



## COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA  
95014-3255 TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333  
CUPERTINO.ORG

### CITY COUNCIL STAFF REPORT

Meeting: July 7, 2020

#### **Subject**

Municipal Code Amendments to regulate Short-Term Rental activity in the City. A new Chapter 5.08 (Short Term Rental Activity) is proposed and amendments are proposed to Chapter 3.12 (Transient Occupancy Tax), Chapter 19.08 (Definitions) and Chapter 19.120 (Home Occupations), of the Cupertino Municipal Code. Minor process related clarifications are also proposed in Chapter 19.12. (Application No(s): MCA-2018-02; Applicant (s): City of Cupertino; Location: Citywide)

#### **Recommended Action**

That the City Council conduct the first reading and adopt the draft ordinance (Attachment A) to:

1. Find the proposed actions exempt from CEQA; and,
2. Amend the Municipal Code by adding Chapter 5.08 (Short Term Rental Activity) and amending Chapter 3.12 (Transient Occupancy Tax), Chapter 19.08 (Definitions), Chapter 19.12 (Administration) and Chapter 19.120 (Home Occupations).

#### **Background**

Short-term rentals (STRs), made popular by websites like Airbnb and HomeAway, allow operators to rent out a room or an entire residence to a visitor (“transients”) for a period of 30 days or less. Rentals lasting more than 30 days are not considered STRs. Prior to the Santa Clara County’s first Shelter in Place Order issued in March 2020, reports indicated that roughly 400 STRs were operating in the City. However, due to the travel restrictions imposed by the Shelter in Place Orders, STR activity has been affected. Reports indicate that as of June 18, 2020, there were about 242 STRs operating in the City.

Under current regulation, STRs are allowed as a Home Occupation per Chapter 19.120 (Home Occupation) of the Municipal Code, upon obtaining a business license, if the following regulations are met:

- Property owner or leaseholder must be the primary resident at the property and be on-site during the lease period.

- Number of transient guests must be limited to two (2) or fewer.
- All transient rentals must be an incidental use.

Under current Transient Occupancy Tax (TOT) regulations, STR operators are required to pay the City's TOT, which is currently 12%. Currently, the City has an agreement with Airbnb, one of the more prominent STR platforms, to automatically collect TOT via their platform and remit the tax to the City through a Voluntary Collection Agreement.

As part of the FY 2018-19 Work Program, Council requested that a regulatory framework for STRs be developed. At its June 19, 2018 meeting, City Council reiterated its interest in creating a regulatory program for STRs with review by Planning Commission. At a July 24, 2018 study session, the Planning Commission provided guidance on potential STR regulations. The general direction was to allow STRs while protecting long-term housing stock and preserving the quality of life for residents. Planning Commission also suggested additional community outreach. Staff created a project specific website ([www.cupertino.org/str](http://www.cupertino.org/str)), prepared an online community survey regarding STRs that was made available from August 8-26, 2018, and held a community meeting on October 4, 2018. The results of the survey (See Attachment B) and a draft ordinance was presented to Planning Commission on November 27, 2018, at which the Planning Commission recommended adoption of the draft ordinance on a 4-0-1 vote (Paulsen abstained).

Further research on STR regulations in other jurisdictions was conducted (See Attachment C for a comparison) and additional feedback was sought from the City Council at a study session on April 2, 2019.<sup>1</sup> At the study session, Council provided direction which resulted in updates to the proposed ordinance in the following areas:

- Limit maximum number of guests based on number of bedrooms in the STR
- Allow STR activity in condominiums and townhomes
- Allow STR activity within units in duplex, triplexes and four-plexes
- Restricting guest activity to prevent nuisance.
- Require a car license plate registry or a hanging placard/parking permit system.
- Incorporate objective standards for revocation of registration and
- Incorporate regulations for hosting platforms.

The revised ordinance was brought to the Planning Commission on January 14, 2020 to receive additional feedback on the changes.

