal.App.3d 678, 682, 215 Cal.Rptr. 439 [anti-monotony ordinance]; see also Guinnane v. San Francisco City Planning Com. (1989) 209 Cal.App.3d 732, 257 Cal.Rptr. 742 [residential character ordinance].)

In his declaration, plaintiff John Ewing criticizes Ordinance No. 89-17 as follows: "I do not know if the term 'remuneration' prohibits house-swaps, house-sitting, pet-sitting, or allowing someone to use my house in return for bartered consideration, dinner, or house or yard work. I also do not know whether the 'remuneration' has to be viewed from my point of view or my guests'. For example, many of my guests agree to use my Carmel home, either alone or when I am also present, only on condition they be allowed to do something for me in return. In some cases, I consider this clearly a 'bargained for consideration.' In other cases I do not, but I know my guests

consider it bargained for consideration. Am I violating the ordinance in both cases, or only those in which I consider the deal to have been 'bargained for?' If it is only when I consider it 'bargained for,' how will Carmel distinguish between different owner's interpretations of their friends' or guests' insistencies that they be allowed to do something for the homeowner in exchange for the right to occupy the residence?"

In fact, Carmel's attorney acknowledged at trial that housesitting and house swapping could be viewed as "bargained for consideration." Even a host and his overnight guest who treats him to dinner might find themselves on the wrong side of the Ordinance.

At this point, we do not presume to know how expansively Carmel will interpret Ordinance No. 89-17. Although a very broad reading of "remuneration" or "bargained for consideration" might lead to absurd applications, as Carmel's attorney admitted, the legislative purpose is clearly to prohibit transient commercial use of residential property. The word "commercial" appears repeatedly at every critical juncture in the Ordinance. As the court observed with respect to zoning matters in Sechrist v. Municipal Court, supra, 64 Cal.App.3d at p. 746, 134 Cal.Rptr. 733, "[t]he term 'residential' is normally used in contradistinction to 'commercial' or 'business.' " (See also City of Beverly Hills v. Brady (1950) 34 Cal.2d 854, 856 ["Whether the questioned activities amount to the conduct of a business depends upon the adopted definition of that word and the primary intent of the zoning restrictions."].)

Plaintiffs complain that Carmel's use of the word "commercial" in Ordinance No. 89-17 is "self-serving, unrealistic, and legally incorrect." To the contrary, we view Carmel's repeated use of the word as strong evidence that Carmel intends only to prevent homeowners in the R-1 District from operating like a "bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging...." In our experience, such establishments do not normally engage in house-swaps, house-sitting, pet-sitting, or permit customers to pay by treating the proprietor to dinner or by doing

yard work. Given the repeated use of the word "commercial," we do not discern an intention by Carmel to police bread-and-butter gifts. We believe that Ordinance No. 89-17 is sufficiently clear to allow people of common intelligence to understand its meaning.

Finally, we turn to plaintiffs' contention that Ordinance No. 89-17 violates their constitutional rights of substantive due process and equal protection. They argue first that the Ordinance infringes upon their rights of freedom of association and of privacy guaranteed by the federal and state Constitutions. (See U.S. Const., 1st, 3d, 4th, 5th, & 9th Amends.; Griswold v. Connecticut (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; Cal.

Const., art. I, § 1; White v. Davis (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94.) Because these are fundamental rights (see Griswold v. Connecticut, supra, 381 U.S. at pp. 484-486, 85 S.Ct. at pp. 1681-1683 [privacy]; N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 460-461, 78 S.Ct. 1163, 1170-1171, 2 L.Ed.2d 1488 [association]), they contend the Ordinance is not presumed valid, as would be the normal zoning ordinance. Rather, they maintain that Carmel has the burden of demonstrating that the infringement upon constitutional rights is necessary to meet a compelling public need and that the Ordinance is the least intrusive means of meeting that need. (See Moore v. East Cleveland (1977) 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531; Robbins v. Superior Court (1985) 38 Cal.3d 199, 213, 211 Cal.Rptr. 398.)

Second, plaintiffs argue that even if the Ordinance does not infringe upon fundamental rights, it still violates substantive due process and equal protection because it is not rationally related to the goals sought to be achieved. (See Village of Belle Terre v. Boraas, supra, 416 U.S. at p. 8, 94 S.Ct. at p. 1540; Roman Cath. etc. Corp. v. City of Piedmont (1955) 45 Cal.2d 325, 331.)

We have already determined that the Ordinance is rationally related to the stated goal. Carmel wishes to enhance and maintain the residential character of the R-1 District. Limiting transient commercial use of residential property for remuneration in the R-1 District addresses that goal. We have also concluded there is a rational basis for the 30-day cutoff and for the allowance of home occupations in the R-1 District despite the prohibitions contained in Ordinance No. 89-17. Plaintiffs rely upon Roman Cath. etc. Corp. v. City of Piedmont, in which the California Supreme Court struck down an ordinance prohibiting private schools in an area where public schools were allowed, finding no rational basis for distinguishing one from the other. The case is inapposite. Carmel has not prohibited one kind of transient commercial use while permitting another comparable use. Rather, through ordinance No. 89-17, Carmel has prohibited all transient commercial use of residential property for remuneration.

Further, a review of a few of the cases relied upon by plaintiffs shows that this case is not within the ambit of association or privacy rights. Plaintiffs rely particularly upon City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 164 Cal.Rptr. 539, in which the California Supreme Court struck down an ordinance prohibiting housekeeping units of more than five persons unrelated by blood, marriage, or adoption. The court concluded that there was no nexus between the "rule-of-five" and the city's goal of maintaining residential character. " 'The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses

which pose no threat to the
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accomplishment of the end sought to be achieved.... As long as a group bears the "generic character of a family unit as a relatively permanent household," it should be equally as entitled to occupy a single family dwelling as its biologically related neighbors.' " (Id. at p. 134, 164 Cal.Rptr. 539, quoting from State v. Baker (1979) 81 N.J. 99, 405 A.2d 368, 371-372.)

In Robbins v. Superior Court, the California Supreme Court concluded that plaintiffs were likely to succeed on their claim that certain aspects of the defendant county's general assistance program were unconstitutional. Under the program, single, employable residents were not eligible for cash benefits but only for "in-kind" benefits, meaning food and shelter at a county facility. Because the assistance program likely interfered with plaintiffs' rights of association and privacy, the court held that the trial court erred in refusing to issue a preliminary injunction.

In Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal.App.3d 87, 226 Cal.Rptr. 199, the court declared unconstitutional a private restrictive covenant that limited the maximum number of occupants per unit to three. In Atkisson v. Kern County Housing Authority (1976) 59 Cal.App.3d 89, 130 Cal.Rptr. 375, the court declared unconstitutional a county housing authority policy prohibiting a low income public housing tenant from living with a member of the opposite sex to whom the tenant was not related by blood, marriage, or adoption. In each case, the court determined that the rule interfered with . the complainants' right to privacy by restricting with whom they could live.

In Moore v. East Cleveland, the United States Supreme Court struck down an ordinance limiting the occupancy of a single dwelling unit to members of a single "family" and defining "family" so as to prohibit even related individuals from living together in certain instances. When the government so intrudes upon family living arrangements, the Court declared, "the usual judicial deference to the legislature is inappropriate." (Moore v. East Cleveland, supra, 431 U.S. at p. 499, 97 S.Ct. at p. 1935.) The Court distinguished the case from Village of Belle Terre v. Boraas, in which the Court upheld an ordinance that limited the ability of unrelated individuals to live together but placed no limitation upon those related by blood, marriage, or adoption. The Court noted that the Belle Terre ordinance promoted "family needs" and "family values." (Village of Belle Terre v. Boraas, supra, 416 U.S. at p. 9, 94 S.Ct. at p. 1541.) Achieving just the opposite, the East Cleveland ordinance "slic[ed] deeply into the family itself." (Moore v. East Cleveland, supra, 431 U.S. at p. 498, 97 S.Ct. at p. 1935.)

Ordinance No. 89-17 differs sharply from the ordinances, policies, and covenants declared unconstitutional in the cases cited by plaintiffs. The rule
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in each of those cases prohibited cohabitation by certain people or groups of people. In effect, each rule governed with whom residents could reside, based upon the number of people or upon their familial relationship. The Ordinance here does no such thing. Plaintiffs are free to live with whom they wish. They may entertain whom they wish. They may rent to whom they wish--the only condition being that the occupancy, possession, or tenancy last at least 30 consecutive calendar days. As the Supreme Court emphasized in City of Santa Barbara v. Adamson, supra, 27 Cal.3d

at p. 133, 164 Cal.Rptr. 539, "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." The Ordinance here does just that. It prohibits the transient commercial use of residential property for remuneration in the R-1 District--regardless of who the parties are. Because Ordinance No. 89-17 focuses on use, rather than users, it does not violate fundamental rights and does not warrant stricter scrutiny than is normally accorded zoning laws.

Even if their privacy rights are not violated by Ordinance No. 89-17 itself, plaintiffs fear the means by which Carmel will detect violations of the Ordinance. Plaintiffs allege that Carmel attempted to enforce earlier versions of the Ordinance by monitoring houses and license plate numbers and by dispatching letters and police officers to the homes of suspected violators. Plaintiffs contend such methods would violate their right to privacy. Just as we do not presume to know precisely how Carmel will interpret Ordinance No. 89-17, we also do not presume to know precisely how Carmel will detect violators. But we shall not assume that Carmel intends to invade constitutional rights. Review of Carmel's specific application and enforcement of the Ordinance, if appropriate, must await another day. (See Euclid v. Ambler Co., supra, 272 U.S. at pp. 395-397, 47 S.Ct. at 121-122; People v. Wingo (1975) 14 Cal.3d 169, 180, 121 Cal.Rptr. 97 ["A statute valid on its face may be unconstitutionally applied."].)

Because we conclude that Carmel has not violated plaintiffs' constitutional rights, we do not reach their arguments under 42 U.S.C. §§ 1983 and 1988.

DISPOSITION

The judgment is affirmed.

CAPACCIOLI, Acting P.J., and COTTLE, J., concur.

Joseph Spilka, III, Respondent
v.
Town of Inlet, Appellant.
Supreme Court of New York, Third Department
June 1, 2004.

Kane, J.

Appeal from an order of the Supreme Court (Aulisi, J.), entered July 11, 2003 in Hamilton County, which, inter alia, denied defendant's motion to dismiss the complaint.

Since 2001, plaintiff has owned a one-family dwelling in the Town of Inlet, Hamilton County. Under a 1966 zoning ordinance, the property is in an R-1 residence district. Plaintiff alleges that **[8 A.D.3d 813]** the property is his primary residence, but he rents it out on a short-term basis for approximately three months per year. In 2002, defendant amended the zoning ordinance to require special use permits for rental of nonowner-occupied dwellings for periods of less than four months. Plaintiff commenced this action seeking a judgment declaring that the rental of his property was permitted under the 1966 ordinance and was, therefore, permitted under the amendment as a prior nonconforming use or, alternatively, that his property is an owner-occupied dwelling not subject to the amendment or, alternatively, that the amendment was arbitrary, discriminatory and illegal. In lieu of answering, defendant moved to dismiss the complaint for failure to state a cause of action, for a declaration that the amendment is valid, and for dismissal due to plaintiff's failure to exhaust administrative remedies. Plaintiff cross-moved for summary judgment. Supreme Court denied defendant's motion, and denied plaintiff's cross motion as premature. Defendant appeals.

Where no question of fact is raised but only a question of law or statutory interpretation is presented on a motion to dismiss a declaratory judgment action, the court may render a determination and declare the rights of the parties (*see Washington County Sewer Dist. No. 2 v White*, 177 A.D.2d 204, 206 [1992]; *see also Hopkinson v Redwing Constr. Co.*, 301 A.D.2d 837, 837-838 [2003]). This Court may convert a motion to dismiss to a motion for summary judgment (*see* CPLR 3211 [c]), and the notice of such conversion is excepted where only questions of law are raised, they have been fully briefed by the parties and such treatment is requested by one party (*see Historic Albany Found. v Breslin*, 282 A.D.2d 981, 983-984 [2001], *lv dismissed* 97 N.Y.2d 636 [2001]; *Four Seasons Hotels v Vinnik*, 127 A.D.2d 310, 320 [1987]). If defendant prevails on any point, the proper determination would be a declaration in its favor rather than dismissal of the complaint (*see Bresky v Ace INA Holdings*, 287 A.D.2d 912, 913 [2001]).

Our first question, whether the 1966 ordinance permitted short-term rental of a one-family dwelling in an R-1 district, is a question of statutory interpretation. Zoning codes must be strictly construed against the enacting municipality and any ambiguities must be resolved in favor of the property owner (*see Matter of Sposato v Zoning Bd. of Appeals of Vil. of Pelham*, 287 A.D.2d 639,

639 [2001]). The list of permitted uses in an R-1 district include [o]ne family dwelling or camp." While the less-restrictive permitted uses in defendant's resort residential district include rooming houses, and the definition of that term **[8 A.D.3d 814]** includes tourist homes, there is no definition of tourist homes, so it is unclear if plaintiff's property would fit into that category (*cf. Matter of Androme Leather Corp. v City of Gloversville*, 1 A.D.3d 654, 656 [2003], *lv denied* 1 N.Y.3d 507 [2004]). Plaintiff's house fits squarely within the definition of a one-family dwelling. There is no indication whether such dwelling may be rented, let alone any restrictions on time periods for rentals. Construing the 1966 ordinance against defendant, plaintiff is entitled to a declaration that rental of his one-family dwelling for any time period was permitted under the original ordinance.

While short-term renting was not prohibited under the 1966 ordinance, it was clearly restricted in the amendment. Plaintiff contends that he is entitled to continue such renting, in a manner similar to his practice prior to the 2002 enactment of the amendment, as a nonconforming use. Nonconforming uses, in existence when a zoning ordinance is enacted, are generally permitted to continue despite the contrary ordinance if the preexisting use was legal when established (*see Matter of Keller v Haller*, 226 A.D.2d 639, 640 [1996]). Accepting as true plaintiff's allegation that he previously rented his house on a short-term basis, defendant's motion to dismiss must be denied and Supreme Court must determine the factual issue regarding whether plaintiff established a nonconforming use.

We now address plaintiff's remaining arguments. Defendant is entitled to a declaration that plaintiff's home is not owner occupied. The amendment only applies to nonowner-occupied rental dwellings. In the amendment's permit requirement section, it is deemed a violation of the ordinance for any person or entity who owns a building or structure in the R1 Residence District, but is not occupying that building or structure" to rent it for a period of less than four months without a special use permit. As the amendment does not define the term owner occupied," the term must be given its ordinary meaning (*see Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 A.D.2d 614, 619 [1998], *lv denied* 93 N.Y.2d 803 [1999]). Considering the context of the amendment and the term's ordinary meaning, owner occupied" means that the owner occupies a portion of the property and rents another portion, not, as plaintiff claims, that the owner resides there most of the time and rents it when he is absent. The opposite of an owner-occupied rental property would be a rental property with an absentee owner. Thus, defendant is entitled to a declaration that plaintiff's property is not owner occupied.

Finally, the amendment is not arbitrary, capricious or illegal. Zoning ordinances are presumed valid and the challenger bears **[8 A.D.3d 815]** the burden of proving invalidity (*see McMinn v Town of Oyster Bay*, 66 N.Y.2d 544, 549 [1985]). The test is whether the ordinance was enacted in furtherance of a legitimate governmental purpose and is reasonably related to the end sought to be achieved (*see id.* at 549; *Interlaken Homeowners' Assn. v City of Saratoga Springs*, 267 A.D.2d 842, 844-845 [1999]). The amendment identified many legitimate governmental purposes for its enactment, including preserving aesthetic integrity in residential neighborhoods, encouraging residential property maintenance, prevention of neighborhood blight, protecting residential property values, permitting efficient use of defendant's dwellings to provide economic support to residents, and enhancing the quality of life in residential neighborhoods. Placing restrictions on

absentee landlords is reasonably related to achieving these goals and does not improperly distinguish between homeowners who occupy their premises and those who do not (*see Kasper v Town of Brookhaven*, 142 A.D.2d 213, 218 [1988]). Thus, defendant was entitled to a declaration that the amendment was valid.

Mercure, J.P., Peters, Spain and Carpinello, JJ., concur.

Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied defendant's motion and plaintiff's cross motion; plaintiff's cross motion granted to the extent of declaring that the 1966 ordinance permitted rental of one-family dwellings and defendant's motion granted to the extent of declaring that plaintiff's house is not owner-occupied within the meaning of the ordinance and the 2002 amendment to the ordinance is valid; and, as so modified, affirmed.

76 So.3d 401 (Fla.App. 2 Dist. 2011), 2D10-5696, City of Venice v. Gwynn /**/ div.c1 {text-align: center} /**/

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76 So.3d 401 (Fla.App. 2 Dist. 2011)

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CITY OF VENICE, Petitioner,

v.

Martha L. GWYNN, Respondent.

No. 2D10-5696.

Florida Court of Appeal, Second District.

December 30, 2011

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Hala Sandridge of Fowler White Boggs, P.A., Tampa, for Petitioner.

Martha L. Gwynn, pro se.

FERNANDEZ, KIMBERLY K., Associate Judge.

The City of Venice seeks certiorari review of an order of the circuit court sitting in its appellate capacity which declared a city ordinance unconstitutional as applied to Martha L. Gwynn's property. At issue before the court was review of the Venice Code Enforcement Board's order finding that Gwynn's " nonconforming use" of the property violated the ordinance. We grant the City's petition because the circuit court departed from the essential requirements of law in determining that the ordinance was unconstitutional as applied.

In 2009, the Venice City Council enacted Ordinance 2009-06 to amend various provisions

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in the City's Land Development Code that control the use of residential property. *See* City of Venice, Fla., Code of Ordinances, ch. 86, art. V, Div. 3 (2009). The amendments to the code prohibited owners of single-family dwellings in residential neighborhoods from renting their property for short periods of time.[1] *See* §§ 86-81(d), 86-151. According to the ordinance, owners of single-family dwellings may rent their property for a period of less than thirty days only three times in a calendar year unless they had complied with the preexisting use requirements of the ordinance prior to July 14, 2009, the effective date of the ordinance. To have " grandfathered in" short-term rental property, the property owner must have obtained " all of the applicable state and local registrations, licenses and/or permits, including, but not limited to all necessary tax registration and occupational licenses necessary for operation of such rentals." § 86-570(b) (defining an " [e]xisting legal nonconforming resort dwelling").

Gwynn purchased her property in 2004 for the purpose of renting it to seasonal visitors. Although she had been notified of the right to do so, Gwynn did not pursue the right to have her vacation rental property grandfathered in by attempting to meet the requirements of the ordinance. After the effective date of the ordinance, she continued to advertise her property as being available for lease for less than thirty days. As a result, the City of Venice Code Enforcement Board sent Gwynn a notice to cease advertising and operating her property as a resort dwelling. The Board then sent Gwynn a Notice of Hearing " concerning unabated violations of the City of

Venice code *Sec. 86-151, Resort Dwellings.* "

At the hearing before the Board, Gwynn's attorney specifically argued: " The narrow question that I see in terms of what's before the council this morning is the issue of whether [Gwynn] is in violation. We are not here to discuss the issue of whether the ordinance is valid or not." Gwynn admitted that she had at least three short-term rentals after the effective date of the ordinance and that she had not obtained the licenses required to be grandfathered in. Her attorney conceded that there had been several short-term rentals after July 14, 2009; however, he argued that because the rental agreements were made before the ordinance went into effect, Gwynn should not be found in violation of the ordinance. Based on the evidence before it, the Board found that Gwynn's property was " not a legal non-conforming resort dwelling" and that she had violated the ordinance. The Board ordered her to " come into compliance by not renting [the property] for periods of less than thirty (30) days for the remainder of 2009." [2]

Gwynn appealed the Board's decision to the circuit court. In her initial brief, Gwynn argued that the ordinance was unconstitutional on its face and unconstitutional as applied to her property because it constituted a governmental " taking" of her property

without just compensation.[3] Gwynn argued that the ordinance's prohibition on short-term rentals substantially interfered with her rightful use of and reasonable expectation for her property without substantial advancement of any legitimate governmental interest. The City responded that although the ordinance interfered with Gwynn's desire to use her property for short-term rentals, the application of the ordinance to her property did not constitute a compensable taking when other economically viable uses of the property remained.

The circuit court, acting in its appellate capacity, rejected Gwynn's argument that the ordinance was unconstitutional on its face but held that the ordinance was unconstitutional as applied and could not be enforced against Gwynn's property.[4] It is from this order that the City seeks second-tier certiorari review in this court. We have jurisdiction. *See* Fla. R.App. P. 9.030(b)(2)(B).

When reviewing an administrative action, " the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982). At the second appellate level, this court's inquiry is limited to whether the circuit court provided procedural due process and whether it departed from the essential requirements of the law. *Allstate Ins. Co. v. Kaklamanos,* 843 So.2d 885, 889 (Fla.2003); *see also United Auto. Ins. Co. v. Santa Fe Med. Ctr.,* 21 So.3d 60, 63 (Fla. 3d DCA 2009) (" A departure from the essential requirements of law is equivalent to a failure to apply the correct law."). The City has not alleged that it was deprived of due process by the circuit court; accordingly, we limit our review to whether the circuit court departed from the essential requirements of the law in finding the ordinance unconstitutional as applied to Gwynn.

A use restriction on real property may constitute a taking " if it has an unduly harsh impact on the owner's use of the property." *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104,

127, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). When engaging in an analysis of whether a regulation unconstitutionally interferes with a property owner's rights, a court must consider: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion. *Id.* at 124, 98 S.Ct. 2646; *see also Shands v. City of Marathon,* 999 So.2d 718, 723 (Fla. 3d DCA 2008) (" The standard of proof for an as-applied taking is whether there has been a *substantial*
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deprivation of economic use or reasonable investment-backed expectations."). When considering the issue of economic impact, the court must conduct " a fact-intensive inquiry of the impact of the regulation on the economic viability of the landowner's property by analyzing permissible uses before and after the enactment of the regulation." *Taylor v. Vill. of N. Palm Beach,* 659 So.2d 1167, 1171 n. 1 (Fla. 4th DCA 1995). This includes a comparison of " the value that has been taken from the property with the value that remains in the property." *Leon Cnty. v. Gluesenkamp,* 873 So.2d 460, 467 (Fla. 1st DCA 2004). A party challenging the constitutionality of a regulation has the burden to establish that he or she has suffered significant financial loss from the imposition of the regulation. *Id.* (citing *Bass Enters. Prod. Co. v. United States,* 54 Fed.Cl. 400, 403 (Fed.Cl.2002)).

In its order, the circuit court concluded that the ordinance had a significant economic impact on Gwynn by restricting the duration and frequency of rental periods and that it interfered with Gwynn's " expectation that she could rent the property to seasonal visitors." Although the court noted the factors announced by the Supreme Court in *Penn Central,* the court's order failed to apply the economic impact factor. Limited by the record established at the hearing before the Municipal Enforcement Board, the circuit court was hindered in its ability to engage in any meaningful analysis of the value of Gwynn's property before and after the enactment of the ordinance.[5] In focusing on Gwynn's denied expectations for the use of her property, the court failed to recognize record evidence that Gwynn's property had continued value as a monthly rental, as a short-term rental for three periods, or as investment property which could be sold. *See Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1072-73 (11th Cir.1996) (" The standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land."). The circuit court focused on Gwynn's loss of the potential rentals available before the enactment of the ordinance but did not weigh this loss with the property's value based on the residual uses after the enactment. By failing to weigh the before and after values of the property, the circuit court did not determine the economic impact of the ordinance on the property owner as required by *Penn Central* and its progeny; this was a departure from the essential requirements of the law.

Accordingly, we grant the petition, quash the order of the circuit court, and reinstate the order of the Venice Code Enforcement Board.

Petition granted.

DAVIS, J., Concurs.

KHOUZAM, Judge, Specially concurring.

Certiorari is appropriate where " there has been a violation of a clearly established principle

of law resulting in a miscarriage of justice." *Combs v. State,* 436 So.2d 93, 96 (Fla.1983). A miscarriage of justice can result when the court disregards clearly relevant facts in coming to a decision. Because

this occurred here, I concur with the majority.

Notes:

[1] Section 86-570(b) defines a " resort dwelling" as

any one, two, three or four-family dwelling unit located in the RE or RSF zoning district which is rented to guests more than three times in a calendar year for periods of less than 30 days or one calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of less than 30 days or one calendar month, whichever is less.

[2] Gwynn was not in violation of the ordinance for rental agreements she had entered into for 2010 because the agreements were for monthly rentals.

[3] A regulation may be challenged as unconstitutional on its face or unconstitutional as applied. A facial challenge contends that the regulation on its face, as enacted, constitutes a taking. *Taylor v. Vill. of N. Palm Beach,* 659 So.2d 1167, 1170 (Fla. 4th DCA 1995). An as-applied challenge evaluates the impact of the application of a regulation on a particular parcel of land. *Id.* at 1170-71.

[4] Section 162.11, Florida Statutes (2009), authorizes an aggrieved party to appeal a final administrative order to the circuit court. Such an appeal is not " a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." For appeals under this section, the circuit court is the proper forum to address constitutional claims. *Wilson v. Cnty. of Orange,* 881 So.2d 625, 632 (Fla. 5th DCA 2004); *Kirby v. City of Archer,* 790 So.2d 1214, 1215 (Fla. 1st DCA 2001) (citing *Holiday Isle Resort & Marina Assocs. v. Monroe Cnty.,* 582 So.2d 721, 721-22 (Fla. 3d DCA 1991)).

[5] As the party bearing the burden of showing the ordinance was unconstitutional as applied, Gwynn was required to prove that the market value of her property had decreased or that she had been economically impacted by the enforcement of the ordinance. *See Gluesenkamp,* 873 So.2d at 467.

VILAS COUNTY, A WISCONSIN MUNICIPAL CORPORATION, PLAINTIFF-RESPONDENT,
v.
HARLAN J. ACCOLA AND BRENDA L. ACCOLA, DEFENDANTS-APPELLANTS
Appeal No. 2014AP2688
Court of Appeals of Wisconsin, District III
May 12, 2015

Editorial Note:

Under Wisconsin Rules of Civil Procedure, Rule 809.23(3), Unpublished opinions issued before July 1, 2009 holds no precedential value except for limited purposes. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.

APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. Cir. Ct. No. 2013CV152.

Before Hoover, P.J., Stark and Hruz, JJ.

OPINION

STARK, J.

[¶1] Harlan and Brenda Accola appeal an order granting summary judgment to Vilas County in the County's action to enforce a zoning ordinance. The issue on appeal is whether the ordinance permits short-term rentals of single-family detached dwelling units located in the single-family residential district. We agree with the County and the circuit court that, under the facts of this case, the ordinance unambiguously prohibits short-term rentals of single-family detached dwelling units in the R-1 district. Accordingly, we affirm the order granting summary judgment to the County.

BACKGROUND[1]

[¶2] In June 2012, the Accolas purchased a home on Rosalind Lake in the Town of Presque Isle. The property is subject to the County's general zoning ordinance and is located in the R-1 zoning district. Section 4.1 of the ordinance, which governs the R-1 district, begins with a statement explaining that the purpose of the R-1 district is to " create areas for exclusive low density residential use and prohibit the intrusion of uses incompatible with the quiet and comfort of such areas." Vilas Cnty., Wis., General Zoning Ordinance § 4.1(A) (Nov. 24, 2010). Immediately following this purpose statement, the ordinance lists the following as permitted uses in the R-1 district:

(1) Single-family detached dwelling units, including individual mobile homes, which meet the yard requirements of the district. (2) One non-rental guesthouse, which may be occupied on a temporary basis. (3) Parks, playgrounds, golf courses and other recreation facilities. ... (4) Home occupations as defined in Article XI of this Ordinance.[2] (5) Essential services. (6) Hobby farms. *Id.*, § 4.1(B).

[¶3] In addition to the R-1 district, the general zoning ordinance also creates a Residential/Lodging

(RL) district. Section 4.2 of the ordinance, which governs the RL district, contains the following purpose statement:

Purpose: The Residential/Lodging District is to provide for areas with primarily low-density residential use, but with some mixing of low-density Transient Lodging. (Transient Lodging is defined as: A commercial lodging establishment, which allows rental of sleeping quarters or dwelling units for periods of less than one month.) Transient Lodging uses are a permitted use. Examples of these uses include residential dwellings, bed & breakfasts and resort establishments with no contiguous multiple-family dwelling units. ...

Id., § 4.2(A). The ordinance then lists the following permitted uses for the RL district:

(1) All uses permitted in the R-1 District. (2) Bed and breakfast establishments. (3) Resort establishments with no contiguous multiple-family dwelling units. (4) Rental of residential dwelling unit.

Id., § 4.2(B).

[¶4] The Rosalind Lake property is not the Accolas' primary residence. Shortly after they purchased the property, the Accolas began advertising it for rent on the internet, for stays as short as two nights. On July 18, 2012, the County notified the Accolas that single-family residences in the R-1 district could not be rented for periods of less than one month. The County asserted rentals of less than one month constituted " transient lodging," as that term is used in the section of the ordinance governing the RL district.

[¶5] The Accolas subsequently created a corporation called A Better Way to Live. They began allowing people to stay at the Rosalind Lake property for periods of less than one month in exchange for " donations" to the corporation. The Accolas represented to individuals interested in staying at the property that the corporation would use a portion of each donation to pay " expenses, utilities[,] cleaning fees, etc[.]," and the remainder would be donated to charity.[3] The County again informed the Accolas that renting their property for periods of less than one month violated the general zoning ordinance. The County asserted, " Soliciting donations on a weekly basis in exchange for housing is the functional equivalent of renting the property[.]"

[¶6] The County initiated the instant enforcement action in August 2013, seeking forfeitures and an injunction prohibiting the Accolas from renting the Rosalind Lake property for periods of less than thirty days. The parties ultimately filed cross-motions for summary judgment. The Accolas argued the short-term rental of their property was permitted because the general zoning ordinance allows " [s]ingle-family detached dwelling units" in the R-1 district. *See id.*, § 4.1(B)(1). They asserted their property indisputably qualified as a single-family detached dwelling unit, and the general zoning ordinance did not explicitly prohibit short-term rentals of single-family detached dwelling units in the R-1 district.[4]

[¶7] The County, in turn, argued the Accolas' short-term rental of the Rosalind Lake property constituted " transient lodging." As noted above, the general zoning ordinance expressly permits transient lodging in the RL district. *Id.*, § 4.2(A). By definition, the term " transient lodging" applies only to rental of sleeping quarters or dwelling units " for periods of less than one month." *Id.* The ordinance for the RL district lists " residential dwellings" as an example of transient lodging, and it then lists " rental of residential dwelling unit" as a permitted use in the RL district. *Id.*, § 4.2(A),

(B)(4).

[¶8] Reading these provisions together, the County argued the ordinance permits rental of residential dwelling units for periods of less than one month in the RL district. The County then noted the ordinance also permits in the RL district " [a]ll uses permitted in the R-1 district." *Id.*, § 4.2(B)(1). Given that all uses permitted in the R-1 district are also permitted in the RL district, the County argued the Accolas' interpretation of the ordinance would render § 4.2(B)(4) superfluous because, if rentals of residential dwelling units for periods of less than one month were permitted in the R-1 district, there would be no need to separately list " rental of residential dwelling unit" as a permitted use in the RL district. Accordingly, the County argued the only reasonable reading of the ordinance was that short-term rentals of residential dwelling units were not permitted in the R-1 district.

[¶9] The circuit court agreed with the County, concluding short-term rentals of the Accolas' property for periods of less than one month, whether compensated by direct payment of rent or by donations to the Accolas' corporation, were not permitted in the R-1 district. The court reasoned it was not dispositive that the zoning ordinance failed to expressly prohibit short-term rentals of single-family detached dwelling units in the section governing the R-1 district because " the concept of zoning is to list what you can do. And if it's not there[,] the presumption is that you [cannot]." The court then explained that the " specific permission to rent a residential dwelling unit in [the] RL District provides the necessary synthesis to say that it's permitted somewhere, that implies that it's prohibited in R-1." The court concluded the ordinance, " although not perfect, is sufficiently clear that it's not ambiguous as to whether or not you're allowed to rent property on a short term basis" in the R-1 district. As a result, the court imposed a $35,000 forfeiture and permanently enjoined the Accolas from renting the Rosalind Lake property for periods of less than thirty days. The Accolas now appeal.

STANDARDS OF REVIEW

[¶10] We independently review a grant of summary judgment, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis.2d 226, 232, 568 N.W.2d 31 (Ct.App. 1997). Summary judgment is appropriate where " there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

[¶11] Here, the material facts are undisputed, leaving only an issue of law for our review. Specifically, we must determine whether the County's general zoning ordinance permits single-family detached dwelling units in the R-1 district to be rented for periods of less than one month. " [C]onstruction of an ordinance under undisputed facts is a question of law for our independent review." *Schwegel v. Milwaukee Cnty.*, 2015 WI 12, ¶ 18, 360 Wis.2d 654, 859 N.W.2d 78; *see also FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 9, 301 Wis.2d 321, 733 N.W.2d 287 (interpretation of a zoning ordinance presents a question of law that we review independently).

[¶12] When interpreting a zoning ordinance, we apply the rules of statutory interpretation. *FAS, LLC*, 301 Wis.2d 321, ¶ 21. " [T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute. *Id.*, ¶ 45. Statutory language is given its

common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meanings. *Id.*
Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.
Id., ¶ 46. Where possible, statutory language must be read " to give reasonable effect to every word, in order to avoid surplusage." *Id.*
[¶13] When conducting a plain-meaning analysis of statutory language, we may consider an explicit statement of legislative purpose contained in the statute's text. *Id.*, ¶ ¶ 48-49. However, we may not consult extrinsic sources of interpretation, such as legislative history, unless the statute is ambiguous. *Id.*, ¶ 46. A statute is ambiguous if its ability to support two reasonable constructions creates an ambiguity that cannot be resolved through the language of the statute itself. *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶ 17, 290 Wis.2d 421, 714 N.W.2d 130.
[¶14] In addition to these general principles of statutory interpretation, we observe that the power to enact zoning ordinances is broadly construed in favor of the municipality. *See HEEF Realty & Invs., LLC v. City of Cedarburg Bd. of Appeals*, 2015 WI App. 23, 7, 361 Wis.2d 185, 861 N.W.2d 797. However, because zoning ordinances are " in derogation of the common law[,]" any ambiguity in the terms of a zoning ordinance must be resolved in favor of the free use of private property. *Cohen v. Dane Cnty. Bd. of Adjustment*, 74 Wis.2d 87, 91-92, 246 N.W.2d 112 (1976). In other words, " [t]he provisions of a zoning ordinance, to operate in derogation of the common law, must be in clear, unambiguous, and peremptory terms." *Id.* at 91.
DISCUSSION
[¶15] The Accolas argue the County's general zoning ordinance does not unambiguously prohibit rentals of single-family detached dwelling units in the R-1 district for periods of less than one month. They note § 4.1(B)(1) of the ordinance merely lists " [s]ingle-family detached dwelling units" as a permitted use in the R-1 district, without specifically prohibiting rental of those units. We agree with the Accolas that § 4.1(B)(1) neither expressly permits nor prohibits either short-term or long-term rentals of single-family detached dwelling units.[5] We also observe that no other portion of § 4.1 expressly prohibits the rental of single-family detached dwelling units. We recently held that, when an ordinance simply lists " single-family dwellings" as a permitted use in a zoning district, without more, the ordinance does not unambiguously prohibit short-term rentals of single-family dwellings in that district. *See Heef*, 2015 WI App. 23, ¶ ¶ 8, 13-14, 361 Wis.2d 185, 861 N.W.2d 797. Thus, if we were limited to considering § 4.1 of the County's zoning ordinance, we would agree with the Accolas that the ordinance does not unambiguously prohibit the rental of single-family detached dwelling units in the R-1 district for periods of less than one month.
[¶16] However, the language of § 4.1, governing the R-1 district, must be read in context with § 4.2, which governs the RL district. *See Kalal*, 271 Wis.2d 633, ¶ 46 (Statutory language is interpreted in the context in which it is used, in relation to the language of surrounding or closely-related statutes.). Section 4.2(B)(4) lists as a permitted use in the RL district " [r]ental of residential dwelling unit." Although § 4.2(B)(4) does not distinguish between short-term and long-term rentals,

we agree with the County and the circuit court that the phrase " rental of residential dwelling unit" must be read in context with the definition of transient lodging in § 4.2(A), which contains a one-month time limitation.[6]

[¶17] Specifically, § 4.2(A) states that the purpose of the RL district is to " provide for areas with primarily low-density residential use, but with some mixing of low-density Transient Lodging." It also states that transient lodging uses " are a permitted use" in the RL district. It defines transient lodging as " [a] commercial lodging establishment, which allows rental of sleeping quarters or dwelling units *for periods of less than one month*." [7] (Emphasis added.) It then lists as examples of " transient lodging uses" " residential dwellings, bed & breakfasts and resort establishments with no contiguous multiple-family dwelling units." These examples are the same uses listed as permitted uses in the RL district in § 4.2(B)(2), (3), and (4). Thus, when § 4.2(B)(4) is read in context with § 4.2(A), the only reasonable conclusion is that the phrase " rental of residential dwelling unit" in § 4.2(B)(4) refers to rentals of residential dwelling units for periods of less than one month. We therefore agree with the County and the circuit court that § 4.2(B) unambiguously permits rental of residential dwelling units in the RL district for periods of less than one month.

[¶18] We next observe that § 4.2(B)(1) unambiguously permits in the RL district " [a]ll uses permitted in the R-1 District." The only residential dwelling units permitted in the R-1 District are single-family detached dwelling units. *See* Vilas Cnty., Wis., General Zoning Ordinance § 4.1(B) (Nov. 24, 2010). Nothing in § 4.2 permits any other type of residential dwelling unit in the RL district.[8] Accordingly, as with the R-1 district, the only residential dwelling units permitted in the RL district are single-family detached dwelling units. Thus, when § 4.2(B)(4) states that rental of residential dwelling units is permitted in the RL district, it actually means that rental of single-family detached dwelling units is permitted in the RL district.

[¶19] As demonstrated in the preceding paragraphs, § 4.2 of the general zoning ordinance unambiguously permits in the RL district both: (1) the rental of single-family detached dwelling units for periods of less than one month; and (2) all uses permitted in the R-1 district, which includes single-family detached dwelling units. If the Accolas were correct that the rental of single-family detached dwelling units for periods of less than one month was a permitted use in the R-1 district, § 4.2(B)(4) of the ordinance, permitting the rental of single-family detached dwelling units for periods of less than one month in the RL district, would be superfluous because all uses permitted in the R-1 district are already permitted in the RL district under § 4.2(B)(1). Where possible, an ordinance must be read " to give reasonable effect to every word, in order to avoid surplusage." *See Kalal*, 271 Wis.2d 633, ¶ 46. Consequently, reading § 4.1 of the ordinance in context with § 4.2 leads to the inescapable conclusion that the rental of single-family detached dwelling units for periods of less than one month is not a permitted use in the R-1 district because a contrary interpretation would render § 4.2(B)(4) superfluous.

[¶20] The Accolas argue this interpretation is inconsistent with our recent decision in *Heef*. There, a zoning ordinance promulgated by the City of Cedarburg listed " [s]ingle-family dwellings" as a permitted use in the single-family residential district. *Heef*, 2015 WI App. 23, ¶ 8, 361 Wis.2d 185, 861 N.W.2d 797. The City's Board of Appeals determined this language did not permit short-term rentals of single-family dwellings. *Id.*, ¶ 1. The circuit court reversed the Board's decision on

certiorari review, and we affirmed the court's decision on appeal. *Id.* We reasoned the properties at issue qualified as single-family dwellings because they were designed for use by one family and were used by only one family at a time. *Id.*, ¶ 10. We further observed that the city's zoning ordinance " [did] not require occupancy over a period of time[,]" and there was " nothing inherent in the concept of a residence or dwelling that includes time." *Id.*, ¶ ¶ 10, 13. We concluded, " If the City is going to draw a line requiring a certain time period of occupancy in order for property to be considered a dwelling or residence, then it needs to do so by enacting clear and unambiguous law." *Id.*, ¶ 13. Stated differently, a zoning board cannot " arbitrarily impose time/occupancy restrictions in a residential zone where there are none adopted democratically by the City." *Id.*

[¶21] Unlike the ordinance we interpreted in *Heef*, the County's general zoning ordinance *does* contain a democratically adopted time restriction on the rental of single-family detached dwelling units. As explained above, when § 4.1 of the ordinance, pertaining to the R-1 district, is read in context with § 4.2, pertaining to the RL district, it is clear that rentals of single-family detached dwelling units for periods of less than one month are not permitted in the R-1 district. *Heef* is therefore distinguishable, and it does not mandate a conclusion that the ordinance at issue in this case permits the Accolas to rent the Rosalind Lake property for periods of less than one month.

[¶22] The Accolas also argue the fact that the parties have advanced different interpretations of the general zoning ordinance " [i]n itself demonstrates ambiguity[.]" The Accolas are mistaken. " The fact that the parties advance different interpretations of [an ordinance] does not, alone, make the [ordinance] ambiguous." *State v. West*, 2011 WI 83, ¶ 54, 336 Wis.2d 578, 800 N.W.2d 929. Instead, an ordinance is ambiguous only if its language gives rise to more than one *reasonable* interpretation. *See id.* Here, the Accolas' interpretation is *unreasonable* because it would render § 4.2(B)(4) of the ordinance superfluous. Thus, the parties' differing interpretations of the ordinance are not evidence of an ambiguity.

