

# Analysis of Community Plan and Zoning Provisions That Apply to Short Term Rentals

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**Introduction and Summary** The topic of Short Term Rentals (“STRs”)<sup>1</sup> is currently before the Council and community for potential regulation. In this paper I will examine the key foundational issue: are STRs allowed in Del Mar’s residential areas by the Del Mar Community Plan and Zoning Code? My conclusion is they are not. If Del Mar determines that allowing STRs in residential areas is desirable, then Community Plan and Zoning Code Amendments are required to change the current rules.

**The Community Plan: Background** The Del Mar Community Plan was developed through the painstaking effort of countless citizens, committees, and city staff starting in September 1973 and culminating in voter adoption of a final Community Plan in 1976. The City Council initially adopted the Plan in May 1975 after nearly two years of work. That Plan was then rescinded by the City Council on July 21, 1975, when it faced a qualified referendum. The controversial elements of that Community Plan were identified and segregated and subjected to an advisory plebiscite vote conducted by mailed ballot in November 1975. Nearly 2/3rds of the qualified Del Mar voters participated in the plebiscite. The Planning Commission and City Council then revised the Community Plan to reflect the results of the plebiscite. Finally, the Community Plan, as revised, was adopted by the voters at the polls on March 2, 1976.

Over the nearly 3 years that the Community Plan was in process, detailed studies were made of every aspect of the community. These studies formed the factual basis to guide the development of the Plan’s policies. Following are historical parts of the Plan that relate to STRs.

**Original Beach Area Restrictions.** The modern STR phenomenon fueled by on-line services such as Airbnb and VRBO is taking place mainly (but not exclusively) in the beach area of Del Mar, and both pre-Community Plan land use restrictions and the Community Plan itself provide useful context regarding STRs and other transient uses in the beach area.

In discussing Del Mar’s history, the Community Plan notes that the original land use restrictions in the beach area imposed by the South Coast Land Company in the early 1900s when this area was first developed allowed only single family home uses, and expressly prohibited “...apartments, flats, duplexes, hotels, lodging houses [or] stores.”<sup>2</sup> Thus, from the beginning, transient and business type

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<sup>1</sup> While there is no code definition of “Short Term Rental,” the Del Mar code distinguishes between rentals for fewer than 30 days and those for more than 30 days [DMMC Section 3.12.030 definition of “Transient”], and 30 days seems to be a generally accepted break point for distinguishing short term from long term rentals.

<sup>2</sup> Community Plan page 7.

uses were prohibited.<sup>3</sup> This early reference in the Del Mar Community Plan dispels any inference that short term rentals were always allowed or contemplated in the beach colony.

### **The Community Plan Documents Transient Uses In the Beach Area but Not Short Term Rental Use.**

Those working on the Community Plan in the 1970s studied in detail all aspects of the community as it then existed, and described them in detail in the Plan. Evidently, STRs, if they existed at all<sup>4</sup>, were not significant enough to warrant describing or addressing in the Plan. My own work on the Plan during the 1970s confirms this conclusion—STRs were not, to my knowledge, a topic discussed. The Plan does describe in considerable detail the existence of transient uses in the beach area related to those visiting for the racing season and owners occupying their second homes in the summer. It also documents substantial off-season use by students and moderate income families:

*A comparatively large percentage of transient housing is available within this [North Beach] planning area. During the year much of this transient housing changes from occupancy by students and moderate income families in off-season months to wealthy tourists (often affiliated with the race track) or the property owners themselves during the summer.*<sup>5</sup>

This seems to confirm anecdotal reports that, to the extent rentals were occurring in the beach area in the 1970s, they were longer term than today's typical STRs: they were mainly students renting for the off-season months coinciding with the school year, or summer visitors coming for the multi-week race season. Or, they were seasonal resident owners who stayed at their own properties in the beach area during the summer. There is no indication in the Community Plan that STRs as we know them today were occurring in the beach area.

