

**SPECIAL CALL CITY COUNCIL MINUTES
TUESDAY, SEPTEMBER 29, 2015 9:30 A.M.
CITY HALL, COUNCIL CHAMBERS, VERO BEACH, FLORIDA**

PRESENT: Richard Winger, Mayor, present; Jay Kramer, Vice Mayor, excused absence; Councilmember Pilar Turner, present; Councilmember; Amelia Graves, present and Councilmember Randy Old, present **Also Present:** James O'Connor, City Manager; Wayne Coment, City Attorney and Tammy Vock, City Clerk

1. CALL TO ORDER

A) Roll Call

The Clerk performed the roll call.

B) Pledge of Allegiance

Mayor Winger led the audience and the Council in the Pledge of Allegiance to the flag.

2. PUBLIC COMMENT

3. PUBLIC HEARING – QUASI-JUDICIAL

(Quasi-Judicial)

**Application #A15-000002 Submitted by Law Firm of Rooney and Rooney
Appealing the Planning and Zoning Board's Decision on the Interpretation
of the City Code Pertaining to Guest House and Transient Quarters**

(Quasi-Judicial)

**Application #A15-000003 Submitted by Law Firm of Rooney and Rooney
Appealing the Planning and Zoning Board's Decision on the Interpretation
of the City Code Pertaining to Guest House and Transient Quarters**

It was agreeable to both parties to hear the two (2) cases together.

Mayor Winger asked the Council if they had any ex parte communications to disclose. He said that he has not visited the site, nor has he done any research on it. He said that he generally supports neighborhoods. There was no ex parte communications from any of the other Councilmembers.

Mr. Nick Zbrzezny, Attorney with Frost Van den Boom and the Attorney for the Council, entered into the record several Exhibits (on file in the City Clerk's office).

Mr. Jonathan Rhodeback, Attorney from Rooney and Rooney, said that he was present today representing the appellants Charles Fitz and Kent, Charles, and Gabriel Wagner. He said until he states otherwise, everything that he talks about pertains to both appeals. He said there is just one important difference that he will go into later on in the meeting. He objected to this hearing going forward and the reason was because of Section 2-303 of the Code of Ordinances discussing an appeal of an interpretation or application of a Code provision with the Code of Ordinances. He said the designated administrative authority is defined in Section 2-303(s), which reads: *“designated administrative authority means the City official, department head or director, or his designee, having jurisdiction and responsibility for administration of the code, ordinance, rule or regulation.”* He said the Ordinance or the restriction on “guesthouse and transient quarters” that exists in this City is unconstitutionally vague. The vagueness test is determined by the Florida Courts as to whether a Statute or Ordinance gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. He said in this case no person of ordinary intelligence has fair notice of what constitutes a forbidden guesthouse and transient quarters if that is supposedly forbidden in residential zoning districts. He read from the Code under the definitions that defines guesthouse and transient quarters, *“any structure including converted dwellings in which less than 10 rooms with or without meals, are rented or otherwise provided for compensation to transients for their temporary care and lodging.”* He said the word transient is defined as a guest and transient occupancy. He said transient occupancy is also defined as any occupancy for which it is the intention of the parties that the guest occupancy will be temporary. He said temporary is not defined in the Code. Mr. McGarry, in his interpretation, conceded it is anything that is not permanent. He said anything not permanent could be 30 days, 60 days, 90 days, 5 years, 10 years, or anything less than forever. For that reason anyone that goes through and reads these definitions and how it applies to the particular zoning district would know they are not allowed to rent their house on a temporary basis. In Mr. McGarry’s interpretation he references Section 509.013(4)(a) of the Florida Statutes, which Mr. Rhodeback read in part, *“transient public lodging establishment means any unit, group of units, dwelling, buildings, or group of buildings within a single complex of building which is rented to guests for periods of at least 30 days or 1 calendar month, whichever is less.”* Mr. Rhodeback said the important distinction between Mr. McGarry’s interpretation and what he read was that the City’s Code does not have any reference whatsoever to renting property more than three (3) times in a particular year if it is 30 days or less. If it is rented one time for 30 days or less it is a prohibited guesthouse or transient quarters. The State of Florida determined that it has to be three (3) times in one calendar year for it to be of the transient nature of which Mr. McGarry is stating. He said this is an attempt to regulate or restrict someone’s right to free speech, which isn’t always impermissible. There are some circumstances you can do that, but in this particular case you are trying to regulate speech that is not necessarily forbidden. He brought up the words *rebuttable presumption*. He said rebuttable presumption by definition means that someone could rent their house for less than 30 days and it still would not be a guest house or transient quarters. He said there is nothing in the Code that defines or gives any guidance to anyone as to how they are able to rebut this presumption that their house is a forbidden guest house or transient quarters because they are renting their property for a particular period of time. He said on the other hand, when you read the Code there is nothing that says that you are allowed to rent your