[¶23] Finally, the Accolas argue our interpretation of the ordinance is unreasonable because it produces an absurd result. The Accolas' argument on this point is somewhat convoluted. However, they essentially argue that, under our interpretation, rental of single-family detached dwelling units for periods of less than thirty days would also be prohibited in the multi-family residential district, which allows all uses permitted the R-1 district, as well as several additional uses. *See* Vilas Cnty., Wis., General Zoning Ordinance § 4.3(B) (Nov. 24, 2010). One of the additional permitted uses in the R-2 district is " Resorts." *Id.*, § 4.3(B)(9). The Accolas argue: Resorts are prohibited in RL zoning--where short-term rental is permitted--from having contiguous multiple family dwellings on-site. Since no comparable restrictions on multiple family dwellings exist in R-2 zoning, resorts may have multi-family cabins on their property ... so long as those cabins are not rented out for periods of less than thirty (30) days at a time. As the general purpose of resort cabins would be the accommodation of short-term, " transient" lodgers, the unintended consequence of the [c]ircuit [c]ourt's ruling would create an absurd result.

[¶24] The Accolas' " absurd result" argument rests on a faulty premise. The prohibition on rentals for periods of less than thirty days in the R-1 district is limited to single-family detached dwelling units. It does not extend to multiple-family dwelling units, which are not a permitted use in the R-1 district in the first place. Thus, even if the prohibition on short-term rentals of single-family

detached dwelling units in the R-1 district extends to the R-2 district, as the Accolas claim, that does not mean short-term rentals of multiple-family cabins on resort properties in the R-2 district are also prohibited. Both resorts and multiple-family dwelling units are expressly permitted in the R-2 district, without any restrictions on rentals. *Id.*, § 4.3(B)(2), (9). Nor does any rental restriction arise when the section of the ordinance governing the R-2 district is read in context with other sections of the ordinance. Under the rationale of *Heef*, because the County failed to include any temporal or occupancy restrictions in the ordinance with respect to resorts and multiple-family dwellings located in the R-2 district, short-term rentals are not prohibited. Accordingly, our interpretation of the ordinance does not actually produce an absurd result.

Order affirmed.

Not recommended for publication in the official reports.

Notes:

[1]The Accolas' statement of the case is devoid of record citations. Wisconsin Stat. Rule 809.19(1)(d) requires an appellant's brief to contain " [a] statement of the case, which must include ... a statement of facts relevant to the issues presented for review, with appropriate references to the record." We caution counsel that future rule violations may result in monetary sanctions. *See* Wis. Stat. Rule 809.83(2).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2]Article XI of the ordinance defines a " home occupation" as " a gainful occupation engaged in by persons residing in their dwelling, which is conducted in the principal or accessory structure" and meets certain listed criteria. Vilas Cnty., Wis., General Zoning Ordinance, art. XI at 11-4 (Nov. 24, 2010).

[3]The County asserts A Better Way to Live received $66,827 in " donations" between June 2012 and March 2014 from people who stayed at the Rosalind Lake property, but it donated only $655 to charity. The Accolas dispute this assertion, and they also argue it is irrelevant to the issue presented by this appeal. We agree with the Accolas that the amount of money their corporation donated to charity is not relevant to determining whether the County's general zoning ordinance permits single-family properties in the R-1 district to be rented for periods of less than one month.

[4]The general zoning ordinance defines a single-family dwelling as " [a] residential building containing one dwelling unit." Vilas Cnty., Wis., General Zoning Ordinance, art. XI at 11-3 (Nov. 24, 2010). It defines a dwelling unit as " [a] building or portion thereof; with rooms arranged, designed, used or intended to be used for one family." *Id.* A detached dwelling is defined as " [a] single-family building, which is entirely surrounded by open space on the same lot." *Id.*

For purposes of ruling on the parties' summary judgment motions, the circuit court assumed the Accolas' property had never been used by multiple families at a single time. We do the same for purposes of this appeal. It is undisputed that the Rosalind Lake property qualifies as a single-family detached dwelling unit in all other respects.

[5]The Accolas assert, and the circuit court agreed, that an absolute ban on the rental of single-family detached dwelling units in the R-1 district would be unenforceable. The County does not dispute this proposition.

However, for purposes of this appeal, we need only determine whether the general zoning ordinance unambiguously prohibits rentals of single-family detached dwelling units in the R-1 district for periods of less than one month. We are not asked to determine whether the ordinance unambiguously prohibits rentals for periods greater than one month. Accordingly, we take no position on whether a wholesale ban on the rental of single-family detached dwelling units in the R-1 district would be enforceable.

[6]The Accolas suggest we cannot consider § 4.2(A), the purpose statement for the RL district, unless we first conclude the ordinance is ambiguous. We disagree. We need not find an ordinance ambiguous before considering an explicit statement of legislative purpose contained in its text. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ ¶ 48-49, 271 Wis.2d 633, 681 N.W.2d 110. Only extrinsic sources of legislative intent are prohibited in a plain-meaning analysis. *See id.*, ¶ ¶ 46, 50.

[7]We acknowledge that the definition of transient lodging includes the term " commercial lodging establishment," which is not defined in the ordinance. For purposes of this appeal, we need not attempt to define the term " commercial lodging establishment" or determine at what point the use of a residential property for rental purposes becomes a commercial use. However, we do note that the word " commercial" is commonly defined as " concerned with or engaged in commerce" or " making or intended to make a profit[.]" New Oxford American Dictionary 344 (2001). The facts of this case show that the Accolas advertised their property for rent on the internet, frequently rented the property to third parties for periods of less than one month, and received substantial funds in exchange for the rentals. Under these circumstances, the short-term rental of the Accolas' property was clearly commercial in nature. Moreover, on appeal, the Accolas do not argue their use of the property was not commercial.

[8]" Bed and breakfast establishments" and " [r]esort establishments with no contiguous multiple-family dwelling units" are listed as permitted uses in the RL district. *See* Vilas Cnty., Wis., General Zoning Ordinance § § 4.2(B)(2)-(3) (Nov. 24, 2010). However, these uses do not qualify as residential dwelling units. If they did, § § 4.2(B)(2) and (3) of the ordinance, which list them as permitted uses, would be superfluous, in light of § 4.2(B)(4).

QUESTION 2 REFERENCES

1) See *Acquavella v. City of Seattle*, Case No 08-2-39188-4 SEA under QUESTION 1 References
2) MRSC article: Airbnb: Regulation of Internet-Based Businesses August 25, 2014
3) MRSC article: local Government Catching Up with Airbnb and Other Short-Term Transient rental Businesses

MRSC
Local Government Success

Airbnb: Regulation of Internet-Based Businesses

August 25, 2014
Category: Licensing and Regulation

It's always something. Cities and counties have been grappling recently with the regulation of rideshare services such as Uber, Lyft, and Sidecar, that have been competing for business with taxis and limousine services. The latest regulatory issue along these lines is the regulation of short-term rentals, including such popular services as Airbnb, VRBO, and HomeAway. These online person-to-person short-term rentals compete with hotels, motels, and bed and breakfasts, and often they don't pay license fees or lodging taxes. The sharing, peer-to-peer commerce concept, which started with services such as Craigslist and eBay, has evolved into a broader "shared economy" with shared rides, homes, and "maker" workspaces.

In the past, some Washington jurisdictions, including San Juan County, Port Townsend, and Westport, have regulated vacation rentals and transient accommodations, generally through zoning and/or business licensing requirements. With the popularity of online short-term home, apartment, and room rentals, pressure has mounted to regulate and collect taxes from these services, and even prohibit these uses, either in all or in part of a jurisdiction. Airbnb, for example, specifically warns property owners of possible local requirements, restrictions, and prohibitions. [i]

In July, Portland made the news when the city council adopted an ordinance to legalize one- and two-bedroom short-term rentals in privately owned homes (Ordinance No. 186736). Hosts must pay a two-year $180 permit fee, get their home inspected every six years, pay city lodging taxes (12.5%), and live on-site at least nine months out of the year. Homeowners may use a third party, such as a professional property manager or a family member, to run their in-home business. Within the next few months, Portland will consider allowing short-term rentals in apartments and condominiums as well. According to Airbnb, in one year the Airbnb service generated $16 million in economic activity in Portland and supported 660 jobs.[ii]

Founded in August of 2008 and based in San Francisco, Airbnb is a community marketplace for people to list, discover, and book short-term accommodations around the world – online or from a cell phone. Airbnb growth has been accelerating: in 2012, it booked 12 to 15 million "spaces."[iii] Airbnb and similar services offer serious competition for traditional hotels, with rates about 20-50% below market price.[iv] In Chicago, short-term rentals generated $108 million in overall economic activity in 2013, with $70.6 million directly attributable to visitor spending on short-term rentals and related expenses, such as food, recreation, and transportation.[v]

While, to our knowledge, no Washington jurisdictions have enacted ordinances explicitly to address home-share services, some tourism-oriented cities and counties (as noted above) have had provisions in place for a while addressing short-term rentals. So, we can learn from Portland and other cities that have been facing this issue head-

on. In June of this year, the U.S. Conference of Mayors issued a letter of support for innovative companies that participate in the sharing economy, including services such as Airbnb.[vi]

In addition to Portland, Austin, TX, Palm Desert, CA, Myrtle Beach, SC, and Madison, WI have passed ordinances regulating these short-term rental services. Communities that are currently tackling this issue include San Francisco, Boston, New York, and New Orleans, as well as smaller cities like Berkeley and Malibu, CA, Grand Rapids, MI, and Roanoke, VA. In 2011, Florida passed a law that prohibits local governments from banning short-term rentals. Some cities like Charleston, SC have even prohibited short-term rentals. In Los Angeles, the city issued a memorandum stating that city residents may not rent out their apartments and homes for fewer than 30 days if they live in what the planning department classifies as a purely residential neighborhood. In New Orleans, the city council adopted a ban on unlicensed short-term vacation rentals.

If your jurisdiction is considering regulations to address short-term vacation rentals, MRSC would be interested in hearing from you (email: ctobin@mrsc.org).

Other Resources

The following are some additional resources that address issues associated with the regulation of Airbnb, VRBO, HomeAway, and similar short-term rental services:

- "Airbnb At The Tip Of The Spear Of The Regulatory State Versus Innovators," *Forbes*, June 18, 2014 - Discusses regulation of Airbnb and other Internet-based industries

- Airbnb Policy Blog, Airbnb – Latest news on regulatory and policy issues

- "Regulation Will Not Kill Airbnb, Says Harvard Historian Nancy Koehn," WGBH News, July 22, 2014 – Argues that the push to regulate Internet services like Airbnb will not have a major negative effect on the sharing economy

- Short Term Rental Advocacy Center – Promotes best practices in short-term rental regulation; includes links to articles and case studies

- Short Term Rental (STR) Licensing Requirements, Austin, TX – Defines an STR as the rental of a residential unit or accessory building for less than 30 consecutive days (requires $285 operating license fee, also payment of hotel occupancy tax). There is a cap on the number of STRs allowed in each census tract of non-owner occupied properties.

[i] See "What legal and regulatory issues should I consider before hosting on Airbnb?" Airbnb.

[ii] Airbnb 2014 press release.

[iii] "Airbnb: A Spare Room for Debate," by Larry Downes, *Harvard Business Review* Blog Network, June 26, 2013.

[iv] Id.

[v] "Studies Find STRs Boost Jobs And Local Economies in Chicago and St. Joseph," Short Term Rental Advocacy Center, March 13, 2014.

[vi] Letter in Support of Previous USCM Policy, Airbnb Public Policy Blog.

Comments

0 comments on Airbnb: Regulation of Internet-Based Businesses

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Local Government Success

Local Government Catching Up with Airbnb and Other Short-Term Transient Rental Businesses

February 12, 2016 by Steve Butler
Category: Licensing and Regulation

Airbnb and other short-term transient rental websites, such as HomeAway and FlipKey, seem to be in the news on a daily basis. Depending upon your perspective, these commercial enterprises can be many things: shining examples of the "sharing economy," unwelcome intruders into established residential neighborhoods, ways for homeowners to help pay their monthly mortgages, businesses skirting their local financial and regulatory obligations, and the list goes on. Regardless of your feelings, it is probably time to consider whether your community needs to establish or update its short-term transient rental regulations.

Some local governments have focused their zoning regulations on more traditional travel accommodations, like hotels/motels, and tried to prohibit short-term rentals altogether, but such bans have met with limited success. So, if a community wants to adopt standards to regulate short-term transient rentals, where should it start? I would advise that local governments begin by identifying what issue(s) they want to address. Is it:

1. Lack of lodging and sales tax collection on these short-term rental stays;
2. Unregulated traffic, parking, and noise impacts on the surrounding neighborhood; and/or
3. Non-compliance with life/safety standards that are commonly applied to other types of lodging establishments (such as hotels, motels, and bed-and-breakfasts)?

Tax Collection

Even though Airbnb has started collecting all applicable sales and lodging-related taxes in Washington State (as of October 15, 2015), there are many other short-term rental websites that leave it up to state and local government to try and collect those taxes. If a primary goal is to collect a lodging tax, a logical first step is to adopt a local lodging

tax, if you don't already have one. Once in place, a municipality should then provide clear information to short-term rental unit owners about payment of applicable fees and lodging taxes, and may want to follow Portland's lead by setting up a low-cost licensing program.

The benefits of a user-friendly, low-cost licensing/permitting program extend beyond just collection of lodging taxes. Such a program will also likely encourage more short-term transient rental owners to register their units, so that a local government will be knowledgeable of their locations and assured that the owners are aware of all local requirements.

Neighborhood Impacts

In the ideal world, short-term transient rental guests would be well behaved and nearby residents would not even realize that those occasional visitors weren't just friends visiting their neighbors; this situation is likely the case for the vast majority of short-term rental experiences. If you are a local government and don't want to rely on a "best case" scenario, however, you should review and update your local regulations, so that it is clear how short-term rentals are defined, where they can be located, and what rules need to be followed by guests and owners. Palm Desert, California's Short Term Rental regulations provide a good example - they have a low-cost licensing program, specify the on-site parking requirement, and point out the local noise regulations, among other things. New Orleans defines and regulates short term rentals as "bed and breakfasts," which means that owners need to occupy part of the residential structure they are renting out, making it easier for them to monitor guests' behavior.

It is also important to consider the impact of short-term rentals not just on immediate neighbors, but on the neighborhood as a whole. To avoid an over-concentration or "clustering" of short-term transient rentals in a specific neighborhood, Durango, Colorado established a program that currently limits such rentals to only one rental per "street segment" within specified zones and caps the total number within those zones. Austin, Texas has a cap on the number of non-owner-occupied and multi-family/commercial short-term rentals allowed per census tract.

Safety

In most communities, lodging establishments must meet stricter life/safety standards than those required of single-family residences. Public safety is a major issue for Portland, so their Accessory Short-Term Rental (ASTR) program requires initial and follow-up inspections (which are covered by the permit fees) that check for adequate egress to the rentable sleeping rooms, smoke detectors, and even carbon monoxide detectors in some cases (Portland's ASTR adopted regulations may be found here).

Enforcement

A major challenge in regulating short-term rentals will be on the enforcement side. A well-crafted set of regulations that spell out a community's expectations may be important, but there also needs to be effective methods for enforcing those standards. Enforcement will likely be difficult, however, because most short-term transient rentals are in residential neighborhoods and not as visually noticeable as a hotel or motel located in a commercial zone. Reacting to citizens' complaints and monitoring short-term rental websites, with the appropriate follow-up against violators, appear to be the two primary tools for enforcing your licensing, permitting, and tax collection requirements. Santa Monica and Bainbridge Island staff members review the various short-term rental websites to identify violators. Portland had to go so far as to sue HomeAway.com and its VRBO.com subsidiary for not following the city's regulations, and underwent serious negotiations with Airbnb before reaching an agreement with them.

Given their popularity with consumers, short-term transient rentals appear to be here to stay. Given this prognosis, I would recommend that Washington cities, towns, and counties identify their locally significant issues (be it tax collection, reduction of neighborhood impacts, or something else), and proactively take steps to address them. The major challenges will be to create a process that is not so complicated, burdensome, and expensive that it causes short-term rental owners to "fly under the radar," rather than comply with local requirements, and to encourage a high rate of participation with your local program.

Recommended Resources

- Lawmakers Struggle to Legalize Airbnb, GovTech.com
- Popular online short-term vacation rental sites can mean tax, neighborhood issues, *The Gazette* (CO)
- Video about Austin's (TX) Short-Term Rental Licensing Requirements

If you have had experience with short-term transient rentals in your community or have developed an approach that has been working, please leave a comment below or contact me directly at sbutler@mrsc.org.

About Steve Butler

Steve joined MRSC in February 2015. He has been involved in most aspects of community planning for over 30 years, both in the public and private sectors. Steve has served as president of statewide planning associations in both Washington and Maine, and was elected to the American Institute of Certified Planner's College of Fellows in 2008.

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Comments

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QUESTION 3 REFERENCES

1) *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (Wash. 1997)
2) City of Seattle Draft ordinance

133 Wn.2d 861

133 Wn.2d 861 (Wash. 1997)

947 P.2d 1208

CITIZENS FOR MOUNT VERNON, a Washington nonprofit

corporation, Respondent,

v.

CITY OF MOUNT VERNON, a municipal corporation; Robert S.

Peterson, as his separate estate; Briar

Development Company; a Washington

corporation; Haggen, Inc., a

Washington corporation,

Appellants.

No. 63823-3.

Supreme Court of Washington, En Banc.

December 18, 1997

Argued May 20, 1997.

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C. Thomas Moser, Mount Vernon, Buck & Gordon, Peter L. Buck, Kitteridge Oldham, Seattle, Linford C. Smith, Mount Vernon, Hutchison, Foster & Weigelt, William B. Foster, III, Lynnwood, for Appellants.

Law Offices of J. Richard Aramburu, J. Richard Aramburu, Jeffrey Eustis, Seattle, for Respondent.

133 Wn.2d 863

JOHNSON, Justice.

Appellants, Briar Development Company and Haggen, Inc. (Haggen), appeal a superior court order which reversed a decision of the Mount Vernon City Council approving a commercial planned unit development. Appellants contend Mount Vernon's comprehensive plan and zoning code authorize approval **[947 P.2d 1210]** of a commercial planned unit development in a neighborhood zoned residential and on property zoned for single family residences. We affirm the superior court.

FACTS

On April 14, 1995, Haggen applied to the planning director of the city of Mount Vernon for approval of a commercial planned unit development (PUD). Haggen requested a 39.3-acre property be annexed into the city of Mount Vernon and rezoned "R-2A" (single family attached townhouse residential district) and "P" (public park). Additionally, Haggen requested approval of a commercial PUD which would overlay the entire 39.3-acre property and potentially permit construction of the commercial project in a residential neighborhood. Haggen wanted to construct a commercial PUD consisting of a 63,000+ -square-foot grocery/specialty store covering 8.3 acres of the 39.3-acre property. Haggen also intended to construct a 1.4-acre commercial pad and a residential development of approximately 42 to 58 units on 8.4 acres.

In January 1995, Before the Haggen development request, the Mount Vernon City Council adopted a new comprehensive plan for the city under the Growth Management Act (GMA), RCW 36.70A. At this time the Mount Vernon City Council had not yet adopted specific

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development regulations as required by **RCW 36.70A.040**. Mount Vernon did have an existing zoning code.

The zoning regulations governing this specific property are somewhat unclear. Prior to the annexation and the rezone, the site was an unincorporated island, wholly surrounded by city property, zoned "P" (Public/Park) and "C-LI" (Commercial/Light Industrial) under Skagit County zoning regulations. Under the comprehensive plan adopted by the city council in accordance with the GMA, the property appears to be zoned multiple family and medium density single family residential. Although the comprehensive plan suggests the area in which this property is located may need some type of commercial development in the future, the comprehensive plan does not specify the size, intensity, or location of any future commercial development. These areas of potential future commercial development are designated by large circles in the Mount Vernon comprehensive plan.

The comprehensive plan includes five different types of commercial retail zones. These retail centers include: downtown, mall area, community, neighborhood, and convenience. The comprehensive plan designates areas within Mount Vernon for these commercial zones, and the comprehensive plan describes the standards governing commercial development. The comprehensive plan also designates areas with "future potential need for Neighborhood Community Retail." The Haggen property lies within the Neighborhood Community Retail area under the plan.

On August 1, 1995, the Mount Vernon planning commission voted on the underlying zoning of R-2A and P; the planned unit development overlay; the master plan for the entire parcel; and the preliminary planned unit development for the commercial portion. The planning commission vote on the entire proposal ended in a 3-3 tie. The issue was passed to the city council without recommendation from the planning commission.

Public hearings on the annexation, the proposed initial zoning, the master plan, and the preliminary planned unit

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development were held on two separate dates in September 1995 by the city council. On each occasion, residents voiced their opinions both for and against the project. At the September 27, 1995 meeting of the city council two votes were taken. The first vote approved the annexation of the approximately 40 acres into the city of Mount Vernon and the underlying rezone to R-2A and P. The second vote approved adoption of the master plan and the preliminary planned unit development.

On October 18, 1995, Respondent Citizens for Mount Vernon (Citizens) filed an action as a land use petition under the Land Use Petition Act [1] in Skagit County Superior Court. After reviewing the record and hearing oral argument, the superior court entered **[947 P.2d 1211]** an order reversing the city council's approval of the Haggen commercial planned unit development. Specifically, the court determined: (1) without implementing development regulations, the comprehensive plan fails to provide specific standards for making specific land use decisions; (2) even if the comprehensive plan can be used as an approval document, the approval of this project and the R-2A zone is inconsistent with the comprehensive plan; (3) the project is inconsistent with existing zoning regulations; and (4) Citizens exhausted its administrative remedies and was not required to appeal specific land use issues to the Growth Management Hearing Board (Board). Haggen appealed this decision to this court, which accepted direct review.

ANALYSIS

Exhaustion of Remedies

Before reaching the merits of the case, we must address Haggen's argument that a city council's approval of a land use project must be appealed to the Growth Management Hearings Board to comply with the exhaustion of administrative

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remedies requirement. The trial court found Citizens did not fail to exhaust its remedies and had standing because issues of noncompliance with zoning and planning laws were adequately raised at public hearings and through written correspondence.

The doctrine of exhaustion of administrative remedies is well established in Washington. A party must generally exhaust all available administrative remedies prior to seeking relief in superior court. See **RCW 34.05.534**; *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wash.2d 640, 646, **835 P.2d 1030** (1992). The court will not intervene and administrative remedies need to be exhausted when the "relief sought ... can be obtained by resort to an exclusive or adequate administrative remedy." *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wash.2d 68, 73, **677 P.2d 114** (1984) (quoting *State v. Tacoma-Pierce County Multiple Listing Serv.*, 95 Wash.2d 280, 284, **622 P.2d 1190** (1980)).

The principle is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges. South Hollywood Hills Citizens, 101 Wash.2d at 73, **677 P.2d 114**; Retail Store Employees Local 1001 v. Washington Surveying & Rating Bur., 87 Wash.2d 887, 906, **558 P.2d 215** (1976) (citing *Robinson v. Dow*, **522 F.2d 855**, 857 (6th Cir.1975)). The United States Supreme Court has stated in *McKart v. United States*, **395 U.S. 185, 89 S.Ct. 1657**, 23 L.Ed.2d 194 (1969) the policies underlying this principle: (1) insure against premature interruption of the administrative process; (2) allow the agency to develop the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts. McKart, 395 U.S. at 193-94, 89 S.Ct. at 1662-63; South Hollywood Hills Citizens, 101 Wash.2d at 73-74, **677 P.2d 114**.

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Haggen asserts because Citizens did not appeal the city council's decision to approve the project to the Board, Citizens did not exhaust the "administrative remedies to the extent required by law." **RCW 36.70C.060(2)(d)**. Due to this failure, Haggen argues Citizens did not meet the standing requirement for judicial review as set forth in **RCW 36.70C.060**. [2]

[947 P.2d 1212] Under **RCW 36.70A.280**, the Board has a very limited power of review.

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under **RCW 36.70A.040** or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to **RCW 43.62.035** should be adjusted.

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RCW 36.70A.280(1)(a) and (b). Contrary to the position of Haggen, the challenge to the approval of the Haggen development by Citizens does not involve the issue of whether the Mount Vernon City Council properly complied with the GMA, but rather involves the effect of the comprehensive plan on specific land use decisions. The Board does not have jurisdiction over these types of issues and cannot provide the remedy or relief sought by Citizens.

Citizens' complaint does not assert that the comprehensive plan implemented by the city of Mount Vernon does not comply with the requirements of the GMA. Rather, Citizens allege that the approval of the rezone and the approval of this specific development project do not comply with the underlying zoning or with the comprehensive plan, and that the comprehensive plan cannot be used to make specific land use decisions. The Board is not able to render a decision on this issue because the approval granted by the city council falls outside the scope of review granted to the Board. Citizens sought to prevent the development of this property for a commercial use. The Board cannot render a decision on a specific development project; thus, Citizens properly brought the issue to the superior court for judicial review.

Haggen also agues Citizens cannot look to the courts for a remedy because Citizens failed to raise the issue of the rezone and the project approval specifically enough in the public hearing process. Haggen contends this failure eliminates Citizens' standing to challenge approval of the project in court.

As noted, exhaustion of administrative remedies is clearly required by **RCW 36.70C.060** Before a party will have standing to seek judicial review of a land use petition. The statute states nothing of the degree of participation or the specificity with which issues must be raised to seek judicial review. Traditionally, the doctrine of exhaustion looks to determine whether administrative remedies have been pursued. Fred P. Bosselman & Clifford L.

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Weaver, Judicial Review in Donald G. Hagman et al., Urban Planning & Land Development Control Law § 23.5 (2d ed.1986). The only administrative remedy available to Citizens under the Land Use Petition Act, prior to seeking review in superior court, was participation in the public hearings. The record reflects Citizens did participate, and Haggen makes no claim they did not.

This court has not specifically addressed how much participation at a public hearing is required to exhaust an administrative remedy. Haggen urges us to adopt precedent applying the Administrative Procedure Act's statutory exhaustion requirement. Prior cases may be helpful in understanding how exhaustion has been applied, but are not analogous or binding. In the present case, individual citizens were permitted to speak for three minutes Before the city council; the cases cited by Haggen involve an administrative process that was more formal and more adversarial. See **RCW 34.05.554**; *King County v. Boundary Review Bd.*, 122 Wash.2d 648, **860 P.2d 1024** (1993) (citing *Griffin v. Department of Soc. & Health Servs.*, 91 Wash.2d 616, 631, **590 P.2d 816** (1979) and *Kitsap County v. Department of*

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Natural Resources, 99 Wash.2d 386, 393, **662 P.2d 381** (1983)).

One case applying the Administrative Procedure Act's statutory exhaustion requirement has established that prior to judicial review of an administrative action, the appropriate issues must first be raised Before the agency. Boundary Review Bd., 122 Wash.2d at 668, **860 P.2d 1024**. In order for an issue to be properly raised Before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record. Boundary Review Bd., 122 Wash.2d at 670, **860 P.2d 1024**. Our cases require issues to be first raised at the administrative level and encourage parties to fully participate in the administrative process. See, e.g., Boundary Review Bd., 122 Wash.2d at 670, **860 P.2d 1024**; Department of Natural Resources, 99 Wash.2d at 393, **662 P.2d 381**; Griffin, 91 Wash.2d at 631, **590 P.2d 816**.

The record here reflects Citizens participated in all

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aspects of the administrative process and raised the appropriate project approval issues. Haggen suggests the issue is R-2A zoning; Haggen is wrong. The issue is the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential. The precise, legal argument is compatibility between the project and the underlying zoning. Citizens opposed the Haggen commercial development project Before the city council on the grounds it was inconsistent with the comprehensive plan; that the Haggen proposal was not a neighborhood grocery store; and that the Haggen proposal was inconsistent with the residential zoning regulations surrounding the site. Citizens opposed the Haggen project through written correspondence to the city council and through testimony at the public hearings. The issue of zoning for this property was Before the city council. The compatibility of a large commercial development project with the comprehensive plan, with the residential neighborhood, and with the residential rezone was Before the city council.

Haggen contends Citizens' failure to specifically raise the technical, legal argument of compatibility between R-2A zoning and a commercial PUD demands the project be approved without an examination of the case on the merits. Individual citizens did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing. The fact remains that the city council's approval of the commercial PUD project conflicted with the city of Mount Vernon's zoning regulations, undermined established Washington zoning precedent, and was illegal. Finally, Haggen suggests the compatibility problem between the R-2A zone and the commercial PUD could have been corrected by the city council; however, Haggen fails to explain how a zoning correction drastic enough to accommodate the commercial project would escape the vices of spot zoning. Here, Citizens exhausted its administrative

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remedies and has standing to seek judicial review of its land use petition.

Mount Vernon's Zoning Code

Haggen argues a commercial PUD is compatible with the R-2A rezone and the comprehensive plan. Haggen also asserts a commercial PUD is permitted in R-2A zones because PUDs are permitted under the terms of the Mount Vernon R-2A zoning regulations and because the comprehensive plan suggests some commercial development may be necessary in the area in which this site is located.

An examination of Mount Vernon's zoning code is necessary to determine the uses permitted on a site zoned R-2A and to determine how Mount Vernon resolves issues surrounding the complex nature of PUDs. This is a legal issue, which we review de novo. *Sunderland Family Treatment Servs. v. City of Pasco,* 127 Wash.2d 782, 788, **903 P.2d 986** (1995).

The purpose of Mount Vernon's R-2A zone and the uses permitted in R-2A zones are codified under Mount Vernon Municipal Code (MVMC) 17.21. The intent of the R-2A zone is "to provide for small areas within neighborhoods containing single-family attached dwellings in the form of 'townhouses'...." MVMC 17.21.010. PUDs are permitted in R-2A zones under MVMC

[947 P.2d 1214] 17.21.020(C), which states, "[p]lanned unit developments may be permitted according to procedures outlined in Chapter 17.66." [3] (Emphasis added.) PUDs are permitted, but the inquiry into the type of PUD permitted in R-2A zones cannot be answered without looking to MVMC 17.69.

The zoning code requires us to look to the procedures outlined in MVMC 17.69, planned unit development districts. First, MVMC 17.69.030 states:

Any uses permitted outright or as a conditional use in the

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zone where the PUD is located shall be permitted in a PUD, subject to the criteria established in this chapter; provided, that duplexes or multifamily dwellings may be permitted as a PUD in any residential zone. No use shall be permitted except in conformity with a specific and precise final development plan pursuant to the procedural and regulatory provisions of this chapter.

(Emphasis added.) The Haggen commercial PUD proposal is not a use permitted outright in the R-2A zone.

The Mount Vernon zoning code specifically separates residential PUDs from commercial PUDs. Haggen concedes this is not a residential PUD. [4] The Haggen commercial PUD is therefore governed by the commercial PUD section of Mount Vernon's zoning code, MVMC 17.69.410, business and commercial PUDs:

A. The foregoing PUD procedures may be employed in established business or commercial zones to encourage business or commercial site layout serving the public in a more satisfactory manner than generally would be possible with the conventional zoning regulations. The same general provisions apply to acceptability of a business or commercial PUD proposal as a residential PUD.

(Emphasis added.)

In order to comply with this section, the proposed commercial PUD must be located in established business or commercial zones which, as noted, this area was not. Planned unit developments are permitted in R-2A zones, but only in accordance with MVMC 17.69. By its own terms the zoning code explicitly prohibits the commercial planned unit development proposed by Haggen on a site zoned R-2A.

RCW 36.70B.030

Haggen's asserts Mount Vernon's comprehensive plan

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is the only required document necessary to make this specific land use decision. Haggen also states the comprehensive plan provides sufficient guidelines to approve the commercial planned unit development. Haggen cites **RCW 36.70B.030** to support these arguments. **RCW 36.70B.030**(1) describes the project approval process:

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under **RCW 36.70B.040** shall incorporate the determinations under this section.

Mount Vernon has adopted a comprehensive plan, Mount Vernon has existing zoning regulations, but Mount Vernon had not adopted specific development regulations as of the start of this action.

The present case presents a problem because the statute above suggests, and Haggen argues in its brief and during oral argument, a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise. In *Barrie v. Kitsap County*, 93 Wash.2d 843, **613 P.2d 1148** (1980), we held comprehensive plans generally are not used to make specific land use decisions. Instead, we stated a comprehensive plan is a "guide" or "blueprint" to be used when making land use decisions. Barrie, 93 Wash.2d **[947 P.2d 1215]** at 849, **613 P.2d 1148**. Although the court confirmed there need not be "strict adherence" to a comprehensive plan, any proposed land use decision must generally conform with the comprehensive plan. Barrie, 93 Wash.2d at 849, **613 P.2d 1148**.

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. *Cougar Mountain Assocs. v. King County*, 111 Wash.2d 742, 757, **765 P.2d 264**

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1988). If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. *Weyerhaeuser v. Pierce County*, 124 Wash.2d 26, 43, **873 P.2d 498** (1994). These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.

As explained earlier, the Haggen commercial PUD is not consistent with the underlying R-2A zoning regulations. If the commercial PUD is not consistent with the underlying R-2A zoning, the project cannot be approved despite general consistency with the comprehensive plan. Employing the rule stated earlier to the facts of this case, we find that when underlying zoning regulations explicitly prohibit a commercial PUD, but the comprehensive plan allows the development, the zoning regulations must govern the land use decision.

PUDs and Zoning

Haggen argues the city council's decision to approve the PUD, despite its apparent incompatibility with the underlying R-2A zone, was correct because MVMC 17.69.010 states the PUD is an overlay zone requiring a rezone and because the comprehensive plan requires rezoning through the PUD process. Haggen interprets the need for rezoning to imply the underlying zoning is immaterial to the land use analysis and the rezone is merely a "reversionary" zone should the PUD not be constructed. The trial court did not agree. It looked to the underlying R-2A zone, and held the commercial PUD could not be constructed in a R-2A zone because only those uses permitted in the underlying zone are permitted in the PUD and no commercial uses are permitted in a R-2A zone. Haggen's interpretation of Mount Vernon's zoning regulations and Washington case law is not correct.

The legal effect of approving a planned unit development is an act of rezoning. *Lutz v. City of Longview,* 83 Wash.2d 566, 568-69, **520 P.2d 1374** (1974). The following

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general rules apply to rezone applications: (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezone must bear a substantial relationship to the public health, safety, morals, or welfare. *Parkridge v. City of Seattle,* 89 Wash.2d 454, 462, **573 P.2d 359** (1978).

Haggen agrees the approval of a PUD is an act of rezoning, but Haggen has failed to demonstrate how conditions have changed to warrant a rezone. The record does not indicate and the trial court did not find this area had become a commercial or business area. Therefore, we will not address the issue of whether conditions have changed.

Haggen argued to this court, for the first time, the city council could have fixed the problem with the R-2A zoning and avoided the time spent in court by retaining Skagit County's original commercial zoning on the site. As we noted in Lutz, in certain circumstances, the approval of a planned unit development may constitute spot zoning. Lutz, 83 Wash.2d at 573-74, **520 P.2d 1374**. Spot zoning is a zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from, and inconsistent with, the classification of surrounding land and not in accordance with the comprehensive plan. Lutz, 83 Wash.2d at 573-74, **520 P.2d 1374** (citing *Smith v. Skagit County,* 75 Wash.2d 715, 743, **453 P.2d 832** (1969)). The main inquiry is whether the zoning action bears a substantial relationship to the general welfare **[947 P.2d 1216]** of the affected community. *Save a Neighborhood Env't v. City of Seattle,* 101 Wash.2d 280, 286, **676 P.2d 1006** (1984).

Professor Richard L. Settle wrote in Washington Land Use and Environmental Law and Practice,

The vice of "spot zoning" is not the differential regulation of adjacent land but the lack of public interest justification for such discrimination. Where differential zoning merely accommodates some private interest and bears no rational relationship

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to promoting legitimate public interest, it is "arbitrary and capricious" and hence "spot zoning."

Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.11(c) (1983) (footnotes omitted).

Spot zoning emphasizes why the planned unit development does not trump underlying zoning; if a planned unit development can be placed at any location within a city regardless of the underlying or surrounding zoning, as Haggen argues, it might raise issues of spot zoning and it might undermine the overall zoning plan. Planned unit developments allow for flexibility in planning, in design, or in density. They do not permit ad hoc land use decisions merely because a developer has decided to employ the PUD process.

The commercial use proposed by Haggen is inconsistent with, and distinctly different from, the surrounding neighborhood zoning. As this court stated in Lutz:

[T]he PUD achieves flexibility by permitting specific modifications of the customary zoning standards as applied to a particular parcel. The developer is not given carte blanche authority to make any use which would be permitted under traditional zoning.

Lutz, 83 Wash.2d at 568, 520 P.2d 1374. The PUD process does not override underlying zones, nor does a PUD trump specific zoning regulations.

CONCLUSION

Citizens exhausted its administrative remedies and adequately identified the issues and objections to the project to have standing to bring this challenge.

Although RCW 36.70B.030 requires the comprehensive plan be used as the foundation for project review in the absence of development regulations, a proposed project must generally conform to the comprehensive plan. Even

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if the Haggen commercial PUD generally conformed to the comprehensive plan, the proposal directly conflicts with the underlying R-2A zoning regulations. The zoning regulations prohibit this type of development in a R-2A zone. This conflict is resolved in favor of zoning regulations. Additionally, approval of a planned unit development is an act of rezoning, which must be accompanied by a showing of significant changed circumstances. No such showing was made which would justify approval of the project in this case.

The decision of the superior court is affirmed.

DURHAM, C.J., and DOLLIVER, SMITH, ALEXANDER and TALMADGE, JJ., concur.

SANDERS, Justice (dissenting).

Although the majority discusses several different issues, at the end of the day it reverses the Mount Vernon City Council, concluding this commercial project is inconsistent with the city's R-2A residential zone. Had this been a commercial zone the majority would have affirmed the council by the same logic.

Assuming the majority is correct on the merits, we still must ask if the court is at liberty to decide the merits, given our prior pronouncements on the necessity to raise appropriate objections Before an administrative agency to test their disposition on subsequent judicial review. Compare *King County v. Boundary Review Bd.*, 122 Wash.2d 648, 860 P.2d 1024 (1993) ("[C]ase law has established that prior to judicial review of an administrative action, the appropriate issues must first be raised Before the agency." Majority at 1212 (citing Boundary Review Bd. at 668, 860 P.2d 1024)). Preservation of the zoning issue for judicial review is the problem here--and it is a very great problem--because, in point of fact, the Citizen group never claimed at the administrative level this [947 P.2d 1217] project (or the proposed PUD which embodied the project) would violate the R-2A zone. It is that simple.

Of course, there were many other objections raised but

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never this one. Able counsel for the Citizens submitted to the city council a detailed letter in opposition to the project raising several concerns, [1] but not zoning. Many citizens spoke to and wrote the council in opposition to the project; however, none simply stated project approval would violate the R-2A zone. About as close as the record comes to a proper objection is the claim that the proposal would place a commercial project in a residential neighborhood; however, while this might constitute notice of a claim of potential neighborhood incompatibility, it is hardly notice of a claimed zoning violation as the specific requirements of the zoning ordinance cannot be determined by the character of the prior actual use.

In response the majority states:

The record here reflects Citizens participated in all aspects of the administrative process and raised the appropriate project approval issues. Haggen suggests the issue is R-2A zoning; Haggen is wrong. The issue is the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential. The precise, legal argument is compatibility between the project and the underlying zoning.

Majority at 1213. The subtlety of the majority's distinction escapes me. What is the difference between stating "the issue is R-2A zoning" on the one hand and "the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential"

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on the other? While the majority states Citizens "raised the appropriate project approval issues" (Majority at 1213), in fact Citizens did not raise the issue in any form.

Failure to raise the R-2A zone claim Before the city council is so obvious upon this record it simply does not permit denial. It was obvious to both parties, as well as the superior court judge, when judicial review was first conducted. Hence, it was then the claim of the Citizen group that specifically raising the zoning objection as a condition to judicial review should be excused as imposition of such a requirement would be too great a burden on the Citizen participants. Verbatim Report of Proceedings (RP) (Feb. 13, 1996) at 166. [2] Accepting the Citizens' argument, the superior court legally erred when it agreed the zoning objection need not be specifically raised to be preserved for judicial review. Notwithstanding its legal error the superior court correctly identified the precise issue when it asked whether there is a legal requirement "that one of the persons Before that City Council had to say, listen R-2A is the wrong zone for this and these are the reasons." RP (Feb. 13, 1996) at 163.

Responding to this question the project proponent replied, "Absolutely." *Id.* He was correct that Boundary Review Bd. says just that. The majority agrees Boundary Review is applicable and even admits it stands for the proposition "[i]n order for an issue to be properly raised Before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record [citing Boundary Review at 670, **860 P.2d 1024**]." Majority at 1213. Yet the majority subverts in practice the very rule it articulates in theory. If the rule is not to be applied consistently, it is better we have it not at all, as the reasons asserted for its **[947 P.2d 1218]** adoption and continued vitality are thereby defeated and its continued existence simply becomes an open invitation for discriminatory enforcement.

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A review of the facts of this case demonstrate if ever the rule has a reason, the reason is served by application here.

We begin by recalling the proposed situs of the project (Haggen's tract) originally lay in an unincorporated, commercially zoned island of Skagit County surrounded by the Mount Vernon municipality. The original county zoning on Haggen's tract was commercial/limited industrial (C-LI) and public. [3] As a matter of fact, the original development proposal was submitted at a time when the property was zoned commercial by the county.

However, the proponents saw it advantageous to encourage annexation of the tract into the Mount Vernon municipality and essentially packaged up a proposal for annexation with a proposal that the newly annexed property be appropriately zoned to accommodate the proposed development.

Given the present reality that a man's desire to improve his property is often cast in terms of a political question, the proponent realistically attempted to persuade the appropriate governmental decision-makers to adopt those actions necessary to allow the project to proceed. And, of course, those who disagreed with that objective attempted to marshal whatever political resources at their disposal to make sure this did not happen.