The Community Plan also sets out goals to preserve the beach area's character:

*The Land west of Camino Del Mar between 29<sup>th</sup> Street and the mouth of the San Dieguito River is proposed as low density Residential in order to preserve the existing character and discourage major intensification of development.*

*South of 29<sup>th</sup> Street, medium density single family and duplex usage is recommended... thereby preserving the present character and discouraging redevelopment to higher density more expensive housing and encouraging the maintenance of existing residential development.*<sup>6</sup>

Because STRs are not documented as an existing part of the beach area's character as it existed in the 1970s, and because of their high potential to change that character, it is hard to reconcile STRs as consistent with the Community Plan and its goal to preserve the beach area's character. Rather, STRs as we see them today are best described as a new and different ultra-transient use that, as discussed

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<sup>3</sup> These restrictions were eventually repealed in the mid-1930s and County zoning then governed until the City of Del Mar incorporated in 1959.

<sup>4</sup> There is much anecdotal support for the proposition that rentals have occurred in the beach area in the summer and racing months for many years. There is little, if any, documentation or anecdotal evidence that these rentals were short term like present day STRs, with turnover as often as every 2-3 days; rather, they were often longer term or for the race season.

<sup>5</sup> Community Plan, Community Development Element p.7.

<sup>6</sup> Community Plan, Community Development Element p. 14

below, are inconsistent with the Community Plan's goals for the beach area and other residential districts of Del Mar.

**The Community Plan And Zoning Code Are Permissive. Uses Not Expressly Allowed Are Disallowed.**

The Community Plan and the city Zoning Code (like most such plans and codes in California) are "permissive", meaning they describe what is allowed, and uses not expressly permitted are disallowed. If STRs are not expressly allowed by the Community Plan and Zoning Code in residential areas, they are not allowed. There does not need to be language expressly disallowing them.

**The Community Plan, STRs, and Residential Districts.** The task of this paper is to read the Community Plan and its implementing zoning as a whole to determine if there is language that can be reasonably construed as allowing STRs in residential areas, including, but not limited to, the beach area. The areas designated as residential in the Plan are set out by districts. The Plan describes the existing character of each district and then sets the type and density of housing for each district. Depending on the district, either single, duplex, or multi-unit dwellings are allowed. In all cases the then-existing special residential character of Del Mar is identified as important, as worthy of preservation, and as a guidepost to direct future development.

I have reviewed the entire Community Plan, cover to cover, including all amendments. My conclusion is that the best interpretation is that STRS are not consistent with the Plan's provisions and goals governing Del Mar's residential areas, but that they are consistent with the Visitor Commercial and most other commercial areas. What follows is my review of key Plan and zoning provisions.

**The Community Plan's Overall Goal.** The overall goal of the Community Plan is set out at page 20 as follows:

*OVERALL GOAL: PRESERVE AND ENHANCE THE SPECIAL RESIDENTIAL CHARACTER OF DEL MAR, THE ELEMENTS OF WHICH ARE A VILLAGE-LIKE COMMUNITY OF SUBSTANTIALLY SINGLE FAMILY RESIDEINTIAL CHARACTER, A PICTURESQUE AND RUGGED SITE, AND A BEAUTIFUL BEACH.*

Central to the identified "special residential character" to be protected is Del Mar's "single family residential character." Single family residential use is not the same as short term rental use. This seems to have been apparent to the Community Plan drafters who restricted transient visitor uses to the Visitor Commercial and most other commercial zones. This intended segregation of uses by the Community Plan becomes even clearer on review of the Community Plan's implementing zoning.

**City Zoning.** The city Zoning Code states it is adopted to implement the Community Plan<sup>7</sup>. As such it is our best tool to interpret the Community Plan. The Zoning Code has detailed definitions of terms that,

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<sup>7</sup> Del Mar Municipal Code Section 30.01.010.

read together, pretty clearly do not allow transient short term rental uses in areas reserved for residential uses.

The Code defines “single family dwelling” as:

*Section 30.04.010 L. **Dwelling, One Family.** A detached building used exclusively for occupancy by one family (including their guests, servants, and employees) and containing one dwelling unit.*

This definition expressly limits occupancy to “one family” and their “guests, servants and employees.” STRs cater to ultra-transient uses with turnover as frequent as every few days. A typical STR, over the course of a single month, might be occupied by 4-10 different groups of people, with multiple families and unrelated groups (e.g., a bachelorette party) occupying the rental unit over the course of that single month.

The kind of occupancy that is consistent with the goals of the Community Plan is long term family occupancy by residents who can integrate into the community in a way consistent with preserving the identified “special residential character”, not STRs used by transient visitors.

