



Office of the Mayor

CONSENT CALENDAR

April 4, 2017

To: Members of the City Council

From: Mayor Jesse Arreguin

Subject: Amending BMC Section 23C.22.050, Short-Term Rental Regulations

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Section 23C.22.50, Short-Term Rental Regulations.

BACKGROUND

The City Council adopted a Short-Term Rental Regulations Ordinance, Berkeley Municipal Code Chapter 23C.22, on February 28, 2017.

During the Council debate this year of the revised Short-Term Rental Ordinance, AirBnB Legal Counsel informed the City Council that one section of the ordinance, Section 23C.22.050(D) may be pre-empted by federal law. This section would hold the hosting platform liable for rental of any Short-Term Rental in violation of the ordinance. This section was intended to prevent illegal hostings. The ordinance also requires the host to include the Zoning Certificate number on the rental ad so that the City can track which hostings are in compliance with the ordinance.

This policy of holding hosting platforms liable is the subject of unresolved litigation in San Francisco and Santa Monica. Anaheim was sued and promptly removed a similar provision.

Prior to final adoption of the ordinance AirBnB advised the City that it intended to seek legal action to challenge the ordinance if Section 23C.22.050(D) was not removed (Attachment 2). After consultation with AirBnB representatives and City Attorney, it is prudent to strike this section to avoid unnecessary litigation so the ordinance can move forward and so AirBnB can work cooperatively with the city in implementation.

The Council can always add this section after litigation is resolved in other cities and if it determines that holding the hosting platform liable is necessary to ensure compliance.

FINANCIAL IMPLICATIONS

None. Adopting the proposed ordinance will avoid unnecessary litigation which will incur legal costs to the City and also may invalidate the ordinance, costing the city Transient Occupancy Tax and Enforcement Fee revenues.

ENVIRONMENTAL SUSTAINABILITY

No adverse effects to the environment.

CONTACT PERSON

Jesse Arreguin, Mayor, 510-981-7100

Attachments:

- 1: Ordinance
- 2: Letter from AirBnb Legal Counsel

ORDINANCE NO. #,###-N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTION 23C.22.050, SHORT TERM RENTAL REGULATIONS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 23C.22.050 is amended to read as follows:

**23C.22.050 Operating Standards and Requirements**

A Short-Term Rental is allowed only if it conforms to each of the operating standards and requirements set forth in this Section.

A. Proof of Host Residency.

1. An Owner-Host of a Short-Term Rental must provide documentation of Owner Host and Host Residence status and, if applicable, Host Presence, as defined in subdivisions C, E and B of Section 23C.22.030.

2. A Tenant-Host must provide documentation of lessee status, Host Residence and Host Presence, if applicable, as defined in subdivisions C, E, and B of Section 23C.22.030. In addition, a Tenant-Host must present written authorization allowing for a Short-Term Rental in the Host Residence from the building owner or authorized agent of the owner.

B. STR Duration and Required Residency Timeframes

1. When the Host is Present, the unit, or a portion thereof, may be rented as a Short-Term Rental for an unlimited number of days during the calendar year.

2. When the Host is not Present, the number of days that the unit can be used for Short-Term Rental purposes shall be limited to 90 days per calendar year.

C. Number of Occupants. The maximum number of Short-Term Rental Transients allowed for a Short-Term Rental unit shall be as provided for in the Berkeley Housing Code (BMC Chapter 19.40).

D. Notification. Initial, one-time notification of the establishment of a Short-Term Rental by ZC and Business license shall be provided to the residents of all Adjacent Properties. Notification shall include Host and Local Contact information. Additional notification shall be required within a week of updated Host, Local Contact or other information. Page 3 of 21 Ordinance No. 7,521-N.S. Page 4 of 21

E. Enforcement Fee. For the initial enforcement period, while enforcement costs are being determined, the Host shall pay an additional enforcement fee in an amount equal to 2% of the rents charged by that Host, not to exceed the cost of the regulatory program established by this Chapter over time. Such fees may be paid by the Hosting Platform on behalf of the Host. After the initial enforcement period, the Council may revise the enforcement fee by resolution.

F. Liability Insurance. Liability insurance is required of the Host, or Hosting Platform on behalf of the Host, in the amount of at least \$1,000,000.

G. Documents Provided to STR Transients. Electronic or paper copies of the Community Noise Ordinance and Smoke-Free Multi-Unit Housing Ordinance must be provided to STR Transients upon booking and upon arrival.

H. Transient Occupancy Tax. Either the Host or Hosting Platform must pay the transient occupancy tax (TOT).

I. Housing Code Compliance. Any building or portion thereof used for Short-Term Rentals shall comply with the requirements of the Berkeley Housing Code (BMC Chapter 19.40).

J. Payment of Taxes. The Host shall pay all City taxes and fees owed in a timely manner.

K. The Host shall be responsible for listing on any rental ad the Zoning Certificate number. The Host shall also provide both the Business License number, if required pursuant to Chapter 9.04, and Zoning Certificate for the STR to the City and/or a vendor hired by the City to administer this Chapter, upon request.

~~L. No Hosting Platform shall facilitate the Short Term Rental of any unit that does not possess a valid Zoning Certificate and Business License if required pursuant to Chapter 9.04, at the time of such rental.~~

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

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From: Kevin Heneghan <[kevin.heneghan@airbnb.com](mailto:kevin.heneghan@airbnb.com)>  
Sent: Tuesday, February 14, 2017 3:09 PM  
Subject: Short-term Rental Ordinance  
To: Cowan, Zach <[zcowan@cityofberkeley.info](mailto:zcowan@cityofberkeley.info)>  
Cc: Berkeley Mayor's Office <[mayor@cityofberkeley.info](mailto:mayor@cityofberkeley.info)>, Marisa Moret <[marisa.moret@airbnb.com](mailto:marisa.moret@airbnb.com)>

Zach -

Thank you for the time this morning to discuss the short-term rental ordinance.

As discussed, Airbnb believes that this section violates Section 230 of the Communications Decency Act and Airbnb respectfully requests that the City remove section 23C.22.050(L) (hereinafter "platform liability provision") from Ordinance 7,521-N.S. The issue of cities imposing liability on hosting platforms is an issue which has been, and is currently, the subject of litigation in several California cities, including Anaheim, San Francisco, and Santa Monica. This litigation is ongoing in both San Francisco and Santa Monica and you can find the dockets for the litigation here: [Anaheim](#), [San Francisco](#), and [Santa Monica](#). The complaints and motions for preliminary injunctions are probably the most relevant documents for you to review.

Again, we would recommend the City remove the platform liability provision, pass the ordinance without the platform liability provision, and await the conclusion of the aforementioned litigation rather than pass the ordinance as currently drafted. This would allow our policy team to engage with Berkeley policymakers on common sense solutions and avoid unnecessary litigation.

If you have any questions, please let me know.

Best,

Kevin

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