

June 11, 2019, City Council Item SS3 Comments

The following comments on an [item](#) on the Newport Beach City Council [agenda](#) are submitted by:

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Item SS3. Update on Short Term Lodging

Based on the attachments, it is good to see staff apparently planning to discuss the detailed language of an ordinance with the Council before it is presented for introduction.

It would have been even better if the “clean” version that has been posted for review matched the latest, amended “redline,” but this appears to still be very much a work in progress.

The attempt to copy court-tested language from other cities is also good, but the Council should understand there no universally-accepted model, and Newport Beach’s currently ordinance, which the other’s language is being grafted onto, is quite different from others.

Indeed, since the fear in regulating internet advertisements is the possibility of challenge an invalidation due to federal preemption, court decisions from other parts of the country may be as relevant as the one cited from Santa Monica.

The most recent readily available one opining on this subject seems to be *AIRBNB, INC. v. City of Boston*, [Civil No. 18-12358-LTS](#) (Dist. Court, D. Massachusetts 2019), which noted that a recent ordinance enacted by the City of Boston “*echoes ordinances enacted by San Francisco and Santa Monica, both of which survived nearly identical legal challenges by Airbnb,*” yet might still contain some unique provisions that will require further litigation (such as a provision completely banning an internet host from posting any listings for Boston in the event of repeated violations).

Thus, we have at least three examples of court-reviewed short term lodging of municipal code for comparison:

- San Francisco’s [Chapter 41A](#) -- tested by *Airbnb, Inc. v. City & Cty. of San Francisco*, [217 F. Supp. 3d 1066](#), 1071 (N.D. Cal. 2016)
- Santa Monica’s [Chapter 6.20](#) -- tested by *HomeAway.com, Inc. v. City of Santa Monica*, [918 F.3d 676](#), 680 (9th Cir. 2019)
- Boston’s [Chapter 9-14](#) – with possible problems still being litigated in the case cited above

It might be noted these codes all look very different from each other, and very different from ours. So reliance on copying a few words out of context may not be sufficient to avoid challenge.

One common feature that leaps out of these three, but which does *not* appear to be part of the Newport Beach proposal as presently written, is that before attempting to regulate internet advertising, each of these cities commits, in its code, to maintaining a readily available **registry** of all units within the city that can be legitimately advertised at a particular moment, and by

whom. The internet platform operator can then readily compare the listings on their site to the city's registry to determine which listings are legitimate and which are not.

In contrast to this, our ordinance (proposed Sec. 5.95.050.C) seems to penalize the internet platform operator if they fail, on their own, to determine, in some undefined way, if each user advertising a Newport Beach location is the possessor of both a valid Newport Beach business license (oddly, attached to the "unit" rather than the person) and a currently valid short term lodging permit for the unit being advertised. The burden that places on the internet operator to first understand our systems and then locate the information seems substantial. **To reduce that burden and survive challenge, I would guess Newport Beach would have to commit (in its code) to producing an easily consulted and definitive registry like the other cities.**

Another clear difference which needs more explanation is the definition of who is allowed to and responsible for conducting the short term lodging operations, and how that definition impacts "home-sharing." The Newport Beach code appears to restrict its application to property owners in the strictest sense, while the other cities include lessees. Santa Monica not only includes sub-lessees, but includes some strange language that places liability on all persons providing services to the unit (including maintenance and even insurance), referred to collectively as the potential lodging "host."

Without further explanation, it is not obvious what the intent is in copying language from Santa Monica, but substituting "owner" for "host." In other words, is Newport trying to prohibit a family from renting a room in a house if the person named on the deed is on vacation during the renter's stay? And what if the recorded owner is a trust? Who must be present to have the rental qualify as home-sharing? And if the arrangement does *not* qualify as home-sharing because the recorded owner is not present during the stay, is it intended to be outside the range of the code, and therefore *not* subject to TOT, etc.? (one might similarly wonder what the rules are if a paid stay is longer than 30 days)