This distinction between residents and transient visitors is underscored by the Code’s definition of “dwelling”<sup>8</sup>:

*30.04.010 J. **Dwelling.** A building or portion thereof used exclusively for residential purposes, including one family, two-family, and multiple dwellings, but not including hotels, boardinghouses, lodgishouses, and all forms of vehicles including immobilized vehicles.*

This definition distinguishes, as does the Community Plan, between buildings used for residential purposes and those used for transient or visitor purposes, including hotels and lodgishouses. Short term rentals are indistinguishable in many respects from hotels or lodgishouses, since they all provide lodging for compensation. Just as no one would consider a person staying in a hotel for three days to be a “resident” of Del Mar, persons staying in an STR for three days are not “residents,” and these uses are not for “residential purposes” within the meaning of the Code definitions.

The Code sets forth the following definitions which appear to apply much better to what modern STRs actually are than the residential definitions above:

*Section 30.04.010 E. **Boardinghouse or Lodgishouse.** A building where lodging and meals are provided for compensation, but not including rest homes.*

*Q. **Apartment Hotel.** A building or portion thereof designed for or containing both individual guest rooms, and suites of rooms, and dwelling units.*

*D. **Hotel.** A building or group of buildings in which there are six or more guest rooms where lodging with or without meals is provided for compensation, and where no provision is made for cooking in any individual room or suite....*

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<sup>8</sup> “Dwelling Unit” is similarly defined in 30.04.010 N.

*E. **Motel or Tourist Court.** A group of attached or detached buildings containing individual sleeping or living units where a majority of such units open individually and directly to the outside, and where a garage is attached or a parking space is conveniently located to each unit, all for the temporary use by automobile tourists or transients, including auto courts and motor lodges.*

STRs pretty closely meet one or more of these categories: “Boardinghouse” because they provide lodging and kitchen access for compensation; “Apartment Hotel” because individual guest rooms or suites of rooms are provided; or Motel or Tourist Court” units. And the definition of “Hotel” expressly applies to any short term rental property with 6 or more guest rooms, so long as kitchen facilities are separate from the individual guest rooms or suites<sup>9</sup>.

Reviewing all these definitions together leads to the conclusion that STRs are significantly different from allowed uses in the residential areas, and are substantially similar to the transient uses such as hotels, motels, lodginghouses, boardinghouses, and apartment hotels which are disallowed.

**STRs Are Businesses Not Allowed In Residential Districts.** Short Term Rentals can also be distinguished as not allowed in residential areas by review of the definitions of “business” and of the kinds of “businesses” allowed in residential zones.

The Code defines “Business” as:

*Section 30.04.010 N. **Business.** The purchase, sale, lease, rent or other transaction involving the handling or disposition of any article, service, substance or commodity for livelihood or profit; or the management of office buildings, offices, recreational or amusement enterprises, or the maintenance or use of office, structures, and premises by professions and trades rendering services.*

This definition includes renting for livelihood or profit. This is at the heart of what STRs do. They are rental businesses.

The Zoning Code provides that the only types of “business” allowed in residential zones are “home occupations” which are incidental to the primary residential use of the property, conducted by a family member residing in the main building, and with significant restrictions designed to strictly limit the potential impact on the residential character of the neighborhood. Specifically, “home occupation” is defined as follows:

*Section 30.04.010 C. **Home Occupation.** An occupation or business conducted entirely within the main building by a member of a family residing therein, conducted as an incidental use to the primary residential use thereof, and in which there is no sign used; no display; no stock in trade*

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<sup>9</sup> It is noted in this regard that any STR with more than 6 guest rooms is a “hotel” under Section 30.040.010 but that an STR with 3 or more rooms is a “Hotel” and should be paying transient occupancy (TOT) tax pursuant to Section 30.12.030 definition of “Hotel.”