## **Discussion**

---

<sup>1</sup> Staff Report and attachments for April 2, 2019 City Council meeting available online at: <https://cupertino.legistar.com/LegislationDetail.aspx?ID=3903121&GUID=6E2EA2F6-B64C-4BAA-95CD-CC40140A8CF3&Options=&Search=>

### Short-term Rental Regulations

The new Short-term Rental regulations are proposed to be located within Title 5: Business License and Regulations in a new Chapter 5.08. In addition, amendments have been proposed to Chapter 3.12, 19.08, 19.12 and 19.120 for consistency and clarification of the STR regulations. Redlines are indicated in Attachment D.

### *Definitions*

Several new definitions have been proposed within the new chapter regulating STR activity to allow implementation and enforcement of the new regulations. These include “host”, “hosting platform”, “hosted stay”, “local contact”, “short-term rental”, “transient”, and “un-hosted stay”. To ensure consistent interpretation of these terms, definitions in Chapters 3.12 and 19.12 have been amended and/or added. For example, “transient” and “hosting platform” in Chapter 3.12 and “dwelling unit”, “hotel”, “short-term rental”, among others in Chapter 19.12.

### *Short-Term Rental Activity*

With the proposed amendments, STR activity would be allowed as a home occupation within a primary residence (the property at which a person resides a majority of time, carries on basic living activities, and the place he or she usually returns to, in the event of travel.) An STR is prohibited if the dwelling unit is not used as a primary residence. STR activity would not be permitted within any Accessory Dwelling Unit (ADU), including Junior ADU. The property on which the STR is located must provide the minimum parking spaces required by the zoning district in which it is located in, and designate at least one on-site parking space for the STR.

STR activity is limited to one rental agreement or hosting platform booking per night per parcel. Hosted stays, when the host is present, may occur throughout the calendar year without a limitation on the cumulative number of short-term rentals. Un-hosted stays, when the host is not present, are limited to 60 days per calendar year. The number of guests is limited to a total of two times the number of bedrooms in the dwelling unit or portion rented per the rental agreement, or a maximum of two (2) for a studio or single room rental (such as a family room/living room rental).

Since STR activity is allowed as a home occupation, it would continue to be regulated by Chapter 19.120: Home Occupations. The Home Occupation regulations ensure that the use of the property for an STR remains secondary to the use of the dwelling for residential purposes and does not damage the residential character of the neighborhood. However, to ensure that the residential character of the neighborhood is maintained, additional requirements are placed on STRs as follows:

- For STR guests:
  - Prohibiting activities for commercial purposes and/or events that are likely to result in violation in traffic, parking, noise, or other standard regulating the residential use and character of the neighborhood.
  - Complying with quiet hours from 9 p.m. to 7 a.m.
- For hosts:
  - Identifying a Local Contact that is responsible for responding to all complaints within 60 minutes
  - Limiting STR registrations to one (1) per parcel
  - Entering into no more than one (1) STR agreement per night
  - Providing a guest manual to the renter at the same time as the booking, and locating the manual in a prominent place within the STR. The guest manual must include information on noise, quiet hours, trash collection, vehicle parking and any relevant regulations from the Municipal Code.
  - Identifying and making available one designated on-site parking space for the guest.
  - Maintain a license plate registry for all transient tenant cars.

The host must also maintain records documenting compliance (records on reservation, payment of TOT, etc.) for a period of three years.

#### *Short-Term Rental Registration*

To operate an STR within Cupertino, STR registrants will have to submit an application that, in addition to a registration fee, must include the following:

- |                                                          |                                                        |
|----------------------------------------------------------|--------------------------------------------------------|
| ▪ Host Name and Contact Information                      | ▪ Property Location                                    |
| ▪ Site plan and floor plan indicating location of STR(s) | ▪ Acknowledgement of compliance with city requirements |
| ▪ Consent to Inspections                                 | ▪ Local Contact                                        |
| ▪ Proof of primary residence                             | ▪ Identification of off-street parking                 |
| ▪ HOA or Property Owner approval (if applicable)         | ▪ Proof of remittance of TOT (renewals only)           |

STR registration will be valid for one calendar year and must be renewed annually. Upon submission of the registration application and fee, the City will provide the applicant with a unique STR registration number that must be displayed on any advertisement of the STR.

