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MEMORANDUM – PUBLIC RECORD

TO: Mayor, City Administrator, Leavenworth City Council, and Leavenworth Planning Commission

FROM: Weed, Graafstra & Associates, Inc. P.S., City Attorneys for Leavenworth

DATE: 07/11/16

RE: Important Information Concerning Short Term (less than thirty day) Rentals

INTRODUCTION

These informational materials are prepared in response to the request of Leavenworth City Administrator, Joel Walinski. The goal of these materials is to generally survey legal issues related to short term rentals in residential zones in the City.

These informational materials address the following questions:

1. May a City completely ban, or preserve a ban of short term rentals in residential zones?
2. If a complete ban is lawful, how should that ban be written and implemented?
3. May a City impose a limited ban of short term rentals in residential zones?
4. If a limited ban is lawful, what options are available for that ban and how should the ban be written and implemented?
5. Rather than a ban or limited ban, may a City regulate short term rentals in residential zones?
6. What types of lawful regulation of short term rentals may be advisable? and
7. Depending on the option chosen to address short term rentals, what enforcement mechanisms are available to the City?

BACKGROUND

A. Current City Code

In 1989 by Ordinance 852 Leavenworth first defined "Transient Accommodation." That definition has been amended from time to time and is currently codified as LMC 18.08.405 and

reads as follows:

> **18.08.405 Transient accommodation.** "Transient accommodation" means a dwelling unit or motel room regularly rented to transient guests with a less than monthly rental period for each individual or group of guests.

The definition addresses rentals ('rented') "less than[a] monthly rental period to transient guests in both a motel room and in a dwelling unit." The term "transient guests" is not defined by code. "Dwelling unit" is defined in LMC 18.08.150 as follows:

> **18.08.150 Dwelling unit.** "Dwelling unit" means one room or rooms connected together constituting a separate, independent housekeeping establishment for owner occupancy, rent, or lease, to one individual family on a monthly or longer basis, and which is physically separated from any other rooms or dwelling units which may be in the same structure and which contains independent cooking and sleeping facilities.

Leavenworth is divided into several zoning districts, including the Residential Low Density 6000 District (RL6), the Residential Low Density 12,000 District (RL 12) and the Multifamily Residential District. These zones and their permitted uses were established by Ordinance 1089 enacted in 1998.

The zoning code, generally Chapter 18.20, 18.21, 18.22 and 18.24 for residential zones, builds upon itself, such that uses permitted and prohibited in one zone, the RL6 zone, become the starting point for permitted and prohibited uses in the next zones, either the RL 12 or the Multifamily Residential Zone. Through this built up approach, Leavenworth currently does not permit, and therefore bans, "transient accommodations" in its residential zones.

In the RL 6 zone, a so-called "Group A home occupation" is allowed. LMC 18.20.020 G. But LMC 18.20.020 G 15 c. prohibits "transient accommodations" as a "Group A Home occupation" in the zone rendering "transient accommodations" not permitted and therefore currently banned in that zone in the City. In the RL 12 zone "Group A home occupations" are allowed to the same extent as in the RL 6 zone, and since they are not permitted in the RL 6 zone they are not permitted in the RL 12 zone. LMC 18.21.020 G. Group A home occupations are not addressed in the Multifamily Residential District. Instead, LMC 18.22.020 permits uses that "are permitted outright in the low density residential districts." LMC 18.22.020 A. Since "transient accommodation" is not permitted in the RL 6 or RL 12 zones, by this carryover in LMC 18.22.020 a transient accommodation is not permitted but banned in the Multifamily Zone.

In summary based upon Ordinance 1089 from 1998 short term overnight vacation rentals (transient accommodations) currently are not permitted but banned in the City in its common

residential zones, the RL 6, RL 12 and Multifamily Residential zones.

B. Changes in Rental Options since 1998

In 1996 shortly before the City's current code was enacted, VRBO (Vacation Rental by Owner) was founded. In 2004 HomeAway, Inc. was founded. HomeAway acquired VRBO in 2006. HomeAway now owns a multitude of short term rental sites and purports to have more than 1,000,000 vacation rental listings in 190 countries. AirBNB grew into existence between 2007 and 2009. This company also has hundreds of thousands of listings and has done millions of guest bookings.