*or commodity stored, rented or sold upon the premises; no person employed other than the member of the resident family; no deliveries made or other pedestrian or vehicular traffic generated; no mechanical equipment used or kept on the premises except those customarily found in the home; no commercial vehicle used or kept on the premises in connection with such home occupation or business.*

The limitations are significant: no sign can be displayed; no person can be employed other than the resident family member conducting the home occupation; no deliveries can be made; no pedestrian or vehicular traffic can be generated; no “stock in trade” (“the equipment, merchandise, or materials necessary to or used in a trade or business”) can be stored on the premises

STRs cannot qualify as a “home occupation” for many reasons, even if signs marking or advertising the rental are not displayed. They generate both pedestrian and vehicular traffic, from guests as well as from personnel who perform management, housekeeping, maintenance or repair work for the STR. In many cases, the person operating the STR lives off-site, and is not a member of the “resident family,” nor is the rental business “incidental” to the primary residential purpose of the property. Often, more than one person is employed to perform services to operate the STR. Supplies needed for the STR operation are delivered to the property, and are stored on the premises.

Allowed “home occupations” would include, for example, a university professor who grades papers at home, a writer with a home office working on novels, and similar activities conducted in one’s home where there are no employees, no traffic, no deliveries, etc. All these other types of activities are prohibited to prevent the possibility of neighborhood impacts and to prevent any onsite activity that might be inconsistent with preserving the special residential character of these areas.

To say that a CPA living in his/her home cannot work at home with a part time secretary but that such a home owner can rent out his/her home for STR profit, can advertise online, in the papers, and with yard signs, can have regular cleaning and prep crews visit before and after each short term stay, can engage a professional property manager, can vacate the premises him or herself and turn it over to full time STRs, can bring more people and more cars to the area, and can bring all the other neighborhood impacts inherent in short term renting, is to defy logic and to ignore the clear language of the code. STRs do not qualify as “home occupations” and, accordingly, are business operations that are not allowed in residential areas.

The best reading of the Community Plan, using these Zoning Code definitions to interpret the Plan, leads to the conclusion that STRS are not a permitted use in residential zones, but they are permitted in the Visitor Commercial and some other commercial zones.

### **The Specific Zoning Designations.**

I have also gone through the entire zoning code, cover to cover. Certain patterns become apparent. For example, in all of the primary residential zones, *R1-40, R-1-14, R-1-10, R-1-10B, R-1-5, R-1-5B*, the

statement of “purpose” is identical, varying only as to density. By way of example, the statement of purpose for the R-1-40 zone reads as follows:

**Purpose.** *The R1-40, Zone is designed to provide for an area of one-family residential development at a density level consistent with the City Community Plan. The standards of the zone are intended to preserve an open and uncrowded character and protect the unique residential environment of Del Mar. The standards are intended to promote and protect those special amenities associated with a district of single-family homes. Factors of topography and environmental sensitivities, the character of existing, low-density residential areas, and the need to identify Del Mar as a distinct and separate community shall be taken into account in administering the standards contained herein.*

Consistent with the Community Plan, this statement of purpose for the city’s primary residential zoning districts emphasizes that as expressed in the R-1-40 example above, these residential zones are for one family residential development, and are intended to protect the “...amenities associated with a district of single family homes...” Other residential zones have similar language, but with differing densities, such as those allowing duplexes. Across all of these primary residential zones, the intended purpose is the same, with criteria that are not descriptive of STRs.

A second pattern across all these residential zones is that the “use” allowed is based around “A one family dwelling on each building site.” A home may be built as a one family dwelling but when it is converted to STR use, in my opinion, it loses that character and contributes to unauthorized changes in neighborhood character, by intensifying the use both in terms of the number of people who typically use the property at any given time, and by the negative impacts associated with frequent turnover.

A third pattern we see in the Code is that a second dwelling unit, where allowed, may be rented but may not be sold. The length of required stay for such rental is not expressly specified. The rules of statutory interpretation for resolving ambiguities like this are:

1. First, discern and implement the clear meaning of the language if possible.
2. Second, if ambiguity exists, determine the purpose and intent behind the language, and interpret any ambiguities, if reasonably possible, consistently with the discerned intent.

Here, there is ambiguity as to the length of stay allowed for rental of an allowed on-site second dwelling unit because no term is expressed. Reading the Community Plan and zoning as outlined above, it seems clear to me that this ambiguity is best resolved by concluding that the allowed rental term must be long term and cannot be short term. Long term rentals have much in common with single family use and occupancy. Long term occupancy contributes to, and is part of, the fabric of the special residential character identified as so important. STRs are not part of this fabric.