An STR may only be registered when all the required information has been provided, the STR has not had two or more willful violations within the last six months, and operation of the STR is not a public nuisance or a threat to public health, safety, or welfare.

*Revocation*

STR registrations may be revoked for any of the following reasons:

- That registration was obtained by misrepresentation, false statement, or fraud;
- That the short-term rental activity is being conducted in violation of local and/or state law;
- There have been two or more willful violations within the preceding six months;
- That the short-term rental activity has caused or is causing a serious threat to human health or public safety; or
- Consent to inspection has not been provided.

When evidence suggests that a violation has occurred, the revocation process will be initiated. As a first step, the City will issue either a Notice of Pending Revocation or a Notice of Suspension Pending Revocation, the latter of which is effective immediately. The notice is provided to the host, property owner, and the local contact, and details the grounds for revocation. The process allows for submission of a written statement and/or documentation disputing the grounds for revocation within 30 days of receipt of the notice. Upon receipt of this information, the City has 30 days to make a determination on the revocation.

If the decision to revoke an STR registration is made, the registrant may file an appeal within 14 days of the decision. A hearing held by an independent hearing officer will be scheduled within 30 days from the appeal. The decision of the independent hearing officer would be final.

*Regulation on Hosting Platforms*

Under the proposed ordinance, hosting platforms are responsible for collecting TOT, unless a valid voluntary collection agreement or other agreement for TOT remittance exists. Platforms operating within the City are required to retain records documenting compliance for a period of three (3) years. The retained records must include information such as history of the property on the hosting platform, recording indicating payment of any and all transient occupancy taxes, type of stay (hosted or unhosted), length of stay per reservation, and the number of persons per reservation. Specific information can be requested by the City via an administrative subpoena for review in the event it is needed to verify compliance. Additionally, STR platforms are required to have a way of preventing the booking of any STR that does not have a valid registration number from the City.

The City has conducted outreach with two of the largest STR hosting platforms (Airbnb and Expedia) in developing the section regulating hosting platforms. Comments from Expedia have been included as Attachment E, and Attachment F includes comments from

Airbnb. Their comments have been incorporated to the extent feasible, given the City's concerns about preserving neighborhoods.

Expedia Group's letter claims that the proposed hosting platform regulations may violate Proposition 218, see Attachment F. The Planning Commission discussed the issue and asked for additional information. Although there is no case law directly on point, we believe the City would have a strong defense if the proposed STR regulations were challenged under Proposition 218. Prop 218 generally prohibits a local government from imposing, extending, or increasing a property-related fee or charge without a majority vote of the property owners subject to the fee or a two-thirds vote of the electorate. Cal. Const. art XIID, sec. 6(c). Expedia has argued the proposed regulations are subject to Prop 218 because they "would newly 'impose' tax liabilities and obligations on hosting platforms by subjecting platforms to tax collection, recordkeeping, enforcement and remittance liabilities for tax owed as a result of short-term residential occupancies the platform facilitates." However, Expedia does not cite legal authority for this proposition, and indeed it appears to have no support in the law.

Prop 218 is not concerned with administrative obligations, such as recordkeeping or enforcement, where those obligations merely implement an existing tax. *See, e.g.,* Gov. Code § 53750(h)(2)(B). Thus, a court would not likely characterize the administrative duties imposed on hosting platforms as a "tax, fee, or charge" that is "increased" or "imposed" on the hosting platforms. Additionally, the proposed revisions establish hosting platforms as pass-through entities. No tax, fee, or charge is levied on hosting platforms. Rather, the Municipal Code is clear that the transient occupancy tax "constitutes a debt owed *by the transient to the City.*" Mun. Code § 3.12.030 (emphasis added). If the transient fails to pay the tax to the operator or to the hosting platform, the City "may require that such tax is paid directly to the [City's] Tax Administrator." *Id.* Likewise, if a hosting platform fails to collect and remit the TOT to the City, that obligation to collect and remit the TOT reverts to the STR operator. *See* Mun. Code § 3.12.070. The operator then bears the burden of paying the tax. Therefore, the proposed revisions in the Municipal Code do not violate Proposition 218 as claimed by Expedia Group.