property for more than 30 days either. He said as set forth in their own Code, it says whatever is not expressible as listed as permitted is forbidden in the City of Vero Beach. There is nothing in the Code that states you can rent your property for more than 30 days it is just allowed to be rented on a temporary basis. In Mr. McGarry's official interpretation he made reference to the Florida Statutes specifically Florida Statute Section 509.013(4)(a). He uses that to bolster his interpretation that transient is a period of less than 30 days or one calendar month, whichever is less. He said there is an important distinct difference between the Florida Statutes and the City Code of Ordinances. The very definition that Mr. McGarry references is that it is an establishment which is rented to guests more than three (3) times in a calendar year for periods of less than 30 days or one calendar month, whichever is less. He said if the goal was to copy the State Statute as it pertains to this particular issue, it did not occur. Also, another key difference between the Florida Statutes and the City Code of Ordinances is that the Florida Statute as it pertains to transient rentals or short term rentals deals with licensing. So the definitions in the Florida Statutes make sense in respect to the licensing context. He said when you put it into this context it actually ends up being an impermissible restriction on speech, which is a violation of the first amendment. He brought up Ordinance #2015-02 and said that there is another hurdle and that hurdle is preemption. He said in Florida Statute 509.023(7)(b) it states *a local law ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals unless such local law, ordinance, or regulation adopted on or before June 1, 2011.*" He said the definitions guest house and transient quarters was amended by Ordinance 2015-02. The definition of transient was amended pursuant to Ordinance 2015-02. The definition transient occupancy was added in Ordinance 2015-02, all of which when put together read into the Code and applying it to this situation is a law that was adopted after June 1, 2011. The State Legislature has said that this cannot be done. They have expressly preempted local governments from ruling on this particular issue. It may be argued that the supposed ban on transient and guest housing quarters has always been banned for approximately 30 years. He said if you look at the City Code prior to 2015, transient was never defined and there was never a cross reference to Florida Statutes 509.013, which is the State Statute referring to transient lodging or public lodging establishments. There was already a ruling from the City Code Enforcement Board prior to the 2015-02 Ordinance that determined that it was impermissibly vague because there were not enough definitions defined for guidance to anyone that read the Code. This case went to Court and was declared per curiam (which means we agree but did not issue a written opinion). Here there could be no dispute that the Ordinance changes the City Code of Ordinances and how it applies to the ban on guest houses and transient quarters. He went back to Ordinance 2015-02 and said that this is approximately four years after the deadline set by the State Legislature, which he said this City cannot do and the Ordinance was enacted anyway. For that reason the ban on guesthouse and transient housing quarters cannot be upheld. He said this is an attempt to regulate or restrict someone's right to free speech, which isn't always impermissible. In the definition of transient occupancy the City doesn't just attempt to restrict rentals for a period of 30 days, but also restrict people's right to advertise or hold out to the general public that they are renting their property for a period of 30 days or one calendar month. He said this is a content based restriction. He said content based restrictions are not always impermissible. However, in this case that circumstance does not exist. The Code states

that there is a rebuttable presumption if you rent your property for less than 30 days or one calendar month that the occupancy is transient in nature. The Code does not say rentals for less than 30 days are banned in the City of Vero Beach. Yet, they also regulate any speech in regards to that, which means they are regulating speech as it pertains to something that is not necessarily legal or unlawful or forbidden in this City.

Mr. Rhodeback pointed out that there was a distinct difference between the Charles Fitz case and the Charles and Gabrielle Wagner case and it deals with the citations involved. He said with Mr. Fitz's case it is pretty straight forward. A citation was issued. It was to go before the Code Enforcement Board and that proceeding was abated pursuant to the Code. He said with the Wagner case it is a little different in that they were initially cited for a violation on April 7, 2015 in regards to City Code Sections 60.11 and 61.02. In Section 61.02, it applies to a different residential district from where his clients have property. So therefore a violation cannot be corrected that does not exist. He said during the appeal process when there was a challenge of the interpretation in the application in that particular Code provision, an amended citation was issued. The amended citation changed the applicable Code Sections. The issue becomes that the amended citation gave the Wagners' an opportunity to cure the violation, but the violation date was April 21, 2015, which is almost three months prior to the amended citation being issued. Mr. McGarry in his official interpretation said that Sections 61.36 and 61.37 should have been cited in the original citation. Mr. Rhodeback did not know how he could possibly have said something like that and any amendments to the citation are immaterial. He does not know how Mr. McGarry could have determined that without any factual evidence whatsoever. This seems to be a situation where Mr. McGarry doesn't like the results of the case so we will just change the rules as we go. To uphold any citation against the Wagners' would be a gross violation of due process. He said due process is simply notice and an opportunity to be heard. In this particular case the Wagners' were put on notice that they were in violation of the Code Section pertaining to a residential district they don't own property in. He said how are they supposed to amend or correct a violation that does not exist. Then an amended citation is issued and it required the Wagners' to go back in time and try to correct the violations prior to the amended citation issued. He felt what was going on here was a little bit of a government overstep with the short term rental issue. He said the State Legislature has determined that they are going to control short term rentals and it is not an issue for local governments. But, this local government is trying to ban or regulate short term rentals in this particular case. He was not saying there was not a way this could have been regulated, but the Florida Statutes have been violated by enacting this Ordinance. He said that the interpretation should be overturned and Ordinance #2015-02 should be stricken out.

