

The Rise of Vacation/Short-Term Residential Rentals and What Cities Are Doing About It

February 4, 2015
10:00 – 11:30 a.m.



Agenda

- **Introduction and Welcome**

- Kirstin Kolpitcke, Legislative Representative for the League of California Cities
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- **Webinar Presentation**

- Betsy Strauss, Special Counsel for the League of California Cities
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- Michael Barrett, City Attorney for Napa
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- Andrea Visveshwara, Assistant City Attorney for Petaluma
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- Trevor Rusin, Assistant City Attorney for the Cities of Malibu, Hermosa Beach and Lomita
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- **Question and Answers**

How to Ask a Question

- All phone lines have been muted.
- For written questions - use the Q&A window to the right side of your screen. Please enter your name, title and city.

Issues

- ◆ Will short-term rental of residence be regulated as new land use?
- ◆ Will short-term rental of residence be regulated as a business?
- ◆ Will business license tax be imposed on owner/lessee?
- ◆ Will business license tax be imposed on “hosting platform” or other Internet advertising site?

Issues - Continued

- ◆ Will transient occupancy tax be imposed on stay of less than 30 days?
- ◆ Who will be required to collect and remit T.O.T.?
- ◆ How will information about units for rent be gathered?
- ◆ Is an annual reporting requirement necessary?

San Francisco's Experience

- ◆ S.F. had long prohibited rental of residential housing units for less than 30 days. Ordinance passed in 10/14; effective 2/1/15.
- ◆ Allows short-term rentals under certain circumstances when “permanent resident” occupies residential unit for no less than 275 days/year.
- ◆ Registration requirement and annual reporting requirement
- ◆ Imposes requirements on “hosting platforms” including required notice to users of service, and collection and remission of 14% T.O.T.

Homeaway, Inc. v. S.F.

Case No. 14-cv-04859-JCS 01/27/15

- ◆ Homeaway “operates world’s largest online marketplace in the vacation rental industry” comprising many websites including homeaway.com, vrbo.com, vacationrentals.com, and bedandbreakfast.com.
- ◆ Listing owners pay Homeaway a fee or purchase subscription. Homeaway does not “participate in rental transaction:” (1) does not know whether rental transaction has occurred; (2) cannot collect TOT.
- ◆ Two dormant commerce clause challenges: ordinance discriminates against out-of-state SF property owners and “advertising venues” (vs. “agency” business model).

Homeaway v. S.F. cont'd

- ◆ **Commerce clause challenges fail:** Homeaway lacks standing to challenge occupancy requirements because it is not a party to the transactions and is not a non-resident owner. Can't assert rights of its customers.
- ◆ **T.O.T.:** Homeaway is not an “operator” under the SF tax regulations [“a website company or any other person acting as a merchant of record who receives rent in connection with an occupancy transaction”]

Business License Tax

- ◆ Impose on owner/lessee of residential unit?
- ◆ Impose on “hosting platform” or other online presence that facilitates short-term rentals?
- ◆ A local tax does not violate Commerce Clause if “it is applied to an activity which has a substantial nexus with the taxing jurisdiction, is fairly apportioned, does not discriminate against interstate commerce, and is reasonably related to services provided by the taxing jurisdiction” (*Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279).
- ◆ Voter approval required?

Transient Occupancy Tax

- ◆ Rev. & Tax Code § 7280 [“...cedes to cities and counties the ability to levy taxes on occupancy of rooms in hotels and other lodgings unless occupancy is for a period of more than 30 days....” *Kumar v. Superior Court* (2007) 149 Cal.App.4th 543, 552].
- ◆ “...the power to tax carries with it the corollary power to use reasonable means to effect its collection; otherwise the power to impose a tax is meaningless” (*Ainsworth v. Bryant* (1949) 34 Cal.2d 467, 476).
- ◆ Importance of following city-adopted procedures (*City of Oakland v. Hotels.com* 572 F.3d 958, 961 (9th Cir. 2009)).
- ◆ Use of legislative subpoena: *Kumar v. Superior Court* (2007) 149 Cal.App.4th 543.

Airbnb Website

- ◆ <https://www.airbnb.com/help/responsible-hosting>
- ◆ Refers “hosts” to links to websites of 13 cities
- ◆ *“When deciding whether to become an Airbnb host, it is important for you to understand the laws in your city. As a platform and marketplace we do not provide legal advice, but we want to give you some useful links that may help you better understand laws and regulations in Healdsburg, CA. This list is not exhaustive, but it should give you a good start in understanding your local laws. If you have questions, contact the [Department of Planning and Building](#) or other city agencies directly, or consult a local lawyer or tax professional.”*

Push for state legislation

- ◆ Some organizations see need for state legislation
- ◆ Existing law provides cities with tools they need to regulate land use and business impacts of short-term “vacation” rentals of residential uses.