Eventually all met Before the city council which convened to adopt the annexation, proposed zoning, and PUD proposal as a package. It is fair to say, and I do not think it is subject to dispute, the matter had progressed this far because it was driven by the natural desire of the project proponent to have whatever legislative action taken as was necessary for project approval. Decidedly the action ultimately taken was not an academic exercise in land use planning for the coming century--rather, all had gathered together to do battle over a proposed supermarket.

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The learned superior court judge understood the reality of this record very well upon his initial review, although he disagreed in legal consequence:

It's abundantly clear to this Court that the decision of the City was project driven. Such appears clear. Haggen was in there with the City staff at least six months Before the Comprehensive Plan was adopted. Haggen proposed the annexation, proposed the zoning, but it strikes me that the City decided it was going to put this plan in place and it did,

but wrongfully as far as this Court is concerned. So the decision was molded to accommodate the Haggen project proposal....

RP (Feb. 16, 1996) at 7. Given that the annexation and the proposed zone adoption was "project driven," it is an undeniable inference that the council indeed intended to do what was necessary to lawfully approve the project. Certainly it was within their legislative prerogative to adopt a commercial zone compatible with their comprehensive plan, especially for property previously zoned commercial prior to annexation. In fact, with the same result, the council could have approved the annexation without adopting any zone at all! Moreover, the comprehensive plan, adopted in January 1995, targeted the area containing the Haggen tract as one available for a retail center, which is defined as a commercial outlet of fewer than 70,000 square feet on no more than 10 acres. Administrative Record at 1325-27. (Haggen's proposed retail center is a 63,000-square-foot supermarket on 8.3 acres.)

However, the council adopted an R-2A zone at the same time it approved the annexation and commercial PUD, unmistakably evidencing its intention that the project be approved although, according to the majority, mistaking the law in the process. The failure of a project opponent to object on zoning grounds Before final action presents an important added dimension--the failure to timely object removed the only realistic prospect **[947 P.2d 1219]** that the council would cure the objection while saving the project by simply adopting a commercial zone compatible with this "project

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driven" proposal. But the objection was not made until long after it was too late for the council to take corrective action.

I do not assume the objection was intentionally withheld; however, under the majority's scenario there is every reason why it could have been with the same result. Certainly that would have been to the profit of the opponent. Indeed, any attorney worth his salt would specifically counsel opponents to withhold such objection for fear the council would timely correct its error, thereby making the project all the less vulnerable to subsequent legal attack on judicial review. Such is precisely one of the reasons we have stated the rule as set forth in Boundary Review--to preserve an objection for judicial review it must first be asserted to the agency to allow the agency to avoid its own error.

In Boundary Review one of the issues on judicial review was whether a particular King County ordinance applied to prohibit the subject land annexation. 122 Wash.2d at 668, **860 P.2d 1024**. The interested landowner defended by asserting the theory had never been presented to the county agency, and therefore the opponents had not adequately exhausted their remedies. In response, the opponents (very much like the case Before us) asserted they had generally raised the issue below, even if they had not done so specifically. But on review this court held petitioners must raise their theory with specificity below or it is lost. *Id.* at 669, **860 P.2d 1024**. The court noted while the opponents "presented extensive testimony Before the Board" in opposition to the annexation, they "never mentioned the ordinance" and "never argued to the Board that the proposed annexations were prohibited by Ordinance 9849...." *Id.* at 669, **860 P.2d 1024**. Because the opponents never argued their precise theory Before the agency, we refused to consider it. *Id.* at 669, **860 P.2d 1024** ("[W]e decline to consider the effect of Ordinance 9849 because it was not raised Before the Board."). We explained, "This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in

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protecting the integrity of administrative decisionmaking." *Id.* at 668, **860 P.2d 1024**. We noted it furthered important purposes of:

(1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

Id. at 669, **860 P.2d 1024** (quoting *Fertilizer Inst. v. United States Envtl. Protection Agency*, **935 F.2d 1303**, 1312-13 (D.C.Cir.1991)). As we held in Boundary Review: "In order for an issue to be properly raised Before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." 122 Wash.2d at 670, **860 P.2d 1024**.

The case Before us presents the prototypical example of why this rule exists. Had a proper objection been made at the administrative level, several years of judicial appellate proceedings could have been avoided as well as the no doubt substantial cost associated with this litigation, not to mention the delay and consequential damage to those whose

interests were dependent upon the outcome of this review. Most importantly, the city council could have avoided the error to begin with by adopting a zone ordinance compatible with this project and beyond justified legal objection. To this the majority responds:

Finally, Haggen suggests the compatibility problem between the R-2A zone and the commercial PUD could have been corrected by the city council; however, Haggen fails to explain how a zoning correction drastic enough to accommodate the commercial project would escape the vices of spot zoning.

Majority at 1213. I find this argument less than persuasive. Indeed, it is no argument at all. Whatever Mr. Haggen did or did not do has no bearing whatsoever on the adequacy of the Citizens' presentation. It certainly **[947 P.2d 1220]** was not incumbent

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upon Mr. Haggen to justify a zoning ordinance which the city council did not pass. Beyond that, the majority seems to forget the subject property was acquired through annexation and, by national majority rule, annexed land comes into the acquiring jurisdiction unzoned, thereby permitting any use not a nuisance per se. See, e.g., *Ben Lomond, Inc. v. City of Idaho Falls,* **92 Idaho 595**, 598-99, **448 P.2d 209** (1968) (citing 101 C.J.S. Zoning § 134, at 892 and other authorities). *Cf. Olympic View-Mukilteo Action Group v. City of Mukilteo,* 97 Wash.2d 707, 710, **649 P.2d 116** (1982) (referencing the claim that annexed acquisitions are unzoned, the court found this land was zoned by simultaneous ordinance to retain its unincorporated zoning designation); **RCW 35A.14.330** (code city may prepare proposed zoning ordinance to be effective on annexation). The same result would even follow under the minority rule, which generally holds that newly annexed property retains its previous zoning designation, here commercial. Given (1) the lack of legal necessity to zone at all, (2) the commercial zoning prior to annexation, and (3) the Mount Vernon comprehensive plan which designated this parcel and environments suitable for a commercial zone, I suspect it would take the presence of factors not apparent from this record to persuade any court the adoption of a commercial zone for this area would be somehow invalid. In short, the whole tenor of the majority's claim regarding what Mr. Haggen "fails to explain" and/or the "vices of spot zoning" testifies to the very weakness of its argument on the issue it will not confront: the zoning objection has not been preserved for judicial review because it was not properly raised at the administrative level.

If the majority were to overrule that line of cases which requires an administrative litigant to state an objection in order to preserve it for judicial review--having determined, for example, the requirement placed an unfair burden on litigants at the administrative level--at least that result would provide some prospective consistency and clarity. Unfortunately, however, we now have a rule of unknown dimensions, finding honor only in its breach,

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which is simply an open invitation to confusion and discriminatory enforcement. I dissent.

MADSEN and GUY, JJ., concur.

Notes:

[1] The land use petition is the new process the Legislature has established for parties seeking judicial review of local land use decisions. This process replaces the writ system. See RCW 36.70C; Laws of 1995, ch. 347.

[2] **RCW 36.70C.060**(2) states in part:

"Standing to bring a land use petition under this chapter is limited to the following persons:

...

"(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

"(a) The land use decision has prejudiced or is likely to prejudice that person;

"(b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

"(c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

"(d) The petitioner has exhausted his or her administrative remedies to the extent required by law."

[3] Although this section states the procedures are found in MVMC 17.66, this is a typographical error. Planned unit development districts are governed by MVMC 17.69.

[4] Haggen made this concession because MVMC 17.69.400(C) and (D) require the commercial portion of a residential PUD to be built after the residential portion it is designed or intended to serve, and the commercial portion must primarily serve the residents of the PUD.

[1] On September 20, 1995, a detailed letter was hand-delivered to the city council on behalf of the Citizens group outlining five specific objections to the proposal (which I paraphrase):

1. Development regulations were not adopted to implement the comprehensive plan;

2. The comprehensive plan and map is incomplete;

3. The proposed development is not permitted under the comprehensive plan;

4. The proposal is not supported by an appropriate economic analysis;

5. The subject proposal is not vested.

Administrative Record at 1247-1250.

[2] The Citizens' attorney argued to the court: "Its [requirement that specific objection be raised has] never been applied to citizens and when the Court looks at what citizens are required to do, we go back to Sterling v. Spokane County [, 31 Wash.App. 467, 642 P.2d 1255, review denied, 97 Wn.2d 1041 (1982)]."

[3] Apparently some 20 to 39 acres were C-LI. Such C-LI uses include any business use and any commercial use, even specifically including on-site hazardous waste treatment. Skagit County Code § 14.04.070.

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SEPA DRAFT

CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL _____

..title

AN ORDINANCE amending Sections 23.55.022, 23.84A.024, 23.84A.030 and 23.84A.036 and subsection 23.45.545.G of the Seattle Municipal Code (SMC), adding a new Section 23.42.060 to the SMC and repealing Sections 23.44.051 and 23.44.072 of the SMC; to define and adopt development standards for short term rental uses and modify the definition and standards for bed and breakfast uses.

..body

WHEREAS housing vacancy rates are at low levels, making it increasingly difficult for people to obtain permanent housing; and

WHEREAS, removal of residential units from the long-term housing market contributes to low vacancy rates; and

WHEREAS, the conversion of long-term housing units to short-term rentals could result in the loss of housing for Seattle residents; and

WHEREAS, according to data published by Airbnb in December 2015, 630 units were rented on the Airbnb platform for more than 90 nights a year; and

WHEREAS, it is in the public interest that short-term rental uses be regulated in order to help preserve housing for long-term tenants; and

WHEREAS, the exception created here for short-term rentals uses rented for less than 91 nights in any 12 month period provides flexibility for short-term rentals offered on an occasional basis; and

WHEREAS, short-term rental platform's business depends upon participation and contact with local short-term rental operators; and

WHEREAS, the standards for the operation of short-term rental uses contained in this ordinance help preserve the City's permanent housing stock, reduce negative effects on affordable housing, and protect the livability of residential neighborhoods; and

WHEREAS, the Council finds that this ordinance will help protect and promote the health, safety and welfare of the general public,

NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. A new Section 23.42.060 is added to the Seattle Municipal Code as follows:

23.42.060 – Short-term Rentals and Bed and Breakfasts

Short-term rental and bed and breakfast uses are subject to the following provisions:

A. Short-term rentals and bed and breakfasts are permitted as an accessory use to any residential use unless the proposed use is over water or otherwise prohibited by the Shoreline regulations contained in Chapter 23.60A.

B. A short-term rental use may be located in an accessory dwelling unit.

C. Limit on number of nights.

1. Except as provided in subsection 23.42.060.C3, when a person provides a dwelling unit or a portion thereof as a short-term rental or bed and breakfast, and the dwelling unit is the person's primary residence, there is no limit on the number of nights the dwelling unit or portion thereof may be rented for short-term rental or bed and breakfast use.

2. When a person provides a dwelling unit or portion thereof that is not their primary residence for short-term rental use, the dwelling unit or portion thereof may be rented as a short-term rental use for a maximum of 90 nights in any 12 month period.

3. In multi-family zones, there is no limit on the number of nights the dwelling unit or portion thereof may be rented as a bed and breakfast use.

D. Business License.

1. All owners or operators of short-term rental uses and bed and breakfast uses shall have a Business License Tax Certificate issued by the Department of Finance and Administrative Services.

2. All operators of short-term rental uses that are rented for more than 90 nights in a 12 month period at a single dwelling unit, as permitted by subsection 23.42.060.C.1, shall have a Short-Term Rental Operator's License issued by the Department of Finance and Administrative Services.

3. All operators of bed and breakfast uses rented for more than 90 nights in a 12 month period shall have a Short-Term Rental Operator's License issued by the Department of Finance and Administrative Services.

E. Number of residents and guests. The total number of residents and guests occupying a dwelling unit that includes a short-term rental may not exceed the number of residents allowed in a household. For sites with an accessory dwelling unit, the total number of residents and guests occupying both dwelling units may not exceed the number allowed for a household.

1. A bed and breakfast use in a single-family zone may have up to five guest rooms and the maximum number of residents and guest allowed shall be as permitted by Title 22, provided that there is no limit on the number of guest rooms in: (1) a bed and breakfast use in a multi-family zone, or (2) a bed and breakfast in a single-family that was lawfully established on or before April 1, 1987 and that has been continuously operated as a bed and breakfast since April 1, 1987.

F. Short-term rental uses and bed and breakfast uses may display signs identifying the use if the signs are permitted by Chapter 23.55;

Section 2. Section 23.44.051 of the Seattle Municipal Code, last amended by Ordinance 124919, is repealed:

((~~**23.44.051 Bed and breakfasts**~~

~~A bed and breakfast use is permitted if it meets the following standards:~~

~~A. General provisions~~

~~1. The bed and breakfast use shall have a business license issued by the Department of Finance and Administrative Services;~~

~~2. The bed and breakfast use shall be operated by an owner who owns at least a 50 percent interest in the dwelling in which the bed and breakfast is located;~~

~~3. An owner who owns at least a 50 percent interest in the dwelling shall reside in the structure in which the bed and breakfast use is located during any period in which rooms are rented to guests;~~

~~4. No more than two people who reside outside the dwelling unit shall be employed, with or without compensation, in the operation of the bed and breakfast use;~~

~~5. The bed and breakfast use shall be operated within the principal structure, which shall be at least five years old;~~

~~6. There shall be no evidence of the bed and breakfast use from the exterior of the structure except for a sign permitted by subsection 23.55.020.D.1;~~

~~7. The bed and breakfast use shall have no more than five guest rooms, provided that this limitation does not apply to bed and breakfasts that were established on or before and have been continuously operated as a bed and breakfast since April 1, 1987; and~~

~~8. Parking shall be provided as required in Chapter 23.54.~~

~~B. Alterations to single-family structures. Interior and exterior alterations consistent with the development standards of the underlying zone are permitted.~~

~~C. Dispersion. Any lot line of property containing any proposed new bed and breakfast use must be located 600 feet or more from any lot line of any other bed and breakfast use.~~

~~D. Neighborhood mitigation provisions~~

~~1. The owner will make public transit information available to patrons, and the owner's operating plan must describe how the transit information will be made available to patrons.~~

~~2. The design of the structure in which the use is located and the orientation of the access will minimize impacts, such as noise, light and parking, to neighboring structures.~~

~~3. The owner's operating plan includes quiet hours, limits on programmed on-site outdoor activities, and parking policies to minimize impacts on residential neighbors.~~

~~4. The delivery of goods and services associated with the bed and breakfast use are accommodated at a time and in a manner that will limit, to the extent feasible, impacts on surrounding properties.~~

~~5. The operating plan shall be distributed to all residents and property owners within 300 feet of the proposed bed and breakfast use. The distributed plan shall reference this Section 23.44.051 and provide contact information for the Seattle Department of Construction and Inspections' Review and Inspection Center and contact information for the operator of the bed and breakfast. Applicants for a permit to establish a bed and breakfast use shall provide proof to the Seattle Department of Construction and Inspections that they made a good faith effort to provide the required distribution prior to issuance of a permit establishing the use.~~))

Section 3. Subsection 23.45.545.G of the Seattle Municipal Code, last amended by Ordinance 124378, is amended as follows:

G. Reserved ((~~Bed and breakfast uses. A bed and breakfast use may be operated under the following conditions:~~

~~1. The bed and breakfast use has a business license issued by the Department of Finance;~~

~~2. The operation of a bed and breakfast use is conducted within a single dwelling unit;~~

~~3. The bed and breakfast use is operated within the principal structure and not in an accessory structure;~~

~~4. There shall be no evidence of a bed and breakfast use from the exterior of the structure other than a sign permitted by subsection 23.55.022.D.1, so as to preserve the residential appearance of the structure;~~

~~5. No more than two people who are not residents of the dwelling may be employed in the operation of a bed and breakfast, whether or not compensated; and~~

~~6. Parking is required pursuant to Chapter 23.54. Interior and exterior alterations consistent with the development standards of the underlying zone are permitted.~~))

Section 4. Section 23.44.072 of the Seattle Municipal Code, last amended by Ordinance 117202, is repealed:

((~~23.44.072 - Roomers, boarders, lodgers.~~

~~The renting of rooms, with or without meals, by a household for lodging purposes only, for the accommodation of not more than two (2) roomers, boarders or lodgers, is permitted~~

~~outright as an accessory use within a dwelling unit as long as the total number of residents does not exceed eight (8).~~))

Section 5. Section 23.55.022 of the Seattle Municipal Code, last amended by Ordinance 120388, is amended as follows:

D. The following signs are permitted in all multifamily zones:

***

8. One electric, externally illuminated or nonilluminated sign, not exceeding 64 square inches in area((~~, bearing the name of a bed and breakfast~~));

***

Section 6. Section 23.84A.024 of the Seattle Municipal Code, last amended by Ordinance 124475, is amended as follows:

23.84A.024 - "L"

***

"Lodging use" means a commercial use in which the primary activity is the provision of rooms to transients. Lodging uses include but are not limited to the following uses:

1. "Bed and breakfast" means a lodging use, lawfully established prior to May 1, 2016, where rooms within a single dwelling unit are provided to transients ((~~by a resident operator~~)) for a fee by prearrangement on a daily or short-term basis. A bed and breakfast use is considered to be lawfully established if the use was issued one or more of the following: a land use permit establishing the bed and breakfast use by the City of Seattle, a Food Service Establishment permit for a bed and breakfast use issued by Seattle King County Public Health; or a Transient Accommodation License for a bed and breakfast use issued by the Washington State Department of Health; and the use has not been discontinued for a period of more than one

year. A breakfast and/or light snacks may be served to those renting rooms in the bed and breakfast, provided that the facility meets all applicable health and safety regulations.

2. "Hotel" means a lodging use, located in a structure in which access to individual units is predominantly by means of common interior hallways, and in which a majority of the rooms are provided to transients for a fee on a daily or short-term basis.

3. "Motel" means a lodging use, located in a structure in which access to individual units is predominantly by means of common exterior corridors, and in which a majority of the rooms are provided to transients on a daily or short- term basis, and in which off-street parking is provided on the lot.

4. "Short-Term Rental" means a lodging use, that is not a hotel or motel, in which a dwelling unit or rooms within a dwelling unit are rented to a person by a short-term rental operator for a fee for fewer than 30 consecutive nights. A breakfast and/or light snacks may be served to those renting rooms in the short-term rental, provided that the facility meets all applicable health and safety regulations.

***

Section 7. Section 23.84A.030 of the Seattle Municipal Code, last amended by Ordinance 124378, is amended as follows:

23.84A.030 - "P"

***

"Pet grooming services." See "Retail sales and services, general."

"Pitched roof" means any non-horizontal roof.

***

"Preliminary plat" means a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks and other elements of a subdivision, that is submitted to furnish a basis for the approval or disapproval of the general layout of a subdivision.

"Primary Residence" means a resident's usual place of return for housing as documented by motor vehicle registration, driver's license, voter registration or other such evidence. A person may have only one primary residence.

"Principal structure" means the structure housing one or more principal uses as distinguished from any separate structures housing accessory uses.

***

Section 8. Section 23.84A.036 of the Seattle Municipal Code, last amended by Ordinance 124457, is amended as follows:

23.84A.036 - "S"

***

"Short subdivision" means the division or redivision of land into nine (9) or fewer lots, tracts, parcels, sites or divisions for the purpose of sale, lease, development or financing.

"Short-term Rental." See "Lodging Use."

"Short-term rental operator" means any person who is the owner or tenant of a dwelling unit, or any designee of the owner or tenant, who provides a dwelling unit, or portion thereof, for short-term rental use.

"Shoulder" means the graded area between the roadway edge and the sidewalk, or slope line where there is no sidewalk, on the portion of a street where there are no curbs.

***

SEPA DRAFT

Section 9. This ordinance shall take effect on January 1, 2017.

Passed by the City Council the ____ day of _____, 2016, and signed by me in open session in authentication of its passage this _____ day of _____, 2016.

_____

President _____of the City Council

Approved by me this ____ day of _____, 2016.

_____

Edward B. Murray, Mayor

Filed by me this ____ day of _____, 2016.

_____

Monica Martinez Simmons, City Clerk

(Seal)

QUESTION 4 REFERENCES

1) See proposed Draft Seattle Ordinance under Question 3 reference materials
2) See *Cope v. City of Cannon Beach*, 317 Or. 339, 855 P.2d 1083 (Or. 1993) under Question 1 reference materials
3) See *Ewing v. City of Carmel*, 234 Cal.App.3d 1579, 286 Cal. Rptr 382 (Ca.App 1991) under Question 1 reference materials
4) See *Spilka v. Town of Inlet*, 778 N.Y.S 2d 222, 8 A.D.3d 812 (NY 2004) under Question 1 reference materials
5) See *City of Venice v. Gywnn*, 76 So.3d 401, 37 Fla. L. Weekly D 47 (Fla.App. 2 Dist. 2011) under Question 1 reference materials
6) See *Vilas County v. Accola*, 364 Wis.2d 409, 866 N.W. 2d 406 (Wis.App 2015) under Question 1 reference materials

QUESTION 5 REFERENCES

1) Airbnb Hosting Laws in Anaheim, CA
2) Airbnb Hosting Laws in Los Angeles, CA
3) Airbnb Hosting Laws in San Francisco, CA
4) Airbnb Hosting Laws in Tacoma, WA
5) Airbnb Hosting Laws in Seattle, WA
6) Airbnb Hosting Laws in Bellevue, WA
7) *City of Portland v. Homeaway.com*, Case no. 3:15-cv-01984-MO June 7, 2016
8) *Louisville/Jefferson County Metro Government v. Hotels.com,* 590 F.3d 381 (6th Cir. 2009)

AIRBNB HOSTING LAWS IN ANAHEIM, CA

Short term rentals are allowed (with restrictions)

Rent Rooms or Entire House (Short Term Rentals)

Short term rentals are regulated in Anaheim. The city defines the Short Term Rentals term, which applies in residential zones and provides a list of regulations required for this use.

Definition:""Short-term rental unit" shall mean a dwelling, or any portion thereof, that is being rented, or is intended to be rented, as a short-term rental to a person or group of persons. (Ord. 6299 § 1 (part); May 13, 2014.)" **(Anaheim Municipal Code - 4.05.030 - Definitions - M) (http://library.amlegal.com/nxt/gateway.dll/California/anaheim /title4businessregulation/chapter405short-termrentals?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca$anc=JD_4.05.030)**

Regulation and restrictions

- "Short-term rental property" means a parcel of real property, as shown on the latest equalized tax assessment roll as maintained by the assessor of the County of Orange, upon which a short-term rental unit (or units) is (are) maintained. "Short-term rental property" includes the premises upon which a short-term rental unit is located, including parking areas, driveways, landscaping, accessory structures, fences, walls, swimming pools, hot tubs, and spas. **(Anaheim Municipal Code - 4.05.030 - Definitions - L (http://library.amlegal.com/nxt/gateway.dll/California/anaheim /title4businessregulation/chapter405short-termrentals?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca$anc=JD_4.0**
- 0102 The owner shall provide proof sufficient to the Planning Director in consultation with the City Attorney that short-term rentals are not prohibited under any Declaration of Covenants, Conditions and Restrictions or any other community standards/guidelines governing the short-term rental unit and short-term rental property enacted by a Homeowners' or Maintenance Association having jurisdiction over the short-term rental property. **(Anaheim Municipal Code - 4.05.100 - Conditions of Permit - 0102 (http://library.amlegal.com/nxt/gateway.dll/California /anaheim/title4businessregulation/chapter405short-termrentals?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca$anc=JD_4.0**
- 0111 The owner shall require all occupants to agree to a minimum stay of three (3) consecutive nights. **(Anaheim Municipal Code - 4.05.100 - Conditions of Permit - 0111 (http://library.amlegal.com/nxt/gateway.dll/California/anaheim**

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Fees and Taxes

- **Municipal Code Chapter 2.12 - Transient Occupancy Tax (http://library.amlegal.com/nxt/gateway.dll/California/anaheim/title2taxes/chapter212transientoccupancytax?f=templates$fn=default.htm$3.0)**

City Level Resources

- [Full list of regulations is available in the city code ...]
- **Chapter 18.38.130 - Home Occupations (http://library.amlegal.com/nxt/gateway.dll/California/anaheim/title18zoning/chapter1838supplementaluseregulations?f=templates$fn=default.htm$3.0$vid=aml**
- **Good Neighbor Brochure for Short Term Rentals (http://www.anaheim.net/DocumentCenter/View/1084)**
- **Municipal Code Homepage (http://library.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca$**
- **Short-Term Rental Program (http://www.anaheim.net/574/Short-Term-Rental-Program)**
- **Zoning Map (http://gis.anaheim.net/citykeymap.pdf)**

Media Resources

- **latimes.com - Anaheim imposes moratorium on new short-term rentals (http://www.latimes.com/business/la-fi-anaheim-airbnb-20150916-story.html)**

Nearby Cities

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- **San Diego (/city/CA/San-Diego)**

AIRBNB HOSTING LAWS IN LOS ANGELES, CA

Short term rentals may or may not be allowed (laws are unclear)

Rent Rooms In Primary House (Bed and Breakfast)

Bed and breakfasts may be permitted, however the laws are unclear on required regulations.

Definition:"Bed and Breakfast Facility. A building or portion thereof which is used as a temporary lodging place for fewer than thirty consecutive days and which does not contain more than five guest rooms and one kitchen. (Added by Ord. No. 172,792, Eff. 10/4/99.)" **(Los Angeles Municipal Code: §12.03) (http://library.amlegal.com/nxt/gateway.dll /California/lamc/municipalcode/chapterigeneralprovisionsandzoning /article2specificplanning-zoningcomprehen?f=templates$fn=altmain-nf.htm$q= [field%20folio-destination-name:%2712.03.%27]$x=Advanced#JD_12.03.)**

Regulation and restrictions

- Home occupation. An occupation carried on by the occupant or occupants of a dwelling as a secondary use in connection with the main use of the property, subject to the regulations of Section 12.05 A.16. of this Code. For dwelling units where a home occupation is conducted, the home occupation shall be considered a residential use for zoning purposes. (Amended by Ord. No. 171,427, Eff. 1/4/97, Oper. 3/5/97.) **(Los Angeles Municipal Code: §12.03 (http://library.amlegal.com/nxt/gateway.dll /California/lamc/municipalcode/chapterigeneralprovisionsandzoning /article2specificplanning-zoningcomprehen?f=templates$fn=altmain-nf.htm$q= [field%20folio-destination-name:%2712.03.%27]$x=Advanced#JD_12.03.))**
- A person wishing to conduct a home occupation must obtain a City business license, if a license is required to perform the occupation, from the Office of Finance. (Amended by Ord. No. 173,268, Eff. 7/1/00, Oper. 7/1/00.) **(Los Angeles Municipal Code: §12.05 (http://library.amlegal.com/nxt/gateway.dll/California /lamc/municipalcode/chapterigeneralprovisionsandzoning /article2specificplanning-zoningcomprehen?f=templates$fn=altmain-nf.htm$q= [field%20folio-destination-name:%2712.05.%27]$x=Advanced#JD_12.05.))**
- [Full list of regulations is available in the city code ...]

Fees and Taxes

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City Level Resources

- Municipal Code Article 1.7 Transient Occupancy Tax (http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode
- Municipal Code Homepage (http://www.amlegal.com/codes/client/los-angeles_ca/)
- Zoning Map (http://zimas.lacity.org/)

Media Resources

- LATimes.Com - L.A. officials want to keep AirBnB-type rentals from being 'rogue hotels' (http://www.latimes.com/local/lanow/la-me-ln-airbnb-rental-regulations-20150825-story.html)

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- Anaheim (/city/CA/Anaheim)
- Bakersfield (/city/CA/Bakersfield)

AIRBNB HOSTING LAWS IN SAN FRANCISCO, CA

Short term rentals are allowed (with restrictions)

Rent Rooms or Entire House (Short Term Rentals)

Short term rentals are regulated and permitted in San Francisco. The city went to great length to simplify and ease the hosting process. The city has a business portal and a short-term residential rental guide that covers both renting a single room in your primary residence or renting the entire unit. In addition, the city allows AirBnB to collect and pay TOT (Hotel-Tax) from hosts that use AirBnB as a platform.

Definition:"Short-Term Residential Rental. A Tourist or Transient Use where all of the following conditions are met: (a) the Residential Unit is offered for Tourist or Transient Use by the Permanent Resident of the Residential Unit; (b) the Permanent Resident is a natural person; (c) the Permanent Resident has registered the Residential Unit and maintains good standing on the Department's Short-Term Residential Rental Registry; and (d) the Residential Unit: is not subject to the Inclusionary Affordable Housing Program set forth in Planning Code Section 415et seq.; is not a residential hotel unit subject to the provisions of Chapter 41, unless such unit has been issued a Permit to Convert under Section 41.12; is not otherwise a designated as a below market rate or income-restricted Residential Unit under City, state, or federal law; has not been the subject of an eviction pursuant to the Ellis Act and Administrative Code Section 37.9(a)(13) within the five year period prior to applying for the Registry if such eviction occurred after November 1, 2014; and no other requirement of federal or state law, this Municipal Code, or any other applicable law or regulation prohibits the permanent resident from subleasing, renting, or otherwise allowing Short-Term Residential Rental of the Residential Unit." **(San Francisco Municipal Code - Sec. 41A.4. Definitions) (http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?f=templates$fn=altmain-nf.htm$q=[field%20folio-destination-name:%2741A.4%27]$x=Advanced#JD_41A.4)**

Regulation and restrictions

- [Full list of regulations is available in the city code ...]

Fees and Taxes

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City Level Resources

- Areas In Which AirBnB Collects Occupancy Tax (https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available)
- AirBnB Help Center - San Francisco (https://www.airbnb.com/help/article/871/san-francisco-ca)
- City Site FAQ - Collecting TOT (Hotel Tax) through AirBnB (http://sftreasurer.org/tot_hotel_website_merchant_faq#5)
- Municipal Code Homepage (http://www.amlegal.com/codes/client/san-francisco_ca/)
- Municipal Code Article 7 Tax on Transient Occupancy of Hotel Rooms (http://library.amlegal.com/nxt/gateway.dll/California/business/article/7taxontransientoccupancyofhotelro?f=templates$fn=default.htm$3.0)
- San Francisco Business Portal - Short Term Residential Rental (http://businessportal.sfgov.org/start/starterkits/short-term-rental)
- Zoning Map (http://propertymap.sfplanning.org/)

Media Resources

- Cnet.com - San Francisco mayor signs landmark law making Airbnb legal (http://www.cnet.com/news/san-francisco-mayor-makes-airbnb-law-official/)

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- San Jose (/city/CA/San-Jose)
- Sacramento (/city/CA/Sacramento)

AIRBNB HOSTING LAWS IN TACOMA, WA

Short term rentals may be allowed (with restrictions)

Permit is required

The city of Tacoma allows one to operate a B&B in his or her home, subject to several limitations. The city states that: "Lodging house [is a] building with not more than nine guest rooms where lodging or lodging and boarding is provided for compensation. This use, which includes bed and breakfasts, is often operated in conjunction with and within a single-family detached dwelling" and [Lodging house] is permitted in some zones, and prohibited in others, in addition, regulations may change based on the zoning type, for example: " For R-2, R-2SRD, and HMR-SRD lodging is limited to one guest room only, provided such use shall not be in connection with a foster home for children or foster home for adults which may otherwise be authorized.". Regulations may change based on location, home-owners-association and other criteria. Consult the city-code, state laws and home-owner-association regulations (where applicable) for additional information.

Note that the state of Washington also regulates short term rentals (defined as providing accomdations for gueses for a period of less than 30 days). Regulations, permits and taxes are subject to various criterias, for instance: whether the number of rented rooms is 3 or more. See state laws for state wide regulations which may apply in your specific case.

City Level References

- **Business Licenses (http://cms.cityoftacoma.org/taxlicense/regulatorylicense/hol%20agreement%20Sept%202010.pdf)**
- **City Code - Title 13 - Land Use Regulatory Code (http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title13-LandUseRegulatoryCode.PDF)**
- **City Code - Title 06 - Tax and License Code (http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title06-TaxandLicenseCode.PDF)**
- **City Code - Homepage (http://www.cityoftacoma.org/cms/one.aspx?objectId=2255)**
- **Zoning Map (http://wspdsmap.ci.tacoma.wa.us/samples/zoning.pdf)**

State Level References

- **AirBnB Collecting Occupancy Tax Collection in Washington State (https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available)**
- **Washington State Department of Revenues - transient rental income tax (http://dor.wa.gov/content/findtaxesandrates/othertaxes/tax_transrental.aspx)**
- **Washington State Department of Revenues - Personal home rentals tax laws (http://dor.wa.gov/docs/pubs/industspecific/homerentals.pdf)**
- **Washington State Department of Health - License for transient accommodations (http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate**

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/TransientAccommodations/LicenseRequirements)

- **Washington State Revised Code of Washington (RCW) - Transient Accommodations (http://apps.leg.wa.gov/WAC/default.aspx?cite=246-360)**
- **Washington State Revised Code of Washington (RCW) (http://apps.leg.wa.gov/rcw/default.aspx)**

City contacts

- **City of Tacoma - general inquire - contact number: 253- 591-5000 (tel:253- 591-5000)**
- **City of Tacoma - general inquire online form (https://www.cityoftacoma.org /cms/one.aspx?portalId=169&pageId=38900&rqst=111)**

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AIRBNB HOSTING LAWS IN SEATTLE, WA

Short term rentals may be allowed (with restrictions)

Permit is required

The city of Seattle allows one to operate a B&B in his or her home, subject to several limitations. The city states that: "'Bed and breakfast' means a lodging use, where rooms within a single dwelling unit are provided to transients by a resident operator for a fee by prearrangement on a daily or short-term basis. A breakfast and/or light snacks may be served to those renting rooms in the bed and breakfast.", "The bed and breakfast use is operated within the principal structure, and a bed and breakfast use may not locate in a principal structure that is less than five years old" and "any lot line of property containing any proposed new bed and breakfast use must be located 600 feet or more from any lot line of any other bed and breakfast use". Regulations may change based on location, home-owners-association and other criteria. Consult the city-code, state laws and home-owner-association regulations (where applicable) for additional information.

Note that the state of Washington also regulates short term rentals (defined as providing accomdations for gueses for a period of less than 30 days). Regulations, permits and taxes are subject to various criterias, for instance: whether the number of rented rooms is 3 or more. See state laws for state wide regulations which may apply in your specific case.

City Level References

- **Seattle Permits - Home Occupations (http://www.seattle.gov/DPD/Publications/CAM/cam236.pdf)**
- **Business License (http://www.seattle.gov/licenses/get-a-business-license)**
- **City Code - 23.42.050 - Home occupations (https://www.municode.com/library/wa/seattle/codes /municipal_code?searchRequest= %7B%22searchText%22:%22home%20occupation%22,%22pageNum%22:1,%22resultsPerPage%22: %5B%22CODES%22%5D,%22productIds%22:%5B%5D %7D&nodeId=TIT23LAUSCO_SUBTITLE_IIILAUSRE_DIV2AUUSDEST_CH23.42GEUSPR_23.42.050H**
- **City Code - 23.44.051 - Bed and breakfasts (https://www.municode.com/library/wa/seattle/codes /municipal_code?searchRequest= %7B%22searchText%22:%22bed%20and%20breakfast%22,%22pageNum%22:1,%22resultsPerPage' %5B%22CODES%22%5D,%22productIds%22:%5B%5D %7D&nodeId=TIT23LAUSCO_SUBTITLE_IIILAUSRE_DIV2AUUSDEST_CH23.44RESIMI_SUBCHAPTI**
- **City Code - Chapter 5.60 - Sales And Use Tax (https://www.municode.com/library/wa/seattle /codes/municipal_code?searchRequest= %7B%22searchText%22:%22lodging%20tax%22,%22pageNum%22:1,%22resultsPerPage%22:25,%2 %5B%22CODES%22%5D,%22productIds%22:%5B%5D %7D&nodeId=TIT5REFITA_SUBTITLE_IITA_CH5.60SAUSTA)**
- **City Code - Homepage (https://www.municode.com/library/wa/seattle/codes/municipal_code)**

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- **Zoning Map (http://www.seattle.gov/dpd/research/GIS/webplots/smallzonemap.pdf)**

State Level References

- **AirBnB Collecting Occupancy Tax Collection in Washington State (https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available)**
- **Washington State Department of Revenues - transient rental income tax (http://dor.wa.gov/content/findtaxesandrates/othertaxes/tax_transrental.aspx)**
- **Washington State Department of Revenues - Personal home rentals tax laws (http://dor.wa.gov/docs/pubs/industspecific/homerentals.pdf)**
- **Washington State Department of Health - License for transient accommodations (http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/TransientAccommodations/LicenseRequirements)**
- **Washington State Revised Code of Washington (RCW) - Transient Accommodations (http://apps.leg.wa.gov/WAC/default.aspx?cite=246-360)**
- **Washington State Revised Code of Washington (RCW) (http://apps.leg.wa.gov/rcw/default.aspx)**

City contacts

- **Department of Planning And Development - contact number: 206-233-7156 (tel:206-233-7156)**

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- **Shoreline (/city/WA/Shoreline)**

AIRBNB HOSTING LAWS IN BELLEVUE, WA

Short term rentals are allowed (with restrictions)

Permit is required

The city of Bellevue allows one to operate a B&B in his or her home, subject to several limitations. The city states that: "Bed and Breakfast [is an] owner-occupied dwelling which temporarily houses guests for profit. A bed and breakfast does not include a rooming house as defined in LUC 20.50.044. (Refer to LUC 20.20.140 for general development requirements applicable to bed and breakfast uses.) (Ord. 6223, 4-6-15, § 5; Ord. 4028, 7-17-89, § 10)", "Boarding houses and bed and breakfasts require a Home Occupation Permit, Part 20.30N LUC, approval. In addition, not more than two rooms may be rented to not more than two persons other than those occupying a single-family dwelling, provided there is compliance with health and building code requirements. The owner of the rooms to be rented shall provide off-street parking for such rooms at the rate of at least one parking stall for each room. (Ord. 5089, 8-3-98, § 11; Ord. 4028, 7-17-89, § 3; Ord. 3145, 9-27-82, § 29)" and "not more than two rooms may be rented to not more than two persons other than those occupying a single-family dwelling, provided there is compliance with health and building code requirements". Regulations may change based on location, home-owners-association and other criteria. Consult the city-code, state laws and home-owner-association regulations (where applicable) for additional information.

Note that the state of Washington also regulates short term rentals (defined as providing accomdations for gueses for a period of less than 30 days). Regulations, permits and taxes are subject to various criterias, for instance: whether the number of rented rooms is 3 or more. See state laws for state wide regulations which may apply in your specific case.

City Level References

- **Home Occupation Permit (City Brochure) (http://www.ci.bellevue.wa.us/pdf/Development%20Services/L-34_HomeOccupPermit.pdf)**
- **Home Occupation (LH) (http://www.ci.bellevue.wa.us/Home_Occupation.htm)**
- **City Code - Part 20.30N Home Occupation Permit (http://www.codepublishing.com/WA/Bellevue/LUC/BellevueLUC2030N.html#20.30N)**
- **City Code - 20.10.440 Land use charts. (http://www.codepublishing.com/WA/Bellevue/LUC/BellevueLUC2010.html#20.10.440)**
- **City Code - Chapter 4.19 -Lodging Excise Tax (http://www.codepublishing.com/WA/Bellevue/html/Bellevue04/Bellevue0419.html)**
- **City Code - Homepage (http://www.codepublishing.com/wa/bellevue/)**
- **Zoning Map (http://www.ci.bellevue.wa.us/pdf/IT/zoning_fb.pdf)**

State Level References

Home (/) · Blog (./blog) · Sitemap (./sitemap)

- **AirBnB Collecting Occupancy Tax Collection in Washington State (https://www.airbnb.com**

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/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available)

- Washington State Department of Revenues - transient rental income tax (http://dor.wa.gov/content/findtaxesandrates/othertaxes/tax_transrental.aspx)
- Washington State Department of Revenues - Personal home rentals tax laws (http://dor.wa.gov/docs/pubs/industspecific/homerentals.pdf)
- Washington State Department of Health - License for transient accommodations (http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/TransientAccommodations/LicenseRequirements)
- Washington State Revised Code of Washington (RCW) - Transient Accommodations (http://apps.leg.wa.gov/WAC/default.aspx?cite=246-360)
- Washington State Revised Code of Washington (RCW) (http://apps.leg.wa.gov/rcw/default.aspx)

City contacts

- City of Bellevue - Service First Desk - contact number: 425-452-6800 (tel:425-452-6800)

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- Sammamish (/city/WA/Sammamish)
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City of Portland v. HomeAway.com, Inc., 060716 ORDC, 3:15-cv-01984-MO /**/ div.c1 {text-align: center} /**/

CITY OF PORTLAND, Plaintiff,

v.

HOMEAWAY.COM, INC. and HOMEAWAY, INC., Defendants.

No. 3:15-cv-01984-MO

United States District Court, D. Oregon, Portland Division

June 7, 2016

OPINION AND ORDER

MICHAEL W. MOSMAN, CHIEF UNITED STATES DISTRICT JUDGE

When new technologies are developed, there is often a tension between those new technologies and efforts to regulate them within a framework built around older technologies. This case is an illustration of that tension. Plaintiff City of Portland sued Defendants *HomeAway.com*, Inc. and HomeAway, Inc. (collectively "HomeAway") for failure to comply with various provisions of the Portland City Code collectively known as the "Transient Lodgings Tax." HomeAway moves to dismiss the City's complaint. I GRANT HomeAway's Motion to Dismiss [7] and DENY injunctive relief.