Long term rental of a second dwelling unit can serve affordable housing goals, provide security and support for seniors who want to stay in their homes, and can add to the diversity of our community and enrich the corps of residents who volunteer to help maintain Del Mar’s special community character. Long term renters are neighbors and residents, not visitors. STRs change all of that by bringing a constant stream of ultra-transient visitors to a residential neighborhood. STRs also have many

characteristics of disallowed businesses that residential occupancy does not. It is, in my view, unreasonable to interpret STRs as an allowed use in second dwelling units.

A fourth pattern in the Code is that the renting of one room to not more than one person is allowed as an accessory use of a residential use. Again, no length of stay is specified, but the most reasonable interpretation is that the renting must be for long term, not for STR-type ultra-transient use, which necessarily violates many of the restrictions set forth in the home occupation provision. In any event, the express limit to renting of “one room to one person” disqualifies all, or nearly all, STRs.

The multi-family zones in Del Mar [RM zones and R2] are worded somewhat differently but they still focus on allowing a one, two, or multiple family dwelling, depending on the zone, on each buildable site at the density prescribed by each zone. The allowed use remains residential in nature, and not compatible with STR transient business uses. These zones also use similar language to allow the renting of one room to not more than one person, [or the provision of table board], as an accessory use. Accessory living quarters are allowed for guests and servants but renting is expressly disallowed.

The most reasonable reading of these multi-family provisions is that they contemplate families occupying homes, either as owners or as long term tenants, at the density prescribed by each zone. The provisions of the multi-family zones allowing renting one room to one person would not cover STRs and the accessory living quarters expressly exclude renting. I see nothing in these multifamily zone provisions intended to allow STRs.

#### OTHER STR RELATED ISSUES OF NOTE

There are other important issues related to STRs that go beyond the subject of this paper. These related issues deserve brief mention.

**Distinguishing the Occasional Rental from the Business of Renting.** Some Del Mar homeowners occasionally rent their house, or a portion of it, for a few weeks per year, perhaps during race season, or while they take a vacation, visit relatives, or the like; they handle these occasional rentals themselves without professional management, and live in their home most of the year. This occasional rental activity can be distinguished from those whose rental activity is more intensive. The IRS draws the distinction at 15 days—those who rent their home for 15 days or fewer in a year do not have to report that rental income. They are considered not in the “business” of renting.<sup>10</sup>

It may be that this kind of occasional and very limited rental undertaken directly by the owner could be accommodated in Del Mar’s residential zones, with appropriate regulations and code amendments to ensure such occasional use is consistent with preserving the “special residential character” of Del Mar’s residential neighborhoods. If the owner or long term renter lives on site most of the year, the overall use of the property, arguably, contributes positively to preserving the fabric essential to maintaining

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<sup>10</sup> See, <https://www.irs.gov/taxtopics/tc415.html>. “There is a special rule if you use a dwelling unit as a personal residence and rent it for fewer than 15 days. In this case, do not report any of the rental income and do not deduct any expenses as rental expenses.”

that “special residential character,” and appropriate regulations can ensure that the neighborhood is not negatively impacted from these occasional rentals.

Drawing this distinction and allowing occasional rentals by simple permit or perhaps by exemption from an otherwise general non-allowance of STRs in residential areas, could be a way to allow some STR use while at the same time protecting residential neighborhoods as called for by the Community Plan. This is an approach to managing STRs in Del Mar worthy of consideration, recognizing that its implementation would require code amendments and perhaps a Community Plan Amendment. This option is identified for further study.

**Affordable Housing.** The Community Plan has goals in support of diversity and affordable housing<sup>11</sup>. STRs in Del Mar likely have a negative effect on affordability and housing stock to the extent they convert lower priced long term rentals to more expensive and more profitable short term rental use. To the extent the high profitability of STRs encourages tear down and rebuilding or remodels, to maximize revenue potential, STRs also likely contribute to the degradation of community character as they convert some of Del Mar’s many older and smaller homes to larger buildings with maximum bedrooms for STR use.

The Community Plan explicitly identified use patterns that had a positive impact on affordable housing, with off-season rental opportunities for students and moderate income families. The economics of STRs shifts at least some of this “affordable housing” opportunity to more lucrative purposes that dramatically increase the price of the housing.

