



Date: February 09, 2024

To: Hampton City Council  
Mary Bunting, City Manager  
Bonnie Brown, Director of Community Development

From: Jessica Kraus, Assistant City Attorney II

cc: Steven Bond, Interim City Attorney

**Re: Stakeholder Legal Briefing Informing Short-Term Rental Policies**

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## **Background**

In Fall 2022, the City sought to enact local regulations concerning the operation of short-term rentals (“STRs”) in the City of Hampton. City staff engaged stakeholders at that time to assist with the development of recommended policies and regulations. The City enacted its current STR regulations via zoning ordinance amendments in December 2022. The current regulations permit STRs with an approved use permit in certain districts. However, any legally operating STRs (having zoning approval and a valid business license) in existence prior to the effective date of the amendment were provided a two-year grace period in which they could operate while coming into compliance. Beginning in December 2024, these grace period STRs require a use permit to legally operate. In Spring 2023, the stakeholders were reengaged to assist staff in refining a set of recommended conditions for STR use permits. Between Spring 2023 and August 2023, the Planning Commission and City Council heard and approved 11 STR use permits. In August 2023, City Council paused consideration of STR use permits in order to investigate policy implications related to STRs. In particular, Council asked staff to consider amendments to current regulations that would address issues related to the density of STRs throughout the city. City staff convened a stakeholder group to assist in developing policy recommendations on these issues. As part of the stakeholder process, the City Attorney’s Office provided legal briefings to stakeholders to educate them on a local government’s authority to regulate STRs. These legal briefings contained information previously provided to City Council regarding the limits of the City’s land use authority. This memo is provided to capture the legal guidance provided to stakeholders as information to consider when assisting staff in developing recommendations for future STR regulations.

## **Legal Briefing**

### **The Dillon Rule**

The Dillon Rule provides that a locality only has the authority to act if the power is expressly granted by the General Assembly or is necessarily implied by those powers expressly granted.<sup>1</sup> Additionally, if the General Assembly states the manner in which a local government must exercise those powers, the local government can only act in that manner.<sup>2</sup> This means that a local government can only create STR regulations if the General Assembly has expressly granted the power to regulate STRs or if the regulation of STRs is necessarily implied from other expressly granted powers. Virginia

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<sup>1</sup> *Bragg Hill Corporation v. City of Fredericksburg*, 831 S.E.2d 483, 489 (Va. 2019)

<sup>2</sup> *Marble Technologies v. City of Hampton*, 690 S.E.2d 84, 88-90 (Va. 2010).

Code § 15.2-983 grants local governments this power. In particular, it states that local governments have the “authority to regulate the short-term rental of property through general land use and zoning authority.”<sup>3</sup> Therefore, except as otherwise stated in the statute, the City of Hampton can utilize its land use and zoning authority to regulate STRs.

### Land Use Tools

Local governments have two primary tools for regulating which uses can operate in which areas. These are a use permit<sup>4</sup> and a Zoning Administrator Permit (“ZAP”).<sup>5</sup> Both of these land use tools “run with the land”, meaning that they are applied to the property as opposed to a specific person. In general, so long as the conditions of the tool are being met, the use permit and ZAP do not expire when a property changes ownership. The main difference between use permits and ZAPs are the way they are administered and revoked. A use permit is subject to a public hearing and approved by City Council. City Council can choose to apply conditions to the use permit that are unique to the use at that specific property. Similarly, use permits are revoked by City Council after a public hearing in which it is determined that there was a violation of a condition of the use permit, the zoning ordinance, city code, or other law. Alternatively, a ZAP is approved by the Zoning Administrator and is not subject to a public hearing. The conditions applied to a ZAP are set forth in the zoning ordinance and are applied in the same manner to all properties for that use. Similarly, a ZAP is revoked by the Zoning Administrator without a public hearing if it is found that there was a violation of the conditions of the ZAP, the zoning ordinance, city code, or other law. Currently, STRs require a use permit to operate legally in the City of Hampton. However, it is possible that the zoning ordinance could be amended to allow approval of STRs via a ZAP instead.

### Zoning Authority

It is important to understand the general zoning authority available to a local government when developing new zoning regulations. In general, zoning regulations should promote the health, safety, and general welfare of the public.<sup>6</sup> Zoning regulations must be justified by a legislative purpose of zoning. Some legislative purposes that may be most relevant to regulations concerning STRs are:

- i. Residential areas be provided with healthy surroundings for family life;<sup>7</sup>
- ii. Regulations are developed to facilitate the creation of a convenient, attractive and harmonious community;<sup>8</sup> and
- iii. Regulations lead to the most appropriate use of land throughout the locality.<sup>9</sup>

Any zoning regulations for STRs must be able to be justified against these legislative purposes of zoning.