I. BACKGROUND

HomeAway operates an online vacation rental marketplace where people interested in making their homes available for short-term rental may advertise their property. Travelers interested in renting a property can access HomeAway's websites to search for and find available properties. HomeAway puts the traveler in contact with the owner or lessee of the property to sort out the details of the lodging arrangement. HomeAway has property listings located all over the world, including in Portland.

In 1972, the City of Portland enacted a Transient Lodgings Tax Ordinance, Portland City Code ("PCC") § 6.04.010, *et seq.* ("the Ordinance"), providing in part that "[e]very [hotel] operator renting rooms or space for lodging or sleeping purposes in this City . . . shall collect a tax from the transient" to be remitted to the City. PCC § 6.04.030(A). The Ordinance applies to hotel "Operators, " defined by the Ordinance as "the person who is proprietor of the hotel in any capacity. Where the operator performs his/her functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator . . . ." PCC § 6.04.010 (M). The Ordinance authorizes the City to levy fines against Operators that do not comply with the Ordinance. *See, e.g.,* PCC § 6.04.170.

On January 21, 2015, the Portland City Council passed amendments to the Ordinance that took effect on February 20, 2015. The apparent goal of the City Council in passing the amendments was to extend the Ordinance to cover "Booking Agents." The Ordinance defines "Booking Agent" as "an Operator or any person that provides a means through which a Host may offer a Short-Term Rental for transient lodging occupancy. This service is usually, though not necessarily, provided through an online platform and generally allows a Host to advertise the Short-Term Rental through a website . . . ." PCC § 6.04.010 (D). The Ordinance expressly lists "[o]nline travel booking sites" as examples of "Booking Agents." *Id.*

After the City Council passed the 2015 amendments to the Ordinance, the City sent HomeAway notices in which the City contended that HomeAway was in violation of various provisions of the Ordinance. *(See* Compl. [1], Exs. 3-8.) Included in these notices was an assessment of $2, 540, 106 in presumptive taxes, penalties, and interest. *(See* Compl. [1], Ex. 7.) HomeAway refused to pay the assessment, claiming it was not in violation of the Ordinance because it was not an Operator or Booking Agent and therefore did not fall under the Ordinance's terms. On October 21, 2015, the City filed this lawsuit against HomeAway seeking a declaratory judgment that HomeAway is an Operator or a Booking Agent, a reduction of fines to judgment, a reduction of presumptive taxes to judgment, and an injunction enjoining HomeAway's operations in Portland.

On May 17, 2016, 1 held oral argument. From the bench, I issued a ruling GRANTING HomeAway's Motion to Dismiss [7] and DENYING injunctive relief. The purpose of this Opinion and Order is to further clarify my rulings.

II. LEGAL STANDARD

When reviewing a motion to dismiss, the court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN,* 393 F.3d 1068, 1072 (9th Cir. 2005). A court need not accept legal conclusions as true because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A pleading that offers only "labels and conclusions" or "'naked assertion[s]' devoid of 'further factual enhancement'" will not suffice. *Id.* (quoting *Twombly,* 550 U.S. at 555, 557). While a plaintiff does not need to make detailed factual allegations at the pleading stage, the allegations must be sufficiently specific to give the defendant "fair notice" of the claim and the grounds on which it rests. *See Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly,* 550 U.S. at 555).

III. DISCUSSION

The City's claims all depend on HomeAway being either an Operator or a Booking Agent as defined under the Ordinance. HomeAway contends that the City's complaint fails to allege that HomeAway is either an Operator or a Booking Agent and therefore all claims should be dismissed. I find the City has failed to allege HomeAway is an Operator. I further find the Portland City Charter does not grant the City the authority to tax HomeAway as a Booking Agent, and the City has not sufficiently alleged enough facts to tax HomeAway as a Booking Agent under the alternative authority of the relevant Oregon statute. Finally, I find the Ordinance does not place any duties and responsibilities on Booking Agents and, accordingly, I decline to reduce to judgment any fines assessed against HomeAway as a Booking Agent. I set forth my reasoning for these findings below.

A. HomeAway's Form 10-K Filing

In its Response to HomeAway's Motion to Dismiss, the City makes numerous factual

allegations based on information contained in HomeAway's Form 10-K filing with the Securities Exchange Commission. HomeAway objects to my consideration of any facts included in the Form 10-K filing and not contained in or attached to the City's complaint and argues that the City has mischaracterized the company's disclosures. Therefore, as a threshold matter, I must determine whether it is appropriate in this case to consider a defendant company's Form 10-K filing when the company contests the facts contained in the filing. I find it inappropriate.

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Riachard Feiner & Co.,* 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). In fact, Rule 12(b)(6) mandates that if "matters outside the pleading are presented to and not excluded by the court, the motion *must* be treated as one for summary judgment" rather than a motion to dismiss. Fed.R.Civ.P. 12(d) (emphasis added). There are, however, two exceptions to the requirement. The first exception is "a court may consider material which is properly submitted as part of the complaint.... If the documents are not physically attached to the complaint, they may be considered if the documents' authenticity ... is not contested and the plaintiffs complaint necessarily relies on them." *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001) (citations and internal quotation marks omitted).

The second exception to the requirement, under Federal Rule of Evidence 201, allows a district court to take judicial notice of "matters of public record." *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Under this exception, courts can consider securities offerings and corporate disclosure documents, such as Form 10-K filings, which are publicly available. *See Metzler Inv. GMBH v. Corinthian Colleges, Inc.,* 540 F.3d 1049, 1064 n. 7 (9th Cir. 2008); *Wynn v. Chanos,* 75 F.Supp.3d 1228, 1235 (N.D. Cal. 2014) ("SEC forms such as a Form 8-K or Form 10-K are matters of public record and may be subject to judicial notice. Accordingly, I take judicial notice of Wynn's . . . Form 10-K from 2011.") (citation omitted). But it is only appropriate for me to "to take judicial notice of the content of the SEC Forms [ ] and the fact that they were filed with the agency. *The truth of the content, and the inference properly drawn from them, however, is not a proper subject of judicial notice under Rule 201" Patel v. Parnes,* 253 F.R.D. 531, 546 (CD. Cal. 2008) (emphasis added); *see also Vesta Corp. v. Amdocs Mgmt. Ltd.,* 80 F.Supp.3d 1152, 1157 (D. Or. 2015) ("The Court takes judicial notice of the SEC filings . . . not for the truth of the facts recited therein but for the existence of the records."); *Gerritsen v. Warner Bros Entm't Inc.,* 112 F.Supp.3d 1011, 1032 (CD. Cal. 2015) (collecting cases from other circuits and various district courts within the Ninth Circuit).

Here, because the City has not attached HomeAway's Form 10-K filing to its complaint nor has the City's complaint necessarily relied on the filing, the first exception does not apply. The second exception also does not apply because neither party has formally requested I take judicial notice of HomeAway's Form 10-K filings. Even if the City were to request I take judicial notice of the Form 10-K filing, to do so would be improper because the City is relying on the truth of the contents of the filing to prove the substance of its claims. Accordingly, I will not consider the contents of HomeAway's Form 10-K filing in ruling on HomeAway's motion.

B. HomeAway as an "Operator"

The City's second, fourth, and sixth claims are predicated on HomeAway being an

"Operator" under the Ordinance. The Ordinance defines an Operator as a "person who is [a] proprietor of the hotel in any capacity. Where the operator performs his/her functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator . . . ." PCC § 6.04.010 (M). In other words, there are two ways the City can allege HomeAway is an Operator: first, if it alleges HomeAway is the proprietor of the hotel; and second, if it alleges HomeAway is a managing agent performing the proprietor's functions. I find the City has failed to allege HomeAway is either a proprietor of a hotel or a managing agent and therefore has failed to allege HomeAway is an Operator.

1. Proprietor of a Hotel

HomeAway is an Operator under the Ordinance if it is the proprietor of a hotel. The Ordinance defines "hotel" as "any structure, or any portion of any structure which is occupied or intended or designated for transient occupancy for 30 days or less for dwelling, lodging, or sleeping purposes PCC § 6.04.010(K). The Ordinance does not, however, define the term "proprietor." Terms that are not defined in the Portland City Code must be construed in accordance with their ordinary usage and in their context. *See* PCC § 1.01.050(D); *see also State v. Langley,* 314 Or. 247, 256, 839 P.2d 692 (1992) (illustrating the rule that "words of common usage" should "be given their plain, natural, and ordinary meaning"). Therefore, before I can determine whether the City has sufficiently alleged HomeAway is a proprietor in the hotel context, I must determine the ordinary meaning of proprietor.

HomeAway argues that the plain meaning of "proprietor" implies full or partial *ownership* of a business or property. In support of this argument, HomeAway relies on several dictionary definitions. *See, e.g., Proprietor,* BLACK's LAW DICTIONARY (10th ed. 2014) ("An owner, esp. one who runs a business."); The American Heritage Dictionary (4th ed. 2000) ("1. One who has legal title to something; an owner. 2. One who owns or owns and manages a business or other such establishment."). HomeAway contends these definitions demonstrate ownership is necessary for proprietorship. The City responds by citing a different, much broader dictionary definition of proprietor. *See* WEBSTER'S THIRD New Int'l Dictionary 1819 (unabridged ed. 2002) (defining "proprietor" in part as, "one having an interest (as control, present use, or usufruct) less than absolute and exclusive right").

I find the definitions HomeAway offers accurately convey the ordinary meaning of "proprietor, " especially when taken in the hotel context. One would not ordinarily understand "proprietor of a hotel" to include people who simply have control over the hotel, use the hotel, or have the right to enjoy the use and advantages of a hotel. Instead, one would understand a proprietor of a hotel to be the owner of the hotel-ownership is a central element of proprietorship.

The City has not alleged, nor can it allege, that HomeAway is an owner of hotel properties. In fact, the City has claimed that the Hosts, rather than HomeAway, are the owners of the various properties listed through HomeAway. (*See* Pl. Resp. [18] at 2 ("HomeAway operates its short-term-rental business by soliciting *listings from property owners* . . . .") (emphasis added).)

At oral argument, the City asserted that HomeAway is in fact the owner of a "virtual hotel" and therefore a proprietor. However, this argument directly contradicts the definition of "hotel" as set forth by the City itself in the Ordinance. The Ordinance limits its definition of hotels to a

"structure" or a "portion of [a] structure." *See* PCC § 6.04.010(K). Therefore, while HomeAway may be a proprietor of a virtual hotel business, a virtual hotel is not a hotel at all under the terms of the Ordinance. Accordingly, I find that the City has not met its burden in alleging that HomeAway is a proprietor of a hotel.

2. Managing Agent

The second way for HomeAway to be an Operator under the Ordinance is if it is a managing agent. The Ordinance does not define the term "managing agent, " so I am left once again to determine the undefined term's meaning given its ordinary usage and context. *See* PCC § 1.01.050(D).

For its suggested definition of managing agent, HomeAway cites Black's Law Dictionary, which defines a managing agent as any "person with general power involving the exercise of judgment and discretion, as opposed to an ordinary agent who acts under the direction and control of the principal." *Managing A*gent, Black's Law Dictionary (10th ed. 2014). The City proposes that I splice the separate definitions of "manager" and "agent" together to arrive at a new definition of managing agent considerably broader than the Black's Law Dictionary definition. The City would define managing agent as "an agent that manages a particular phase or activity within a business or institution" on behalf "of another by authority from him."[1]1 reject this Frankenstein approach to defining a legal term of art, the definition of which is readily ascertainable by referring to a reputable legal dictionary such as Black's. *See Doe v. MedfordSch. Dist. 549C,* 232 Or.App. 38, 48, 221 P.3d 787 (2009) ("When the legislature employs a term of art, however, that term is not necessarily given its ordinary meaning. Instead, we will resort to a specialized dictionary to determine the meaning of the term in its more specialized usage."). I adopt HomeAway's definition, which focuses on the "judgment and discretion" of the actor. The issue, therefore, is whether the City has sufficiently alleged that HomeAway exercises judgment and discretion in performing the functions of a hotel proprietor so as to allege that HomeAway is a managing agent.

The City has failed to allege that HomeAway exercises judgment and discretion and has therefore failed to allege that HomeAway is a managing agent. The City's complaint contains numerous conclusory allegations that HomeAway is in violation of PCC Chapter 6.04. However these allegations are insufficient to defeat a 12(b)(6) motion to dismiss. The City also alleges in its complaint that

[t]hrough third parties, HomeAway offers several ancillary products and services that include credit card merchant processing and eChecks which allows payment by accepting, receiving, or facilitating payments for rentals, insurance products, and tax return services which help their listing owners comply with applicable tax regulations.

(Pl. Comp. [1] at 11, ¶ 27.) Allegations that HomeAway, through third parties, offers various products and services to its customers falls well short of alleging that HomeAway exercises judgment and discretion in performing the functions of a hotel proprietor. I therefore find that the City has not sufficiently alleged that HomeAway is a managing agent. Accordingly, I DISMISS claims two, four, and six because HomeAway is neither a proprietor of a hotel nor a managing agent and therefore cannot be an Operator under the Ordinance. The City may, however, be able to amend its complaint to allege that HomeAway exercises discretion and judgment such that

HomeAway is a managing agent and therefore an Operator.

C. HomeAway as a "Booking Agent"

In addition to the requirements imposed by the Ordinance on Operators, the 2015 Amendments to the Ordinance also impose various requirements on Booking Agents. The City's first, third, and fifth claims all allege that HomeAway has not complied with those Booking Agent requirements. Specifically, the City's first claim seeks a declaratory judgment that HomeAway is a Booking Agent; its third claim seeks to reduce fines imposed against HomeAway for various regulatory violations to judgment; and its fifth claim seeks to reduce presumptive taxes against HomeAway to judgment. HomeAway argues that it is not subject to any taxing provisions in the Ordinance as a Booking Agent because the Portland City Charter does not grant the City the authority to impose tax collection obligations on Booking Agents. HomeAway further argues that it does not qualify as a Booking Agent, but even if it did, the specific regulatory Ordinance provisions HomeAway has allegedly violated do not actually impose any requirements on Booking Agents. While I do not agree with all of HomeAway's arguments, I ultimately agree with both of HomeAway's conclusions and dismiss the City's first, third, and fifth claims.

1. The City's Authority to Impose Tax Collection Obligations on Booking Agents

HomeAway argues the City exceeded the authority granted to it by the Portland City Charter when it passed the January 2015 amendment regulating Booking Agents. The Charter states, in relevant part:

The Council may by ordinance impose and levy a tax ... on gross amounts of money, credit or other things of value *paid to or received for lodging by the owner or operator* of any hotel, motel, apartment or lodging house, mobile home or trailer park or court, or any other place in the City where space designed or intended for lodging occupancy is rented by any person or persons, for any period less than monthly. . . . *The tax imposed shall be collected by the owner or operator of the rental space* in addition to the rental charge, at the time of payment of rent.

Portland City Charter § 7-113(1) (emphasis added). The City argues the Charter grants it authority to impose tax collection obligations on Booking Agents because Booking Agents are "operators" under the Charter. HomeAway argues the Charter limits the City's ability to impose tax collection obligations on only "owners" and "operators, " and since HomeAway is not an Operator under the Ordinance, it cannot be taxed as an operator under the Charter.[2] HomeAway contends that allowing the City to pass an ordinance that taxes Booking Agents in addition to Operators would allow the City to act outside of the authority granted to it through the Charter. *See Watkins v. Josephine Cty.,* 243 Or.App. 52, 60, 259 P.3d 79 (2011) ("A municipal charter bears the same relationship to the municipality's ordinances that a state or federal constitution bears to those respective bodies' legislation: It defines what is and is not within the entity's legislative authority."). HomeAway seeks to superimpose the definition of operator found in the Ordinance onto the Charter-since Home A way is not an Operator under the Ordinance, the City cannot tax HomeAway under the Charter because the City's authority to tax is limited to taxing owners and operators, not Booking Agents. While I agree that the Charter does not grant the City authority to tax HomeAway, I reject HomeAway's argument.

HomeAway's argument assumes the terms "operator" under the Ordinance and under the

Charter are identical. While HomeAway appears to argue these terms lend themselves to an apples-to-apples comparison, in reality the comparison is one between apples and oranges. The Portland City Charter was adopted by the Portland voters. *See* Or. Const., Art. XI, § 2 ("The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon [.]"). In contrast, the Ordinance provision at issue was enacted by the Portland City Council. HomeAway's argument assumes that because I have held that HomeAway falls outside the City Council's definition of Operator as contained in the Ordinance, I must necessarily find that it also falls outside the voters' definition of operator as contained in the Charter. This is clearly not true. A well-recognized canon of construction states that a word or phrase is presumed to bear the same meaning throughout a text. *See, e.g., Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932). However, no such canon exists stating that a word or phrase is presumed to bear the same meaning in different texts drafted by different actors in different contexts. Accordingly, my finding that HomeAway is not an Operator under the Ordinance does not necessarily preclude the City from imposing tax collection obligations on HomeAway as a Booking Agent under the Charter.

The issue remains, however, whether the Charter grants the City authority to impose tax collection obligations on Booking Agents. This depends on whether "operator" in the Charter is defined broadly enough to include Booking Agents. The Charter does not define operator. The City argues that since the term is undefined in the Charter, the City Council is empowered to define the term by ordinance and it did so when it defined Operator and Booking Agent in PCC § 6.04. The City's argument is flawed. While I owe the City Council deference when interpreting ambiguous terms in the City's ordinances, *Cascade Broadcasting Co. v. Groener,* 51 Or.App. 533, 537, 626 P.3d 386 (1981), I do not owe the City Council any deference in interpreting terms in the City's Charter.[3] Rather, "[b]ecasue the charter provision was adopted by the voters, [my] task is to discern what the voters intended . . ., which [I] derive by first looking to the text and context of the provision, taking into account any history of the measure that illuminates the voters' intent." *Brown v. City of Eugene,* 250 Or.App. 132, 136, 279 P.3d 298 (2012) (internal quotation omitted). Therefore, to decipher the intent of the voters, I will first look at the ordinary meaning of the term "operator" in the context of the Portland City Charter. *See Medford Sch. Dist. 549C,* 232 Or.App. at 47 ("In the absence of a definition in the statute itself, we assume that the legislature intends a statutory term to be given its ordinary meaning. To ascertain the ordinary meaning of such terms, courts typically look to dictionary definitions.") (citing *PortlandGen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 859 P.2d 1143 (1993)).

The City offers what it labels "the ordinary, dictionary definition of 'operator.'" (Pl. Resp. [18] at 22). The City proposes the following definition: "a person who actively operates a business . . . whether as owner, lessor, or employee." (*Id.* at 22-23 (quoting Webster's Third New Int'l Dictionary 1581).) I agree with the City that this definition reasonably reflects the ordinary meaning of operator in the context of the Charter and adopt this definition as a reflection of the voters' intent. In other words, applying the City's proposed definition of operator to the language of the Charter, I find the Charter grants the City authority to impose tax collection obligations on people and entities that actively operate a hotel or motel business[4] whether as owner, lessor, or employee.

There are two reasons why HomeAway, even if it is a "Booking Agent, " falls outside this definition and therefore outside of the City's authority granted to it by the Charter to impose tax collection obligations. First, applying the City's definition of operator, the Charter only allows the City to impose tax collection obligations on people and entities that "actively operate" a hotel or motel.[5] The City has not alleged that HomeAway actively operates a hotel. While not alleged in the complaint, at oral argument, the City proposed viewing HomeAway as an active operator of a virtual hotel. To adopt this view would be inconsistent with the purpose of ascertaining an appropriate dictionary definition of "operator" in the first place, which I have done here by adopting the City's own definition. The purpose of referring to the dictionary is to understand what the voters who passed the Charter likely took operator to mean. While the City's definition that I have adopted defines an operator as someone who "actively operates" a hotel as either "owner, lessor, or employee, " there is no doubt the voters who passed the Charter in 1971 did not understand operators of hotels to include operators of virtual hotels. Second, the City's definition applied to the Charter only allows the City to impose tax collection obligations on people and entities who are hotel operators as either "owner, lessor, or employee."[6] The City has not alleged that HomeAway owns, leases, or is an employee of a hotel. Therefore, I find the City Council acted *ultra vires* when it attempted to impose tax collection obligations on HomeAway under the authority granted to it by the Charter.

Regardless of any limitation placed on it by Section 7-113(1) of the Charter, the City argues Oregon state statutes provide an alternate source of authority to impose tax collection obligations on HomeAway. Section 2-106 of the Charter authorizes the City Council to "exercise any power or authority granted by Oregon statute to municipal corporations at any time and also to cities of a class which includes the City of Portland, " and Oregon state law expressly authorizes Oregon cities to impose a transient-lodgings tax. *See* Or. Rev. Stat. Ann. § 320.345 *et seq.* (West 2015). Citing various provisions in the definitions section of the statute, the City contends that "[s]uch a tax may be imposed on any person who 'facilitates the retail sale of transient lodging and charges for occupancy of the transient lodging' or on any 'person that furnishes transient lodgings.'" (Pl. Resp. [18] quoting Or. Rev. Stat. Ann §320.300(12), (13), (14).) Assuming, without deciding, that ORS Chapter 320 authorizes the City to tax those who facilitate the retail sale of or furnish transient lodgings, the City has not sufficiently alleged in its complaint that HomeAway does either of those activities. It is entirely possible, however, if given a chance to amend its complaint, the City may sufficiently allege that HomeAway facilitates the sale of or furnishes transient lodging. The burden is on the City to do so.

Accordingly, since the City does not have the authority to impose tax collection obligations on Booking Agents under the Charter and since it has not sufficiently alleged that HomeAway facilitates the sale of or furnishes transient lodging, I DISMISS the City's fifth claim that seeks to reduce presumptive taxes to judgment.

2. Regulations Imposed on Booking Agents by the Ordinance

My finding that the City may not impose tax collection obligations on HomeAway as a Booking Agent under the City's allegations in its current complaint does not necessarily preclude it from regulating Booking Agents and fining HomeAway for not complying with those regulations.

The City's third claim asks that I reduce to judgment various fines assessed against HomeAway for regulatory noncompliance. The City's complaint references the Revised Notice of Violation letter dated October 7, 2015, which outlines the grounds for the $1, 007, 500 in civil penalties assessed against HomeAway that the City seeks to reduce to judgment. The Revised Notice alleges the following:

HomeAway ... is in violation of the Portland City Code. . . . These violations are based on [the City's] review of the listings on both [of HomeAway's] websites on April 8, 2015. 1. Failure to register with the [Portland Revenue] Division within 15 calendar days after commencing business. As a Booking Agent, HomeAway is an Operator subject to this requirement (PCC 6.04.060 A[;] 6.04.170 C)[.] 2. Failure to collect and remit the Transient Lodging Tax as required for those transactions through HomeAway Payments (PCC 6.04.040 B; 6.04.170 A). 3. Failure to provide the physical address of a transient lodging occupancy location within Portland and the related contact information (PCC 6.04.060 C; 6.04.170 E). 4. Failure to prominently display in the advertising on *HomeAway.com* and *VRBO.com* the Accessory Short-Term Rental permit or case file number. Only eight of 330 *HomeAway.com* listings and only nine of the 347 *VRBO.com* listings included an Accessory Short Term Rental (ASTR) permit or case file numbers in the listings are required (PCC 6.04.060 D; 6.04.170 G)[.]

(Pl. Comp. [1], Ex. 7 at 1). The City cites two provisions of the Ordinance for each of HomeAway's alleged violations. The first provision allegedly establishes the substantive duty or responsibility on HomeAway as a Booking Agent while the second provision "imposes a civil penalty of $500 for each violation" of the Ordinance. PCC § 6.04.170.

HomeAway argues it does not qualify as a Booking Agent, but even if it did qualify, these specific Ordinance provisions cited by the City do not actually impose any requirements or duties on Booking Agents. Assuming, without deciding, that HomeAway does qualify as a Booking Agent under the Ordinance, I will address each Ordinance provision the City alleges HomeAway violated. I find each Ordinance provision fails to impose any duties or responsibilities on Booking Agents and therefore dismiss the City's third claim.

i) Failure to register with the Revenue Division under PCC § 6.04.060(A) and 6.04.170(C)

The first type of civil penalty the City assesses against HomeAway is for a failure to register with the City's Revenue Division within fifteen calendar days after commencing business. The City claims section 6.04.060(A) establishes HomeAway's responsibility to register with the City and section 6.04.170(C) is the enforcement provision imposing the civil penalty. The City alleges that HomeAway violated this provision once and seeks to reduce a $500 fine to judgment against HomeAway. (Pl. Comp. [1], Ex. 7 at 2).

Section 6.04.060(A) of the Ordinance requires "[e]very person engaging or about to engage in business *as an operator of a hotel....* [to] register within 15 calendar days after commencing business." PCC § 6.04.060(A) (emphasis added). The provision only refers to Operators, not to Booking Agents. Since the City has not sufficiently alleged that HomeAway is an Operator, this provision and the associated penalties for noncompliance do not apply to HomeAway or Booking Agents. I therefore decline to reduce to judgment any penalties associated with this provision of the Ordinance against HomeAway.

ii) Failure to collect and remit the Transient Lodging Tax under PCC § 6.04.040(B) and 6.04.170(E)

The second civil penalty the City assesses against HomeAway is for failure to collect the Transient Lodging Tax and remit the tax to the City. The City claims section 6.04.040(B) imposes the duty on Booking Agents and section 6.04.170(A) imposes a civil penalty for failure to comply. The City alleges that HomeAway violated this provision 677 times, resulting in $338, 500 in civil penalties. {*See* Pl. Comp. [1], Ex. 7 at 2).

Section 6.04.040(B) requires an Operator or Booking Agent who "directly or indirectly accepts, receives or facilitates payment" for transient-lodging occupancy to "collect, report and remit transient lodging taxes to the City of Portland." PCC § 6.04.040(B). As explained above, the City has not sufficiently alleged that HomeAway is an Operator. While HomeAway may very well be a Booking Agent under the Ordinance, I have held above that the City may not impose tax collection obligations on HomeAway as a Booking Agent without amending its complaint. Since HomeAway is not required to collect taxes under my holding above, it is not required to comply with section 6.04.040(B).

Notably, if the City were to amend its complaint and allege facts sufficient to demonstrate HomeAway is either an Operator or that HomeAway facilitates the sale of or furnishes transient lodgings such that the City may potentially impose tax collecting obligations under ORS Chapter 320, the City could impose fines based on HomeAway's alleged failure to collect and remit taxes under section 6.04.040(B). However, until the City cures the deficiencies of its complaint, I decline to reduce to judgment any penalties imposed against HomeAway under sections 6.04.040(B) and 6.04.170(A).

iii) Failure to provide physical addresses under PCC § 6.04.060(C) and 6.04.170(E)

Third, the City seeks $338, 500 in civil penalties from HomeAway for 677 alleged violations of section 6.04.060(C) of the Ordinance for failing to provide the physical address of a transient lodging occupancy location. Notably, section 6.04.060(C) imposes no such obligation.[7] But HomeAway makes nothing of this, so neither will I. Presumably the City intended to cite section 6.04.040(C), which in fact requires "Operators, which include Booking Agents" to "provide all physical addresses of transient lodging occupancy locations within Portland city limits and the related contact information" to the City's Revenue Division upon the Division's request. PCC § 6.04.040(C). Those who fail to comply with this provision are subject to a $500 penalty for each violation under section 6.04.170(E).

HomeAway argues the provision's language, "Operators, which include Booking Agents, " is problematic and contends the fact that section 6.04.040(C) mentions Booking Agents is irrelevant.

HomeAway points to the Ordinance's definition of Booking Agent, which states "'Booking Agent' means an Operator *or any person* . . . ." PCC § 6.04.010(D) (emphasis added). This definition acknowledges there are some Booking Agents that are not also Operators. HomeAway asserts that, in light of this language, section 6.04.040(C) only imposes the duty to provide addresses on Operators- including those Operators who also happen to be Booking Agents-not on all Booking Agents. I agree. The City cannot define Booking Agent one way in its definition section and choose a different definition in a later provision without expressly doing so. The definition of

Booking Agent in the definition section of the Ordinance implies the term Booking Agent is broader than the term Operator, while the language of section 6.04.040(C) assumes the definition of Booking Agent is entirely subsumed within the definition of Operator. I therefore find the definition section of the statute, section 6.04.010(D), controls and section 6.04.040(C) only applies to Operators, not Booking Agents *and* Operators. And since the City has not sufficiently alleged HomeAway is an Operator, I decline to reduce to judgment any penalties imposed against HomeAway under sections 6.04.040(C) and 6.04.170(E).

iv) Failure to display a Short-Term Rental permit in advertising under PCC § 6.04.060(D) and 6.04.170(G)

Lastly, the City seeks $330, 000 in civil penalties against HomeAway for 660 alleged violations of section 6.04.060(D) of the Ordinance for failing to prominently display permit numbers in its advertising and other listings. Section 6.04.060(D) says:

Operators of Type A and Type B accessory short-term rentals as described in Section Chapter 33.207 must include their Type A Permit Number or Type B Conditional Use case file number, as applicable, in all advertising and other listing services. . . . Additionally, this Permit Number or Conditional Use case file number shall be prominently displayed in the rental unit so as to be seen by all short-term occupants.

PCC § 6.04.060(D). Notably, this provision only refers to Operators and does not appear to impose any duties or responsibilities on Booking Agents. However, in what appears to be the result of poor drafting, section 6.04.170(G), the companion enforcement provision to section 6.04.060(D), does include a reference to Booking Agents. Section 6.04.170(G) says:

A violation includes, but is not limited to ... . Failure by a Booking Agent to prominently display the Accessory Short-Term Rental permit or case file number.

PCC § 6.04.170(G). In other words, while the provision that sets forth the duty to display the Accessory Short-Term Rental permit or case file number does not mention Booking Agents, the enforcement provision imposes a fine on Booking Agents that fail to comply with the permit requirements.

I find the inconsistency between the two provisions precludes the City from fining HomeAway for noncompliance with a regulation that did not clearly apply to HomeAway. On its face, section 6.04.060(D) applies to "Operators." HomeAway is not an Operator under the facts alleged in the City's complaint. While it is true that section 6.04.170(G) does apply to Booking Agents, a Booking Agent reading that provision would know that it was subject to a fine for noncompliance, but would not know with what duties and responsibilities it must comply. The provision does not include a cross-reference to section 6.04.060(D) or any other provision that explains what an "Accessory Short-Term Rental permit or case file number" is or what information such permits are required to contain. How little information section 6.04.170(G) contains is readily apparent when compared to section 6.04.060(D). Section 6.04.060(D) explains that "Operators of Type A and Type B accessory short-term rentals, as described in Section Chapter 33.207, must include their Type A Permit Number or Type B Conditional Use case file number ... in all advertising and other listing services." PCC § 6.04.060(D). Section 6.04.170(G) does not contain any of this information. Even assuming the City has sufficiently alleged that HomeAway is a Booking Agent, a non-Operator

Booking Agent in HomeAway's position would rightfully believe the requirements and details of section 6.04.060(D) does not apply to it because the provision only applies to "Operators." Therefore, I decline to reduce to judgment any penalties imposed against HomeAway as a Booking Agent under sections 6.04.060(D) and 6.04.170(G).

In summary, I find the Ordinance fails to impose any duties or responsibilities on HomeAway as a Booking Agent. I therefore decline to reduce any fines assessed against HomeAway to judgment and DISMISS the City's third claim in its entirety. Because I find that the Ordinance does not impose any duties or responsibilities on HomeAway as a Booking Agent and because I find, as discussed above, the City has not alleged enough facts that HomeAway can be taxed as a Booking Agent, I also DISMISS the City's first claim which asks me to declare that HomeAway is subject to the Ordinance as a Booking Agent.

D. Injunctive Relief

The City's seventh claim asks that I issue an injunction to enjoin HomeAway from continuing to conduct allegedly unlawful activities. Because I have found the City insufficiently alleged HomeAway's conduct is unlawful under the Ordinance, I decline to issue an injunction at this time. Accordingly, I DISMISS the City's seventh claim.

IV. CONCLUSION

For the reasons explained above, I GRANT Defendant HomeAway's 12(b)(6) Motion to Dismiss [7]. I find that Plaintiff City of Portland has not sufficiently alleged that HomeAway is an Operator under the Ordinance, and I accordingly DISMISS the City's second, fourth, and sixth claims. I also find that the Portland City Charter does not grant the City authority to impose tax collection obligations on Booking Agents nor has the City sufficiently alleged that HomeAway falls under the City's authority to impose tax collection obligations on Booking Agents under the relevant Oregon state statutes; accordingly, I DISMISS the City's fifth claim. Furthermore, I find the Ordinance does not impose any regulatory duties or responsibilities on HomeAway as a Booking Agent and therefore DISMISS the City's third claim. Because the City's third and fifth claims are dismissed, I also DISMISS the City's first claim. Finally, I decline to issue an injunction at this time and therefore DISMISS the City's seventh claim.

Notes:

[1] The City defines "manager" as "one that manages: a person that conducts, directs, or supervises something ... or a particular phase or activity within a business or institution;" and "agent" as "one that acts for or in the place of another by authority from him." (Pl. Resp. [18] at 10 (citing *Webster's Third New Int'l Dictionary))*

[2] Neither party contends that the tax collection obligations imposed on Booking Agents under the Ordinance are imposed because they are "owners" under the Charter; rather the obligations are imposed on Booking Agents because the City alleges it is acting under its authority to impose such obligations on "operators" under the Charter.

[3] The deference Oregon courts afford to a local government's construction of an ordinance is a matter of pragmatism. For example, in *Cascade Broadcasting Co. v. Groener,* the court explained that it deferred to the county's interpretation of an ordinance "because the county has the duty of

administering the ordinance and is its legislative source, and, therefore, the County is in a better position than [the court] to determine the legislative intent." 51 Or.App. 533, 536-37, 626 P.3d 386 (1981) (citing *Bienz v. City of Dayton,* 29 Or. App.. 761, 776, 566 P.2d 904 (1977)). Extending this deference to a city interpreting its own charter, however, would not have the same benefit; the City is in no better position than the court to determine what the voters' intent was when it passed the Charter.

Furthermore, even if I deferred to the City's definition of operator, the City asks me to look at the definition provided in the Ordinance which as discussed above, does not fit HomeAway. What the City really seeks is to define "operator" in the Charter the same way it defines "Booking Agent" in the Ordinance. The City is trying to do through the back door of conflating terms what it should have done through the front door of defining terms.

[4] Section 7-113(1) of the Charter also lists apartments, lodging houses, mobile homes or trailer parks or courts, "or any other place in the City where space designed or intended for lodging occupancy is rented by any person or persons, for any period less than monthly." Portland City Charter § 7-113(1).

[5] The City's definition of Booking Agent, as defined in the Ordinance, is much broader than this, including within it *"any person* that provides a means through which a Host may offer a Short-Term Rental for transient lodging occupancy!,]" whether the person actively operates the hotel or not. *See* PCC § 6.04.010(D) (emphasis added).

[6] Once again, the City's definition of Booking Agent is broader than the authority granted to it by the Charter, including within the definition people that neither own, lease, or are employed by a hotel or motel business.

[7] Section 6.04.060(C) states, in its entirety:

Said certificate shall, among other things, state the following: 1. The name of the operator; 2. The address of the hotel; 3. The date upon which the certificate was issued; 4. "This Transient Occupancy Registration Certificate signifies that the person named has fulfilled the requirements of the Transient Lodgings Tax Chapter of the City of Portland for the purpose of collecting and remitting the lodgings tax. This certificate does not authorize any person to conduct any unlawful business or to conduct any lawful business in an unlawful manner, or to operate a hotel without strictly complying with all local applicable laws, including but not limited to those requiring a permit from any board, commission, department or office of the City of Portland. This certificate does not constitute a permit."

PCC § 6.04.060(C).

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590 F.3d 381 (6th Cir. 2009)

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT and Lexington-Fayette Urban County Government, Plaintiffs-Appellants,

v.

HOTELS.COM, L.P. et al., Defendants-Appellees.

Nos. 08-6302, 08-6303.

United States Court of Appeals, Sixth Circuit.

December 22, 2009

Argued: Oct. 14, 2009.

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ARGUED:

Anthony G. Raluy, Foley, Bryant, Holloway & Raluy, Louisville, Kentucky, for Appellants.

Darrel J. Hieber, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, California, for Appellees.

ON BRIEF:

Anthony G. Raluy, Irvin Daniel Foley, Foley, Bryant, Holloway & Raluy, Louisville, Kentucky, Michael J. O'Connell, Jefferson County Attorney's Office, Louisville, Kentucky, Rochelle E. Boland, Leslye M. Bowman, Lexington-Fayette Urban County Government

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Department of Law, Lexington, Kentucky, for Appellants.

Darrel J. Hieber, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, California, Karen L. Valihura, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware, William Jay Hunter, Jr., Timothy J. Eifler, David S. Sullivan, Stoll Keenon Ogden, Louisville, Kentucky, Marcus G. Mungioli, Brian S. Stagner, Kelly Hart & Hallman LLP, Forth Worth, Texas, for Appellees.

Before: GILMAN and GIBBONS, Circuit Judges; ANDERSON, District Judge.[*]

OPINION

RONALD LEE GILMAN, Circuit Judge.

Hotels.com, L.P. and various other online travel companies (OTCs) engage in a business practice whereby they agree to pay lodging establishments a contractually agreed room rate if the OTCs find customers to rent the available rooms. Customers pay to rent the rooms at a higher " retail" rate charged by the OTCs, which then remit the original negotiated price to the lodging establishments along with any taxes applicable to the negotiated " wholesale" price.

Asserting that the OTCs are violating local tax ordinances by failing to pay a transient room tax on the difference between the two rates, the Louisville/Jefferson County Metro Government (LJCMG) and the Lexington-Fayette Urban County Government (LFUCG) sued the OTCs in federal court. The district court granted the OTCs' motion to dismiss, reasoning that because the OTCs lack ownership and physical control over the rooms rented, they do not constitute " like or similar accommodations businesses" within the purview of the ordinances in question. As a result

of this decision, the counties are not collecting transient room taxes on the difference between the two rates. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

The Kentucky Enabling Acts authorize counties to impose a transient room tax on " the rent for every occupancy of a suite, room, or rooms, charged by all persons, companies, corporations, or other like or similar persons, groups or organizations doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses." Ky.Rev.Stat. Ann. § 91A.390(1). Money collected from the tax is used to establish convention and tourist commissions " for the purpose of promoting convention and tourist activity." Ky.Rev.Stat. Ann. § 91A.350(1). Pursuant to this authority, the two counties in question enacted ordinances imposing a transient room tax and adopted the language of the Enabling Acts to describe the category of businesses to be taxed. *See* Louisville/Jefferson County, Ky., Code of Ordinances § 121.01(A); Lexington-Fayette Urban County, Ky., Charter of Code of Code of Ordinances § 2-172(a).

According to the counties' allegations, the OTCs contract with hotels for rooms at a discounted " wholesale" price. The OTCs then offer the rooms for rent at a " retail" price that is higher than the negotiated wholesale rate and purport to include " tax recovery charges and fees." When a customer

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books a room using an OTC, the company remits to the appropriate hotel both the negotiated wholesale price and the taxes due on that lesser amount. The counties contend that this arrangement deprives them of the taxes owed on the difference between the retail price and the wholesale price.

B. Procedural background

In September 2006, LJCMG sued the OTCs in federal district court for the alleged violation of its transient room tax ordinance, seeking declaratory relief and damages. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332(a). LFUCG filed an intervenor complaint approximately one-and-a-half years later, asserting the same cause of action and seeking similar relief.

The OTCs twice moved to dismiss the claim brought against them. They first filed a motion to dismiss LJCMG's complaint prior to the addition of LFUCG to the lawsuit, asserting that they were not " motor courts, motels, hotels, inns or like or similar accommodations businesses" for the purposes of LJCMG's ordinance, and that LJCMG's proposed construction of the ordinance converted the enactment into an impermissible excise tax under the Kentucky Constitution. In denying the motion, the district court reasoned that LJCMG's allegation that the OTCs leased rooms at a marked-up retail price was sufficient at the pleading stage to qualify the companies as " like or similar accommodations businesses" under the ordinance. Shortly thereafter, the OTCs filed a motion for reconsideration and, while this motion was pending, LFUCG filed its intervenor complaint.

The district court granted the OTCs' second motion and reversed its earlier holding. It determined that the OTCs are not " like or similar" to " motor courts, motels, hotels, or inns"

because they " have neither ownership, nor physical control, of the rooms they offer for rent." Because the OTCs did not exist at the time the ordinances were written, the court remarked that the Kentucky Enabling Acts " have simply failed to keep up with the times." The court therefore concluded that the OTCs were not subject to the ordinances and that the counties' claims should be dismissed. This timely appeal followed.

II. ANALYSIS

A. Standard of review

A motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure seeks to have the complaint dismissed based upon the plaintiff's failure to state a claim upon which relief can be granted. The court must " accept all the ... factual allegations as true and construe the complaint in the light most favorable to the Plaintiff[ ]." *Gunasekera v. Irwin,* 551 F.3d 461, 466 (6th Cir.2009) (citation and internal quotation marks omitted). Our review of a district court's grant of a motion to dismiss is de novo. *Id.* at 465-66.

B. Overview

The counties' primary contention is that the OTCs constitute " like or similar accommodations businesses" under the ordinances. In addition, LJCMG argues that the district court lacked a proper basis to grant the OTCs' motion for reconsideration and that the court impermissibly made factual findings in ruling on the motion. We will address each issue in turn.

C. " Like or similar accommodations businesses"

To determine whether the OTCs fall under the purview of the ordinances, we begin by analyzing the statutory language.