Regulation of Vacation Rentals in the City of Napa

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Scope of Presentation

- City of Napa's Efforts (2008 – 2010)
- Balance:
 - “Transient” (30 days or less) Tourism Economy
 - Preserve Tranquil Residential Neighborhoods (and Housing Stock)
- Regulatory Stability
- 2014 – 2015 Demand for Additional Changes

City of Napa's Tourism Economy

	Room Rate	Revenue to City
➤ TOT	12%	\$15.5M
➤ TBID	1.5%	(Countywide)
➤ TBID	0.5%	\$300K

➤ 2005/2006: TOT	is 12% of General Fund
➤ 2014/2015: TOT	is 22% of General Fund
	Sales Tax (22% of General Fund)
	Property Tax (35% of General Fund)

Types of Transient Occupancies

- Hotels 22 facilities / 2,122 rooms
- Bed & Breakfast 18 facilities / 182 rooms
- Vacation Rentals
 - 2002: 5 facilities (not permitted)
 - 2008: 44 facilities (permitted)

Conflicting Approaches to VR Regulation: “Conditional Licenses”

- 2002: 5 facilities (13 rooms) not authorized per zoning:
- “Conditional” business licenses:
 - Owner acknowledged:
 - Owed TOT and Business License Tax
 - Ongoing use not “permitted” under zoning
 - Possible termination if zoning not amended
 - City identified “plan” to analyze zoning amendment

Conflicting Approaches to VR Regulation: Enforce Violations

- 2002-2008: Number of facilities grew from 5 to 50.
- Number of complaints from neighbors grew:
 - Demand for illegal units to be shut down
 - Noise, traffic, parking, garbage
- 2006: City filed injunction to close one illegal unit
- Complaints from neighbors continued to mount

“Clear Up” the Conflict

Stop Issuing “Conditional Licenses”

- January 9, 2008: City stopped issuing any new Conditional Licenses (pending Council review of the City’s VR policy)
- Word spread quickly among community of VR owners and Real Estate brokers
- Argued that City staff had provided “permission”:
 - Invested in new VR business based on reasonable reliance on representations from City staff

March 2008 Council Meeting

- Strong and Conflicting Presentations:
 - VR Owners and Real Estate Brokers:
 - Investments based on representations from City
 - Value to the Community (tourist based economy)
 - Well run businesses are good neighbors
 - Residential neighbors:
 - Adverse impacts on peace and tranquility
 - Shut down illegal uses
- Council directed process for compromise solution

Urgency Interim Permits

- Many communications and meetings with community
- 7/1/2008: Urgency Interim Ordinance:
 - Establish regulations to permit continued operation if, as of January 9, 2008:
 - Existing conditional license, or
 - “Pipeline” project: provide documentation of reasonable reliance and investment in VR business based on representation from City
- Potential licensees limited to 69:
 - 50 existing conditional licenses
 - 19 approved for “pipeline” status (of 33 applications)
 - Agreed to comply with new/undefined regulations

Vacation Rental Ordinance

- July 2008 – April 2009, many more community meetings
- Ordinance adopted April 7, 2009 (NMC Section 17.52.515)
 - Treat as quasi-legal nonconforming use (gradual elimination, non-transferable)
 - Prove mitigation of adverse impacts on neighbors: (noise, traffic, parking, garbage, light, privacy, safety)
 - Annual notices to neighbors with contact information
 - Limit overnight guests (2 per bed rm, max 10)
 - Limit daytime guests (2x overnight)
 - Require owners to impose house “rules” on renters
 - Annual inspections

Vacation Rental Permits

- 49 Applications submitted (of 69 possible):
 - 44 Vacation Rental Permits issued
 - 2 applications approved as Bed & Breakfast Inn
- 3 challenges of City decision to deny VR permit (all based on unmitigated impacts on neighbors)
 - 3 appeals filed with Planning Commission
 - 2 appeals filed with City Council
 - 1 lawsuit successfully defended

Vacation Rental Implementation

- July – September 2010: Ordinance and fee structure amended:
 - Minimal complaints from neighbors
 - Reduced allocation of code enforcement staff
 - Regulatory fee reduced from \$1,075 to \$197 per year
- 2014 – 2015: Interest in increasing number of VR permits
 - January 2015: first community meeting
 - Anticipated presentations to Planning Commission and City Council in 2015