Furthermore, City Council is limited to considering certain factors when evaluating a use permit and enacting zoning regulations. One factor that Council always considers when approving a use permit or

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<sup>3</sup> Va. Code § 15.2-983(D).

<sup>4</sup> Va. Code § 15.2-2286(A)(3). Use permits are also sometimes called “special use permits,” “conditional use permits,” and “special exceptions” in other localities.

<sup>5</sup> Va. Code § 15.2-2286(A)(4).

<sup>6</sup> Va. Code § 15.2-2283.

<sup>7</sup> Va. Code § 15.2-2200.

<sup>8</sup> Va. Code § 15.2-2283.

<sup>9</sup> Va. Code § 15.2-2284.

enacting zoning regulations is the conformity of such action with the Comprehensive Plan. Other factors that can be considered are described below:

A. Character of the Neighborhood

When there is an established character to a certain area or neighborhood, the City Council can justifiably consider the proposed use’s impacts on that character when evaluating a use permit. A recent Court of Appeals case held that the Albemarle County Board of Supervisors was justified in their denial of an STR use permit when it found that “the number of rooms requested [was] not in character with the surrounding neighborhood” when that neighborhood was primarily residential.<sup>10</sup> The court found that the STR use could increase noise and traffic in a way that would not be consistent with the established neighborhood.<sup>11</sup> Therefore, City Council could consider the impacts of STRs on the character of the neighborhood when crafting regulations.

However, while Council may consider the character of the neighborhood generally, Council may not create regulations based on neighborhood covenants, home owners’ association declarations, or deed restrictions. These are private agreements between neighbors which are not enforceable by the City. Therefore, these are not a valid land use consideration on which zoning regulations and decisions can be based.

B. Unaddressed Impacts to Nearby Properties

Many land use cases consider the impact of uses on nearby properties. The City Council may analyze a use against the standards set forth in Zoning Ordinance Section 14-6 (concerning noise, traffic, nuisances, etc.). If the Council finds that these standards cannot be met through conditions on the use, then the Council can determine that the use is not appropriate in that area. Therefore, STR use permit and/or ZAP conditions can be written to address nuisance concerns. Concerns that the conditions do not sufficiently prevent these impacts on nearby properties could be a reason for Council to prevent an STR at a certain location.

C. Concentration of the Use

The Virginia Supreme Court has held that a locality can create zoning regulations such that certain uses are “separated rather than concentrated in the same areas.”<sup>12</sup> The case concerned Norfolk’s regulations separating the location of adult theaters by 1000 feet from one another throughout the city.<sup>13</sup> While STRs may pose different policy considerations than adult theaters, the authority of a local government to separate the location of the use so as not to concentrate the use (and associated nuisances) in one area is well established. Therefore, the Council could regulate the density and separation of STRs throughout the city.

D. Public Opposition

Public opposition to a use alone is an insufficient basis for a regulatory determination.<sup>14</sup> However, Council may use public opposition that is articulating a legitimate land use concern as a reason for taking regulatory action.<sup>15</sup> Therefore, if Council heard public opposition based on a land use consideration, it could take that into account when regulating STRs.

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<sup>10</sup> *Manors LLC v. Bd. of Supervisors of Albemarle Cnty.*, 883 S.E.2d 684, 688 (Va. Ct. App. 2023).

<sup>11</sup> *Id.*

<sup>12</sup> *City of Norfolk v. Tiny House, Inc.*, 281 S.E.2d 836, 839 (Va. 1981).

<sup>13</sup> *Id.*

<sup>14</sup> *Town of Vienna Council v. Kohler*, 244 S.E.2d 542, 547–48 (Va. 1978).

<sup>15</sup> *See Loch Levan Land Ltd. P’ship v. Bd. of Supervisors of Henrico Cnty.*, 831 S.E.2d 690 (Va. 2019).

E. Inconsistent Actions

Additionally, City Council decisions and zoning regulations that treat similarly situated properties differently are potentially invalid.<sup>16</sup> However, Council's actions could be justified if there are distinguishable characteristics between the properties at issue.<sup>17</sup> This means that any STR regulations should be crafted in a way that treats similarly situated properties similarly and allows for fair and just administration to similar properties.

**Conclusion**

Staff made a concerted effort to provide stakeholders with all relevant information necessary to make decisions about zoning regulations. Part of that effort included legal briefings from the City Attorney's Office to make stakeholders aware of the legal parameters involved in creating policy recommendations. The stakeholders' engagement with these legal criteria resulted in more informed feedback as staff crafted policy recommendations for the regulation of STRs in Hampton.

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<sup>16</sup> *Bd. of Sup'rs v. Rowe*, 216 S.E.2d 199 (Va. 1975).

<sup>17</sup> *Bd. of Sup'rs of Fairfax Cnty. v. McDonald's Corp.*, 544 S.E.2d 334, 339-40 (Va. 2001).

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