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We must conduct this analysis utilizing Kentucky law because jurisdiction in this case is based on diversity of citizenship. *See Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Essentially, we are obliged to decide the case as we believe the Kentucky Supreme Court would do. *See Stalbosky v. Belew,* 205 F.3d 890, 893 (6th Cir.2000) (applying Kentucky's negligent-hiring law in a diversity-of-citizenship case). We will therefore interpret the ordinances using the framework developed by the Kentucky courts.

Under that framework, " [t]he essence of statutory construction is to ascertain and give effect to the intent of the legislature." *Hale v. Combs,* 30 S.W.3d 146, 151 (Ky.2000). To determine legislative intent, courts should analyze the statutory language and " [r]esort must be had first to the words, which are decisive if they are clear." *Stephenson v. Woodward,* 182 S.W.3d 162, 170 (Ky.2005) (alteration in original) (internal quotation marks omitted) (quoting *Gateway Constr. Co. v. Wallbaum,* 356 S.W.2d 247, 249 (Ky.1962)). " [S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman,* 86 S.W.3d 47, 49 (Ky.2002).

1. Plain meaning

Our initial consideration, therefore, is to determine whether the words of the ordinances reveal the legislature's intent to include the OTCs in the category of " like or similar accommodations businesses." The counties make three arguments as to why the plain meaning of the ordinances discloses such an intent. They first contend that, to avoid rendering the phrase "

like or similar accommodations businesses" meaningless, it cannot be limited to brick-and-mortar establishments and must include companies such as the OTCs that have only an online presence. But the phrase still has meaning even if it is construed to exclude online businesses. Bed and breakfasts, hostels, and rooming houses, for example, are not motor courts, motels, hotels, or inns, yet they presumably would fall into the " like or similar accommodations businesses" category.

Second, the counties argue that the phrase " like or similar" indicates a legislative intent to broaden the category. That observation is surely correct, but it provides little guidance as to *how* broadly to construe the category and whether the OTCs should be included.

Finally, the counties emphasize the statutory language directing that the tax be levied on " the rent for every occupancy" of a room charged by accommodations businesses, and they contend that the full retail price constitutes the rent paid to occupy a room. The counties' focus on the amount paid by the ultimate customer is not conclusive, however, because the tax is not assessed on the occupant of a room, but rather on the entities doing business as hotels and the like. Accordingly, none of the counties' arguments regarding the plain meaning of the ordinances is persuasive.

Nor does the expressed purpose of the Enabling Acts provision authorizing the imposition of the transient room tax provide clarification. According to the statute, a portion of the money collected from the transient room tax " may be used to finance the cost of acquisition, construction, operation, and maintenance of facilities useful in the attraction and promotion of tourist and convention business." Ky.Rev.Stat. Ann. § 91A.390(3). The remainder of the funds is to be used to " establish tourist and convention commissions for the purpose of promoting convention and tourist activity." Ky.Rev.Stat. Ann. § 91A.350(1).

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As described by the Kentucky Court of Appeals (the highest court in the state until 1976), the statute " did two things: (1) it authorized the creation of an administrative agency to promote convention and tourist activity in the county, and (2) it provided for the financing of this activity by the imposition of a room tax upon hotels, motels and the like." *Second Street Props., Inc. v. Fiscal Court of Jefferson County,* 445 S.W.2d 709, 714 (Ky.1969). The Court in *Second Street* noted the existence of a " correlation" between the businesses taxed and the use of the money collected because hotels and motels in Jefferson County would " specially" benefit from an increase in tourism. *Id.*

This ruling is the basis for the counties' argument that the OTCs will likewise reap the benefits of increased tourism in Louisville and Lexington. Because the OTCs lack any physical presence in these locations, however, they do not " specially" benefit from increased tourism in those cities any more than they would from an increase in tourism in any other part of the country. We thus find unpersuasive the counties' argument that the purpose of the Enabling Acts supports subjecting the OTCs to the transient room tax.

The OTCs, on the other hand, attempt to bolster the decision of the district court by noting that in 2009 the Kentucky General Assembly rejected a proposed bill that would have extended the category of entities subject to the transient room tax to include " other entities that may broker

or facilitate the transaction." H.B. 482, 2009 Gen. Assem., Reg. Sess. (Ky.2009). This proposed amendment is not conclusively in the OTCs' favor, however, because the legislature might have simply been trying to make explicit what it thought was clear from the statute as presently worded-that OTCs are " like or similar accommodations businesses." More likely, though, is the legislature's recognition that the express language of the statute as it is written does not reach the OTCs.

Elsewhere in the Enabling Acts, the Kentucky legislature defined " hotel" to mean " any hotel, motel, inn, or other establishment which offers overnight accommodations to the public for hire." Ky.Rev.Stat. Ann. § 243.055(1)(a). This definition is limited, however, to a separate section of the Acts regulating licenses for hotels to sell alcohol as part of their in-room service. *See* Ky.Rev.Stat. Ann. § 243.055(1)(a). We therefore find the definition unhelpful in resolving the instant dispute. Perhaps, as the counties suggest, the legislature did not intend to restrict the transient room tax to brick-and-mortar businesses as it did with alcohol licenses and therefore deliberately omitted the word " establishment" from the taxing provisions. But given that the legislature defined " hotel" in a section completely separate from that granting the counties their taxing authority, this observation is not persuasive as to the meaning of the statutory language in question.

Kentucky caselaw provides a modicum of guidance as to the proper interpretation of the statute. Specifically, three Kentucky appellate cases have analyzed the transient room tax at issue. In *Second Street,* the Kentucky Court of Appeals upheld the constitutionality of the JLCMG ordinance, concluding that the avowed purpose of the Enabling Acts provision-promoting convention and tourist activities-was " sufficiently definite to circumscribe the permitted proper functions of the administrative agency." 445 S.W.2d at 713. Finding a reasonable basis for subjecting " hotels, motels and the like" to the tax, the Court reasoned that there was a " definite correlation between the purpose of the tax and the business of the selected taxpayer" because " hotels and motels will specially

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benefit from the expenditure of this tax revenue." *Id.* at 713-14. *Second Street's* analysis is of limited help on the issue before us, however, and at most it reveals a preference for a narrow reading of the statute given the Court's concern to limit the imposition of the tax to a well-defined category of businesses.

Two years later, the Kentucky Court of Appeals addressed a constitutional challenge to a transient room tax imposed by the City of Lexington. The Court held that there was no reasonable basis for singling out hotels and motels to pay the tax and rejected the city's justification for this categorization-that hotels and motels use city services to a greater degree than other businesses-as unpersuasive. *City of Lexington v. Motel Developers, Inc.,* 465 S.W.2d 253, 258-59 (Ky.1971). (Lexington's tax ordinances have since been amended to limit the use of the transient room tax to the funding of convention and tourist activities.) As in *Second Street,* the Court repeatedly referred to " hotels and motels" as well as " hotel and motel owners, and others similarly engaged" when identifying the businesses subject to the tax. *Id.* at 254-55, 258-59. Nevertheless, neither *Second Street* nor *Motel Developers* provide significant guidance on the issue of how broadly to construe "

like or similar accommodations businesses."

Lexington Relocation Services, LLC v. Lexington-Fayette Urban County Government, No.2003-CA-001593-MR, 2004 WL 1418184 (Ky.Ct.App. June 25, 2004), is more directly on point. In that case, Lexington Relocation Services (LRS) leased or owned units in various Lexington apartment complexes and rented them, fully furnished, to corporate employees who had relocated to Lexington or were on temporary assignment there. *Id.* at * 1. The court held that LRS qualified as an " accommodations business" and was therefore subject to the transient room tax because a significant fraction of its rentals " supply short-term accommodations suitable for visitors." *Id.* at *2. Moreover, the court noted that LRS held " itself out as operating, and does operate," in the short-term accommodations market. *Id.*

Unlike LRS, the OTCs in the present case do not physically control or furnish the rooms they advertise. The OTCs also do not " supply" or " provide" rooms to visitors in the same manner that LRS does because they take no part in making the room physically available. Thus, the Kentucky Court of Appeals's interpretation in *Lexington Relocation Services* provides the most support, by way of contrast, for the OTCs' argument that they are not subject to the transient room tax.

Overall, the wording of the ordinances, based on the language used and what legislative intent is discernable, is inconclusive as to whether the OTCs constitute " like or similar business accommodations." Kentucky appellate caselaw, however, suggests that they do not fall into this category.

2. Further interpretation

Where legislation lacks plain meaning, Kentucky courts are instructed to " resort to the canons or rules of construction." *King Drugs, Inc. v. Commonwealth,* 250 S.W.3d 643, 645 (Ky.2008). Having found no plain meaning of the statute in question, the district court concluded that the principle of *ejusdem generis* should apply. The rule states that

where, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated,

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unless there is a clear manifestation of a contrary purpose.

Steinfeld v. Jefferson County Fiscal Court, 312 Ky. 614, 229 S.W.2d 319, 320 (Ky.1950).

Applying this principle, the district court determined that the phrase " like or similar accommodations businesses" should be restricted by the four types of businesses listed immediately prior to this phrase-i.e., motor courts, motels, hotels, and inns. *See Garcia v. Commonwealth,* 185 S.W.3d 658, 664 (Ky.Ct.App.2006) (applying the principle of *ejusdem generis* to conclude that the term " other nuisance" is limited to nuisances similar to noise and smoke because it was preceded by those words in the statute). The district court reasoned that the OTCs are not like or similar to the listed types of businesses because they " have neither ownership, nor physical control, of the rooms they offer for rent." According to the counties, this reading impermissibly adds the terms " owner" and " physical establishment" to the ordinances. We are unpersuaded by this argument, however, because the notions of ownership and physical control

over the rooms for rent are simply shared characteristics of motor courts, motels, hotels, and inns. The district court thus properly applied the principle of *ejusdem generis* to the ordinances in question.

When faced with the same issue, the United States Court of Appeals for the Fourth Circuit similarly interpreted a county ordinance in North Carolina as excluding OTCs from the transient room tax. There, the ordinance at issue applied to " [o]perators of hotels, motels, tourist homes, tourist camps, and similar type businesses." *Pitt County v. Hotels.com, L.P.,* 553 F.3d 308, 313 (4th Cir.2009) (alteration in original). The court applied the principle of *ejusdem generis* to conclude that the OTCs were not " similar type businesses" because the specifically enumerated businesses preceding the expansive phrase were physical establishments that " provide lodging to patrons on site." *Id.* Because the OTCs did not physically provide the rooms, the court concluded that they were outside the parameters of the statute. *Id.*

The counties assert that this interpretation of the statute leads to the " absurd result" that a county would receive less tax money if a customer books a hotel room through an OTC than if the room is booked directly through a lodging establishment. This potential loophole has been recognized by several district courts in other circuits. *See, e.g., City of Charleston v. Hotels.com, L.P.,* 586 F.Supp.2d 538, 543 (D.S.C.2008) (observing that exempting OTCs from a similar tax " would lead to the absurd result of a hotel being able to establish and operate a wholly-owned subsidiary corporation in another jurisdiction which handled all of its reservations and booking, and be completely immune from municipal accommodations taxes"), *holding limited by Pitt County,* 553 F.3d at 313; *City of Fairview Heights v. Orbitz, Inc.,* No. 05-CV-840, 2006 WL 6319817 (S.D.Ill. July 12, 2006) (reasoning that a narrow interpretation of a tax ordinance " would open up a potentially gaping loophole" whereby " a hotel operator could simply incorporate a shell entity or make some other similar arrangement, rent the hotel rooms to that entity for a nominal amount, and then re-rent the rooms to consumers, who would be taxed only on the nominal sum paid by the side entity to the operator").

We reject the counties' " absurdity" argument, however, in part because the Kentucky General Assembly, not the court, is the proper entity to close any such potential loophole. *See*

Camera Ctr., Inc. v. Revenue Cabinet, 34 S.W.3d 39, 45 (Ky.2000) (" [T]he legislature can easily choose to close a tax exemption window of opportunity either in whole or in part."). Furthermore, unlike in the hypotheticals set forth above, none of the OTCs here are under common ownership with the physical establishments that control the rooms.

Moreover, the recent decision of the Georgia Supreme Court in *Expedia, Inc. v. City of Columbus,* 285 Ga. 684, 681 S.E.2d 122 (2009), is instructive by way of the contrasting language in the city ordinance before the state court. The City of Columbus ordinance assesses a tax on " the charge to the public" for a room, causing the Court to conclude that because " Expedia is not the end-consumer, is not a member of the public at large, and is not the occupant of the hotel room," the tax targets the full rate paid by the customer. *Id.* at 128. We agree with that reasoning, but the lack of equivalent language in the ordinances before us leads to the opposite result. In other words, imposing the transient room tax based on " the charge to the public" provides clarity

that is sorely lacking in the ordinances at hand.

Finally, any doubt as to whether the OTCs are " like or similar accommodations businesses" must be resolved in favor of the OTCs under Kentucky law. Kentucky's highest court has stated that

[t]axing laws should be plain and precise, for they impose a burden upon the people. That imposition should be explicitly and distinctly revealed. If the Legislature fails so to express its intention and meaning, it is the function of the judiciary to construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers.

George v. Scent, 346 S.W.2d 784, 789 (Ky.1961). " This is particularly so in the matter of pointing out the subjects to be taxed." *Id.* Because the counties' interpretation of the ordinances in question is at best doubtful, we are obligated under Kentucky law to resolve the doubt " in favor of the taxpayer," i.e., the OTCs.

D. District court's grant of the OTCs' motion for reconsideration

In addition to appealing the determination that the OTCs are not " like or similar accommodations businesses," LJCMG asserts that the district court had no proper basis for granting the OTCs' motion for reconsideration. But " courts will find justification for reconsidering interlocutory orders whe[re] there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez v. Tenn. Laborers Health & Welfare,* 89 Fed.Appx. 949, 959 (6th Cir.2004). In light of the foregoing analysis, the district court properly concluded that it had committed a clear error of law when it failed to exempt the OTCs from the transient room tax the first time around. We are therefore unpersuaded by LJCMG's argument on this point.

LJCMG also contends that the district court erred by making a factual finding that the OTCs do not exercise physical control over the rooms they rent. By doing so, LJCMG asserts, the court failed to resolve all factual disputes in LJCMG's favor on a motion to dismiss. *See Great Lakes Steel, Div. of Nat'l Steel Corp. v. Deggendorf,* 716 F.2d 1101, 1104-05 (6th Cir.1983) (" A motion to dismiss ... [for] failure to state a claim upon which relief can be granted must be viewed in the light most favorable to the party opposing the motion."). In making this argument, LJCMG relies on *City of San Antonio v. Hotels.com,* No. SA-06-CA-381-OG, 2007 WL 1541184 (W.D.Tex. March 20, 2007). The court in that case denied a motion to dismiss filed by the OTCs because there

was a factual dispute as to whether the OTCs exercised control over the rooms. *Id.* at *3. But the court also noted that the city had alleged facts relating to the issue of control. *Id.* In contrast, the counties here have not alleged that the OTCs have any physical control over the rooms. There is accordingly no factual dispute to be resolved in the counties' favor. (We note, by the way, that a jury verdict was reached in October 2009 in the *City of San Antonio* case, with the jury concluding that, under the terms of San Antonio's tax ordinance, the OTCs exercise control over the hotel rooms they rent. But that ordinance, because it imposes an excise tax on the price a transient pays to occupy a hotel room, bears little resemblance to the ones at issue in the present case.)

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

Notes:

[*] The Honorable S. Thomas Anderson, United States District Judge for the Western District of Tennessee, sitting by designation.

QUESTION 6 REFERENCES

1) MRSC Topic page: Lodging Tax (Hotel-Motel tax)
2) LMC Ch 5.04 Business License Tax – Generally
3) LMC Ch 3.24 Sales or Use Tax
4) LMC Ch 3.48 Lodging Tax
5) WAC 246-360-010 Definitions
6) WAC 246-360-020 Licensure
7) WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, hostels, trailer camps, and similar lodging businesses
8) RCW 67.28.180 Lodging tax authorized – Conditions
9) RCW 67.28.1816 Lodging tax – Tourism promotion
10) Santa Monica Home-Sharing Ordinance information and sample registration

MRSC
Local Government Success

Lodging Tax (Hotel-Motel Tax)

What is the Lodging Tax?

The lodging tax, also referred to as the hotel-motel tax, is a consumer tax on lodging charges for periods of less than 30 consecutive days for hotels, motels, rooming houses, private campgrounds, RV parks, and similar facilities.

How Can the Lodging Tax Revenues Be Used?

The guiding principle for the use of lodging taxes is that they must be used for activities, operations and expenditures designed to increase tourism. Specifically, lodging taxes can be used for:

- Tourism marketing;
- Marketing and operations of special events and festivals designed to attract tourists;
- Operations and capital expenditures of tourism-related facilities owned or operated by a municipality or a public facilities district; or
- Operations of tourism-related facilities owned or operated by nonprofit organizations (RCW 67.28.1816).

Note that, as of July 1, 2013, capital expenditures for tourism-related facilities owned by nonprofit organizations are no longer permitted expenditures of lodging tax funds.

If you are considering using lodging tax revenues to fund staff support of the Lodging Tax Advisory Committee, see MRSC's blog post on the topic.

What is Included in Tourism Marketing and Operations?

It includes activities defined as "tourism promotion" in state law (RCW 67.28.080).

- Advertising, publicizing, or otherwise distributing information for the purpose of attracting and welcoming tourists;
- Developing strategies to expand tourism;
- Operating tourism promotion agencies; and
- Funding the marketing or operation of special events and festivals designed to attract tourists.

What is a "Tourism-Related Facility"?

A tourism-related facility is a real or tangible personal property with a usable life of three or more years, or constructed with volunteer labor that is (a) owned by a public entity, nonprofit organization (including a non-profit business organization, destination marketing organization, main street organization, lodging association, or chamber of commerce) and (b) used to support tourism, performing arts, or to accommodate tourist activities (RCW 67.28.080).

What Kinds of Facilities Does this Include?

It depends. The guiding principle here is that the facilities should be used by tourists. So, for example, a municipal golf course would likely be a permitted expenditure in Chelan, where it probably would not be if it were in a residential neighborhood in Spokane. Each situation is unique.

Applications for Lodging Tax Funds

In counties or cities of at least 5,000 population, applications must be submitted directly to the lodging tax advisory committee (LTAC). In counties or cities of less than 5,000, applications are submitted to the county or city. The law is silent on how often the awards should be made. Some jurisdictions choose to make awards as part of their annual budget cycle. Others also make mid-year awards to account for unexpected increases or decreases in projected revenue.

Who Must Apply?

- Convention and visitors bureaus;
- Destination marketing organizations;
- Nonprofits, including main street organizations, lodging associations, or chambers of commerce;
- Municipalities - The State Auditor's Office is interpreting the law to mean that all users of funds, including municipalities, are considered applicants and must follow relevant application procedures. So, cities and counties should submit applications for their own projects to the LTAC.

What is Included in the Application?

All applications must include estimates of how funding the activity will result in increases to people staying overnight, travelling 50 miles or more, or coming from another state or country. To ensure this data is collected, jurisdictions should require this information on their lodging tax application forms.

There is no requirement that priority for funding be given to applicants expected to generate the most travelers, and lodging tax revenue may still be awarded to recipients who generate few of these types of travelers.

Examples of Funding and Application Guidelines

- **Mount Vernon** Lodging Tax/Tourism Promotion Funding Application Guidelines and Information
- **San Juan County** 2015 Lodging Tax Facilities Grant Program
- **Ocean Shores** 2015 Lodging Tax Plan for Use and Application Information

Examples of Applications for Lodging Tax Funds

- **Ellensburg** Request for Proposals Lodging Tax Fund (2014)
- **Lacey** Application for City of Lacey Lodging Tax Funds (2013)
- **Pacific County** Lodging Tax Grant Application Packet (2015)
- **Wenatchee** Application for Wenatchee Lodging Tax Funds (2013)

Review and Selection of Applications

In a municipality of at least 5,000 population, the LTAC receives all applications for lodging tax revenue and recommends a list of candidates and funding levels to the municipality's legislative body for final determination. If a municipality under 5,000 chooses to establish a LTAC, they may, but do not have to, follow these requirements.

What Does the Municipality Do with the LTAC's Recommendations?

The legislative body "may only choose recipients from the list of candidates and recommended amounts provided by the local lodging tax advisory committee." However, a city or county does not have to fund the full list as recommended by the LTAC and can choose to make awards in the recommended amounts to all, some, or none of the candidates on this list. The selected recipients must be awarded the amounts recommended by the LTAC.

Contracts with Recipients of Lodging Tax Funds

Because of the state constitutional gift of public funds prohibition, a city or county should enter into a contract with any private organization providing marketing services, operating special events or festivals, or any other tourist promotion activity. The contract should spell out the tourism-related services to be provided in exchange for city or county funding and what reports will be required. Also, any organization doing promotion on behalf of the city or county may only spend lodging tax funds on items that the city or county itself could fund. This prohibits, for example, any expenditures on promotional hosting.

Examples of Contracts for Services with Recipients of Lodging Tax Funds

- **Olympia** Professional Services Agreement for Tourism Promotion (Lodging Tax) Services
- **Union Gap** Old Town Days Agreement (2011)
- **Wenatchee** Municipal Services Agreement Re: Lodging Tax Funded Activities (2014)

Reporting Requirements

- All entities receiving lodging tax funds must provide information to their respective local government on their use of these funds as required by RCW 67.28.1816. This includes local governments that directly use lodging tax funds for municipal purposes, such as municipal facilities or community events. Local governments will then, in turn, report this information annually to JLARC using their on-line reporting system.
- Local governments should, as part of their contract with recipients, require that the report be provided immediately after the event or activity.
- The deadline for local governments to submit the annual data to JLARC is March 15 for the year ending the previous December 31.
- JLARC does *not* provide advice on how to estimate tourism impacts. Good faith estimates of actuals can be reported provided applicants and users of funds indicate how those estimates will be developed. All information (including descriptions of how actual impacts were estimated) will be available for public review.
- JLARC can be contacted for technical issues associated with the reporting portal by emailing jlarc@leg.wa.gov

Reference Sources

- **JLARC**: Letter from JLARC regarding reporting requirements (2014)
- **JLARC**: Lodging Tax Reporting System (2014) – Webinar presentation slides
- **JLARC**: 2014 Lodging Tax Use Report to the Legislature (2015)

Lodging Tax Advisory Committee (LTAC)

- This committee must have at least five members, appointed by the governing body.
- The committee membership must include at least two representatives of businesses that are required to collect the lodging tax, at least two people who are involved in activities that are authorized to be funded by this tax, and one elected city official who serves as chairperson of the committee. The statute also provides that a person who is eligible under the first category is not eligible for appointment under the second category, and vice versa.
- Organizations representing hotels and motels and organizations involved in activities that can be funded by this tax may recommend people for membership.
- The number of committee members from organizations representing the hotels and motels and the number from organizations involved in activities that can be funded must be equal.
- A city's committee may include a non-voting elected county official and vice-versa.
- The governing body must review the membership of the committee annually.

In addition to reviewing applications for the use of the lodging tax, what does the committee do?

Any proposal to impose a new lodging tax, raise the rate of an existing tax, repeal an exemption from the lodging tax, or change the use of the tax proceeds, must be submitted to the lodging tax advisory committee for review and comment.

- This submission must occur at least 45 days before final action will be taken on the governing body's proposal. Even if the committee finishes its work before the 45 days are up, the governing body still must wait 45 days.
- The committee's comments must include an analysis of the extent to which the proposal will accommodate activities for tourists or increase tourism, and of the extent to which it will affect the long-run stability of the fund to which the hotel-motel taxes are credited.
- If the advisory committee does not submit comments before the time that final action is to be taken on the proposal, the governing may go ahead and take final action.

Examples of Code Provisions

- **Kirkland** Municipal Code Ch. 5.19 – Lodging Excise Tax
- **Olympia** Lodging Tax Advisory Committee
- **Port Townsend** Municipal Code Ch. 2.74 – Lodging Tax Advisory Committee
- **Kitsap County** Lodging Tax Advisory Committee
- **San Juan County** Code Sec. 3.16.030-.050 – Lodging Tax Advisory Committee
  - Lodging Tax Advisory Board

What Are the Tax Rates?

Any county and most cities may impose a "basic" two percent tax under RCW 67.28.180 on all charges for furnishing lodging at hotels, motels, and similar establishments (including bed and breakfasts and RV parks) for a continuous period of less than one month. This tax is taken as a credit against the 6.5 percent state sales tax, so that the total tax

that a patron pays in retail sales tax and the hotel-motel tax combined is equal to the retail sales tax in the jurisdiction. In most cases, when a city and county both impose this tax, there is a credit for the amount of the city tax against the county tax so that two taxes are not levied on the same taxable event.

In addition, most counties and cities may levy an additional tax of up to two percent, for a total rate of four percent, under RCW 67.28.181(1). This "special" tax is not credited against the state sales tax. Therefore, if a county or city levies this additional tax, the total tax on the lodging bill will increase by two percent.

There are some exceptions established in RCW 67.28.181(2).

RCW 67.28.181(1) stipulates that this additional two percent tax may be levied as long as the total tax rate under Ch. 36.100 RCW (the public facilities district tax), Ch. 82.08 RCW (the state sales tax), Ch. 82.14 RCW (the city, county, and transit district sales taxes), Ch. 67.28 RCW (the hotel-motel tax chapter), and Ch. 67.40 RCW (the convention and trade center tax) does not exceed twelve percent. (Note that the sales tax rate for the Regional Transit Authority (Sound Transit) in portions of King, Pierce, and Snohomish counties is not included in making these calculations.) The limit for the total rate in Seattle is 15.2 percent, because the convention center tax is higher than in the rest of the county. This means that most cities in King County may only levy a one percent tax and Seattle cannot levy any tax.

Counties (including the cities within the county) and cities that had authority to levy a "special" tax before July 27, 1997 that allowed a total rate higher than four percent, had that rate grandfathered in by the 1997 legislation. Grays Harbor and Pierce counties are in this category, plus Chelan, Leavenworth, Long Beach, Bellevue, Yakima, and Winthrop.

Cities located in counties that had the authority to levy a total four percent tax county-wide before January 1, 1997, are limited to the "basic" two percent rate. This affects cities in Snohomish and Cowlitz counties.

Due to some unique circumstances, there was a period of time at the end of 1997 and beginning of 1998 when the outstanding taxing authority was six percent, rather than the four percent the legislature intended. During this time, Wenatchee and East Wenatchee raised their total tax to six percent. These rates were grandfathered in by the 1998 legislature.

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Chapter 5.04
BUSINESS LICENSE TAX – GENERALLY

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5.04.010 Purpose.

The provisions of this chapter are an exercise of the power of the city to license for revenue and tracking business activity. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 1, 1954.]

5.04.020 Definitions.

In construing the provisions of this chapter, except when otherwise declared, or clearly apparent from the context, the following definitions shall be applied:

A. "Business" includes all activities, occupations, trades, pursuits or professions located and/or engaged in within the city with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly. Each business location is a separate business. Different activities, occupations, trades, professions or pursuits, although carried on at a single physical location, are deemed separate businesses, each requiring a separate business license. Such "different activities" shall be determined by the city and shall include, but not be limited to, businesses with differing names and/or signage, businesses in one location with differing owners, and businesses carried on at the same location under the direction of the same business owner which are differing in nature.

B. "Engaging in business" means commencing, conducting or continuing in any business, and also the exercise of corporate or franchise powers, as well as liquidating a business when the liquidators hold themselves out to the public as conducting such a business.

C. "Person" means any individual, firm, partnership, company, corporation, association, receiver, assignee, trustee in bankruptcy, trust, estate, joint venture, club, joint stock company, business trust, society, or any group of individuals acting as a unit.

D. "Taxpayer" and/or "licensee" includes any person who engages in business or who is required to have a business license, or who is liable for the collection of any license fee or tax under this chapter, or who performs any act for which a license fee or tax is imposed by this chapter. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 733 § 1, 1983; Ord. 389 § 2, 1954.]

5.04.030 Required – Application – Issuance.
On and after the effective date of the ordinance codified in this chapter no person, whether a resident or nonresident, shall engage in any business or activity in the city for which a license or a tax is imposed by this chapter without first having obtained and being the holder of a valid and subsisting license to do so to be known as a general business license, issued under the provisions of this chapter, and without paying the license fee or tax imposed by this chapter. Such license shall expire on the date established for the business by the Washington Department of Licensing's Master License Service (MLS), and must be renewed through the MLS on or before that expiration date in order for the business to continue operations within the city. The application for a license shall be made by submitting a master business application, along with any appropriate addenda forms, and all fees due, to the MLS, which application shall set forth at least the nature of the business, the name of the applicant, residence address, place of business, and the amount of the license fee or fees prescribed by this chapter. Every license granted under this chapter shall be posted in a conspicuous place in the place of business of the licensee. Any license issued under and by virtue of the provisions of this chapter shall be personal and nontransferable. In case business is transacted at two or more separate places in the city by one taxpayer, a separate city license for each place in which business is transacted shall be required. If two or more business owners operate separate businesses at the same location, each must obtain a license for the respective business. Each license shall be numbered, and show the name and place of the business of the licensee. No license shall be issued by the city for any business which is not a legal business pursuant to state law, or for any business which violates this code, including but not limited to LMC Title 18, Zoning. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 462 § 4, 1964; Ord. 389 § 5, 1954.]

5.04.035 Application – Appeal to hearing examiner.
A. The mayor or the mayor's designee shall approve or deny all business license applications. Those applications involving a business holding a Washington State Liquor Control Board license and desiring to conduct music, dancing or entertainment on the licensed premises, shall be reviewed by the city and the city shall either expressly grant or shall deny as part of the permit, the authority of such licensee to conduct music, dancing or entertainment on the licensed premises as required by RCW 66.28.080.

B. In the event a particular application, in the judgment of the mayor or mayor's designee, is of a nature requiring city council review and approval, the mayor or such designee shall refer that application to the city council for approval or denial. In the event the mayor or mayor's designee, or the Leavenworth city council, denies a business license application, the applicant may appeal the denial to the Leavenworth hearing examiner by giving notice of appeal to the Leavenworth city clerk-treasurer within 10 days following the date of mailing of the notice of denial of the business license application to the applicant. The Leavenworth hearing examiner shall set a hearing to review the matter and the decision of the Leavenworth hearing examiner shall be final, subject only to an appeal filed with the Chelan County superior court within 14 days following the date of such decision. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1368 § 1, 2010; Ord. 1354 § 1 (Att. A), 2010; Ord. 1232 § 5, 2004; Ord. 960 § 1, 1994; Ord. 797 § 1, 1987; Ord. 702 § 1, 1981; Ord. 539, 1974; Ord. 462, 1964; Ord. 389, 1954.]

5.04.040 Application – Mailing forms – Effect.

A taxpayer may request to have forms for applications for licenses mailed, but failure of the taxpayer to receive any such forms shall not excuse the taxpayer from making application for and securing the license required and payment of the license fee or tax, when and as due hereunder. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 5, 1954.]

5.04.050 Application or renewal – Failure to make – Effect.
Failure to apply for and obtain a license prior to engaging in business within the city constitutes unlicensed activity. Failure to update or obtain a new business license if the nature of the business changes after a business license is granted, regardless if the name of the business changes, constitutes unlicensed activity. Upon discovery of such unlicensed activity the city clerk-treasurer is authorized to contact the person so engaged in business and require the filing of an application for a business license under LMC 5.04.030. Failure to obtain the license is a violation of this chapter and may be punishable as provided under LMC 5.04.160.

In addition, the Master License Service late renewal penalty fee authorized by RCW 19.02.085 may be assessed on any licensee who fails, neglects, or refuses to renew the business license by the expiration date of the license. If the license renewal remains delinquent for at least 120 consecutive calendar days, the license may be cancelled as provided under LMC 5.04.180, and the person may be required to reapply for the city license per LMC 5.04.030 in order to continue operating within the city. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 8, 1954.]

5.04.060 Application – False statements or evading payment unlawful.
It is unlawful for any person liable to tax hereunder to fail or refuse to secure the license or to pay the fee or tax when due, or for any person to make any false statement or representation in or in connection with any such application, or to aid or abet another in any attempt to evade payment of the fee or tax or any part thereof or in any manner to hinder or delay the city or any of its officers in carrying out the provisions of this chapter. Should the nature of a business be changed after a business license is issued by the city, and such business change is not licensed pursuant to LMC 5.04.050, continued operation of such business shall constitute making a false statement. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 10, 1954.]

5.04.070 Exempt businesses.
The following businesses shall be exempt from the licensing provisions of this chapter:

A. Activities carried on by nonprofit entities, including without limitation, religious, charitable, benevolent, fraternal or social organizations;

B. Public utility companies;

C. Any instrumentality of the United States, state of Washington, city of Leavenworth, or political subdivision thereof with respect to the exercise of governmental functions;

D. Hospitals;

E. Any business which is owned and operated by a person under the age of 18 years, and which does not generate a net income of more than $1,500 per year. This provision is intended to exempt such activities engaged in by minors such as baby-sitting, newspaper delivery, lawn mowing and similar types of business activities;

F. Farmers or gardeners selling their own unprocessed farm products raised or grown exclusively upon lands owned or occupied by them, and when selling such products under the provisions of farmers markets;

G. Subcontractors working under a contractor who has obtained a business license;

H. Any person delivering in the city any property purchased or acquired in good faith from such person at his/her regular place of business outside the city where no intent by such person is shown to evade the provisions of this chapter;

I. Sales persons soliciting orders from manufacturers, wholesalers, distributors or retailers, where no other act of business is done in the city;

J. Businesses located outside the city unless work is performed or services are furnished requiring a city permit, in which case a business license shall be required in accordance with this chapter. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 960 § 2, 1994; Ord. 462 § 3, 1964; Ord. 389 § 4, 1954.]

5.04.080 Rate schedule.
There is levied upon and shall be collected from every person engaging in business in the city an annual license fee or tax for the privilege of engaging in business activities.

A. Such city business license fee shall be measured by the number of employees of each business employed within the city and shall be set by resolution of the city council from time to time and such rates shall be transmitted to the Master License Service when adjusted and will be on file at the office of the city clerk-treasurer.

B. The annual fee amount may be prorated to accommodate the expiration date established by the Master License Service.

C. Total fees due will include the Master License Service application or renewal handling fees authorized by RCW 19.02.075. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 1043 § 1, 1997; Ord. 874 § 1, 1991; Ord. 713 § 1, 1982; Ord. 539 § 1, 1974; Ord. 462 § 1, 1964; Ord. 389 § 3, 1954.]

5.04.090 Businesses located outside city.
As to businesses located outside the city for which a business license is required pursuant to LMC 5.04.070(J), a license fee or tax as provided in this chapter shall be measured by the number of employees in such business who perform any part of their duties within the city. Such businesses located outside the city and furnishing or performing services within the city shall provide to the city clerk-treasurer, as part of the application for a business license described in LMC 5.04.030, the permanent firm name, address and phone number of such business located outside the city. The city may require that information regarding the location of where business will be conducted within the city be provided prior to issuance of a license. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 960 § 3, 1994; Ord. 746 § 1, 1984; Ord. 462 § 2, 1964; Ord. 389 § 3(B), 1954.]

5.04.100 Rates – Payable when – Penalty for failure.
A. Each annual license fee provided herein shall become due and payable no later than the expiration date established for the business by the Master License Service.

B. The annual license fee amount may be prorated to accommodate the expiration date established by the Master License Service.

C. A temporary license valid for a period of one month to four months only may be obtained by applying directly to the city clerk on a form provided by the city, and paying a license fee or tax at the rate of $25.00 per month. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 875 § 1, 1991; Ord. 462 § 5, 1964; Ord. 389 § 6, 1954.]

5.04.110 Unpaid tax constitutes debt – Remedy.
Any license fee or tax due and unpaid under this chapter and all penalties thereon shall constitute a debt to the city and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to all other existing remedies. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 11, 1954.]

5.04.120 Overpayment and underpayment.
If the city clerk-treasurer upon investigation or upon checking returns finds that the fee or tax paid on any of them is more than the amount required of the taxpayer, he/she shall return the amount overpaid by a warrant drawn upon the general fund. If MLS is holding any funds to be refunded, MLS will refund those funds to the business. MLS processes all city general business license application fees for the city. The city processes additional

application fees for taxpayers with 13 or more employees or as amended from time to time by resolution of the city council. If the city clerk-treasurer finds that the additional application fee or tax paid is less than required, he/she shall mail a statement to the taxpayer showing the balance due, who shall within 10 days pay the amount shown. MLS will pursue the taxpayer for any other relevant application and/or renewal underpayments, and submit complete fees to the city. MLS delinquency fees to the business may apply where appropriate, if the business does not comply with required renewal deadlines for payment. If the business does not comply with the required city fees after MLS has processed the delinquent account, MLS will then refer the business owner to the city for any action required by the city. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 7, 1954.]

5.04.130 Appeal procedure.
Any taxpayer aggrieved by the amount of the fee or tax found by the city clerk-treasurer to be required under the provisions of this chapter may appeal to the city council from such by filing a written notice of appeal with the city clerk-treasurer within five days from the time such taxpayer was given notice of such amount. The council shall, as soon as practicable, fix a time and place for the hearing of such appeal. Notice of time and hearing shall be mailed to the taxpayer. At such hearing the taxpayer shall be entitled to be heard and introduce evidence on his/her own behalf. The city council shall thereupon ascertain the correct amount of the fee or tax by resolution and the city clerk-treasurer shall immediately notify the appellant by mail of the amount. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 9, 1954.]

5.04.140 License not granted for nonpayment.
If any person required by the terms and provisions of this chapter to pay a license fee for any period fails or refuses to do so, he/she shall not be granted a license for the current period until such delinquent license fee, together with penalties, has been paid in full. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 5, 1954.]

5.04.150 Clerk-treasurer's report to council – Records.
It shall be the duty of the city clerk-treasurer to submit to the city council a list of all delinquent business licenses upon request. It shall also be the duty of the city clerk-treasurer to maintain careful records, such records being subject to audit at any time. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 389 § 13, 1954.]

5.04.160 Violation – Penalty.
A. Any person violating or failing to comply with any of the provisions of this chapter or failing to pay the annual license fee imposed when due shall pay an MLS delinquency fee equal to 50 percent of the applicable business license fee, not to exceed $150.00, in addition to the required city renewal fees. If the business fails to comply with MLS's one time delinquency effort, the delinquent business will be referred to the city for violation penalties. Any person violating or failing to comply with any of the provisions of this chapter or failing to pay MLS which requires the city to send notification to collect fees shall pay a civil penalty to the city equal to 50 percent of the applicable business license fee in the event the annual fee is paid to the city within one month of notification from the city and 100 percent of the applicable business license fee after one month of being due.

B. The city, through its authorized agents, may initiate in Chelan County superior court an action to collect the license fee or for an injunction against any person who violates or fails to comply with any provision of this chapter and the city shall be entitled to enjoin, abate or terminate the carrying on of any business activity by any person who is in violation of or who has failed to comply with this chapter. In any such action brought by the city to collect the license fee or to enjoin a person violating this chapter, in the event the city is a prevailing party, then the party against whom the chapter is enforced in such action shall pay to the city costs and reasonable attorney fees at trial and in any appeal incurred by the city. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 748 § 1, 1984; Ord. 738 § 1, 1984; Ord. 389 § 12, 1954.]

5.04.170 Standards of conduct.
Every licensee under this chapter shall:

A. Permit reasonable inspections of the business premises by city of Leavenworth authorities for the purpose of enforcing the provisions of this chapter.

B. Comply with all federal, state and city statutes, laws, regulations and ordinances relating to the business premises and the conduct of the business thereon.

C. Refrain from unfair or deceptive acts or practices, or consumer fraud, in the conduct of the business, and avoid maintaining a public nuisance on the business premises.

D. Refrain from operating a business after expiration of a license or during the period that the license may be suspended or revoked. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 1236 § 1, 2004; Ord. 1232 § 1, 2004.]

5.04.180 Revocation or suspension of license – Grounds.
The mayor or the mayor's designee may, at any time, suspend or revoke any license issued under the provisions of this chapter whenever the licensee, or any manager, officer, director, agent or employee of the licensee, has caused, permitted or knowingly done any of the following:

A. Violated any federal, state or city statute, law, regulation or ordinance upon the business premises, or in connection with the business operation, whether or not any party has been convicted in any court of competent jurisdiction of such violation;

B. Conducted, engaged in or operated the business in the city which does not conform to the ordinances of the city;

C. Engaged in unfair or deceptive acts or practices in conduct of the business, or operated the business in such a manner as to constitute a public nuisance;

D. Made any false statement or representation, or failed to disclose any material information to the city in connection with obtaining the business license or any renewal thereof; or

E. Failed to pay, within 120 days of the date due as provided in LMC 5.04.100, the annual license fee payable to the city by the licensee. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 1236 § 2, 2004; Ord. 1232 § 2, 2004.]

5.04.190 Hearing required.
Whenever the mayor or the mayor's designee determines that there may be cause for suspending or revoking any license issued pursuant to this chapter, the mayor or designee shall notify the person holding said license by registered or certified mail, return receipt requested, of the determination. Notice mailed to the address on the license shall be deemed received three days after mailing. The notice shall specify the grounds for suspension or revocation. The notice shall also specify that a hearing shall be conducted by the Leavenworth hearing examiner at a time and date denominated in the notice to determine whether or not the license should be suspended or revoked. The notice shall be mailed to the licensee at least seven days prior to the date set for the hearing. The licensee may appear at the hearing and be heard in opposition to such suspension or revocation. The decision of the hearing examiner shall be final, subject only to an appeal with the Chelan County superior court pursuant to Chapter 21.11 LMC. [Ord. 1385 § 1 (Exh. A), 2011; Ord. 1354 § 1 (Att. A), 2010; Ord. 1236 § 3, 2004; Ord. 1232 § 3, 2004.]