To really know the extent of the negative impact of STRs on housing stock would require data collection, but it seems evident that allowing STRs in residential areas can have this impact, except perhaps, where an owner or long term renter engages in only occasional STR rentals and lives in the home most of the year. In that circumstance the home is still being used for either owner occupancy or long term. And the economic motivation to tear down and rebuild or to remodel is less strong.

On the benefit side, STRs can offer a lower priced and different visitor opportunity than some hotels and motels. Research shows that Del Mar has 354 hotel/motel rooms with an average rental rate on the low end of \$191, and without L’Auberge, an average low end rental rate of \$159 per night. The average low end rental rate for STRs in the same areas is \$127 per night (on a per-bedroom basis), lower but not dramatically so.

**There Is No Shortage Of Areas Zoned For Short Term Transient Use.** Del Mar already has a high ratio of hotel/motel rooms, both per square mile (200 rooms per square mile) and per capita (1 room for every 12 people in Del Mar) with no documented shortage. In addition, it is noted that one “dwelling unit” per property is an allowed accessory use in the Central Commercial, North Commercial, and Professional Commercial zones. Because they are in commercial districts appropriate for business activities, these dwelling units could be rented short term. With some restrictions, R-2 type dwellings are permitted in

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<sup>11</sup> See, e.g. Community Plan Community Development Element page 9-10 Goal D

the Residential-Commercial zone,<sup>12</sup> and these also could be rented short-term. Hotels and motels are allowed uses in the Central Commercial zone<sup>13</sup>, not just in the Visitor Commercial zone, providing even more opportunity for short term transient housing. Thus, there is considerable unused opportunity already in Del Mar's Zone Code for STR usage.

If there were a shortage of visitor serving accommodations in Del Mar the argument that allowing STRs in the residential zones could help address the shortage might have merit. But, ample data demonstrate that Del Mar already has significant facilities for visitors, has adequate areas zoned for short term visitor accommodations and considerable untapped potential for additional STR usage. Del Mar does not need to, nor should it, allow the intrusion of STRs into residential areas.

**The STR Experience.** It is acknowledged that the experience of staying in an STR is different from the experience in a hotel or motel. STRs allow the transient visitors to cook on site and socialize in ways different from what is available in some hotels and motels. A hotel or motel experience may not be an appealing substitute for an STR stay to some people. However, the STR experience can be provided in the Visitor Commercial and other commercial zones, as discussed above. Additionally, Del Mar, in my view, has an obligation to provide a level playing field for hotels and motels by controlling unregulated competition from STRs. We can do this by adhering to the assignment of STR type uses only to the Visitor and other commercial zones, keeping them out of the residential zones, where hotels are not allowed, and by providing comparable regulations for STRs where they are allowed. And, there is considerable potential to provide homes (one per lot) in commercial zones that could be dedicated to STR use catering to those looking for a home, as opposed to a hotel or motel, experience.

**Enforcement.** The city attorney has advised that enforcement of the current code rules not allowing STRs in residential zones might be difficult due to ambiguities in the code. The city attorney has also opined that enforcement is made more difficult due to a long history of non-enforcement. The city attorney has also confirmed, however, that mere lack of enforcement does not create a right to an STR use. The mere long term continuance of an illegal use does not create any right to continue that use.

The current code has provisions for resolving ambiguities like those referenced by the city attorney. Invoking this established process would be a fair and easy way, through public hearing and stakeholder participation, to clear up any ambiguities that are impeding effective enforcement. The key code section states:

***30.01.030 Determination of Allowable Use.** A. A determination of whether a particular use is within the scope of permitted uses and allowable accessory uses in a particular zone shall constitute a "determination of allowable use." B. A person with an interest in real property located within a particular zone who intends to develop such real property with a use not expressly allowed in such zone shall be entitled to apply to the Planning Commission for a*

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<sup>12</sup> The Del Mar zoning code allows one dwelling unit in the following commercial zones as an accessory use: DMMC Section 30.22.015(B) covering the Central Commercial Zone; Section 30.24.030(D) covering the North Commercial zone; 30.25.030(d) covering the Professional Commercial zone. See, section 30.21.030(A) allowing R-2 type dwellings in the RC zone.