The letter from Airbnb (see Attachment F) commented on several topics including unhosted stays, accessory dwelling units (ADUs), capping STRs, requiring HOA approval, provision of site and floor plans, and regulations on hosting platforms. While no changes are proposed to the draft for most of the items commented on by Airbnb, staff recommends that a change in Section 5.08.060: Regulation for Hosting Platform, to address concerns from Airbnb to related to difficulties in documenting hosted vs. unhosted stays. Staff recommends that additional language be included at the end of subsection B as follows: "*A hosting platform that does not categorize their listings as hosted or*

*unhosted stays, must retain records that provide good faith approximation of hosted or unhosted stays.*" This change will allow hosting platforms to report data as requested by the City. This language is currently included in the draft ordinance (Attachment A.)

#### Other Municipal Code Amendments

A few clarifications have been made to the Municipal Code in Chapter 19.12 regarding the processing of permit applications and revocations of permits. These have been identified with redlines in Attachment D. The proposed amendments do not change current business practices but simply clarify them.

#### Planning Commission Meeting

At the January 14, 2020 Planning Commission, the Commission recommended the approval of the draft ordinance (4-0-1, Wang absent) with a modification to clarify that STR activity is not allowed in Junior Accessory Dwelling Units (JADUs). At the hearing, the Commission discussed several items, to which Staff has responded.

- *Allowing STR's in Accessory Dwelling Units (ADUs):* The proposed ordinance would not allow for STR activity to occur within any ADU (including JADUs). Recent state legislation, AB 68, allows for cities to prohibit STRs in some ADUs and requires cities to prohibit STRs in other ADUs (including JADUs). Cities are split in allowing STR activity in ADUs. For instance, Sunnyvale and Mountain View allow STR activity in ADUs, Santa Cruz prohibits STR activity in ADUs, while Los Gatos allows STR activity in ADUs approved prior to February 6, 2019.
- *Daytime vs. Nighttime Guests:* The proposed draft, similar to many other cities stipulates a maximum guest limit. However, of the cities surveyed, only the Town of Los Gatos limits the number of daytime guests (1.5 times the maximum overnight guests). In the proposed draft ordinance, staff has clarified that the guest limitation is for overnight guests. Adverse impacts due to STR activity in the daytime would likely result in a violation of city laws, and thus would be enforceable through city ordinances and applicable laws.
- *Limit on the number of STRs:* There is no cap on the number of STR registrations under the proposed ordinance. Of the cities surveyed only two cities have a cap on STRs - the Town of Los Gatos (5% of all housing stock) and City of Santa Cruz (250 STR licenses). At this time, an STR cap is not recommended. Should the number of ADUs vastly increase over time, this issue could be revisited.
- *Parking Regulations:* The proposed ordinance has requirements similar to the cities of Sunnyvale, Mountain View, and San Jose, where the site must comply with the off-street parking requirements of the zoning district in which it is located. Cupertino's regulations, additionally, would require the identification of one parking stall specifically for use of the STR guests. Los Gatos requires off-street

parking only where no on-street parking is permitted, while Los Altos Hills does not allow overnight on-street parking.

- *Levels of Enforcement:* As discussed below, enforcement could occur at varying levels – reactive, semi-proactive and pro-active. The Planning Commission did not have any clear consensus on enforcement. Depending on the expected level of enforcement a change to budget allocations would allow for the impact of STRs in a neighborhood to be minimized.