City of Napa Resources

- 3/18/2008: Council Report: Proposal to regulate vacation rentals
- 5/20/2008: Council Report: Refining “Pipeline” project definition
- 7/1/2008: Council Report: Recommend Interim Urgency Ordinance
- 7/1/2008: Interim Urgency Ordinance O2008-9
- 3/3/2009: Council Report: considering Vacation Rental Ordinance
- 3/17/2009: Council Report: first reading of Vacation Rental Ordinance
- 4/7/2009: Council Report: second reading/adopt VR Ordinance
Vacation Rental Ordinance O2009-6
- 5/5/2009: Council Report: established regulatory fee for VR permits
- 7/6/2010: Council Report to amend VR regulatory fee
- 9/7/2010: Council Report to amend ordinance re element of annual notice
- 9/21/2010: Ordinance O2010-16 adopted

Dornaus v. City of Napa: Writ Challenge of City’s Vacation Rental Ordinance

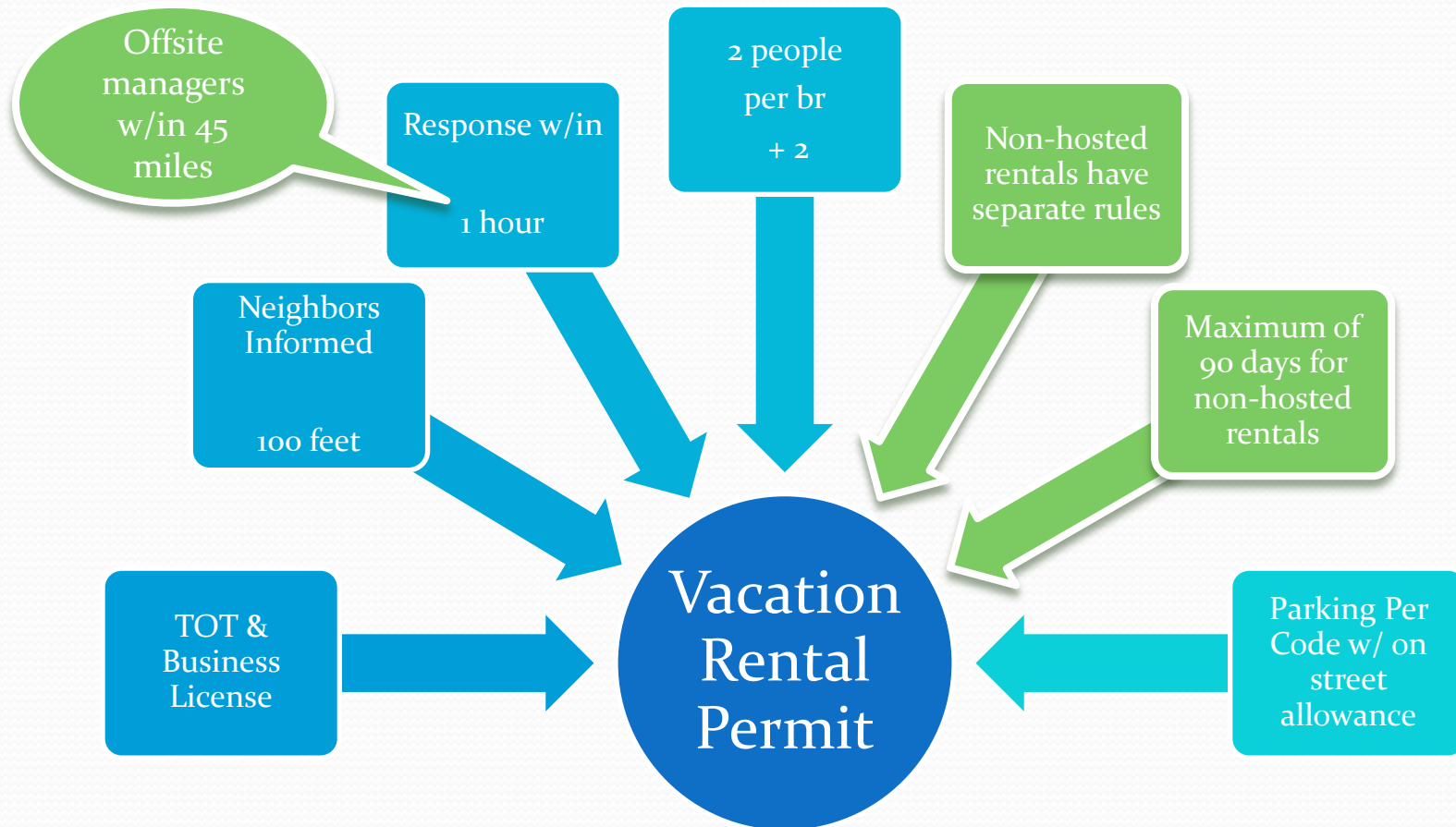
- 4/16/2010: Petitioner’s Points & Authorities in Support of Writ
- 5/17/2010: City’s Ps&As in Opposition to Writ
- 5/27/2010: Petitioner’s Ps&As in Reply to Opposition
- 9/14/2010: Superior Court Statement of Decision

City of Petaluma

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Recommended Ordinance from Petaluma's Planning Commission



Issues Considered in Developing Petaluma's Recommended Ordinance

- Compliance with Business License and TOT Requirements
- CEQA Analysis
- Enforcement
- Annual Permit

Airbnb's Input on Petaluma's Recommended Ordinance

- Educated each other on constraints: technology vs. local regulations.
- Provided staff with examples from other jurisdictions.
- Provided helpful comments regarding need for clarification or unintended consequences.
- Agreed to disagree.