In addition to these multinational listing companies, there have been vacation rental companies established statewide and in the Leavenworth market. The city has received many reports of short term rentals in its residential zones in violation of its current ban.

These for profit short term rental sites should not be confused with house sharing arrangements, where an owner allows third parties to reside in their residence either for support or assistance or with the expectation of reciprocity. Homeshare, a housing exchange goes back to the 1970s, but has been experiencing growth since 1999, with the establishment of Homeshare International. What manner and amount of home sharing is occurring in Leavenworth is unknown.

Human imagination will undoubtedly find other lodging arrangements to satisfy needs or to generate profits. It is therefore likely, that however Leavenworth addresses short term rentals, or rental like arrangements in its residential zones, the City will be in a chronic catch up mode.

C. Organization of the Balance of this Paper

The balance of this paper will address the questions posed in the introduction. To keep the length of this paper manageable and readable, each question and answer will be kept to one page or less. As a result, legal analysis will be provided in a summary fashion with a minimum of citation to either applicable statutes or case law. A single copy of this paper with an appendix containing source materials, and where applicable, legal authorities, will be supplied to City Administrator Walinski, and will be available for inspection and reference.

ADDRESSING THE QUESTIONS

Question 1: May a City completely ban, or preserve a ban of short term rentals in residential zones? SHORT ANSWER: *Yes, in certain circumstances where justified by the record made to establish or preserve a ban, a complete ban may be imposed.*

Local zoning is the exercise of police power (ie., "local police, sanitary and other regulations") under Article XI section 11 of the Washington Constitution. A local zoning ordinance is presumed valid, until it is shown to "be clearly unreasonable, arbitrary or capricious." Therefore, if an ordinance promotes the "public safety, health or welfare and bears a reasonable and substantial relationship to accomplishing the purpose pursued," a zoning ordinance is valid and lawful. The City's current ban, and any preservation of the ban, will be measured against this standard. Thus, if a ban is to be preserved by an Ordinance making only technical changes, the current record and the record for Ordinance 1089 from 1998 will need to demonstrate that short term rentals are (1) inconsistent with the Comprehensive Plan and related planning documents of the City, (2) have documented negative impacts on the residential zones and their residents, and/or (3) impede or negatively impact other important goals of the City, for example perhaps achieving population and affordable housing goals. On a proper record a ban would be lawful because it is reasonable and it accomplishes the purpose pursued.

Some may assert that municipal short term housing bans already have been found unlawful in the State of Washington. This is incorrect. No reported Washington decision has found a municipal ban on short term rentals unlawful. The only Washington case law relates to private bans in subdivision covenants. In a number of Washington cases, such private bans on short term rentals have been found unenforceable for a variety of reasons. In these private ban cases, there is language in the opinions that questions if true differences exist between a long term rental and a short term rental.

We are aware also of one Superior Court decision, Aquavella v. City of Seattle, where the City of Seattle's municipal ban on short term rentals was found by the Superior Court not in fact to impose a ban on short term rentals. This case is not a precedent and does not provide guidance on the lawfulness of municipal bans on short term rentals.

There are cases on municipal short term rental bans outside Washington. This case law is a mixed bag. In some cases, the purported ban was found, on its specific terms, not to ban the rental arrangement at issue. A case or two may hold that bans based on public perception of impacts from short term housing are not lawful bans. On the other hand, cases also demonstrate examples where a ban, based upon a proper record of actual impacts and public goals thwarted (preserving affordable housing stock) are lawful.

For these reasons, we conclude that municipal bans of short term rentals, on the proper record, are lawful in Washington.

Question 2: If a complete ban is lawful, how should that ban be written and implemented?
SHORT ANSWER: *Zoning bans have been found unenforceable in instances where "single family residences" are permitted, and the ban inadequately relates to ill-defined short term*

occupancies. It is important that any definition of "single family" be written so that a short term rental is not permitted by the permission for a "single family residence."

For example, in the Seattle Case, the Court evaluated whether rental of condominium units for three or more days at a time violated City Codes as an impermissible lodging use. The Court found that the City's definition of lodging use "a retail sales and service use in which the primary activity is the provision of rooms to transients." SMC 23.84.024 did not apply in this case. The City did not explicitly define transients and when the Court looked elsewhere, the dictionary and the Condominium CC&R's (which prohibited rentals less than three days), the Court found that the disputed activity did not fall within the City's lodging definition and was a residential use permitted in the multi-family zone.