### Public Notice and Outreach

The following noticing has been conducted for this project:

<b>Notice of Public Hearing, Site Notice &amp; Legal Ad</b>	<b>Agenda</b>
<ul style="list-style-type: none"> <li>▪ Legal ad placed in newspaper (<i>at least 10 days prior to hearing</i>)</li> <li>▪ Display ad placed in newspaper (<i>at least 10 days prior to hearing</i>)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Posted on the City's official notice bulletin board (<i>four days prior to hearing</i>)</li> <li>▪ Posted on the City of Cupertino's Web site (<i>four days prior to hearing</i>)</li> </ul>

Staff conducted an online community survey regarding STR regulations in August 2018. The results of the online community survey are presented in Attachment B. In total, the survey received 140 responses, with 97.1% of the responses coming from Cupertino residents. Key takeaways from the survey included concerns regarding impacts to the long-term housing stock, support for allowing use of a person's primary residence as an STR, and concerns about parking impacts.

In addition to the community survey, staff held an outreach meeting on October 4, 2018 to receive input on proposed preliminary draft regulations. A postcard announcing the community meeting was sent to all addresses (approximately 25,000 postcards) in Cupertino. In addition, Airbnb also cooperated by sending their known operators notification about the outreach meeting. The outreach meeting was attended by 26 people. A majority of the people in attendance were STR hosts. Attachment H includes a summary of the comments received from the outreach meeting. Key items of interest included concerns with "over regulation" in general and, regulation as a reaction to a few bad actors, in particular, maximum occupancy, parking regulations, and concerns with guest behavior that adversely impact nearby neighbors.

While the online survey responses (mainly from residents) indicated a desire to see more regulation for STR activity, the outreach meeting responses (mainly STR hosts) indicated a preference for fewer regulations. STR hosts cited that regulations are not needed because there have been very few complaints regarding this activity and that the activity is a self-regulating process since some of the hosting platforms allows guests an opportunity to rate the host and the STR.



It should be noted that input from the online survey and the outreach meeting have been incorporated into the draft ordinance in several topic areas such as:

- Parking
- Length of stay(s)
- Outreach
- Enforcement
- Number of guests
- Regulations

### Implementation and Short-term Rental Enforcement Options

#### *Operative Date*

Due to COVID-19 and the Santa Clara County Shelter in Place Order, STRs have been impacted by the required travel restrictions, with some ceasing (temporarily or permanently) operations. There is no certainty as to whether or when the number of STRs will rebound to the pre-COVID-19 levels of roughly 400, at this time. Currently, there are roughly 242 STRs operating. Without a reasonable way to estimate the number of STRs that will be active once Shelter in Place allows travel or the order is lifted, an effective cost recovery fee cannot be determined.

Due to this, it is recommended that the operative date of the ordinance be six months after the State and County's Shelter in Place Orders are lifted to allow non-essential travel. The six-month timeframe is recommended to allow three months for STRs to resume operation, the STR market to stabilize and data collection to inform the cost recovery fee for STR registration. After the data has been analyzed, fee options will be calculated and brought before Council for adoption. The additional three months allows time for scheduling and conducting hearings and the fee schedule resolution to become effective.

#### *Enforcement Expectations and Options*

In order to ensure adequate and effective compliance with the proposed STR program, and to address any associated public nuisances, it is important to evaluate existing staff resources and consider whether additional resources are necessary to meet community and City Council expectations.

Enforcement of all STRs is currently managed by one (1) full-time Code Enforcement Officer within the Community Development Department, who in addition, also enforces other areas of the Municipal Code including zoning, building and housing standards, fire prevention regulations, and protected private trees. STR code enforcement is conducted on a reactive basis, i.e., as complaints are received from the public; only upon which, an investigation is initiated to determine whether STR activity is occurring, and if so, whether the activity is being conducted in compliance with the Municipal Code. Between April 2016 and December 2019, the City received twelve (12) complaints related to STRs. Generally, the complaints were related to noise, disruptive guest traffic, parking, unpermitted construction, the improper rental and occupancy of accessory structures,

and the improper rental and occupancy of garages. On average, it takes staff almost 90 days (even longer, in some cases) to resolve these complaints and obtain compliance.