Next Steps for Petaluma

- City Council will consider adoption of the proposed ordinance on February 23, 2015
- City Council staff report will be available on the City's website www.cityofpetaluma.net
- Planning Commission's staff report for the November 18, 2014, meeting is available on the City's website

The Explosion of the Vacation Rental Phenomenon



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Obstacles to Enforcing a Vacation Rental Ordinance:

- Privacy rights can hinder investigations
- Operators range from unsophisticated to highly savvy
- Evidence can be difficult to acquire
- Financial Temptation

Problems with Vacation Rental Bans

- Pushes rentals underground
 - Financial penalties ineffective
- Hybrid systems offer a compromise, but enforcing a limit is difficult.

Malibu's Regulation of Vacation Rentals

Malibu's Regulation Scheme has two key parts:

- **Transient Occupancy Tax Ordinance**
 - Operators must register with the City
 - 12% Transient Occupancy Tax
 - Operators must maintain records for 3 years
 - Tax submitted to the City quarterly
- **Special Event Permit Ordinance**
 - Limited to 4 events per year
 - Permit required in advance

Enforcing a Vacation Rental Ordinance

- Put the time into investigation
 - Everyone advertises; take advantage
 - Build a file for each property
- Education is the easiest, and cheapest, way to increase compliance
 - Results can be dramatic, especially if operators see that enforcement is a priority for the City.
- While education is the foundation of a good enforcement program, it needs to be paired with direct enforcement to be effective.

Malibu's Enforcement Program



- Once violators are identified, request records
- If records are incomplete or not produced, issue subpoena for records to operator
 - It's harder to ignore a judge than a letter from the city
- Alternatively, the city can immediately assess tax and penalties based on known violations

Legislative Subpoena Basics

- Every City has the power to issue legislative subpoenas
 - General Law Cities: codified in Government Code sections 37104-37109
 - Charter Cities: broader power which stems from Article XI sections 3(a) and 4(e) of the California Constitution, often detailed in a city's charter
- Requirements
 - Signed by Mayor and attested by City Clerk per Gov't Code § 37105
 - Served pursuant to CCP section 1987 (the same as a civil subpoena)
- Consequences
 - Failure of subpoenaed party to obey/appear or answer questions shall be reported by the mayor to the superior court. Gov't Code § 37106.
 - Judge will review subpoena, and issue an attachment or OSC requiring the subpoenaed party to appear in court. Gov't Code § 37107.
- If subpoenaed party is not physically present in the county where the court is located the subpoena may be difficult to enforce.

Legislative Subpoena Practices

Beyond the procedural basics, every legislative subpoena must be

- 1) Authorized by ordinance or similar enactment,
- 2) Serve a valid legislative purpose, and
- 3) The witness or material subpoenaed must be pertinent to the subject matter of the investigation.

Connecticut Indemnity Company v Sup. Ct. (2000) 23 Cal.4th 807, 814

As a result, it is best to adopt a resolution authorizing the issuance of the subpoena

- Detail purpose and need for subpoena
- Describe relevance of materials/testimony sought
- “Matters relating to the investigation and enforcement of tax measures are proper legislative concerns.” *City of Vacaville v Pitamber* (2004) 124 Cal.App.4th 739, 748.
- Malibu’s subpoena to a vacation rental website, and supporting materials, can be found at <http://www.cacities.org/getattachment/Policy-Advocacy/Hot-Issues/Vacation-Rentals/Subpoena-to-YBYC-Inc-6-30-14.pdf.aspx>

Legislative subpoenas must also comply with general subpoena requirements, notably:

- (1) the materials or testimony must be sufficiently defined (see *Flora Crane Service, Inc. v. Sup. Ct.* (1965) 234 Cal.App.2d 767),
- (2) the request should not be overly broad or unduly burdensome/oppressive (see *Southern Pacific Co. v. Sup.Ct.* (1940) 15 Cal.2d 206), and
- (3) it should not run afoul of any statutory or common-law privilege which prevents disclosure.

THE COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY




#TheShortAns

Respondent

Questions?





**Thank you to our
speakers and
thank you for
attending this
webinar!**

www.cacities.org

E-mail questions to: Leg@cacities.org