For these reasons we conclude that any complete ban must be carefully written to not be part of a zoning code where single family residential is outright permitted, but an ill-defined prohibition is established for short term rentals. Courts have found zoning permitting "single family residences" to permit short term rentals unless there is extreme care taken in defining what is a single family residence, and in such definition it is clear that short term rental is not included. Depending upon the policy direction taken on the question of short term rentals we will work with staff, the planning commission and the city council to insure as best as possible that ambiguity does not develop in what is permitted and prohibited in Leavenworth.

Question 3: May a City impose a limited ban of short term rentals in residential zones? SHORT ANSWER: *Yes, reason based distinctions are permissible in imposing a zoning code provision.*

Zoning to be lawful must be "generally applicable" and satisfy the criteria discussed in answer to Question 1 to be lawful. "Spot zoning" is its evil opposite and not lawful because it either favors a particular property or discriminates against a particular property. Therefore, differential regulation is lawful and permissible, even for adjacent lands, if it is justified by the public interest, bears a rational relationship to achieving that public interest, and is not designed to achieve a private interest.

Within this large context, it is permissible to address short term rentals differently in different zoning districts. It is permissible to make distinctions based on distance from or proximity to commercial areas. It is also possible to impose partial bans based on amount of use during a period of time. In fact this is the approach Seattle has taken to respond to the Seattle Case. A copy of Seattle's new proposed ordinance (the "Seattle Ordinance"), scheduled for further action on July 20, 2016 is in the Appendix to this paper.

Question 4: If a limited ban is lawful, what options are available for that ban and how

should the ban be written and implemented? SHORT ANSWER: *So long as reason based, and not based on private interest, both ban/no ban based on geographic area, or ban some of the time but not all of the time are lawful.*

The proposed Seattle Ordinance distinguishes between owner occupied and non-owner occupied residences. "Owner occupied" residences are not restricted by time for short term rentals. "Non-owner occupied" residences are subject to a partial time ban, and short term rentals are limited to 90 days in a twelve (12) month period.

Geography based regulations generally come in two forms. The first form is a ban or regulation based on the zone within which the potential rental is located. For example, cities and counties have had regulations upheld when short term or transient rentals are banned in all residential areas or a subset of residential areas (i.e. banned in low density residential only but allowed in moderate density or multi-family zones). The second form is when regulations allow short term or transient rentals that are within a certain distance to commercial or business zones regardless of the particular parcel's zoning designation. This second form is far less common.

Question 5: Rather than a ban or limited ban, may a City regulate short term rentals in residential zones? SHORT ANSWER: *Yes.*
We have found multiple examples of regulation of short terms rentals. The types of regulations employed range across a broad spectrum, and include: registration/business licensing requirements, taxation (sales and lodging tax), occupancy time or number limits, parking limits, initial and follow up inspections, setbacks, and limits on concentration in a neighborhood or street segment.

Generally, there has been little litigation on these types of regulations, though there has been a challenge by HomeAway whether lodging or related taxes apply to them, and/or whether they must collect taxes for their bookings. Hotels.com has litigated with some success questions whether local registration, business licensing and taxation apply to their internet services.

Question 6: What types of lawful regulation of short term rentals may be advisable? SHORT ANSWER: *If the policy decision is made not to preserve the current ban, or not to impose a rigorous limited ban, regulations ranging from registration and taxation, owner/nonowner regulations, limits on number of occupants, requirements for parking and inspection may be advisable.*