A change to the level of enforcement for STR violations is dependent upon the expectations for enforcement and commensurate adjustments to fund allocation and the budget. Depending on expected outcomes, STR registration enforcement can be done at three levels:

1. Proactive: A full proactive approach is conceptually the most intensive approach which intends to ensure the highest level of registration compliance (both initial and ongoing), proactive annual inspections of existing registrants, while continuing to provide ongoing reactive response to public nuisance complaints.
2. Semi-proactive: This approach aims to provide a satisfactory registration compliance rate of known STR operators while continuing to provide an ongoing reactive response to complaints. There would be no annual inspections as part of this approach.
3. Reactive: The reactive approach would maintain status quo on registration compliance and nuisance complaints by continuing to provide a reactive response by complaint only.

Third-party compliance monitoring contract services provides ongoing monitoring and capture of records and information which can be used to both verify registration compliance and as supporting evidence in the enforcement of the STR regulations. This would be vital to the successful implementation and enforcement of the proposed STR program. Setting up a customized and exclusive monitoring system for the City would be cost-prohibitive for the anticipated volume of STR registrants. There are already established providers that provide these services. Some of the service providers have also established platforms to assist with STR registration. E.g., the Town of Los Altos Hills accepts STR registrations online through a third-party service provider (visit: <https://safe.hostcompliance.com/los-altos-hills-ca/permit-registration/welcome>).

It is highly recommended that the City contract for additional code enforcement staffing and for third-party compliance monitoring with a service provider, regardless of the desired enforcement approach, in order to facilitate even a minimum level of success for the program.

The following table summarizes the three approaches discussed above and provides an estimate of additional contracted staffing needs and third-party monitoring costs to conceptually accomplish each approach:

Enforcement Level	Services Provided	Expected Rate of	Additional Contract	Third-Party Monitoring	
-------------------	-------------------	------------------	---------------------	------------------------	--

	<b>Registration Enforcement</b>	<b>Complaint Response</b>	<b>Compliance (of known STRs)</b>	<b>Staffing Needs</b>		<b>Total Estimated Cost</b>
Proactive	Yes, with annual inspections	Reactive	> 90%	3,120 annual hours (\$374,400)	\$34,289	\$408,689
Semi- Proactive	Yes, with <u>no</u> annual inspections	Reactive	> 70%	2,080 annual hours (\$249,600)	\$34,289	\$283,889
Reactive	Only upon complaints	Reactive	> 30%	1,040 annual hours (\$124,800)	\$34,289	\$159,089

Other cities have STR registration and license fees between \$165 and \$274. Most cities also require a business license in addition to the STR registration.

The enforcement level will be discussed at a future date when the registration fee is brought before Council as this will impact the cost recovery calculation.

#### **Environmental Review**

The proposed ordinance is not a project within the meaning of section 15378 of the California Environmental Quality Act ("CEQA") Guidelines because it has no potential for resulting in physical change in the environment, either directly or indirectly. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines sections 15061(b)(3) and 15304 because it can be seen with certainty to have no possibility of a significant effect on the environment and because the ordinance is a minor alteration to land use limitations.

#### **Sustainability Impact**

There are no sustainability impacts identified with STR activity.

#### **Fiscal Impact**

Prior to COVID-19, STR activity was generating about \$400,000 annually for the City. Based on the recent data, STRs generated roughly \$2,000 and \$5,000 in Transient

Occupancy Taxes in March and April, respectively. This shows a significant decrease in STR activity and related revenue.

As discussed above, the STR registration fee will be presented for Council action at a later date.

**Next Steps**

After the first reading for the ordinance, a second reading of the ordinance is tentatively scheduled for July 21, 2020.

---

Prepared by: Erick Serrano, Senior Planner

Katy Nomura, Assistant to the City Manager

Phillip Willkomm, Senior Code Enforcement Officer

Reviewed by: Benjamin Fu, Director of Community Development

Approved by Submission by: Dianne Thompson, Assistant City Manager

**Attachments:**

- A. Draft Resolution Adopting STR Regulations
- B. Online Community Survey Summary
- C. Comparison of Short-Term Rental regulations
- D. Redlines to Titles 3, 5 and 19 of the Municipal Code
- E. Comments from Expedia Group
- F. Comments from Airbnb
- G. Public Outreach Summary