Mobile Version

Chapter 3.24
SALES OR USE TAX[1]

Sections:

3.24.010 Imposed – Collection.
3.24.020 Rate.
3.24.025 Taxes cumulative.
3.24.030 Administration and collection – Agent designated.
3.24.040 Administration and collection – Statutory provisions.
3.24.050 Violation – Penalty.

3.24.010 Imposed – Collection.
Pursuant to Section 17 of Engrossed Senate Bill No. 4972, amending RCW 82.14.030, a sales and use tax is fixed and imposed by the city. The tax shall be collected from those persons who are taxable by the state of Washington pursuant to Chapters 82.08 and 82.12 RCW upon the occurrence of any taxable event within the city. [Ord. 1481 § 1 (Att. A), 2014; Ord. 709 § 1, 1982.]

3.24.020 Rate.
The rate of such tax imposed shall be as follows:

A. Five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax); provided, however, that during such period as there is in effect a sales or use tax imposed by Chelan County under Section 17(1) of Engrossed Senate Bill No. 4972, amending RCW 82.14.030, the city tax shall be 0.425 percent; and

B. Five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax); provided, that during such period as there is in effect a sales or use tax imposed by Chelan County under Section 17(2) of Engrossed Senate Bill No. 4972, adopting RCW 82.14.030(2), the county shall receive 15 percent of the city tax so imposed, or 15 percent of the rate of tax imposed by the county, whichever is less; and

C. One-tenth of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax); provided, that the taxes collected are split between the city (85 percent) and Chelan County (15 percent) as required by state law. City proceeds shall be used for public safety and criminal justice purposes as allowed by RCW 82.14.450. [Ord. 1481 § 1 (Att. A), 2014; Ord. 709 § 2, 1982.]

3.24.025 Taxes cumulative.
The taxes imposed in LMC 3.24.020(B) and (C) are in addition to the tax imposed by LMC 3.24.020(A). [Ord. 1481 § 1 (Att. A), 2014; Ord. 1203 § 5, 2003.]

3.24.030 Administration and collection – Agent designated.
The Washington State Department of Revenue is designated as the agent for the city for the purposes of collection and administration of the tax levied herein. The city of Leavenworth shall pay to the Washington State Department of Revenue the standard fees and charges in effect throughout the state for such services. [Ord. 1481 § 1 (Att. A), 2014; Ord. 712 § 1, 1982; Ord. 709 § 4, 1982.]

3.24.040 Administration and collection – Statutory provisions.

All definitions, rules, forms, recording procedures and regulations adopted by the Department of Revenue for the administration of Chapters 82.08 and 82.32 RCW are adopted for the purposes of administration and collection of the tax levied herein. The administrative provisions contained in these chapters shall apply with respect to the administration and collection of the tax by the Department of Revenue. [Ord. 1481 § 1 (Att. A), 2014; Ord. 709 § 5, 1982.]

3.24.050 Violation – Penalty.

Any seller who fails or refuses to collect the tax as required with the intent to violate the provisions of this chapter or to gain some advantage or benefit either direct or indirect, and any buyer who refuses to pay any tax due under this chapter, shall be guilty of a misdemeanor and shall be punished by a fine not to exceed $500.00, or by imprisonment not to exceed 90 days, or by both such fine and imprisonment. [Ord. 1481 § 1 (Att. A), 2014; Ord. 709 § 6, 1982.]

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[1]For statutory provisions regarding a city sales and use tax, see Chapter 82.14 RCW.

Mobile Version

Chapter 3.48
LODGING TAX

Sections:

3.48.010 Imposition.
3.48.020 Definitions.
3.48.030 Additional tax.
3.48.040 Tourism fund.
3.48.050 Collection and administration.
3.48.060 Violation – Penalty.

3.48.010 Imposition.

There is levied a special excise tax of five percent on the sale of or charge made for the furnishing of lodging that is subject to tax under Chapter 82.08 RCW. The tax imposed under Chapter 82.08 RCW applies to the sale of or charge made for the furnishing of lodging by a hotel, roominghouse, tourist court, motel or trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property. It shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same. [Ord. 1051 § 1, 1997.]

3.48.020 Definitions.

The definitions of "selling price," "seller," "buyer," "consumer," and all other definitions as are now contained in RCW 82.08.010, and any subsequent amendments thereto, are adopted as the definitions for the tax levied in this chapter. [Ord. 1051 § 2, 1997.]

3.48.030 Additional tax.

The tax levied in this chapter shall be in addition to any license fee or any other tax imposed or levied under any law or any other ordinance of the city; provided, the first two percent of the tax shall be deducted from the amount of tax the seller would otherwise be required to collect and pay to the Department of Revenue under Chapter 82.08 RCW. [Ord. 1051 § 3, 1997.]

3.48.040 Tourism fund.

There is created a special fund in the treasury of the city and all taxes collected under this chapter shall be placed in this special fund to be used solely for the purpose of paying all or any part of the cost of tourist promotion, acquisition of tourism-related facilities, or operation of tourism-related facilities, or to pay for any other uses as authorized in Chapter 67.28 RCW, as now or hereafter amended. [Ord. 1051 § 4, 1997.]

3.48.050 Collection and administration.

For the purposes of the tax levied in this chapter:

A. The Department of Revenue is designated as the agent of the city for the purposes of collection and administration of the tax.

B. The administrative provisions contained in Chapter 82.32 RCW shall apply to administration and collection of the tax by the Department of Revenue.

C. All rules and regulations adopted by the Department of Revenue for the administration of Chapter 82.32 RCW are adopted by reference.

D. The Department of Revenue is authorized to prescribe and utilize such forms and reporting procedures as the Department may deem necessary and appropriate. [Ord. 1203 § 6, 2003; Ord. 1051 § 5, 1997.]

3.48.060 Violation – Penalty.
It is unlawful for any person, firm or corporation to violate or fail to comply with any of the provisions of this chapter. Every person convicted of a violation of any provision of this chapter shall be punished by a fine in a sum not to exceed $500.00. Each day of violation shall be considered a separate offense. [Ord. 1051 § 6, 1997.]

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WAC 246-360-010

Definitions.

For the purpose of this chapter, the following words and phrases have the following meanings unless the context clearly indicates otherwise.

(1) "Approved" means a written statement of acceptability issued by a governmental agency or meeting nationally recognized testing standards.

(2) "Bathroom" means a room containing a bathing fixture.

(3) "Bed and breakfast" means a private home or inn offering lodging on a temporary basis to travelers. This type of facility may include food service in accordance with chapter **246-215** WAC.

(4) "Board" means the Washington state board of health established under chapter **43.20** RCW.

(5) "Clean" means without visible or tangible soil or residue.

(6) "Cleanable" means the material and finish is fabricated to permit complete removal of residue through normal cleaning methods.

(7) "Construction" means:

(a) A new building intended for use as a transient accommodation or part of a transient accommodation;

(b) An addition, modification or alteration that changes the functional use of an existing transient accommodation or portion of a transient accommodation;

(c) An existing building or portion thereof to be converted for use as a transient accommodation; or

(d) A modification requiring a building permit by a local authority having responsibility for enforcing state and local building codes or local ordinances.

(8) "Crisis shelter" means a transient accommodation, at a permanent physical location, providing emergency or planned lodging services to a specific population, for periods of less than thirty days. A crisis shelter may or may not be reimbursed for services in the form of rental fee or labor.

(9) "Department" means the Washington state department of health.

(10) "Dormitory" means a lodging unit containing beds, cots, pads, or other furnishings intended for sleeping by a number of guests.

(11) "Exemption" means a written authorization granted by the department under WAC **246-360-500**.

(12) "Guest" means any individual occupying, or registered to occupy, a lodging unit.

(13) "Hostel" means a transient accommodation offering lodging and limited services, that may include the use of a common kitchen, to guests on a daily or weekly basis in exchange for a rental fee, labor, or a combination of rental fee and labor.

(14) "Laundry" means a central area or room with equipment intended to be used to clean and dry bedding, linen, towels, and other items, including such areas or rooms provided for guests' use.

(15) "Licensee" means the person to whom the department issues the transient accommodation license.

(16) "Local health jurisdiction" means the county or district that provides public health services within the area consistent with chapters **70.05** and **70.08** RCW.

WAC 246-360-001

Purpose.

(1) This chapter outlines the minimum public health and safety standards for the licensure and operations of transient accommodations in Washington state.

(2) This chapter applies to facilities offering three or more lodging units to guests for periods of less than thirty days. These facilities include, but are not limited to:

(a) Hotels;
(b) Motels;
(c) Bed and breakfast establishments;
(d) Resorts;
(e) Rustic resorts;
(f) Inns;
(g) Condominiums;
(h) Apartments;
(i) Crisis shelters;
(j) Hostels; and
(k) Retreats.

(3) RCW **70.62.240** requires the board to adopt rules to assure transient accommodations are operated and maintained in a manner consistent with the public's health and safety. RCW **43.70.110** requires the secretary to charge fees for licensure and RCW **43.70.250** requires the cost of business licensing programs to be fully borne by the licensees.

[Statutory Authority: Chapter **70.62** RCW. WSR 04-24-002, § 246-360-001, filed 11/18/04, effective 4/1/05. Statutory Authority: RCW **70.62.240**. WSR 94-23-077, § 246-360-001, filed 11/16/94, effective 12/17/94; WSR 92-02-019 (Order 225B), § 246-360-001, filed 12/23/91, effective 1/23/92. Statutory Authority: RCW **43.20.050**. WSR 91-02-051 (Order 124B), recodified as § 246-360-001, filed 12/27/90, effective 1/31/91; WSR 89-11-058 (Order 328), § 248-144-010, filed 5/17/89; Order 71, § 248-144-010, filed 4/11/72.]

(17) "Lodging unit" means an individual room or group of interconnected rooms, intended for sleeping, that are for rent or use by a guest, and is individually designated by number, letter, or other means of identification. A lodging unit may or may not include areas for cooking and eating.

(18) "Person" means any individual, firm, partnership, corporation, company, association, organization, or joint stock association, and the legal successor thereof.

(19) "Retreat" means a transient accommodation intended to provide seclusion, meditation, contemplation, religious activities, training, or similar activities.

(20) "Rustic resort" means a rural transient accommodation lacking many modern conveniences. A rustic resort may operate seasonally.

(21) "Sanitary" means hygienic conditions that are conducive to good health.

(22) "Sanitize" means to treat a surface or object with a chemical or physical process, such as heat, to control or limit the presence of germs. For purposes of these regulations, "sanitize" and "disinfect" are equivalent.

(23) "Self-inspect" means the licensee evaluates a transient accommodation for compliance with specific requirements in this chapter.

(24) "Sink" means a properly trapped plumbing fixture, capable of holding water, with approved potable running hot and cold water under pressure.

(25) "State building code" means chapter **19.27** RCW and any codes adopted and any rules and regulations promulgated under chapter **19.27** RCW.

(26) "Survey" means the examination or inspection of a transient accommodation, conducted by the department to determine if minimal health and safety standards in chapter **246-360** WAC are being met. A survey may require one or more site visits and may be announced or unannounced. For purposes of these regulations, a survey and inspection are equivalent.

(27) "Surveyor" means a department employee who conducts a health and safety survey of transient accommodations. For purposes of these regulations, the terms surveyor and inspector are equivalent.

(28) "Transient accommodation" means any facility such as a hotel, motel, condominium, resort, or any other facility or place offering three or more lodging units to guests for periods of less than thirty days and may include food service operations in accordance with chapter **246-215** WAC.

(29) "Utensil" means any food contact implement used in storing, preparing, transporting, dispensing, serving, or selling food or drink, excluding commercial vending and storage equipment.

(30) "Vector" means an animal that transmits a disease-producing organism from one host to another. For example, mosquitoes are vectors that transmit malaria.

(31) "Water closet" means a portable device or a fixture that has a hinged seat and flushing device used to dispose of body waste. This may include water filled, chemical or incineration toilets.

[Statutory Authority: Chapter **70.62** RCW. WSR 04-24-002, § 246-360-010, filed 11/18/04, effective 4/1/05. Statutory Authority: RCW **70.62.240**. WSR 94-23-077, § 246-360-010, filed 11/16/94, effective 12/17/94; WSR 92-02-019 (Order 225B), § 246-360-010, filed 12/23/91, effective 1/23/92. Statutory Authority: RCW **43.20.050**. WSR 91-02-051 (Order 124B), recodified as § 246-360-010, filed 12/27/90, effective 1/31/91; WSR 89-11-058 (Order 328), § 248-144-020, filed 5/17/89; Order 71, § 248-144-020, filed 4/11/72.]

WAC 246-360-020

Licensure.

(1) A person must have a current license issued by the department before operating or advertising a transient accommodation. A license is effective for one year from date of issuance.

(2) An applicant for initial licensure must submit to the department, sixty days or more before commencing business, an application which shall include the following:

(a) A completed application on a form provided by the department;

(b) A completed self-inspection on a form provided by the department;

(c) The fee specified in WAC **246-360-990**;

(d) A completed uniform business identifier number form provided by the department; and

(e) Other information as required by the department.

(3) A licensee must apply for license renewal annually on or before the expiration date of the current license by submitting to the department, by mail postmarked no later than midnight on the license expiration date, or by presenting to the department personally or electronically no later than 5:00 p.m. on the expiration date, a renewal application which shall include the following:

(a) A completed application on a form provided by the department;

(b) A completed self-inspection on a form provided by the department;

(c) The fee specified in WAC **246-360-990**;

(d) A completed uniform business identifier number form, provided by the department; and

(e) Other information as required by the department.

(4) An applicant must pass, to the satisfaction of the department, an on-site survey prior to the department issuing an initial license or reinstating an invalid license.

(5) If the licensee fails to submit a complete renewal application meeting the requirements of subsection (3) of this section by the license expiration date, the license shall become invalid on the thirty-fifth day after the license expiration date unless:

(a) All deficiencies in the renewal have been corrected; and

(b) The applicable penalty or late fee as specified in WAC **246-360-990** has been received by the department, in each case prior to the thirty-fifth day following the expiration date. In the event the license becomes invalid, the transient accommodation is no longer authorized to operate.

(6) An invalid license may be reinstated upon reapplication for a license under subsections (2) and (4) of this section.

(7) At least fifteen days prior to a transfer of ownership or change in the Uniform Business Identifier number of a transient accommodation the current licensee must submit to the department:

(a) The full name and address of the current licensee and prospective licensee;

(b) The name and address of the currently licensed transient accommodation, and the name under which the transferred transient accommodation will operate;

(c) The date of the proposed change; and

(d) Other information as required by the department.

(8) At least fifteen days prior to a transfer of ownership or a change in the Uniform Business Identifier number of a transient accommodation, the prospective new licensee must apply for licensure by submitting to the department:

(a) A completed application on a form provided by the department;

(b) A completed self-inspection on a form provided by the department;

(c) The fee specified in WAC **246-360-990**;

(d) A completed Uniform Business Identifier Number Form provided by the department; and

(e) Other information as required by the department.

(9) A licensee must notify the department when changing the number of lodging units or the name of the transient accommodation by submitting:

(a) A letter describing the intended change;

(b) The fee specified in WAC **246-360-990** for an amended license; and

(c) Other information as required by the department.

(10) The licensee must notify the department prior to construction as defined in WAC **246-360-010**(8) by submitting:

(a) A description of the construction;

(b) A description of how the construction will be used;

(c) A description of any changes in the functional use of existing construction;

(d) Documentation of approvals issued by local authorities having jurisdiction; and

(e) Other information as required by the department.

[Statutory Authority: Chapter **70.62** RCW. WSR 04-24-002, § 246-360-020, filed 11/18/04, effective 4/1/05. Statutory Authority: RCW **70.62.240**. WSR 94-23-077, § 246-360-020, filed 11/16/94, effective 12/17/94; WSR 92-02-019 (Order 225B), § 246-360-020, filed 12/23/91, effective 1/23/92. Statutory Authority: RCW **43.20.050**. WSR 91-02-051 (Order 124B), recodified as § 246-360-020, filed 12/27/90, effective 1/31/91. Statutory Authority: Chapter **34.05** RCW and RCW **42.20.050**. WSR 90-06-049 (Order 040), § 248-144-031, filed 3/2/90, effective 3/2/90. Statutory Authority: RCW **43.20.050**. WSR 89-11-058 (Order 328), § 248-144-031, filed 5/17/89.]

WAC 458-20-166

Hotels, motels, boarding houses, rooming houses, resorts, hostels, trailer camps, and similar lodging businesses.

(1) **Introduction.** This rule explains the taxation of persons operating hotels, motels, bed and breakfast facilities, and similar businesses that provide lodging and related services to transient tenants.

(a) **References to related rules.** The department of revenue (department) has adopted other rules that may contain additional relevant information:

(i) WAC **458-20-111** (Advances and reimbursements);

(ii) WAC **458-20-118** (Sale or rental of real estate, license to use real estate);

(iii) WAC **458-20-159** (Consignees, bailees, factors, agents and auctioneers);

(iv) WAC **458-20-165** (Laundry, dry cleaning, linen and uniform supply, and self-service and coin-operated laundry services);

(v) WAC **458-20-167** (Educational institutions, school districts, student organizations, and private schools);

(vi) WAC **458-20-168** (Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities);

(vii) WAC **458-20-187** (Coin operated vending machines, amusement devices and service machines); and

(viii) WAC **458-20-245** (Taxation of competitive telephone service, telecommunications service, and ancillary service).

(b) **Examples.** This rule includes examples that identify a set of facts and then state a conclusion. The examples are only a general guide. The department will evaluate each case on its particular facts and circumstances and apply both this rule and other statutory and common law authority.

(2) This rule explains the business and occupation (B&O) tax, retail sales tax, special hotel/motel tax, the convention and trade center tax, the tourism promotion area charge, and the taxation of emergency housing furnished to homeless people.

(a) This rule applies to persons operating hotels, motels, and the following businesses.

(i) Trailer camps and recreational vehicle parks that rent space to transient tenants for house trailers, campers, recreational vehicles, mobile homes, tents, and similar accommodations.

(ii) Educational institutions that sell overnight lodging to persons other than students. Information regarding educational institutions is provided in WAC **458-20-167** (Educational institutions, school districts, student organizations, and private schools).

(iii) Private lodging houses, dormitories, bunkhouses, and similar accommodations operated by or on behalf of a business or school solely for the accommodation of employees of the business or students of the school, which are not held out to the public as a place where sleeping accommodations may be obtained.

(b) This rule does not apply to persons operating the following businesses.

(i) Hospitals, sanitariums, nursing homes, rest homes, and similar institutions. Information regarding operating these establishments is provided in WAC **458-20-168** (Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities).

(ii) Apartments or condominiums where the rental is for one month or more. Information regarding rentals for one month or more and the distinction between a rental of real estate and the license to use real estate is provided in WAC **458-20-118** (Sale or rental of real estate, license to use real estate).

(3) **Transient tenant defined.** The term "transient tenant" as used in this rule means any guest, resident, or other occupant to whom lodging and other services are furnished under a license to use real property for less than one month, or less than thirty continuous days if the rental period does not begin on the first day of the month. Providing lodging for a continuous period of one month or more to a guest, resident, or other occupant is a rental or lease of real property. It is presumed that when lodging is provided for a continuous period of one month or more, or thirty continuous days or more if the rental period does not begin on the first day of the month, the guest, resident, or other occupant purchasing the lodging is a nontransient upon the thirtieth day without regard to a specific lodging unit occupied throughout the continuous thirty-day period. An occupant who contracts in advance and remains in continuous occupancy for the initial thirty days will be considered a nontransient from the first day of occupancy provided in the contract.

(4) **Business and occupation tax (B&O).** Where lodging is sold to a nontransient tenant, the transaction is a rental of real estate and exempt from B&O tax. See WAC **458-20-118** (Sale or rental of real estate, license to use real estate). Sales of lodging and related services to transient tenants are subject to B&O tax, including transactions that may have been identified or characterized as membership fees or dues.

(a) **Retailing classification.** Gross income derived from the following activities provided to transient tenants is subject to the retailing B&O tax:

- Rental of rooms for lodging;
- Rental of radio and television sets;
- Rental of rooms, space, and facilities not for lodging, such as ballrooms, display rooms, meeting rooms, and similar accommodations;
- Automobile parking or storage; and
- Sale or rental of tangible personal property at retail. More information regarding retail sales is provided in subsection (5) of this rule discussing retail sales tax.

(b) **Service and other activities classification.** Commissions, amounts derived from accommodations not available to the public, and certain lump sum fees charged for multiple services are taxable under the service and other activities classification of the B&O tax. Gross income derived from the following business activities also is subject to service and other B&O tax.

(i) Commission income received by hotels, motels, and similar businesses from other businesses providing a service to their tenants. The following are examples of commission income that is subject to the service and other activities B&O tax.

(A) Commission income received from acting as a laundry agent for tenants when someone other than the hotel provides the laundry service. Information regarding these commissions is provided in WAC **458-20-165** (Laundry, dry cleaning, linen and uniform supply, and self-service and coin-operated laundry services).

(B) Commission income received from telephone companies for long distance telephone calls when the hotel or motel merely acts as an agent and commission income received from coin-operated telephones. Information regarding these commissions is provided in WAC **458-20-159** (Consignees, bailees, factors, agents and auctioneers) and WAC **458-20-245** (Taxation of competitive telephone service, telecommunications service, and ancillary service). Refer to subsection (5) of this rule for a discussion of telephone service fees subject to retail sales tax.

(C) Commission income or license fees for permitting a satellite antenna to be installed on the premises or for permitting a broadcaster or cable operator to make sales to the transient tenants staying at the hotel or motel are subject to service and other activities B&O tax.

(D) Commission income from the rental of videos for use by tenants staying at the hotel or motel when the hotel or motel operator is making the sales as an agent for a seller.

(E) Commission income received from the operation of amusement devices. Information regarding amusement devices is provided in WAC **458-20-187** (Coin operated vending machines, amusement devices and service machines).

(ii) Gross income derived from the following business activities is subject to the service and other activities B&O tax.

(A) The rental of sleeping accommodations by private lodging houses (including dormitories, bunkhouses, and similar accommodations) operated by or on behalf of a business for its employees, which are not held out to the public as a place where sleeping accommodations may be obtained.

(B) Deposits retained by the lodging business as a penalty charged to a transient tenant for failure to timely cancel a reservation.

(5) **Retail sales tax.** Persons providing lodging and other services generally must collect and remit retail sales tax on the gross selling price of the lodging and other services. They must pay retail sales or use tax on all items they purchase for use in providing their services.

(a) **Lodging.** All fees charged for lodging and related services to transient tenants are retail sales. Included are fees charged for vehicle parking and storage and for space and other facilities, including fees charged by a trailer camp for utility services.

(i) A tenant who does not contract in advance to stay at least thirty days is not entitled to a refund of retail sales tax if the rental period later extends beyond thirty days.

Example: Assume a tenant rents the same motel room on a weekly basis. Further assume the tenant continues to extend occupancy on a weekly basis until the tenant finally exceeds thirty days. Under these assumed facts, the tenant is considered a transient for the first twenty-nine days of occupancy and must pay retail sales tax on the rental fees. The rental fees are exempt from retail sales tax beginning on the thirtieth day. The tenant is not entitled to a refund of retail sales taxes paid on the rental fees for the first twenty-nine days.

(ii) A business providing transient-tenant lodging must complete the "transient rental income" information section of the combined excise tax return. The four digit location code must be listed along with the gross income received from transient-tenant lodging subject to retail sales tax for each facility located within a participating city or county.

(b) **Meals and entertainment.** All fees charged for food, beverages, and entertainment activities are retail sales subject to retail sales tax.

(i) Fees charged for related services including, but not limited to, room service, banquet room services, and service charges and gratuities that are agreed to in advance by customers or added to their bills by the service provider are subject to retail sales tax.

(ii) If meals sold under a promotion such as a "two meals for the price of one," the taxable selling price is the actual amount received as payment for the meals.

(iii) Meals sold to employees are subject to retail sales tax. Information regarding meals furnished to employees is provided in WAC **458-20-119** (Sales by caterers and food service contractors).

(iv) Sale of food and other items sold through vending machines are retail sales. Information regarding income from vending machines and the distinction between taxable and nontaxable sales of food products is provided in WAC **458-20-187** (Coin operated vending machines, amusement devices and service machines) and WAC **458-20-244** (Food and food ingredients).

(v) When a lump sum fee is charged to nontransient tenants for providing both lodging and meals, retail sales tax must be collected upon the fair selling price of such meals. Unless accounts are kept showing the fair selling price, the tax will be computed upon double the cost of

the meals served. The cost includes the price paid for food and drinks served, the cost of preparing and serving meals, and all other costs incidental thereto, including an appropriate portion of overhead expenses.

(vi) Cover fees charged for dancing and other entertainment activities are retail sales.

(vii) Fees charged for providing extended television reception to transient tenants are retail sales.

(c) **Laundry services.** Fees charged for laundry services provided by a hotel/motel in the hotel's name are retail sales. Fees charged to tenants for self-service laundry facilities are not retail sales, but the gross income derived from these fees is subject to service and other activities B&O tax.

(d) **Telephone charges.** Telephone and "message service" fees charged to transient tenants are retail sales, but commission income received from telephone companies for long distance telephone calls when the hotel or motel merely acts as an agent is not subject to retail sales tax.

If the hotel or motel is acting as an agent for a telephone service provider that provides long distance telephone service to the transient tenant, the actual telephone fees charged are not taxable income to the hotel or motel. These amounts are advances and reimbursements. Information on advances and reimbursements is provided in WAC **458-20-111** (Advances and reimbursements). Any additional fee added by the hotel or motel to the actual long distance telephone fee, however, is a retail sale.

(e) **Telephone lines.** If the hotel or motel leases telephone lines and then provides telephone services for a fee to either its transient or nontransient tenants, these fees are retail sales. In this case the hotel or motel is in the telephone business. Information regarding the telephone business is provided in WAC **458-20-245** (Taxation of competitive telephone service, telecommunications service, and ancillary service). The hotel or motel may give a reseller permit for purchases made to the provider of the leased lines and is not subject to the payment of retail sales tax to the provider of the leased lines.

(f) **Rentals.** Renting tangible personal property such as movies and sports equipment is a retail sale.

(g) **Purchases of tangible personal property for use in providing lodging and related services.** All purchases of tangible personal property for use in providing lodging and related services are retail sales. The fee charged for lodging and related services is for services rendered and not for the resale of any tangible property.

(i) Purchases subject to retail sale tax include, but are not limited to, beds, room furnishings, linens, towels, soap, shampoo, restaurant equipment, and laundry supply services. Purchases, such as small toiletry items, are included even though they may be provided for guests to take home if not used.

(ii) Sales of prepared meals or other prepared items are subject to retail sales tax. Information regarding the sales of food products is provided in WAC **458-20-244** (Food and food ingredients).

(h) **Sales to the United States government**. Sales made directly to the United States government are not subject to retail sales tax. Sales to employees of the federal government are taxable even if the employee ultimately will be reimbursed for the lodging fee.

(i) **Payment by government voucher or check.** If the lodging fee is paid by United States government voucher or United States government check payable directly to the hotel or motel, the sale is presumed to be a tax-exempt sale made directly to the federal government.

(ii) **Charges to government credit card.** Various United States government contracted credit cards are used to make payment for purchases of goods and services by or for the United States government. Specific information about determining when a purchase by government

credit card is a tax-exempt purchase by the United States government is available via the department's internet web site at http://dor.wa.gov. (See the department's lodging industry guide.) For specific information about determining when payment is the direct responsibility of the United States government or the employee, you may contact the department's taxpayer services division at http://dor.wa.gov/content/ContactUs/ or:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

(6) **Special hotel/motel tax.** Some locations in the state impose a special hotel/motel tax. (These taxes are imposed under chapters **67.28** and **36.100** RCW.) If a business is in one of those locations, an additional tax is charged and reported under the special hotel/motel portion of the tax return. The four digit location code, the gross-selling price for providing the lodging, and the tax rate must be completed for each location where the lodging is provided. The tax applies without regard to the number of lodging units except that the tax imposed under chapter **36.100** RCW applies only if there are forty or more lodging units. The tax only applies to the fee charged for the rooms used for lodging by transient tenants. Additional fees charged for telephone services, laundry, or other incidental charges are not subject to the special hotel/motel tax. Nor is the fee charged for use of meeting rooms, banquet rooms, or other special use rooms subject to this tax. The tax applies, however, to fees charged for use of camping and recreational vehicle sites.

(7) **Convention and trade center tax.** Businesses located in King County selling lodging to transient tenants that have sixty or more transient-lodging units, must charge their customers the convention and trade center tax and report the tax under the "convention and trade center" portion of the combined excise tax return.

(a) A business having more than sixty units that rents to both transient tenants and nontransient tenants, is subject to the convention and trade center tax only if the business has at least sixty rooms that are available or being used to provide lodging to transient tenants.

Example: Assume Lodging House has one hundred forty total individual-occupancy rooms available to the public and rents ninety-five of the rooms to nontransient tenants. Under these assumed facts, Lodging House is not subject to the convention and trade center tax because only forty-five rooms are available or being used for transient-lodging units.

(b) The convention and trade center tax applies only to the fees charged for the rooms used to provide lodging for transient tenants. Additional fees charged for telephone services, laundry, or other incidental charges are not subject to the convention and trade center tax. Fees charged for the use of meeting rooms, banquet rooms, or other special use rooms are also not subject to the convention and trade center tax. The convention and trade center tax applies, however, to fees charged for camping or recreational vehicle sites. Each camp site is considered a single unit.

(c) Exemptions. Businesses having fewer than sixty transient-lodging units or businesses classified as a hostel are exempt from the convention and trade center tax. For purposes of this exemption:

(i) "Hostel" means a structure or facility where a majority of the rooms for sleeping accommodations are hostel dormitories containing a minimum of four standard beds designed for single-person occupancy within the facility. Hostel accommodations are supervised and must include at least one common area and at least one common kitchen for guest use.

(ii) "Hostel dormitory" means a single room, containing four or more standard beds designed

for single-person occupancy, used exclusively as nonprivate communal sleeping quarters, generally for unrelated persons, where such persons independently acquire the right to occupy individual beds, with the operator supervising and determining which bed each person will occupy.

(d) The four digit location code, gross-selling price for the lodging, and the tax rate must be completed for each location where the lodging is provided.

(8) **Tourism promotion area charge.** A legislative authority as defined in RCW **35.101.010** may impose a charge on the activity of providing lodging by a business located in the tourism promotion area, except for temporary medical housing that is exempt under RCW **82.08.997** (Exemptions—Temporary medical housing). The charge is administered by the department and must be collected by the business providing the lodging from the transient tenant. The charge is not subject to the sales tax rate limitations of RCW **82.14.410**. To determine whether your lodging business must collect and remit the charge, refer to the special notices for tourism promotion areas at http://dor.wa.gov/content/GetAFormOrPublication/PublicationBySubject/tax_sn_main.aspx or the lodging industry guide at http://dor.wa.gov/content/doingbusiness/BusinessTypes/Industry/lodging/.

(9) **Providing emergency lodging to homeless people.** The fee charged for providing emergency lodging to homeless people purchased via a shelter voucher program administered by cities, towns, counties, or private organizations that provide emergency food and shelter services is exempt from the retail sales tax, the convention and trade center tax, and the special hotel/motel tax. This form of payment does not influence the required minimum of transient rooms available for use as transient-lodging units under the "convention and trade center tax" or under the "special hotel/motel tax."

[Statutory Authority: RCW **82.32.300**, **82.01.060**(2), and **36.100.040**. WSR 15-22-085, § 458-20-166, filed 11/3/15, effective 12/4/15. Statutory Authority: RCW **82.32.300** and **82.01.060**. WSR 10-22-067, § 458-20-166, filed 10/29/10, effective 11/29/10. Statutory Authority: RCW **82.32.300**. WSR 94-05-001, § 458-20-166, filed 2/2/94, effective 3/5/94; WSR 92-05-064, § 458-20-166, filed 2/18/92, effective 3/20/92; WSR 88-20-014 (Order 88-6), § 458-20-166, filed 9/27/88; WSR 83-07-033 (Order ET 83-16), § 458-20-166, filed 3/15/83. Statutory Authority: RCW **82.01.060**(2) and **82.32.300**. WSR 78-07-045 (Order ET 78-4), § 458-20-166, filed 6/27/78; Order ET 70-3, § 458-20-166 (Rule 166), filed 5/29/70, effective 7/1/70.]

RCW 67.28.180

Lodging tax authorized—Conditions.

(1) Subject to the conditions set forth in subsections (2) and (3) of this section, the legislative body of any county or any city, is authorized to levy and collect a special excise tax of not to exceed two percent on the sale of or charge made for the furnishing of lodging that is subject to tax under chapter **82.08** RCW.

(2) Any levy authorized by this section is subject to the following:

(a) Any county ordinance or resolution adopted pursuant to this section must contain, in addition to all other provisions required to conform to this chapter, a provision allowing a credit against the county tax for the full amount of any city tax imposed pursuant to this section upon the same taxable event.

(b)(i) In the event that any county has levied the tax authorized by this section and has, prior to June 26, 1975, either pledged the tax revenues for payment of principal and interest on city revenue or general obligation bonds authorized and issued pursuant to RCW **67.28.150** through [and] 67.28.160 or has authorized and issued revenue or general obligation bonds pursuant to the provisions of RCW **67.28.150** through [and] 67.28.160, such county is exempt from the provisions of (a) of this subsection, to the extent that the tax revenues are pledged for payment of principal and interest on bonds issued at any time pursuant to the provisions of RCW **67.28.150** through [and] 67.28.160. However, so much of such pledged tax revenues, together with any investment earnings thereon, not immediately necessary for actual payment of principal and interest on such bonds may be used: (A) In any county with a population of one million five hundred thousand or more, for repayment either of limited tax levy general obligation bonds or of any county fund or account from which a loan was made, the proceeds from the bonds or loan being used to pay for constructing, installing, improving, and equipping stadium capital improvement projects, and to pay for any engineering, planning, financial, legal and professional services incident to the development of such stadium capital improvement projects, regardless of the date the debt for such capital improvement projects was or may be incurred; (B) in any county with a population of one million five hundred thousand or more, for repayment or refinancing of bonded indebtedness incurred prior to January 1, 1997, for any purpose authorized by this section or relating to stadium repairs or rehabilitation, including but not limited to the cost of settling legal claims, reimbursing operating funds, interest payments on short-term loans, and any other purpose for which such debt has been incurred if the county has created a public stadium authority to develop a stadium and exhibition center under RCW **36.102.030**; or (C) in other counties, for county-owned facilities for agricultural promotion until January 1, 2009, and thereafter for any purpose authorized in this chapter.

(ii) A county is exempt under this subsection with respect to city revenue or general obligation bonds issued after April 1, 1991, only if such bonds mature before January 1, 2013. If any county located east of the crest of the Cascade mountains has levied the tax authorized by this section and has, prior to June 26, 1975, pledged the tax revenue for payment of principal and interest on city revenue or general obligation bonds, the county is exempt under this subsection with respect to revenue or general obligation bonds issued after January 1, 2007, only if the bonds mature before January 1, 2035. Such a county may only use funds under this subsection (2)(b) for constructing or improving facilities authorized under this chapter, including county-owned facilities for agricultural promotion.

(iii) As used in this subsection (2)(b), "capital improvement projects" may include, but not be limited to a stadium restaurant facility, restroom facilities, artificial turf system, seating facilities, parking facilities and scoreboard and information system adjacent to or within a county owned

stadium, together with equipment, utilities, accessories and appurtenances necessary thereto. The stadium restaurant authorized by this subsection (2)(b) must be operated by a private concessionaire under a contract with the county.

(c)(i) No city within a county exempt under (b) of this subsection may levy the tax authorized by this section so long as said county is so exempt.

(ii) No city within a county with a population of one million five hundred thousand or more may levy the tax authorized by this section.

(iii) However, in the event that any city in a county described in (c)(i) or (ii) of this subsection (2) has levied the tax authorized by this section and has, prior to June 26, 1975, authorized and issued revenue or general obligation bonds pursuant to the provisions of RCW **67.28.150** through [and] 67.28.160, such city may levy the tax so long as the tax revenues are pledged for payment of principal and interest on bonds issued at any time pursuant to the provisions of RCW **67.28.150** through [and] 67.28.160.

(3) Any levy authorized by this section by a county that has a population of one million five hundred thousand or more is subject to the following:

(a) Taxes collected under this section in any calendar year before 2013 in excess of five million three hundred thousand dollars may only be used as follows:

(i) Seventy percent from January 1, 2001, through December 31, 2012, for art museums, cultural museums, heritage museums, the arts, and the performing arts. Moneys spent under this subsection (3)(a)(i) must be used for the purposes of this subsection (3)(a)(i) in all parts of the county.

(ii) Thirty percent from January 1, 2001, through December 31, 2012, for the following purposes and in a manner reflecting the following order of priority: Stadium purposes as authorized under subsection (2)(b) of this section; acquisition of open space lands; youth sports activities; and tourism promotion. If all or part of the debt on the stadium is refinanced, all revenues under this subsection (3)(a)(ii) must be used to retire the debt.

(b) From January 1, 2013, through December 31, 2015, all revenues under this section must be used to retire the debt on the stadium, until the debt on the stadium is retired. On and after the date the debt on the stadium is retired, and through December 31, 2015, all revenues under this section in a county of one million five hundred thousand or more must be deposited in the special account under (e) of this subsection.

(c) From January 1, 2016, through December 31, 2020, all revenues under this section must be deposited in the stadium and exhibition center account under RCW **43.99N.060**.

(d) On and after January 1, 2021, the revenues under this section must be used as follows:

(i) At least thirty-seven and one-half percent of the revenues under this section must be deposited in the special account under (e) of this subsection.

(ii) At least thirty-seven and one-half percent of the revenues under this section must be used:

(A) For contracts, loans, or grants to nonprofit organizations or public housing authorities for affordable workforce housing within one-half mile of a transit station, as described under RCW **9.91.025** or for services for homeless youth; or

(B) To repay:

(I) General obligation bonds issued pursuant to RCW **67.28.150** to finance such contracts, loans, or grants; or

(II) Revenue bonds issued pursuant to RCW **67.28.160** to finance a fund to make such contracts, loans, or grants; or

(III) Revenue bonds issued pursuant to RCW **67.28.160** to finance projects authorized by an authority under chapter **43.167** RCW to promote sustainable workplace opportunities near a

community impacted by the construction or operation of tourism-related facilities.

(iii) The remainder must be used for capital or operating programs that promote tourism and attract tourists to the county.

(e) At least forty percent of the revenues distributed pursuant to (a)(i) of this subsection must be deposited in a special account. The account may only be used for the purposes of (a)(i) of this subsection.

(f) School districts and schools may not receive revenues distributed pursuant to (a)(i) of this subsection.

(g) Moneys distributed to art museums, cultural museums, heritage museums, the arts, and the performing arts, and moneys distributed for tourism promotion must be in addition to and may not be used to replace or supplant any other funding by the legislative body of the county.

(h) For the purposes of this section:

(i) "Affordable workforce housing" means housing for a single person, family, or unrelated persons living together whose income is between thirty percent and eighty percent of the median income, adjusted for household size, for the county where the housing is located; and

(ii) "Tourism promotion" includes activities intended to attract visitors for overnight stays, arts, heritage, and cultural events, and recreational, professional, and amateur sports events. Moneys allocated to tourism promotion in a county with a population of one million or more must be allocated to local public organizations and nonprofit organizations formed for the express purpose of tourism promotion in the county. Such organizations must use moneys from the taxes to promote events in all parts of the county.

(i) No taxes collected under this section may be used for the operation or maintenance of a public stadium that is financed directly or indirectly by bonds to which the tax is pledged. Expenditures for operation or maintenance include all expenditures other than expenditures that directly result in new fixed assets or that directly increase the capacity, life span, or operating economy of existing fixed assets.

(j) No ad valorem property taxes may be used for debt service on bonds issued for a public stadium that is financed by bonds to which the tax is pledged, unless the taxes collected under this section are or are projected to be insufficient to meet debt service requirements on such bonds.

(k) If a substantial part of the operation and management of a public stadium that is financed directly or indirectly by bonds to which the tax is pledged is performed by a nonpublic entity or if a public stadium is sold that is financed directly or indirectly by bonds to which the tax is pledged, any bonds to which the tax is pledged shall be retired. This subsection (3)(k) does not apply in respect to a public stadium under chapter **36.102** RCW transferred to, owned by, or constructed by a public facilities district under chapter **36.100** RCW or a stadium and exhibition center.

(l) The county may not lease a public stadium that is financed directly or indirectly by bonds to which the tax is pledged to, or authorize the use of the public stadium by, a professional major league sports franchise unless the sports franchise gives the right of first refusal to purchase the sports franchise, upon its sale, to local government. This subsection (3)(l) does not apply to contracts in existence on April 1, 1986.

(4) If a court of competent jurisdiction declares any provision of subsection (3) of this section invalid, then that invalid provision is null and void and the remainder of this section is not affected.

[**2015 c 102 § 3;** 2011 1st sp.s. c 38 § 1; 2010 1st sp.s. c 26 § 8; **2007 c 189 § 1;** (2008 c 264 § 2 expired July 1, 2009); **2002 c 178 § 2;** 1997 c 220 § 501 (Referendum Bill No. 48, approved

June 17, 1997); 1995 1st sp.s. c 14 § 10; **1995 c 386 § 8.** Prior: **1991 c 363 § 139; 1991 c 336 § 1; 1987 c 483 § 1; 1986 c 104 § 1; 1985 c 272 § 1; 1975 1st ex.s. c 225 § 1; 1973 2nd ex.s. c 34 § 5; 1970 ex.s. c 89 § 1; 1967 c 236 § 11.]**

NOTES:

Findings—Intent—2008 c 264: "The legislature finds that locally funded heritage and arts programs build vital communities and preserve community history and culture. It further finds that within existing revenue sources, local jurisdictions should have the capability to preserve these programs in the future.