<sup>13</sup> See, DMMC section 30.22.040(A).

*determination of allowable use. C. Upon the making of the application and the payment of the fee set by resolution of the City Council, the Director shall cause a noticed public hearing to be conducted by the Planning Commission. D. After hearing, a written determination of allowable use rendered by the Planning Commission shall be final and thereafter control development within the particular zone unless an appeal is filed.*

**Would Discontinuance Of STRs In Residential Zones Require Amortization?** The topic of amortizing STRs as part of an enforcement program has also been raised. In order to qualify for amortization rights the burden is on the applicant to establish legal non-conforming rights. Only then is amortization necessary so the owner can recoup his/her investment before the use is discontinued, to avoid a potential “taking” claim.

This is a tough hill to climb for STR operators, as the burden falls on the owner to prove non-conforming rights by proving all of the following:

- (1) The STR use was lawfully established and had all necessary permits when it was instituted. To my knowledge there are no STRs in Del Mar’s residential zones that were lawfully established and permitted.
- (2) That the STR use has been continuously operated since that time without abandonment through non-use. By code if there is a 6 month or more discontinuance, non-conforming rights are deemed abandoned.
- (3) That there has been no expansion of the lawfully established non-conforming use.<sup>14</sup>

The fact that most, if not all, Del Mar STRs cannot qualify for amortizable non-conforming rights does not necessarily mean that offering amortization is a bad idea. As a matter of policy Del Mar could decide to grant amortization periods to some or all illegal STRs. That is a topic worthy of consideration but that goes beyond the scope of this paper.

**Coastal Commission Issues.** As of this writing the Coastal Commission does not have any formal guidelines, regulations, or policies on STRs. At the Coastal Commission staff level concerns about limitations on STRs have been raised when some communities proposed Local Coastal Program (LCP) Amendments to restrict STRs, particularly where the Commission staff documented a shortage of existing short term transient accommodations in the areas proposed for STR restrictions. These staff concerns were raised in Carlsbad, Encinitas, Imperial Beach and elsewhere. Other communities have effectively banned or strictly limited STRs without Coastal Commission interference. Coastal communities with bans or restrictions include Coronado, Manhattan Beach, Santa Monica, Malibu and many others. In Del Mar’s case there is no shortage of short term transient occupancy opportunities, so it is not clear that the Commission’s staff concerns based on that issue would be raised in Del Mar.

More important, the Coastal Commission only has jurisdiction over a city’s STR policies when an LCP Amendment is needed or when the city adopts new local policies that violate its existing LCP. Del Mar has a certified LCP. It contains the Community Plan and Zoning Code. No LCP Amendment is needed to

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<sup>14</sup> See, DMMC sections 30.76.020 through 30.76.070 setting out the requirements for non-conforming use rights and Section 30.76.090 governing their loss through abandonment.

enforce these provisions, or to use the “interpretation” process embedded therein to clear up ambiguities to facilitate enforcement. What Del Mar decides to do regarding STRs is primarily a local matter not subject to Coastal Commission review so long as Del Mar’s policies fall within the scope of Del Mar’s existing LCP.

### **CONCLUSION**

STRs are not currently allowed by the Del Mar Community Plan or Zoning Code in the city’s residential areas. They are restricted to the Visitor Commercial, Central Commercial, Professional Commercial, Residential Commercial and North Commercial zones. Research has shown that Del Mar already has ample areas designated in its zoning to accommodate short term transient visitors, has a large quantity of existing short term visitor accommodations in the Visitor Commercial Zone, and has considerable untapped potential to accommodate more STRs.

STRs can be accommodated in these non-residential areas without the conflict that is unavoidable when STRs are proposed in the City’s residential areas. The residential areas are protected by special provisions of the Community Plan and zoning that make STRs incompatible with residential areas, but do not apply in the non-residential areas.

If Del Mar determines that it is in the best interest of the community to allow STRs in residential areas under some type of regulatory program, Community Plan and Zoning Code amendments would be required. Significant goals set forth in the Community Plan regarding protection of the special residential character of Del Mar could be put at risk by such changes and they should not be undertaken lightly. Concerns about enforcement of the existing rules can be resolved by invoking the “interpretation” process set out in the current Zoning Code. The interpretation process is already authorized in the City’s current LCP.