

## SCHWERDTFEGER LAW GROUP, APC

501 W. Broadway, Suite 2040 San Diego, CA 92101

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To: Capistrano Bay Board of Directors  
From: Sean Schwerdtfeger  
Re: Short-Term Rentals  
Date: August 15, 2019

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### **Executive Summary**

The California Coastal Commission (“Commission”) must approve local government regulation of short-term rentals in the California coastal zone. In 2013, the Commission approved amendments to the local coastal program in the City of Dana Point pertaining to short-term rentals known as Dana Point Municipal Code section 5.38 (“STR Code”). The STR Code requires property owners to apply for and secure a permit in order to rent their property as a short-term rental. As the Board is aware, the STR Code establishes specific conditions on such permits, including but not limited to parking, occupancy, and noise restrictions on the property.

Per its grant of authority as a California Community Service District, Capistrano Bay (occasionally “the District”) has authority to exercise its policy powers consistent with the STR Code. For instance, I believe that Capistrano Bay may exercise its police powers to restrict access onto Beach Road in a manner consistent with the STR Code. This would include enforcing the vehicle limits enumerated in the STR Code. However, other actions discussed below, such as establishing limits on work hours for housecleaning services, I believe exceed the scope of Capistrano Bay’s police powers.

In summary, Capistrano Bay is neither the regulatory nor enforcement authority for the administration of the STR Code. Rather, Capistrano Bay possesses separate police powers within its jurisdictional territory that may be exercised in a manner consistent with the STR Code. Dana Point has separately recognized the authority of Capistrano Bay to report STR Code violations to Dana Point following which Dana Point expressed its willingness to issue a citation and prosecute the citation through administrative hearing.

The Board outlined seven specific questions in its correspondence to me, and I address each of the seven matters below. I look forward to discussing this analysis further with the Board.

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**Issue: If the STR owner does not have a valid permit, can the District deny access to all of their renters?**

Pursuant to paragraph 5.38.030 of the STR Code, owners of short-term rentals located within a zoning district where residential uses are allowed are required to obtain a short-term rental permit in the manner provided for by the STR Code. Specific conditions set forth in paragraph 5.38.080(a) must be met before a permit will be issued to a property owner. As outlined in our previous July memorandum, such conditions include restrictions on the maximum number of occupants per property, as well as the maximum number of vehicles per property.

Because the Commission approved the regulations set forth in the STR Code, these regulations are fully valid and enforceable. Property owners in Capistrano Bay are subject to the regulations in the STR Code and required to obtain a valid permit before operating a short-term rental pursuant to paragraph 5.38.030 of the STR Code. Since obtaining a permit is a prerequisite to operating a short-term rental, it would be within the police powers of the District to restrict access to renters on Beach Road when an owner has not complied with the STR Code and obtained a permit. However, it must be noted that Capistrano Bay would need a reliable method to distinguish renters from other regular visitors in the community. As an example, Capistrano Bay could enact a systemized procedure for documenting short-term rental occupants and managing access onto Beach Road in a manner consistent with the STR Code.

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**Issue: Can the District require homeowners to file a copy of their STR permits with the District?**

The District can request a copy of a permit from STR owners, consistent with the typical method utilized by the District to acquire other information from STR owners. However, if a STR owner refuses to provide a copy of his/her STR permit, the wisdom of pursuing an enforcement action is questionable because STR permits are public records. Thus, the District can procure a copy of an STR permit or confirm the absence of any permit directly with Dana Point with likely less effort than a confrontation with an intransigent STR owner. If no permit exists, Dana Point would be the appropriate authority to take administrative action against the noncompliant homeowner.

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**Issue: The STR code allows for only 2 vehicles, can the District enforce this car limit at the entry gate?**

I believe that the District may validly regulate entry onto Beach Road in a manner consistent with the STR Code. In order to do so in a reasonable manner, I recommend implementing a standardized system for identifying short term rentals, registering the

guests with the gate, issuing temporary parking permits consistent with the STR Code's parking requirements. I envision a system similar to that used by reputable hotels and resorts, wherein guests are registered for their identity, length of stay, and vehicle.

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**Issue: Can the District establish/enforce limits on work hours for housecleaning services?**

The STR Code does not regulate hours during which housecleaning services may occur. I am also unaware of the District having regulated at any time the days or hours during which housecleaning services may occur. Consequently, I would be concerned with regulations regulating days or hours during which housecleaning services may occur for STR owners because such regulations could reasonably be construed as a de facto effort to frustrate the right of an owner to rent their unit consistently with the STR Code. The point would become even more acute if the regulation of housecleaning services only applied to STR owners, rather than the whole of the District.

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**Issue: Can the District prohibit access to SeaBreeze employees/personnel based on their business being unlicensed?**

No, the District cannot prohibit access to SeaBreeze employees/personnel based on their business being unlicensed. SeaBreeze is purporting to operate under an exception to the real estate broker licensing law. In simple terms, the exemption operates as follows:

California Business and Professions Code §10131 defines a real estate broker as one who, *inter alia*, “[l]eases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.” A real estate broker must possess a valid license and is under the regulatory authority of the California Bureau of Real Estate.

California Business and Professions Code §10131.01 exempts from the real estate broker license requirements, *inter alia*, a person or entity “who, on behalf of another or others, solicits or arranges, or accepts reservations or money, or both, for transient occupancies described in paragraphs (1) and (2) of subdivision (b) of Section 1940 of the Civil Code.” Civil Code 1940 defines transient occupancies as essentially those occupancies: (i) subject to taxation under Revenue and Taxation Code §7280; or (ii) facilities where the innkeeper maintains a right of access to and control of the facility and the occupancy is for less than seven days.

I am unaware as to whether SeaBreeze collects and pays a transient hotel tax per Revenue and Taxation Code §7280 or maintains a right of access to and control of the STR units and only permits occupancy for less than seven days. If SeaBreeze does not satisfy the real estate broker licensing exemptions, a license is required .

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**Issue: Can the District require rental property owners to sign and abide by an agreement to comply with the STR Code, that would allow the District to deny access to renters when the owner is found in violation?**

I perceive two significant problems with attempting to require STR owners to sign and abide by an agreement to comply with the STR Code. First, an agreement to comply with the STR Code is superfluous because the STR Code already is the law. No private written agreement can either abrogate or change the STR Code. Second, attempting to require STR owners to sign an agreement requiring compliance with the STR Code carries the connotation that the District does not have the authority to regulate any aspect of STR use. I think the better approach is for the District to exercise its police powers in a manner consistent with the STR Code.

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**Issue: Can the District require that only STR owners register the names of their renters at the gate and not the rental agencies?**

It would be permissible for the District to require that STR owners register the names of their renters at the gate. Since the STR Code enumerates occupancy and parking limits per property, I believe that it is within the policing powers of the District to take measures to ensure these limits are observed. If the rental agencies register under a generic business name, without providing renter names and other information, it would be difficult, and perhaps even impossible for Capistrano Bay to determine how many renters and/or vehicle are utilizing a rental property. Since the STR Code (Dana Point Mun. Code ¶ 5.38.080(a)) is clear that occupancy and vehicle restrictions apply to short-term rentals, Capistrano Bay is within its power to enforce such restrictions at the gate.