The locally funded heritage and arts program in the state's most populated county was established in 1989 using a portion of hotel-motel tax revenues. This program was structured to provide for inflation and an expanding population of the county.

In 1997, the legislature acted to assure the future of the heritage and arts program by creating an endowment fund using these same local funds. This funding mechanism has proved to be inadequate and unless immediately modified will result in a seventy-five percent reduction of funds for the program.

This act will provide a stable and predictable flow of funds to the program, provide for inflation and an expanding population, and assure the future viability of the program within existing revenue flows." [**2008 c 264 § 1.**]

Effective date—2008 c 264: "This act takes effect July 1, 2008." [**2008 c 264 § 5.**]

Retroactive application—2002 c 178: "This act applies retroactively to events occurring on and after September 1, 2001." [**2002 c 178 § 6.**]

Effective date—2002 c 178: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 27, 2002]." [**2002 c 178 § 7.**]

Referendum—Other legislation limited—Legislators' personal intent not indicated—Reimbursements for election—Voters' pamphlet, election requirements—1997 c 220: See RCW **36.102.800** through **36.102.803**.

Severability—Effective dates—1995 1st sp.s. c 14: See notes following RCW **36.100.010**.

Severability—1995 c 386: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1995 c 386 § 17.**]

Effective date—1995 c 386: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 16, 1995]." [**1995 c 386 § 18.**]

Effective date—1991 c 336: "This act shall take effect January 1, 1992." [**1991 c 336 § 3.**]

Purpose—Captions not law—1991 c 363: See notes following RCW **2.32.180**.

Effective date—1986 c 104: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect April 1, 1986." [**1986 c 104 § 2.**]

Severability—1985 c 272: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1985 c 272 § 2.**]

RCW 67.28.1816

Lodging tax—Tourism promotion.

(1) Lodging tax revenues under this chapter may be used, directly by any municipality or indirectly through a convention and visitors bureau or destination marketing organization for:

(a) Tourism marketing;

(b) The marketing and operations of special events and festivals designed to attract tourists;

(c) Supporting the operations and capital expenditures of tourism-related facilities owned or operated by a municipality or a public facilities district created under chapters **35.57** and **36.100** RCW; or

(d) Supporting the operations of tourism-related facilities owned or operated by nonprofit organizations described under 26 U.S.C. Sec. 501(c)(3) and 26 U.S.C. Sec. 501(c)(6) of the internal revenue code of 1986, as amended.

(2)(a) Except as provided in (b) of this subsection, applicants applying for use of revenues in this chapter must provide the municipality to which they are applying estimates of how any moneys received will result in increases in the number of people traveling for business or pleasure on a trip:

(i) Away from their place of residence or business and staying overnight in paid accommodations;

(ii) To a place fifty miles or more one way from their place of residence or business for the day or staying overnight; or

(iii) From another country or state outside of their place of residence or their business.

(b)(i) In a municipality with a population of five thousand or more, applicants applying for use of revenues in this chapter must submit their applications and estimates described under (a) of this subsection to the local lodging tax advisory committee.

(ii) The local lodging tax advisory committee must select the candidates from amongst the applicants applying for use of revenues in this chapter and provide a list of such candidates and recommended amounts of funding to the municipality for final determination. The municipality may choose only recipients from the list of candidates and recommended amounts provided by the local lodging tax advisory committee.

(c)(i) All recipients must submit a report to the municipality describing the actual number of people traveling for business or pleasure on a trip:

(A) Away from their place of residence or business and staying overnight in paid accommodations;

(B) To a place fifty miles or more one way from their place of residence or business for the day or staying overnight; or

(C) From another country or state outside of their place of residence or their business. A municipality receiving a report must: Make such report available to the local legislative body and the public; and furnish copies of the report to the joint legislative audit and review committee and members of the local lodging tax advisory committee.

(ii) The joint legislative audit and review committee must on a biennial basis report to the economic development committees of the legislature on the use of lodging tax revenues by municipalities. Reporting under this subsection must begin in calendar year 2015.

(d) This section does not apply to the revenues of any lodging tax authorized under this chapter imposed by a county with a population of one million five hundred thousand or more.

[2013 c 196 § 1; 2008 c 28 § 1; 2007 c 497 § 2.]

NOTES:

Effective date—2013 c 196: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2013." [**2013 c 196 § 3.**]

City of Santa Monica
Planning & Community Development

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ABOUT US PERMITS ZONING TRANSPORTATION PLANS & PROJECTS CODE COMPLIANCE BOARDS & COMMISSIONS

Overview of the Home-Sharing Ordinance

On May 12th, 2015 the Santa Monica City Council adopted the "Home-Sharing Ordinance," adding chapter 6.20 to the Santa Monica Municipal Code clarifying prohibitions against short-term Vacation Rentals and imposing regulations on Home-Sharing. This law becomes effective by **June 12th, 2015.** It allows eligible Residents (owners and tenants) to apply for a business license through the **City's Business License program.**

This Home-Sharing Ordinance provides for regulations of two types of Short-Term Rentals:

- **"Home-Sharing"** – The new law authorizes Home-Sharing, which is an activity whereby a resident hosts visitors in their home, for periods of 30 consecutive days or less, while at least one of the primary residents lives on-site throughout the visitor's stay. The guest enjoys the non-exclusive shared use of the unit with at least one of the persons who is domiciled at the location.
- **"Vacation Rental"** – The new law continues the City's longstanding prohibition against Vacation Rentals. A Vacation Rental is a rental of any dwelling unit, in whole or in part, to any persons for exclusive transient use of 30 consecutive days or less, whereby the unit is only approved for permanent residential occupancy and not approved for transient occupancy. The guest enjoys the exclusive private use of the unit.

Home-Share Application and Regulations	Information for Home-Sharers
• Home-Sharing Registration Application and Package	• General Information Flyer
• Home-Sharing Administrative Rules and Regulations	• Tenant Information
	• Property Owner Information
	• Renting a Guest-House

Frequently Asked Questions

Why did the Council adopt the Home-Sharing Law?

What will happen to Vacation Rentals that are currently operating?

How much does it cost to register and to get a business License to operate a Home-Share?

Do I need a Business License to operate a Home-Share?

How much does it cost to apply for a Business License?

How much will I pay in Business License tax?

Is there an Enforcement "grace period?"

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What is Plan Check?
Documents & Submittal Requirements
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California Building Codes
Building Design Limitations

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I don't make very much money from my Home-Sharing rental, can I be exempt from having to have a business license?

Does the law apply to houses, apartments, or both?

What are Transient Occupancy Taxes?

Can a tenant operate a Home-Share?

Is there a maximum number of days I can operate a Home-Share?

May I rent a guest house?

Can I rent a unit that I do not live in for more than 30 days?

Why did the Council adopt the Home-Sharing Ordinance?

The number of Vacation Rentals has increased over the last few years, with the growth of online hosting platforms. This has reduced the number of rental units that would otherwise be available for long-term rentals. In some cities, entire apartment buildings have begun to only offer vacation rentals, essentially turning an apartment building into a hotel in a residential neighborhood. However, Council wanted to still allow individuals to rent out a room or couch to a guest in their home, whether that be an apartment or house.

What will happen to Vacation Rentals that are currently operating?

The City will be establishing a proactive enforcement program to identify Vacation Rentals that are operating. This is where an entire unit is rented out without a host on site. Vacation Rentals that are operating illegally may be issued fines of up to $500 per day, and could even face criminal prosecution if they do not cease operating.

How much does it cost to register and to get a Business License to operate a Home-Share?

There are no fees to register or obtain a business license.

Do I need a Business License to operate a Home Share?

Yes, anyone operating a Home-Share must apply for a City business license. For more information on applying for a Business License, visit www.smgov.net/businesslicense or call the Business License unit at (310) 458-8745.

How much will I pay in Business License Tax?

Home-Sharing activities are classified as services and assigned Tax Rate Group III. As such, the annual tax is $75 on the first $60,000 of gross receipts. Additionally, for every $1000 above $60,000 a tax of 0.3% is assessed. For example, if you make $75,000 in rent (without any deductions for expenses) in a calendar year, the Business License tax due would be:

- $75.00 Tax on the first $60,000 of Gross Receipts, plus
- $45.00 Tax on the remaining $15,000 of Gross Receipts
- **$120.00 Total Tax** Due on $75,000 of Gross Receipts

Note: *Business License taxes are not Income Taxes. Gross Receipts are the total amount of receipts collected from rentals. No deductions may be taken for expenses, like with an Income Tax.*

Is there an Enforcement "grace period?"

No. Any vacation rentals that are operating or any home-share this is operating without a business license is doing so illegally.

Vacation Rentals. Individuals or businesses operating a vacation rental must begin winding down operations immediately and shoudl not accept any further reservations past August 31, 2015. Although the City will not begin proactive enforcement against Vacation Rentals until September 1st,

Code Enforcement will respond to complaints and will begin enforcement immediately in response to complaints.

Home-Sharing. Anyone who operates a Home-Share is required to obtain a City business license. As of June 15, 2015, all individuals must register with the City and obtain a business license and comply with the Home-Sharing Ordinance and Administrative Rules and Regulations.

I don't make very much money from my Home-Sharing rental, can I be exempt from having to have a business license?

Anyone who operates a Home-Share is required to obtain a City business license. However, a person who makes $40,000 or less annually in gross receipts may apply for a Small Business Exemption (SMMC 6.04.025). A person must pay their tax on time to qualify for the exemption; otherwise the minimum tax of $75 and the applicable penalties will be due. Please check with the Business License office for more information at (310) 458-8745.

Does the law apply to house, apartments, or both?

The law applies to all residential units in all zones in the City, including single family houses, apartments and condominiums.

What are Transient Occupancy Taxes?

The City levies a 14% tax on the total amount paid for rental of a Home-Share in the City. Federal, State or City of Santa Monica employees on official business are exempt from this tax. The tax is paid by the guest. If payment by the guest is made through the hosting platform, it may collect the tax on your behalf. Please check with your hosting platform to see if these taxes are collected by them. Payment of Transient Occupancy Tax (TOT) is due on a monthly basis. For more information, please contact Treasury Operations at (310) 458-8741.

Can a tenant operate a Home-Share?

Yes. However, a tenant's lease may restrict such activities. Tenants should check their lease before operating a Home-Share.

Is there a maximum number of days I can operate a Home-Share?

No.

May I rent a guest house?

It depends. Any guest house that is located on a parcel that is classified as a single family can use the guest house for home-sharing. It may not be classified as multi-family. Additionally, the guest house many not be a "Rent Control Bootleg Unit as defined in section 9.04.18.075 of the Santa Monica Municipal Code. Form more information please see the Renting a Guest House as a Home-Share flyer.

May I rent a unit that I do not live in for more than 30 days?

You may rent the unit for 31 days or more to a person or persons who do not live elsewhere and who intend to use the unit as their permanent residence. You may not rent the unit out for any period of time to a person or persons who reside elsewhere and intend their stay to be temporary. This is defined as corporate housing and is a zoning violation. A Residential Rental Business License is required to rent out a residence. Transient Occupancy Tax is not applicable if renting a unit for more than 30 days.

Contact Information

General Questions
Planning and Community Development

Business License Application Questions
Finance - Business License Division

Department.
(310) 458-8341
planning@smgov.net

Transient Occupancy Tax Questions
Finance - Treasury Division
(310) 458-8741
treasury@smgov.net

(310) 458-8745
business.license@smgov.net

Rent Control Questions
Rent Control Board
(310) 458-8751
rentcontrol@smgov.net

Report Illegal Vacation Rentals

Code Enforcement

Online: www.smgov.net/sm_go.aspx
Phone: (310) 458-4984
Email: code.enforcement@smgov.net
Mail: 1685 Main Street, Room 111
Santa Monica, CA 90401>

Complaints can be made anonymously. Please include the address and unit number of the location. If you wish to speak with a Code Enforcement Officer, you will need to provide your name and contact information

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Planning and Community Development Department
Website produced by the City of Santa Monica Web Development Division

Contact Us

1685 Main Street, Room 212
Santa Monica, CA 90401
planning@smgov.net
Hours of Operation

DID YOU KNOW

There are new rules on Short-Term Rentals and Home-Sharing.

LEARN MORE AT
www.smgov.net/homeshare

Santa Monica's **"Home-Sharing Ordinance"** reinforces the City's long-standing ban on vacation rentals, but still allows eligible residents (owners and tenants) to continue to earn income through their legal "home-share" business by registering with the City's business license unit.

What Does the Home-Sharing Ordinance Do?

- **Prohibits** the exclusive short-term rental of any home or apartment for 30 days or less. Long-term rental of properties for over 30 days are subject to standard landlord/tenant agreements.
- **Permits** individuals to rent a portion of their home, such as a spare bedroom, for 30 days or less.
- **Creates** a process to further protect residential neighborhoods by regulating hosting platforms.

How Does it Work?

1. **Determine** your eligibility by reviewing the rules and regulations available at www.smgov.net/homeshare. If you rent your residence, please make sure to check your lease agreement and, if applicable, the legal rent control Maximum Allowable Rent (MAR).
2. **Register** your legal home-share with the City's business license unit by filling out an application, which is available online. There are no fees to register.
3. **Pay** your business license tax when tax time comes around. Hosts making less than $40,000 can apply for an exemption. Call the Business License unit for more information at (310) 458-8745.

WHAT IS THE DIFFERENCE BETWEEN A VACATION RENTAL AND A HOME-SHARE?

A Vacation Rental is a rental of any home or apartment to any person for 30 consecutive days or less. The guest enjoys the exclusive private use of the unit. This type of rental is **NOT** allowed.

A Home-Share is a rental in which the host lives on-site during the visitor's 30 day or less stay. Guests enjoy the non-exclusive shared use of the host's home. With a business license, this type of rental **IS** allowed.

For more information about this new ordinance, please contact the Planning and Community Development Department at (310) 458-8341. For information on obtaining a business license, contact the Finance Department at (310) 458-8471.

City of Santa Monica

www.smgov.net/homeshare

DID YOU KNOW

GUEST HOUSES & GRANNY FLATS

There are new rules on Short-Term Rentals and Home-Sharing.

LEARN MORE AT
www.smgov.net/homeshare

Santa Monica's **"Home-Sharing Ordinance"** reinforces the City's long-standing ban on vacation rentals, but still allows eligible residents (owners and tenants) to continue to earn income through their legal "home-share" business by registering with the City's business license unit. In certain cases, the rental of guest houses and "granny flats" are allowed.

What Does the Home-Sharing Ordinance Do?

- **Prohibits** the exclusive short-term rental of any home or apartment for 30 days or less. Long-term rental of properties for over 30 days are subject to standard landlord/tenant agreements.
- **Permits** individuals to rent a portion of their home, such as a spare bedroom, for up to 30 days. The rental of guest houses or granny flats in single-family districts (R1) are permitted, too. However, "bootleg" units or guest houses under rent control are not permitted.
- **Creates** a process to further protect residential neighborhoods by regulating hosting platforms.

Under What Conditions May I Legally Home-Share My Guest House or Granny Flat?

- Your property type must be classified as Single-Family Residential. You can verify your property type classification on the LA County Tax Assessor website.
- You must be living on the property during the time that you home-share your guest house or granny flat.
- You must register your legal home-share with the City's business license unit by filling out an application, which is available online. There are no fees to register.
- Lastly, you must pay your business license tax when tax time comes around. Hosts making less than $40,000 can apply for an exemption. Call the City's Business License Unit for more information at (310) 458-8745

PROHIBIITIONS IN MULTI-FAMILY DISTRICTS

The rental of guest houses, granny flats or any other additional units in all multi-family districts is **NOT** permitted.

For more information about this new ordinance, please contact the Planning and Community Development Department at (310) 458-8341

City of Santa Monica

www.smgov.net/homeshare

DID YOU KNOW

PROPERTY OWNERS There are new rules on Short-Term Rentals and Home-Sharing.

LEARN MORE AT www.smgov.net/homeshare

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What Does the Home-Sharing Ordinance Do?

- **Prohibits** the exclusive short-term rental of any home or apartment for 30 days or less. Long-term rental of properties for over 30 days are subject to standard landlord/tenant agreements.
- **Permits** individuals to rent a portion of their home, such as a spare bedroom, for 30 days or less.
- **Creates** a process to further protect residential neighborhoods by regulating hosting platforms.

How Does it Work?

1. **Determine** your or your tenant's eligibility by reviewing the rules and regulations available at www.smgov.net/homeshare. Your rental agreement with your tenants will determine whether tenants can home-share. The City does not enforce rental agreements.
2. **Register.** You or your tenant must register your legal home-share with the City's business license unit by filling out an application, which is available online. There are no fees to register.
3. **Pay** your business license tax when tax time comes around. Hosts making less than $40,000 can apply for an exemption. Call the Business License unit for more information at (310) 458-8745.

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A Home-Share is a rental in which the host lives on-site during the visitor's 30 day or less stay. Guests enjoy the non-exclusive shared use of the host's home. With a business license, this type of rental **IS** allowed.

For more information about this new ordinance, please contact the Planning and Community Development Department at (310) 458-8341. For information on obtaining a business license, contact the Finance Department at (310) 458-8471.

City of Santa Monica

www.smgov.net/homeshare

DID YOU KNOW

TENANTS! There are new rules on Short-Term Rentals and Home-Sharing.

LEARN MORE AT www.smgov.net/homeshare

Santa Monica's **"Home-Sharing Ordinance"** reinforces the City's long-standing ban on vacation rentals, but still allows eligible residents (owners and tenants) to continue to earn income through their legal "home-share" business by registering with the City's business license unit.

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- **Prohibits** the exclusive short-term rental of any home or apartment for 30 days or less. Long-term rental of properties for over 30 days are subject to standard landlord/tenant agreements.
- **Permits** individuals to rent a portion of their home, such as a spare bedroom, for 30 days or less.
- **Creates** a process to further protect residential neighborhoods by regulating hosting platforms.

How Does it Work?

1. **Determine** your eligibility by reviewing the rules and regulations at www.smgov.net/homeshare. You will want to review your rental agreement to verify that it permits sub-leasing. For rent-controlled units, the Home-Share income may not exceed the Maximum Allowable Rent.
2. **Register** your legal home-share with the City's business license unit by filling out an application, which is available online at www.smgov.net/homeshare. There are no fees to register.
3. **Pay** your business license tax when tax time comes around. Hosts making less than $40,000 can apply for an exemption. Call the Business License Unit for more information at (310) 458-8745.

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City of Santa Monica

www.smgov.net/homeshare

DID YOU KNOW

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HOME-SHARING REGISTRATION PACKET

To ensure a seamless transition into full and compliant operations, the City of Santa Monica has created this Home-Sharing Registration Packet (HSRP).

HSRP PACKET CONTENTS

- Home-Sharing Rules
- Business License and Transient Occupancy Tax FAQs
- Sample Transient Occupancy Tax (TOT) monthly form
- Business License Application

HSRP APPLICATION CHECKLIST

☐ **Read this HSRP for helpful information**

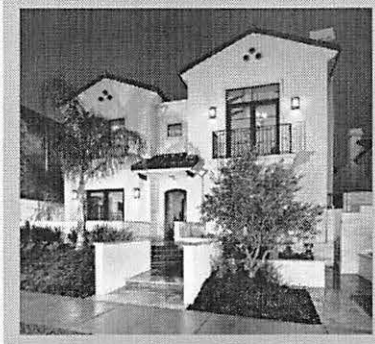
☐ **Download and complete the Home-Sharing Application** *(or use the application provided in this packet)*

☐ **Submit all of the following to the Business License Office:**

- ✓ **Completed Home-Sharing Application**
- ✓ **Payment of business license tax and fees**
- ✓ **Proof of residency at the address in which you wish to Home-Share** *(Acceptable proof includes: utility/cable/phone/credit card bill or bank statement)*

Ordinance Number 2484

THIS NEW ORDINANCE PROVIDES FOR THE LICENSING AND REGULATION OF HOME-SHARING BUSINESSES, AND EXTENDS THE CITY'S LONG-STANDING PROHIBITION ON VACATION RENTALS.



THE ORDINANCE REQUIRES THE REGISTRATION OF ALL "HOME-SHARE" RENTAL PROPERTIES.

City of Santa Monica®

For **Business License** requirements, contact business.license@smgov.net or (310) 458-8745.
For **Transient Occupancy Tax** questions, contact treasury@smgov.net or (310) 458-8741.
For **Home-Sharing Rules and Regulations**, contact planning@smgov.net or (310) 458-8341.

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City of
Santa Monica®

CITY OF SANTA MONICA

HOME-SHARING ORDINANCE RULES

Effective: June 12, 2015

SCOPE AND INTENT

These rules and regulations ("Rules") established pursuant to Santa Monica Municipal Code Section 6.20 shall be followed by hosts and hosting platforms as applicable. All staff responsible for the administration and/or enforcement of the Home-Sharing Ordinance must implement and enforce the program in keeping with these rules. These Rules are not intended to be duplicative.

TABLE OF CONTENTS

I) DEFINITIONS
II) HOME-SHARING HOSTS REQUIREMENTS AND BUSINESS LICENSE CONDITIONS
III) HOME-SHARING HOSTS APPLICATION PROCEDURES
IV) HOSTING PLATFORM REQUIREMENTS

I) DEFINITIONS

a) CITY means the City of Santa Monica.
b) SMMC means the Santa Monica Municipal Code.
c) ACCESSORY STRUCTURE means living quarters, including lawfully permitted second units as defined by the Zoning Ordinance on the same premises as a single family residence. Rent Control Bootleg Units as defined in section 9.04.18.075 of the SMMC are not considered Accessory Structures for the purpose of the Home Sharing Ordinance.
d) DWELLING UNIT means one or more rooms designed, occupied or intended for occupancy as separate living quarters. A dwelling unit includes a single-family residence, an apartment or other leased premises, or residential condominium unit. A dwelling unit shall include a detached Accessory Structure (e.g. guest house) that is intended for human habitation (i.e. living quarters) when the entire property is designated for a single family residential use. Dwelling unit does not include individual hotel/motel guest rooms, condominium timeshare units, cabins, or similar guest accommodations rented to transient guests in a hotel, inn, or similar transient lodging establishment operated by an innkeeper.
e) GUEST or VISITOR means a person who rents a home-share and/or vacation rental
f) HOME-SHARE means an activity whereby the resident(s) host visitors in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitors' stay.
g) HOST means a person engaged in providing a home-sharing and/or vacation rental.
h) HOSTING PLATFORM means a marketplace in whatever form or format which facilitates the Home-Sharing or Vacation Rental, through advertising, match-making or any other means, using any medium of facilitation, and from which the operator of the hosting platform derives revenues, including booking fees or advertising revenues, from providing or maintaining the marketplace.
i) HOUSE SWAPPING means the exchange of a house by one owner with another owner in a different city for short periods of time by agreement between both parties to exchange homes for a specified period of time without compensation.

j) LIVES ON SITE means being present in the dwelling unit where the home-sharing is being offered, which includes but is not limited to sleeping overnight, preparing and eating meals, entertaining, and engaging in other activities in the dwelling unit that are typically enjoyed by a person in their home.

k) SHORT-TERM RENTAL means any rental of any living accommodation that is 30 consecutive days or less, including hotels, motels, bed and breakfasts, home-sharing and vacation rentals.

l) RESIDENT means primary resident of a dwelling unit, when a person occupies a dwelling, typically a house or an apartment, that serves as their primary residence, though they may share the residence with other people. A person may only have one primary residence. A primary residence is considered to be a legal residence for the purpose of income tax and/or acquiring a mortgage.

m) TRANSIENT OCCUPANCY TAX means local transient tax as set forth in Chapter 6.68 of the SMMC. The tax is paid by the guest when paying for their rental. The collected TOT is then remitted to the City.

n) VACATION RENTAL means a rental of any dwelling unit, in whole or in part, within the City of Santa Monica, to any person(s) for exclusive transient use of 30 consecutive days or less, whereby the unit is only approved for permanent residential occupancy and not approved for transient occupancy or Home-Sharing as authorized by Chapter 6.20 of the SMMC.

II) HOME-SHARING HOSTS REQUIREMENTS AND BUSINESS LICENSE CONDITIONS

A host must comply with the following conditions:

a) A Home-Share may only be offered in a space intended for human habitation. For example, a host may not rent a space in an Accessory Structure that is a storage shed or garage as a Home-Share.

b) A host may not advertise their home-sharing business in any area that is exterior to the dwelling unit where the home-sharing is occurring. This includes common interior areas.

c) In any advertisement of the Home-Share a host must include the Business License number issued by the City.

d) A host must provide guests with information related to emergency exit routes if the unit is part of a multifamily building of more than one story.

e) Transient Occupancy Taxes (TOT) shall be collected on all Home-Sharing rentals. If a Hosting Platform does not collect payment for the rental, hosts are solely responsible for the collection of all applicable TOT and remittance of the collected tax to the City on a monthly basis. If a Hosting Platform does collect payment for rentals, then it and the host shall both have legal responsibility for the collection and remittance of the TOT.

f) A Home-Sharing applicant must provide the following as part of his/her application:

1) Address where the Home-Sharing will take place.
2) Type of dwelling unit (e.g. single family home, apartment, condominium).
3) Whether the applicant is a tenant or owner of the dwelling unit.
4) The total number of full time occupants of the dwelling unit.
5) A list of all persons that will be hosting.
6) Contact information for each person that will be hosting (e.g. email, cell phone).
7) A list of each bedroom, office, den, living room, etc., in the dwelling unit. The list shall include for each room:
   i Whether or not the room will be rented
   ii The maximum number of overnight guests that will be allowed
8) Whether or not the unit is rent controlled.
9) An affidavit certifying that the host will comply with all of the provisions of the Home-Sharing Ordinance, Business License Conditions for operating a Home-Share as outlined in these rules, and all relevant laws or be subject to revocation of their Business License.

III) HOME-SHARING HOSTS APPLICATION PROCEDURES

Any person who intends on operating a Home-Share from their primary residence shall complete the Home-Sharing Registration Package (HSRP). The HSRP shall include all instructions, check-lists, applications, and other educational materials related to the Home-Sharing Ordinance and relevant local laws that the host is required to comply with. Home-Share applications are exempt from the Zoning Conformance Review fee and Home Occupancy Permitting requirements.

The applicant must submit all of the following to the Business License unit to register:

a) Business License Home-Sharing Application.
b) Proof of Residency. Acceptable forms of proof include: copy of a current utility bill, cable bill, phone bill, credit card bill or bank statement showing your name and current Santa Monica residential address. Leases, rental agreements, or IDs may not be accepted as proof.

IV) HOSTING PLATFORM REQUIREMENTS

a) The operator of a hosting platform shall report quarterly to the City, in an electronic comma-delimited format or similar format such as MS Excel, the following information:

   1) The address of each residential unit that was offered on the operator's hosting platform for occupancy for tourist or transient use and was occupied for that use during that quarterly reporting period.
   2) The total number of nights that the residential unit was occupied for tourist or transient use.
   3) The amounts paid for the occupancy of that residential unit listed.
   4) The name(s) of the person(s) responsible for each unit listed.

b) If the Hosting Platform collects payment for the rental, the hosting platform and the host shall both have legal responsibility for the collection of all applicable TOT and remittance of the collected tax to the City on a monthly basis.
c) A Hosting Platform must provide its Santa Monica host clients or potential host clients the following disclosure:

   "On May 12, 2015, the Santa Monica City Council adopted the Home-Sharing Ordinance reiterating its ban on the rental of entire units as vacation rentals. The Home-Sharing Ordinance also legalized the short term rental of a portion of a person's home when the host lives on-site throughout the visitor's stay and when the host obtains a business license. Hosts are also required to collect and remit Transient Occupancy Tax (TOT) if not collected and remitted by the hosting platform."

Business License and Transient Occupancy Tax FAQs

What are my responsibilities as a Home-Sharing Host?

- Obtain and maintain your business license
- Comply with the Rules and Regulations established for Home-Sharing
- Collect and remit Transient Occupancy Tax

What is the difference between Home-Sharing and Vacation Rental?

Did you know?

"Home-Sharing" – The new law authorizes Home-Sharing, which is an activity whereby a resident hosts visitors in their home, for periods of 30 consecutive days or less, while at least one of the primary residents lives on-site throughout the visitor's stay. The guest enjoys the non-exclusive shared use of the unit with at least one of the persons who is domiciled at the location.

"Vacation Rental" – The new law continues the City's longstanding prohibition against Vacation Rentals. A Vacation Rental is a rental of any dwelling unit, in whole or in part, to any persons for exclusive transient use of 30 consecutive days or less, whereby the unit is only approved for permanent residential occupancy and not approved for transient occupancy. The guest enjoys the exclusive private use of the unit.

May I rent my guest house?

It depends. Any guest house that is located on a parcel that is classified as single family can use the guest house for home-sharing. It may not be classified as multi-family. Additionally, the guest house may not be a "Rent Control Bootleg Unit" as defined in section 9.04.18.075 of the Santa Monica Municipal Code. For more information, please see the *Renting a Guest House as a Home-Share* flyer located on www.smgov.net/homeshare.

Business License – When is the deadline to apply for a business license for Home-Sharing?

You may apply for a business for Home-Sharing at any time. If you are currently operating as a Home-Sharing business, you should apply now. The City will issue a business license certificate for the period beginning July 1st and it will expire June 30th. The business license certificate will be valid for one fiscal year or the remainder of the fiscal year in which the business license is issued. The business license will be required to be renewed annually.

Business License – What happens after I submit my application to the City?

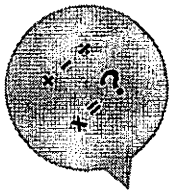
Now what?

The City will review your application to make sure it is complete and that the operation of the dwelling as a Home-Sharing business will comply with the City's requirements. When the City has verified that your application meets all the requirements for Home-Sharing, the City will issue a business license for Home-Sharing.

The business license application can take up to 30 days to process. Given this, please plan accordingly by submitting a complete application well in advance of the date that you wish to begin the Home-Sharing business.

BUSINESS LICENSE AND TRANSIENT OCCUPANCY TAX FAQS

BUSINESS LICENSE – How much will I have to pay?



When applying for a license, the initial costs are as follows:

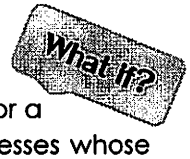
Business License Tax	$75.00
State Mandated CASp Fee	$1.00
Total	$76.00

When renewing your license, Home-Sharing activities are classified as services and assigned Tax Rate Group III. As such, the annual tax is $75 on the first $60,000 of gross receipts. Additionally, for every $1,000 above $60,000 a tax of 0.3% is assessed.

For example, if you make $75,000 in rent (without any deductions for expenses) in a calendar year, the Business License tax due would be:

Tax on the first $60,000 of Gross Receipts	$75.00
plus Tax on the remaining $15,000 of Gross Receipts	$45.00
Total Tax Due on $75,000 of Gross Receipts	$120.00

BUSINESS LICENSE – What if I don't make that much?



Home-Sharing participants that make $40,000 or less annually in gross receipts may apply for a Small Business Exemption (SMMC 6.04.025). The Small Business Exemption applies for businesses whose annual worldwide gross receipts do not exceed $40,000.

Applications are due within 30 days of the start of business and Renewals are due by August 31st each year. A person must apply/renew on time to qualify for the exemption; otherwise the minimum tax of $75 and applicable penalties will be due.

TRANSIENT OCCUPANCY TAX – What are Transient Occupancy Taxes and who's responsible for them?

The City levies a 14% Transient Occupancy Tax (TOT) on the amount paid for the rental of a lodging space in the City. The tax is paid by the guest when paying for their rental. The collected TOT is then remitted to the City.

If payment by the guest is made through a hosting platform, it may collect the tax on your behalf. If not, you will be responsible for the collection and remittance of the tax. Please check with your hosting platform to see if these taxes are collected by them. Payment of TOT is required on a monthly basis.

TRANSIENT OCCUPANCY TAX – How do I remit TOT?

Enclosed in this packet is a sample TOT remittance form. The section on the Tourism Management District Assessment does not apply to Home-Sharing. An electronically fillable copy of this form can be located on the City Taxes section of www.smgov.net/finance. The TOT section should be completed and the form should be returned to the City's Treasury Office monthly with the prior month's reporting and TOT payment.

For example, for your reporting of stays in July, you will need to complete the form and remit payment on August 1st but no later than August 31st.

BUSINESS LICENSE AND TRANSIENT OCCUPANCY TAX FAQS

TRANSIENT OCCUPANCY TAX – I have current contracts with customers and I have not collected TOT. What do I do?

Home-Sharing participants will be required to collect TOT on all future stays effective June 15, 2015. Existing contracts that have been executed prior to June 15, 2015 will not be required to pay and collect TOT. Documentation of any contract executed prior to June 15, 2015 should be retained for auditing purposes.

I received an administrative citation. Who should I call?

Contact the City's Code Enforcement Division at (310) 458-4984.

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City of Santa Monica®

TRANSIENT OCCUPANCY TAX RETURN
and TOURISM MANAGEMENT DISTRICT ASSESSMENT

For the MONTH ending _____

Name of Establishment	**Name of Owner**
_____	_____
Address: _____	Address: _____
City, ST, Zip: _____	City, ST, Zip: _____

AVERAGE OCCUPANCY RATE for the Month: _____%

Computation of TOT Tax:

1. Total Gross Room Rental Receipts..... $_____
2. Allowable Deductions: *(include appropriate* forms)
   a) Permanent Residents..... $_____
   b) Permanent Residents (refund of prior month)..... $_____
   c) Federal, State of California, or City of Santa Monica Employee on Official Business... $_____
   d) Other (please attach explanation)..... $_____

   TOTAL DEDUCTIONS: $_____
3. Taxable Rental Receipts (Line 1 - Line 2)..... $ 0.00
4. Transient Occupancy Tax Due (14 % of Line 3)..... $ 0.00
5. Applicable Penalties (see below)..... $_____
6. **TOTAL TOT TAXES AND PENALTIES DUE** (Line 4 + Line 5)..... $ 0.00

SAMPLE

Computation of TMD Assessment: *(if applicable)*

7. Occupied Room Nights *(excluding complimentary rooms)*..... _____
8. Assessment per Room Night *(per previously determined calculation)*..... $_____
9. Assessment Amount (Line 7 X Line 8)..... $_____
10. Allowable Deductions (include appropriate documentation)
    a) Stays longer than 30 days..... $_____
    b) Contracts signed prior to January 1, 2013..... $_____
    c) Any room paid for in full prior to January 1, 2013..... $_____

    TOTAL DEDUCTIONS: $_____
11. Applicable Penalties (see below)..... $_____
12. **TOTAL TMD ASSESSMENT AND PENALTIES DUE** (Lines 9 - 10 + 11)..... $ 0.00

13. TOTAL AMOUNT DUE (Line 6 + Line 12)..... $ 0.00

Payment is due on the first day after the end of the reporting period.
Make checks payable to **City of Santa Monica** and remit to:

City of Santa Monica
Treasury
1717 4th Street, Suite 150
Santa Monica, CA 90401

PENALTIES

1. Penalty of 10% will be assessed if payment is not received by the last day of the month in which remittance is due.
2. Additional 10% penalty assessed if total amount due is unpaid for an additional 30 days

I certify, under penalties of perjury and misdemeanor, that, to the best of my knowledge and belief, the statements herein are true and correct.

Signature	Title	Phone Number	Date

www.smgov.net/departments/finance ~ (310) 458-8741

(TOT-TMDRTNFM Rev. 11/2012)

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City of Santa Monica®

BUSINESS LICENSE HOME-SHARING APPLICATION

Revenue Division — Business License
P. O. Box 2200, Santa Monica, California 90407-2200
Phone: 310-458-8745 • FAX 310-451-3283
Email: business.license@smgov.net • www.smgov.net/businesslicense

Official Use Only	
BL #:	
Fees Paid: $_____	
Paid By: ☐ Ca. ☐ Ck #_____ ☐ AMEX ☐ Visa ☐ Disc. ☐ MC ☐ Web	
Date Paid: _____	
Processed by: _____	

Complete this application if you are the primary resident of a dwelling unit and will be conducting a Home-Share business, as defined by SMMC §6.20. See Home-Sharing Registration Packet (HSRP) for more information.

HOME-SHARING ENTITY INFORMATION

1	DBA (If applicable):	
2	Legal Business Name:	
3	Home-Sharing Physical Address: *Number Street Unit/Suite # City State Zip*	
4	Mailing Address: ☐ Same as physical *Number Street Unit/Suite # City State Zip*	
5	Business Phone:	Alternate Phone: ☐ Mobile ☐ Fax ☐ Other
6	Date Home-Sharing began/will begin within the City of Santa Monica?	Month / Day / Year: ☐☐ ☐☐ ☐☐☐☐ — Federal Employee Identification #:
7	Business Type: ☐ Sole Proprietor ☐ Partnership ☐ LLC ☐ Corporation ☐ Non-Profit ☐ Trust	
8	Email:	Website:

RESIDENT/HOST INFORMATION

9	Number of full time occupants of the dwelling unit: _____	Please list **all** persons that will be hosting below *(use additional sheets if needed)*		
10	**PRIMARY** Resident First Name:	**PRIMARY** Resident Last Name:		
	Title: ☐ Sole Proprietor ☐ Partner ☐ President ☐ Managing Member ☐ Trustee ☐ Other: _____			
	Type of Proof of Residency: ☐ Bank Statement ☐ Utility Bill ☐ Phone Bill ☐ Cable Bill ☐ Credit Card Bill			
	Address: *Number Street Unit/Suite # City State Zip*			Phone:
	Email:	DOB:	DL or Gov't Issued ID#:	SSN:
11	**ADDITIONAL** Resident First Name:	**ADDITIONAL** Resident Last Name:		
	Type of Proof of Residency: ☐ Bank Statement ☐ Utility Bill ☐ Phone Bill ☐ Cable Bill ☐ Credit Card Bill			
	Address: *Number Street Unit/Suite # City State Zip*			Phone:
	Email:	DOB:	DL or Gov't Issued ID#:	SSN:
12	**ADDITIONAL** Resident First Name:	**ADDITIONAL** Resident Last Name:		
	Type of Proof of Residency: ☐ Bank Statement ☐ Utility Bill ☐ Phone Bill ☐ Cable Bill ☐ Credit Card Bill			
	Address: *Number Street Unit/Suite # City State Zip*			Phone:
	Email:	DOB:	DL or Gov't Issued ID#:	SSN:
13	**EMERGENCY** Contact First Name:	**EMERGENCY** Contact Last Name:		
	24 Hour Phone:	Email:		

Complete next page

HOME-SHARING ACTIVITY INFORMATION

14	Host Information:	In relation to the dwelling unit, the applicant is the: ☐ Property owner ☐ Lessor ☐ Sub-lessor If tenant (lessor/sub-lessor), is the unit rent controlled? ☐ Yes ☐ No
15	Property Information:	Select which type of dwelling unit the Home-Sharing will take place: ☐ Single Family ☐ Apartment ☐ Condominium

16 Home-Share Activity:

**Note: if you are offering lengths of stay that are more than 30 days, please complete the "Lessor" application, which can be located in the "Apply" section at www.smgov.net/businesslicense*

List all rooms in the dwelling unit: *(use additional sheets if necessary)*	Will room be rented?	Maximum number of overnight guests	Length of stay offered*:
☐ Bedroom: # of bedrooms available: _____	☐ Yes ☐ No		☐ up to 30 days ☐ more than 30 days*
☐ Office	☐ Yes ☐ No		☐ up to 30 days ☐ more than 30 days*
☐ Den	☐ Yes ☐ No		☐ up to 30 days ☐ more than 30 days*
☐ Living Room	☐ Yes ☐ No		☐ up to 30 days ☐ more than 30 days*
☐ Guest House	☐ Yes ☐ No		☐ up to 30 days ☐ more than 30 days*
☐ Other (specify):	☐ Yes ☐ No		☐ up to 30 days ☐ more than 30 days*

17 List all hosting platforms you will be using and listing numbers associated for each platform: *(use additional sheets if necessary)*

Hosting Platform Website (s)	Your Listing # (s)

DECLARATION, AFFIDAVIT AND SIGNATURE

I declare, under penalty of making a false declaration, that I am authorized to complete this form, and to the best of my knowledge and belief it is a true, correct and complete statement, made in good faith. I understand and agree that the granting of this license requires my compliance with all applicable Santa Monica Municipal Code provisions, state and federal laws and all conditions set forth above. I also understand and I am familiar with such local, state and federal laws and the conditions set forth above may result in revocation of this license.

I also certify that I will comply with all applicable laws, including but not limited to all limitations, conditions and requirements of Chapter 6.20 of the Santa Monica Municipal Code ("Home-Sharing Ordinance") and the Home-Sharing Administrative Rules and Regulations. I understand that failure to comply will be grounds for revocation of my business license.

Name: Title:

Signature: Date:

FEES DUE:

RETURN ENTIRE APPLICATION FORM TO ABOVE ADDRESS • MAKE CHECK PAYABLE TO THE CITY OF SANTA MONICA

Acceptance of payment does not constitute approval of business license. Authorization to conduct business is not granted until license is issued.

☐ **Check here and enter $0 in the Business License Tax box below if claiming the Small Business Exemption (SBE).**
You may not claim the SBE if annual worldwide gross receipts will exceed $40,000.00 or if you are filing this application more than thirty (30) days after your business start date.