Based upon our review to summarize the applicable law in this Memorandum, and to review articles containing general information and trends on short term housing, we have arrived at the firm conviction that regulation in the following areas may be advisable:

a. Registration and business licensing. This will require revisions to the definitions in LMC 5.04.020 to make clear that rental of transient accommodations is business and the activity of engaging in business. In light of litigation involving HomeAway and Hotels.com registration of such national services, if included, may pose the risk of litigation.
b. Lodging Tax. To resolve any ambiguity, if lodging taxation is desired, the addition of a definition to LMC 3.48.020 defining the "furnishing of lodging" would be indicated. Since the City's sales or use tax taxes sales that are taxable under State law, we do not see any need to revise LMC Chapter 3.24 related to sales tax.
c. Owner/non-owner regulations. The Seattle Ordinance provides an example where broad overnight rental is allowed in an owner occupied unit, but limited rentals are allowed for non-owner occupied units. This type of approach would indicate a new chapter in Title 18 LMC.
d. Occupancy limits. Special occupancy limits and access requirements consistent with appropriate life safety concerns are broadly recommended. Such regulations if desired probably should appear in Title 18 LMC
e. Inspection requirements. To insure compliance with other regulations that might be imposed an initial and a periodic inspection could be a requirement. These requirements probably would be best located in a new proposed chapter in Title 18 LMC
f. Parking Requirements. City code also contains parking requirements for certain occupancies (for example for an accessory dwelling unit; see LMC 18.20.020 B 3). If regulation is pursued, a similar approach, perhaps variable by zone, would appear to be warranted.

Question 7: Depending on the option chosen to address short term rentals, what enforcement mechanisms are available to the City? SHORT ANSWER: *The City has choices among its enforcement mechanism. We recommend an active enforcement approach utilizing the notice and order provisions of Chapter 21.13 LMC*

Leavenworth addresses municipal code enforcement in three ways. Some misconduct is designated criminal and made a misdemeanor, other misconduct is made a civil infraction, and yet other misconduct becomes the basis of a notice leading to administrative enforcement. The City has no felony power.

A misdemeanor must occur in the presence of a police officer to be cited, and processing of the misdemeanor goes to the Chelan County District Court. Depending on outcome, the City may be saddled with a jail bill, that may or may not be recoverable, and if a fine is imposed, the fine if paid does not go to the city but is paid to the District Court. Misdemeanor prosecution has the advantage of a genuine "sting" up to potentially jail time, but the serious disadvantages of

"police observation," associated costs for police and potential jail time, potential liability associated with a wrongful arrest, and the City loss of control over the process since the matter is handled by the prosecutor and the courts. Note there is also lack of clarity on who to cite, the owner or tenant.

A civil infraction need not occur in the presence of a police officer. However, a civil infraction is referred to the Chelan County District Court too, and if the infraction is sustained, any penalty for the infraction is paid to the District Court. A civil infraction does not have the "sting" of a misdemeanor, but does preserve the civil as opposed to criminal nature of the enforcement. Costs of a civil infraction are thus greatly reduced. A civil infraction also has the disadvantage of loss of control because the matter is handled by the courts.

The City therefore generally has used its enforcement and penalty provisions of Chapter 21.13 to deal with land use issues and enforcement matters. This code has been updated to address any due process concerns. The code is typical for such enforcement codes, and to some degree time consuming. However, it does lead to the City potentially recovering some of its costs of enforcement because penalties imposed go to the City if paid.

Because of the advantages and disadvantages set out, it has been and remains our opinion that the enforcement process of Chapter 21.13 generally should apply to zoning code violations.

Should the policy decision be made to require registration and to impose taxation, then enforcement mechanisms consistent with business licensing (Chapter 5.04 LMC) and lodging taxation (Chapter 3.48 LMC) should be imposed too.

In preparing this paper, we have come across repeated statements that local government is "catching up" as it relates to short term rentals. This observation has typically been accompanied by an admonishment that if a city wishes to deal with short term rentals, then its enforcement process must be active and not merely complaint driven and passive. An active program to monitor and a program of quick response to complaints is necessary to bring about enforcement and even then enforcement likely will be costly and difficult. We concur in these observations.

APPENDIX – REFERENCE LIST

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

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)

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

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

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 Housing Laws in Anaheim, CA
2) Airbnb Housing Laws in Los Angeles, CA
3) Airbnb Housing Laws in San Francisco, CA
4) Airbnb Housing Laws in Tacoma, WA
5) Airbnb Housing Laws in Seattle, WA
6) Airbnb Housing Laws in Bellevue, WA
7) *City of Portland v. homaway.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)

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

QUESTION 7 REFERENCES

1) LMC Ch 21.13 Enforcement And Penalties