NOTE: On 09/19/12, Governor Brown Signed into law Senate Bill 1186, which adds a state fee of $1.00 on any applicant for a local business license, similar instrument or permit, or renewal. The purpose of this fee is to increase disability access and compliance with construction related accessibility requirements and to develop education resources for businesses in order to facilitate compliance with federal and state disability laws, as specified under federal and state law, compliance with disability access is a serious and significant responsibility that applies to all California building owners and tenants with buildings open to the public. You may obtain information about your legal obligation and how to comply with the disability access laws at the following agencies:

The Division of the State Architect at www.dgs.ca.gov/das/home.aspx
The Department of Rehabilitation at www.rehavcahwnet.gov
The California Commission on Disability Access at www. ccda.ca.gov

LICENSE FEES DUE		OFFICIAL USE ONLY
Business License Tax	$ 75.00	$
☐ **Check here for SBE**	$ 0.00	
State Mandated Fee	$ 1.00	$
Late Penalty	$	$
Total Due	$	$
Amount Paid	$	$
Fees Due	$	$

Thank you for doing business in the City of Santa Monica!

City of
Santa Monica®

CITY OF SANTA MONICA

HOME-SHARING ORDINANCE RULES

Effective: June 12, 2015

SCOPE AND INTENT

These rules and regulations ("Rules") established pursuant to Santa Monica Municipal Code Section 6.20 shall be followed by hosts and hosting platforms as applicable. All staff responsible for the administration and/or enforcement of the Home-Sharing Ordinance must implement and enforce the program in keeping with these rules. These Rules are not intended to be duplicative.

TABLE OF CONTENTS

I) DEFINITIONS
II) HOME-SHARING HOSTS REQUIREMENTS AND BUSINESS LICENSE CONDITIONS
III) HOME-SHARING HOSTS APPLICATION PROCEDURES
IV) HOSTING PLATFORM REQUIREMENTS

I) DEFINITIONS

a) CITY means the City of Santa Monica.
b) SMMC means the Santa Monica Municipal Code.
c) ACCESSORY STRUCTURE means living quarters, including lawfully permitted second units as defined by the Zoning Ordinance on the same premises as a single family residence. Rent Control Bootleg Units as defined in section 9.27.090 of the SMMC are not considered Accessory Structures for the purpose of the Home Sharing Ordinance.
d) DWELLING UNIT means one or more rooms designed, occupied or intended for occupancy as separate living quarters. A dwelling unit includes a single-family residence, an apartment or other leased premises, or residential condominium unit. A dwelling unit shall include a detached Accessory Structure (e.g. guest house) that is intended for human habitation (i.e. living quarters) when the entire property is designated for a single family residential use. Dwelling unit does not include individual hotel/motel guest rooms, condominium timeshare units, cabins, or similar guest accommodations rented to transient guests in a hotel, inn, or similar transient lodging establishment operated by an innkeeper.
e) GUEST or VISITOR means a person who rents a home-share and/or vacation rental
f) HOME-SHARE means an activity whereby the resident(s) host visitors in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitors' stay.
g) HOST means a person engaged in providing a home-sharing and/or vacation rental.
h) HOSTING PLATFORM means a marketplace in whatever form or format which facilitates the Home-Sharing or Vacation Rental, through advertising, match-making or any other means, using any medium of facilitation, and from which the operator of the hosting platform derives revenues, including booking fees or advertising revenues, from providing or maintaining the marketplace.
i) HOUSE SWAPPING means the exchange of a house by one owner with another owner in a different city for short periods of time by agreement between both parties to exchange homes for a specified period of time without compensation.

j) LIVES ON SITE means being present in the dwelling unit where the home-sharing is being offered, which includes but is not limited to sleeping overnight, preparing and eating meals, entertaining, and engaging in other activities in the dwelling unit that are typically enjoyed by a person in their home.
k) SHORT-TERM RENTAL means any rental of any living accommodation that is 30 consecutive days or less, including hotels, motels, bed and breakfasts, home-sharing and vacation rentals.
l) RESIDENT means primary resident of a dwelling unit, when a person occupies a dwelling, typically a house or an apartment, that serves as their primary residence, though they may share the residence with other people. A person may only have one primary residence. A primary residence is considered to be a legal residence for the purpose of income tax and/or acquiring a mortgage.
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II) HOME-SHARING HOSTS REQUIREMENTS AND BUSINESS LICENSE CONDITIONS

A host must comply with the following conditions:

a) A Home-Share may only be offered in a space intended for human habitation. For example, a host may not rent a space in an Accessory Structure that is a storage shed or garage as a Home-Share.
b) A host may not advertise their home-sharing business in any area that is exterior to the dwelling unit where the home-sharing is occurring. This includes common interior areas.
c) A host must clearly advertise the unit as a shared space. The unit may not be advertised as an "entire home" or "entire unit." This applies even in cases in which the home-sharing takes place in a guest house.
d) In any advertisement of the Home-Share a host must include the Business License number issued by the City.

e) A host must provide guests with information related to emergency exit routes if the unit is part of a multifamily building of more than one story.

f) Transient Occupancy Taxes (TOT) shall be collected on all Home-Sharing rentals. If a Hosting Platform does not collect payment for the rental, hosts are solely responsible for the collection of all applicable TOT and remittance of the collected tax to the City on a monthly basis. If a Hosting Platform does collect payment for rentals, then it and the host shall both have legal responsibility for the collection and remittance of the TOT.

g) A Home-Sharing applicant must provide the following as part of his/her application:

1) Address where the Home-Sharing will take place.
2) Type of dwelling unit (e.g. single family home, apartment, condominium).
3) Whether the applicant is a tenant or owner of the dwelling unit.
4) The total number of full time occupants of the dwelling unit.
5) A list of all persons that will be hosting.
6) Contact information for each person that will be hosting (e.g. email, cell phone).
7) A list of each bedroom, office, den, living room, etc., in the dwelling unit. The list shall include for each room:
   i Whether or not the room will be rented
   ii The maximum number of overnight guests that will be allowed
8) Whether or not the unit is rent controlled.
9) A link to the advertisement of the rental.
10) An affidavit certifying that the host will comply with all of the provisions of the Home-Sharing Ordinance, Business License Conditions for operating a Home-Share as outlined in these rules, and all relevant laws or be subject to revocation of their Business License.

III) HOME-SHARING HOSTS APPLICATION PROCEDURES

Any person who intends on operating a Home-Share from their primary residence shall complete the Home-Sharing Registration Package (HSRP). The HSRP shall include all instructions, check-lists, applications, and other educational materials related to the Home-Sharing Ordinance and relevant local laws that the host is

required to comply with. Home-Share applications are exempt from the Zoning Conformance Review fee and Home Occupancy Permitting requirements.

The applicant must submit all of the following to the Business License unit to register:

a) Business License Home-Sharing Application.
b) Proof of Residency. Acceptable forms of proof include: copy of a current utility bill, cable bill, phone bill, credit card bill or bank statement showing your name and current Santa Monica residential address. Leases, rental agreements, or IDs may not be accepted as proof.

IV) HOSTING PLATFORM REQUIREMENTS

a) The operator of a hosting platform shall report quarterly to the City, in an electronic comma-delimited format or similar format such as MS Excel, the following information:

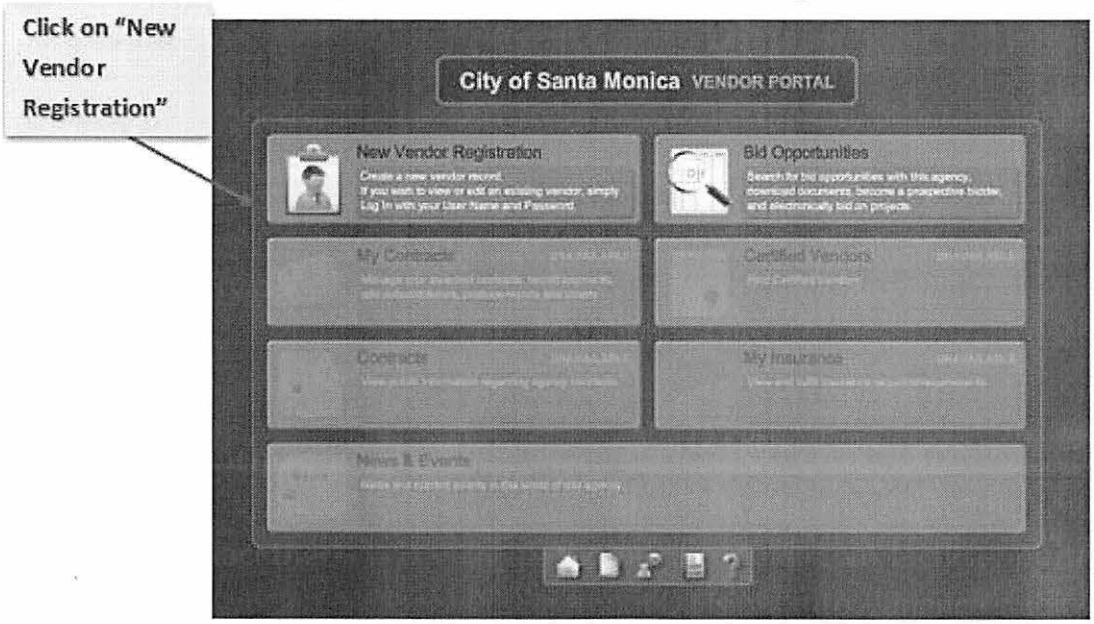
    1) The address of each residential unit that was offered on the operator's hosting platform for occupancy for tourist or transient use and was occupied for that use during that quarterly reporting period.
    2) The total number of nights that the residential unit was occupied for tourist or transient use.
    3) The amounts paid for the occupancy of that residential unit listed.
    4) The name(s) of the person(s) responsible for each unit listed.

b) If the Hosting Platform collects payment for the rental, the hosting platform and the host shall both have legal responsibility for the collection of all applicable TOT and remittance of the collected tax to the City on a monthly basis.
c) A Hosting Platform must provide its Santa Monica host clients or potential host clients the following disclosure:

    "On May 12, 2015, the Santa Monica City Council adopted the Home-Sharing Ordinance reiterating its ban on the rental of entire units as vacation rentals. The Home-Sharing Ordinance also legalized the short term rental of a portion of a person's home when the host lives on-site throughout the visitor's stay and when the host obtains a business license. Hosts are also required to

collect and remit Transient Occupancy Tax (TOT) if not collected and remitted by the hosting platform."

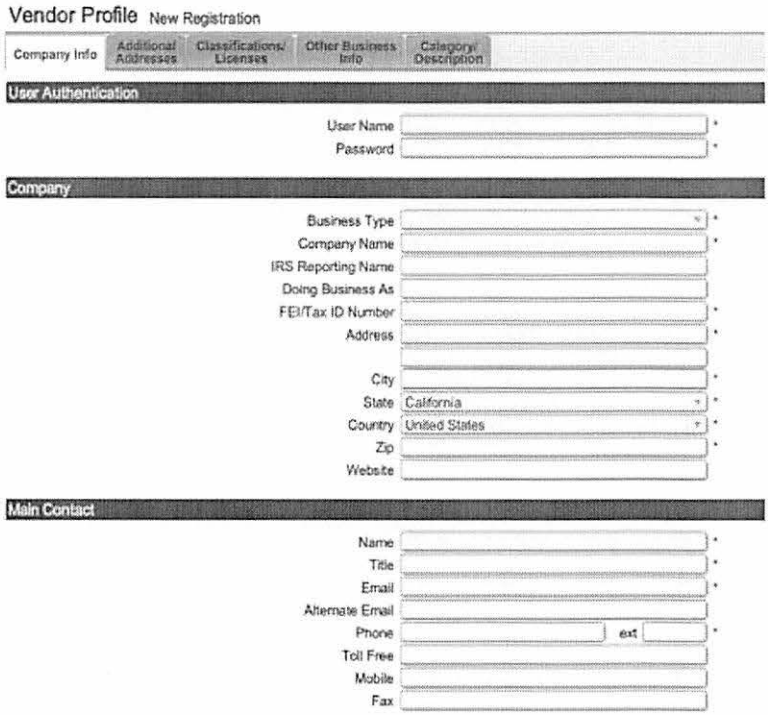
Select "New Vendor Registration" from the main vendor portal.



Next, complete information on each tab, as shown below.

COMPANY INFO

- Fields marked with a red asterisk are mandatory
- You must keep company and contact information up to date at all times.

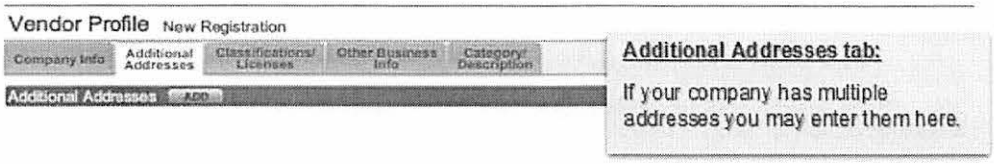


Company Info tab:

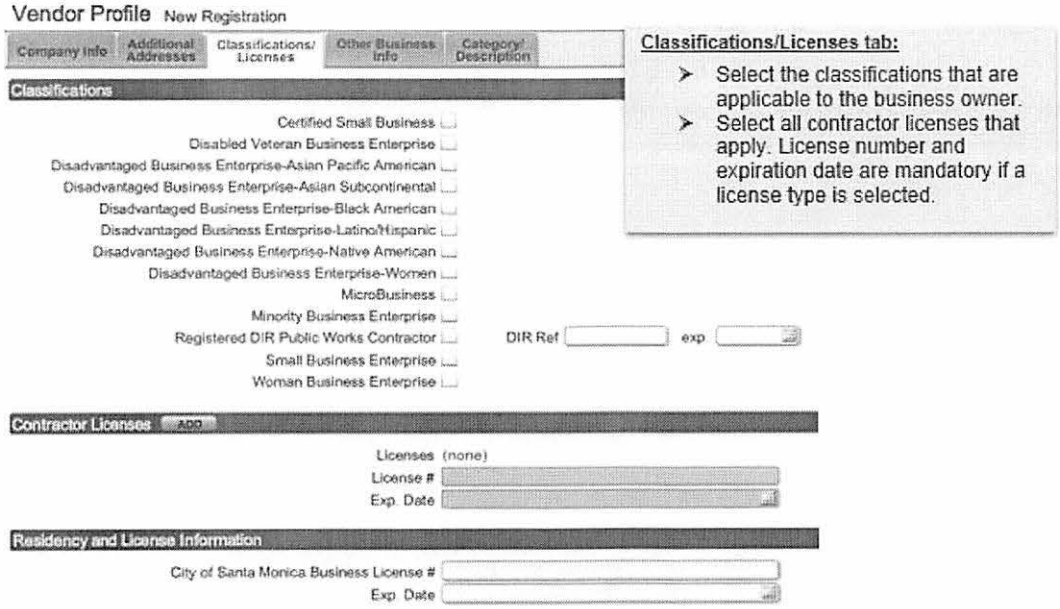
- Select a user name and password (user name/passwords must be between 6-10 characters).
- Complete company information.
- Enter contact information (verify email address is entered correctly).
- In addition to a primary email, an alternate email may be added. Alternate emails are secondary emails that get copied on vendor registration confirmation, user name and password requests, vendor profile edits and new bid alert email messages.

ADDITIONAL INFORMATION

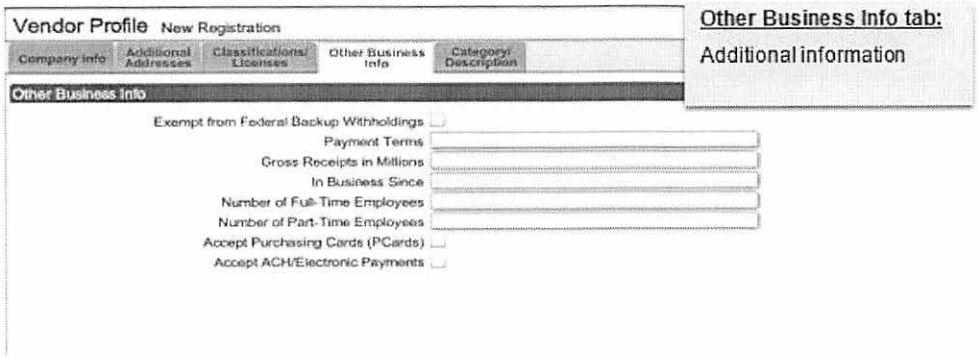
ADDITIONAL ADDRESSES



CLASSIFICATIONS/LICENSES

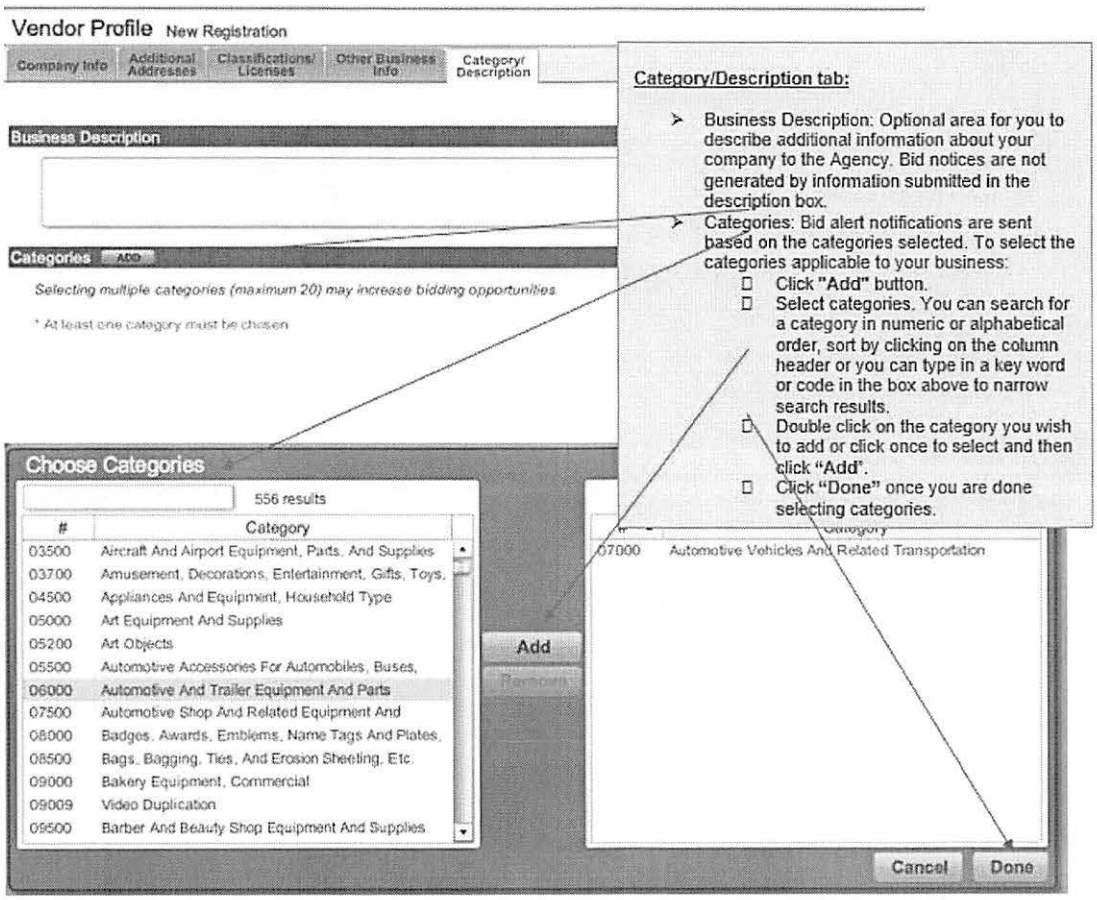


OTHER BUSINESS INFO



CATEGORY / DESCRIPTION

You can click here to view a **current list of commodity codes (http://planetbids.com/santamonica/Category_List.cfm)** for the City of Santa Monica. You can select up to 20 categories. Please be to keep selections up to date.

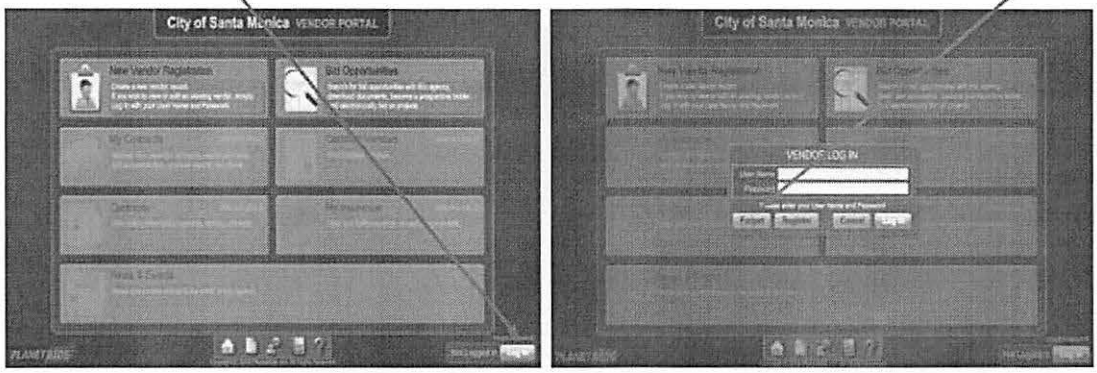


Click on **"Register"** at the bottom of the page when you have completed the registration form.

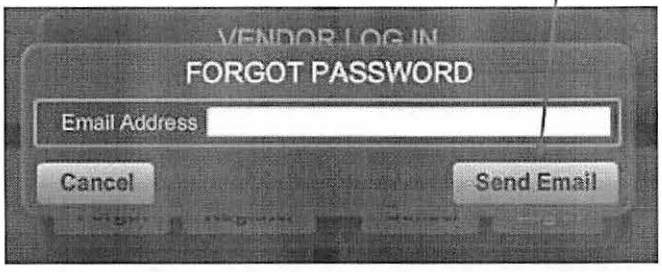
FORGOT YOUR USERNAME OR PASSWORD?

Go to the **vendor portal homepage (https://www.planetbids.com/portal/portal.cfm?CompanyID=15167)**:

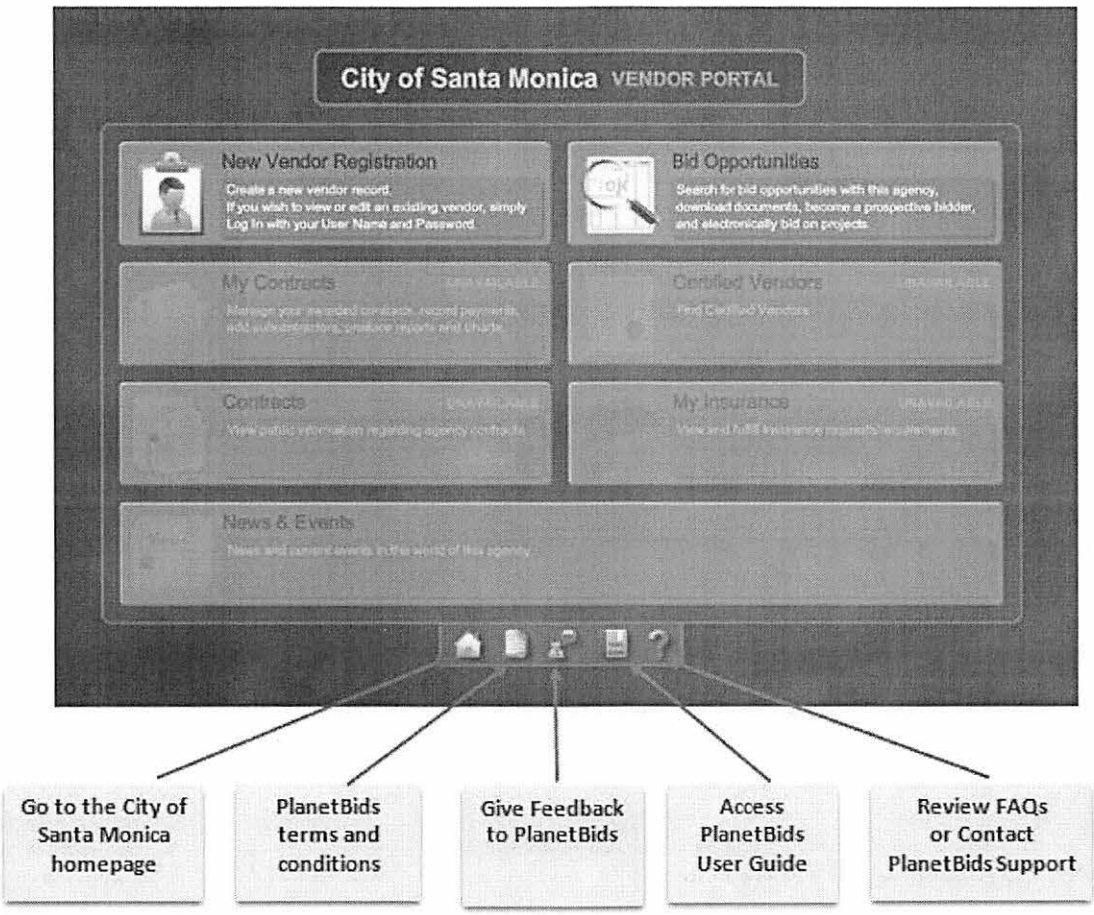
- Click on "**Log In**" on the bottom right side of the screen, then click on "**Forgot**".



Enter your email address and select **"Send Email".** An email will be sent with your user name and password.



USING PLANETBIDS DIRECT LINKS



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Finance Department

1717 4th Street Suite 250
Santa Monica, CA 90401

About (/about)

Contact (/about/contact-us)

Sign In (/Users/Account/LogOn?ReturnUrl=%2Fdoing-business%2Fprocurement%2Fplanetbids)

QUESTION 7 REFERENCES

1) LMC Ch 21.13 Enforcement And Penalties

Chapter 21.13
ENFORCEMENT AND PENALTIES[1]

Sections:

21.13.010 Purpose.
21.13.020 Compliance required.
21.13.030 Enforcing official.
21.13.040 Enforcing official liability.
21.13.050 Right of entry.
21.13.060 Responsibilities defined.
21.13.070 Voluntary correction agreements.
21.13.080 Notice of violation and order.
21.13.090 Violation – Civil enforcement and penalties.
21.13.110 Joint and several responsibility and liability.
21.13.120 Interference with code enforcement unlawful– Misdemeanor.
21.13.130 Approval and permit revocation, suspension and modification.
21.13.140 Repeat violation or failure to abate – Misdemeanor.

21.13.010 Purpose.

The purpose of this chapter is to provide an alternative process that ensures compliance and abate noncompliance with provisions in LMC Titles 12, Streets, Sidewalks and Public Property; 14, Development Standards; 15, Buildings and Construction; 16, Environment; 17, Subdivisions; 18, Zoning; and this title, Development Code Administration. This chapter shall apply as an alternate enforcement process to all regulations as set out in LMC Titles 12, Streets, Sidewalks and Public Property; 14, Development Standards; 15, Buildings and Construction; 16, Environment; 17, Subdivisions; 18, Zoning; and this title, Development Code Administration. If a particular provision in any of said titles provides for a civil infraction or criminal penalties in addition to or as an alternative to enforcement under this chapter, then, at the discretion of the city, a civil infraction may be issued or prosecution as a criminal violation may be undertaken. This chapter shall not apply to enforcement by the city of Chapter 15.10 LMC, Abatement of Dangerous Buildings. This chapter shall apply to all other codes, regulations, programs, permits, approvals and plans referenced in the said chapters, or submitted under or approved under the authority of the said chapters.

The provisions contained in this chapter shall be applied and interpreted to accomplish these purposes. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.020 Compliance required.

A. No person, corporation, partnership, association or other legal entity shall fail or refuse to comply with, interfere with or resist the enforcement of the provisions of this code, LMC Titles 12, 14, 15, 16, 17 and 18 and this title, other laws, ordinances, regulations, plans, permits and approvals as outlined in LMC 21.13.010, and/or any condition of approval imposed by the Leavenworth city council, planning commission, hearing examiner or enforcing official, or a land use order, directive or decision of any other city official. Any such act or failure to act shall constitute a violation under this chapter.

B. Actions under this chapter or other chapters may be taken in any order deemed necessary or desirable by the

city to achieve the purpose of this chapter and the applicable development standards.

C. Proof of a violation of a development permit or approval shall constitute prima facie evidence that the violation is that of the applicant and/or owner of the property upon which the violation exists. An enforcement action under this chapter shall not relieve or prevent enforcement against any other responsible person. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.030 Enforcing official.
The city's code enforcement officers/officials; building officials; building inspectors; construction inspectors; the fire marshal, or his or her designee; fire inspectors; the Chelan County sheriff, or his or her designee; the development services manager, or his or her designee; the director of the public works department, or his or her designee; or any other person or persons assigned or directed by the city administrator or his or her designee, to enforce the regulations subject to the enforcement provisions of this chapter shall be responsible for enforcing LMC Titles 12, 14, 15, 16, 17 and 18 and this title, and other pertinent laws, ordinances, and regulations as outlined in LMC 21.13.010, and may adopt administrative rules to meet that responsibility. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.040 Enforcing official liability.
The enforcing official charged with the enforcement of this chapter, acting in good faith and without malice in the discharge of the duties required by this title or other applicable laws, shall not thereby be rendered personally liable for damages that may accrue to persons or property as a result of an act or by reason of an act or omission in the discharge of such duties. A suit brought against the enforcing official or designee because of such act or omission performed by the enforcing official or designee in the enforcement of any provision of such codes or other pertinent laws or regulations implemented through the enforcement of this chapter shall be defended by the city until final termination of such proceedings. Any judgment resulting therefrom shall be assumed by the city. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.050 Right of entry.
When the enforcing official has reasonable cause to believe that there exists in a building or upon a premises a condition which is contrary to or in violation of this code and is an immediate threat to health and safety which makes the building or premises unsafe, dangerous or hazardous, the enforcing official may enter the building or premises at reasonable times to inspect or to perform the duties imposed by this chapter; provided, that if such building or premises is occupied, credentials be presented to the occupant and entry requested. If such building or premises is unoccupied, the enforcing official shall first make a reasonable effort to locate the owner or other person having charge or control of the building or premises and request entry. If entry is refused, the enforcing official shall have recourse to the remedies provided by law to secure entry. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.060 Responsibilities defined.
The owners are liable for violations of duties imposed by this code and other pertinent laws and regulations as outlined in LMC 21.13.010, even though an obligation is also imposed on the occupants of the building and/or premises. In addition, the owners are also liable when the owner has, by agreement, imposed on the occupant the duty of complying with all or portions of this code and other pertinent laws and regulations as outlined in LMC 21.13.010. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.070 Voluntary correction agreements.
A. At the sole discretion of the city, a voluntary correction agreement may be entered with a person responsible for correcting the violation(s), which may be the owner, agent or occupant.

B. Any such voluntary correction agreement shall be a contract between the city and the person responsible, and shall follow a form to be approved by the city attorney. The agreement shall be entirely voluntary and no one shall be required to enter into such an agreement.

C. In the contract, the person responsible shall agree to the following:

1. Acknowledge a violation(s) exists as shall be briefly there described;

2. Acknowledge it is his/her responsibility to abate the violation(s);

3. Agree to abate the violation(s) by a certain date or within a specified time; and

4. Agree that if he/she does not accomplish the terms of such agreement, the city may proceed without further notice to enforce the applicable provisions of this code and other pertinent laws and regulations as described within this chapter, including entering the premises, rectifying the violation(s), and recovering the expenses and monetary penalties provided for herein.

D. The agreement shall provide that if the person does accomplish the terms of the agreement, as determined by the city, and within the time frame specified therein, the city shall so acknowledge and shall take no further enforcement action or attempt to recover public costs already incurred.

E. The enforcing official may agree to extend the time limit for correction set forth in such agreement or may agree to modify the required corrective action. However, the enforcing official shall not agree to extend or modify the agreement unless the person responsible has shown due diligence and/or substantial progress in correcting the violation, and can show unforeseen circumstances which would require such extension or modification. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.080 Notice of violation and order.
Upon the enforcing official's determination that one or more violations have been committed, except as provided for in LMC 21.13.070, the enforcing official, if enforcement occurs under this chapter, shall issue a notice of violation and order.

A. The notice of violation and order shall, at a minimum, contain the following:

1. The name and address of each property owner of record and any other person the city has determined is responsible for correcting the violation(s);

2. The street address or a legal description sufficient for identification of the property;

3. The assessor tax parcel number(s) of the property;

4. A description of each violation;

5. An order that the use, acts or omissions which constitute violation(s) must cease;

6. A statement of the corrective action required for each violation, with the date by which such action must be completed (the "deadline");

7. A warning: "the failure or refusal to complete corrective action by the deadline will result in enforcement action, civil penalties, a civil infraction and/or criminal penalties as provided in Chapter 21.13 LMC"; and

8. A statement of the right to appeal to the hearing examiner. The appeal is for the sole purpose of the violation. Separate appeal for other actions may be necessary, but shall not be combined with the violation and order appeal. The city will charge no appeal fee for an initial appeal of a notice of violation issued under this section.

B. The notice of violation and order shall be served upon those persons identified in subsection (A)(1) of this section. Service of the notice of violation and order shall be by personal service or by both regular first class mail and certified mail, return receipt requested, addressed to each person's last known address. Service by mail shall be deemed completed three days after mailing.

C. Proof of service shall be made by written affidavit or declaration under penalty of perjury executed by the person effecting the service, declaring the time and date of service, the manner by which service was made, and

if service was made by personal service or by both regular first class mail and certified mail, return receipt requested, facts showing that due diligence was used in attempting to locate a mailing address for the person at whom the notice of violation is directed. Additional proof of service not necessary.

D. The appeal of a notice of violation and order shall be filed with the hearing examiner within 10 calendar days after service of the notice. The appeal is for the sole purpose of the violation. Separate appeal for other actions may be necessary, but shall not be combined with the appeal of the notice of violation and order. Each notice of violation and order and any subsequent letter of assessment shall be appealed separately. Each appeal shall be timely filed. Upon the timely filing of an appeal, the matter shall be scheduled to be heard at the next available appearance by the hearing examiner that is a minimum of 21 but no later than 60 calendar days after the date the appeal was received by the city. Notice of the hearing date and time shall be served by certified mail, return receipt requested, to the address of the party who filed the appeal and requested the hearing. The date and time for any hearing may be rescheduled by the hearing examiner for good cause upon the motion of a party or the hearing examiner.

E. Each day or portion thereof in which the violation continues constitutes a separate offense for which separate notices of violation may be issued. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.090 Violation – Civil enforcement and penalties.
If the person to whom the notice of violation is issued fails to respond as required in this chapter, the violation(s) shall be deemed committed without requiring further action by the city or the city's hearing examiner. In addition, the failure or refusal to complete corrective action by the date set forth in a notice of violation and order (the "deadline") shall subject the person(s) to whom the notice of violation and order was directed to the following enforcement actions and penalties:

A. The enforcing official may revoke, modify or suspend any permit, variance, subdivision or other land use approval issued for the subject property:

1. A person who has been served with a notice of violation must respond to the notice within 14 days of the date the notice is served;

2. That person must comply with the terms and conditions of the notice of violation and order; or

3. Appealing the notice of violation and order as set forth in this chapter. An appeal shall not relieve the person responsible for the violation from the duty to correct or abate the violation. Additional notices of violation may be issued if the violation goes uncorrected;

B. Civil penalties and notices shall be applied as follows:

1. A civil penalty of $250.00 shall be assessed. If there has not been compliance with the notice of violation and order, and there is no appeal, or the appeal is denied, dismissed or withdrawn, a first new letter of assessment, stating the assessment of the $250.00 civil penalty, at the option of the city, shall then be sent in the same manner as the original notice of violation and order as set forth in LMC 21.13.080. The first new letter of assessment shall state that in the event of the further failure or refusal to complete the corrective action within 15 days of the date of service of the first new letter of assessment, a second and additional civil penalty shall be assessed in the amount of $1,000. The first new letter shall include a statement of the right to appeal to the hearing examiner as set forth in LMC 21.13.080;

2. In the event of further failure or refusal to complete the corrective action within 15 days of the date of service of the first new letter of assessment, a second new letter of assessment, stating the assessment of a $1,000 additional civil penalty, at the option of the city, shall be sent in the same manner as the original notice set forth in LMC 21.13.080. The second new letter of assessment shall (a) state the assessment of the first letter of assessment; (b) state the additional second civil penalties; and (c) shall include a statement of the right to appeal to the hearing examiner as set forth in LMC 21.13.080;

3. In the event of the further failure or refusal to complete the corrective action within 15 days of the date of service of the second new letter of assessment, a third new letter of assessment, stating the assessment of a $1,500 additional civil penalty, at the option of the city, shall then be sent in the same manner as the original notice set forth in LMC 21.13.080. The third new letter shall state the assessment of the first, second, and third civil penalties and shall include a statement of the right to appeal to the hearing examiner as set forth in LMC 21.13.080;

4. Upon the expiration of the appeal period stated in the third new letter of assessment, the city, in addition to any other remedy authorized by law or the Leavenworth Municipal Code, may commence an action in the Chelan County superior court to collect the civil penalties assessed and, in addition, the city may exercise any remedy set forth in subsections (C), (D), (E), and (F) of this section;

C. The city, through its authorized agents, may, in addition to any other remedy provided herein, initiate abatement or injunction proceedings or other appropriate action in the municipal court, or the courts of this state, to prevent, enjoin, abate or terminate violations of this chapter. The city may obtain temporary, preliminary, and permanent injunctive relief from the Chelan County superior court;

D. The city may enter the subject property and complete all corrective action. The actual costs of labor, materials and equipment, together with all direct and indirect administrative costs, incurred by the city to complete the corrective action shall be paid by property owner(s) of record, and shall constitute a lien against the subject property until paid. A notice of claim of lien shall be recorded with the Chelan County auditor. Interest shall accrue on the amount due at the rate of 12 percent per annum. In any action to foreclose the lien against the subject property, all filing fees, title search fees, service fees, other court costs and reasonable attorneys' fees incurred by the city shall be awarded as a judgment against the property owner(s) of record, and shall be foreclosed upon the subject property together with the principal and accrued interest;

E. The remedies provided in subsections (A) through (D) of this section are cumulative remedies and not alternative remedies and are in addition to any other remedy to which the city may be entitled by law;

F. In any action brought by the city to enforce this chapter or in any action brought by any other person in which the city is joined as a party challenging this chapter, in the event the city is a prevailing party, then the nonprevailing party challenging the provisions of this chapter, or the party against whom this chapter is enforced in such action shall pay, in addition to the city's costs, a reasonable attorney's fee at trial and in any appeal thereof. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001.]

21.13.110 Joint and several responsibility and liability.

A. Responsibility for violations of the codes enforced under this chapter is joint and several, and the city is not prohibited from taking action against a party where other persons may also be potentially responsible for a violation, nor is the city required to take action against all persons potentially responsible for a violation.

B. Where a person or entity has been found to have committed a violation under this chapter, regardless of whether the violation was resolved without penalty, the failure to abate the violation, or the commission of a subsequent violation, or the violation of a written order of the hearing examiner after having received notice of the order as provided in this chapter, shall each constitute a repeat violation and shall each be a misdemeanor subject to the penalties and provisions of this chapter. The city attorney, or the city attorney's designee, shall, at his or her discretion, have authority to file a repeat violation as either a civil violation or as a misdemeanor. [Ord. 1437 § 1 (Att. A), 2013.]

21.13.120 Interference with code enforcement unlawful – Misdemeanor.

Any person who intentionally obstructs, impedes, or interferes with any lawful attempt to serve notice of a violation, stop work or stop use order, or an emergency order, or intentionally obstructs, impedes, or interferes with lawful attempts to correct a violation shall be guilty of a misdemeanor punishable by imprisonment in jail for a maximum term fixed by the court of not more than 90 days or by a fine in an amount fixed by the court of not more than $1,000, or by both such imprisonment and fine. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010;

Ord. 1158 § 3, 2001. Formerly 21.13.100]

21.13.130 Approval and permit revocation, suspension and modification.
A. A permit, variance, subdivision or other land use approval may be revoked, suspended or modified on one or more of the following grounds:

1. Failure to complete corrective action as required pursuant to a notice of violation and order;

2. The approval was obtained through fraud;

3. The approval was obtained through inadequate or inaccurate information;

4. The approval was issued contrary to law;

5. The approval was issued under a procedural error that prevented consideration of the interests of persons directly affected by the approval;

6. The approval is being exercised or implemented contrary to the terms or conditions of the approval or contrary to law;

7. The use for which the approval was issued is being exercised in a manner that is detrimental to public health, safety or welfare;

8. Interference with the performance of federal, state, county or city official duties.

B. Action to revoke, suspend or modify a permit, subdivision, or other land use approval shall be taken by the enforcing official through issuance of a notice of violation and order as described in LMC 21.13.080.

C. If a permit or approval is revoked for fraud or deception, no similar application shall be accepted for a period of one year from the date of final action and appeal, if any. If a permit or approval is revoked for any other reason, another application may be submitted subject to all applicable requirements contained in this code and other pertinent laws, ordinances, and regulations. [Ord. 1437 § 1 (Att. A), 2013; Ord. 1375 § 1 (Att. A), 2010; Ord. 1158 § 3, 2001. Formerly 21.13.110]

21.13.140 Repeat violation or failure to abate – Misdemeanor.
Where a person or entity has been found to have committed a violation under this chapter, regardless of whether the violation was resolved without penalty, the failure to abate the violation, or the commission of a subsequent violation, or the violation of a written order of the hearing examiner after having received notice of the order as provided in this chapter, shall each constitute a repeat violation and shall each be a misdemeanor subject to the penalties and provisions of LMC 21.13.120. The city attorney, or the city attorney's designee, shall, at his or her discretion, have authority to file a repeat violation as either a civil violation or as a misdemeanor.

For the purpose of this chapter, "repeat violation" means, as evidenced by the prior issuance of a correction notice or a notice of violation, that a violation has occurred on the same property within a two-year period, or a person responsible for a violation who has committed a violation elsewhere within the city of Leavenworth within a two-year period. To constitute a repeat violation, the violation need not be the same violation as the prior violation. [Ord. 1437 § 1 (Att. A), 2013.]

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[1]Prior ordinance history: Ord. 1088.

Mobile Version