PLANNING DIRECTOR PRESENTATION

Mr. Nick Zbrzezny, Attorney on behalf of Mr. Tim McGarry, Planning and Development Director, addressed the scope of today's proceedings and how they got here. He said when an individual receives a citation from a Code Enforcement Officer pursuant to the Code Section 2-303, they can request an Evidentiary Hearing in front of the Code Enforcement Board. They can also file an appeal. They can appeal the Code Enforcement Officer's interpretation of the relevant Code

provision that was the reason for the citation. He said that is what occurred here and the appeal went to Mr. Tim McGarry, Planning and Development Director. Mr. McGarry rendered a decision, but the decision was relating to the Code Enforcement Officer's interpretation of the relevant Code provisions. He said once that decision was rendered, the aggrieved parties in this matter appealed to the Planning and Zoning Board pursuant to Section 64.04 of the Code. He said the scope is still Mr. McGarry's decision relating to the Code Enforcement Officer's interpretation and application of the Code provision. The Planning and Zoning Board issued its decision, which was to unanimously uphold Mr. McGarry's decision. The decision from the Planning and Zoning Board was included in the Exhibits. The aggrieved party is now appealing to the City Council and the scope again does not change. He said the arguments they have heard today regarding constitutionality, first amendment, in vagueness, preemption, are well beyond today's scope of proceedings. Today's inquiry is limited to the decision regarding the Code Enforcement Officer's interpretation and application of the Code provisions. He said there are two different parties being discussed today and both parties were cited for operating a guesthouse and transient quarters in a residential district. In the Fritz matter this property is in the R-1A zoning district and the Wagner property is located in the RM-10 zoning district. He said RM-10 is multiple family residential and R-1A is single-family residential. Pursuant to the Vero Beach Code it is unlawful for a building to be used in a manner that is not permitted by a particular zoning district and no use should be allowed in a zoning district unless it is specifically permitted by the Code.

Mr. Zbrzezny showed on the doc-cam Section 61.02, which are the permitted uses in the R-1A zoning district. He said guesthouses and transient quarters are not a permitted use. He also showed Section 61.03, which outlines conditional uses in the R-1A zoning district and guesthouses and transient quarters are not a permitted use. In Section 61.35 it sets forth the permitted uses in the RM-8 and RM-10 zoning district, in which guesthouses and transient quarters are not a permitted use. They also are not allowed in Section 61.37, which has to do with conditional uses. He said Mr. McGarry's decision makes this very clear, but he wanted to go through each particular provision and demonstrate to the Council that not only are guesthouses or transient quarters not permitted in either of the zoning districts that are in question, but, guesthouses and transient quarters are not permitted in any residential zoning district in the City of Vero Beach. This is the inquiry and genesis of the Code Enforcement Officer's citation in both the Fitz and Wagner matter. He included in the Exhibits, Mr. McGarry's interpretation in the Wagner and Fitz matter. He briefly touched on Mr. McGarry's decision. He said the decision makes it clear that Mr. McGarry relied on nothing but the plain language of Chapter 60, which is the definition section for guesthouse and transient quarters that are set forth in the Vero Beach Code. He put on the doc-cam a copy of Ordinance 2015-02 that contains the definition of guesthouse and transient quarters. He said although this is beyond the scope of today's inquiry, Council can clearly see that there were no substance changes to the definition of guesthouse and transient quarters. In analyzing this definition, Mr. McGarry relied on the plain meaning and ordinary and common usage of the terms language located in the guesthouse and transient quarters definition. He referred to the bottom of page 1 of Mr. McGarry's decision in the Fitz matter (part of Exhibits) where the definition and use of the word "temporary" according to the Merriam-Webster Dictionary, as well as common

understanding and usage of the word, is “lasting for a limited time” or “intended to be used for a limited amount of time;” In other words, “not permanent.”

Mr. Zbrzezni went over the definition of *guest house* and *transient quarters* utilizes the word “transients” as a noun where it refers to rooms being “rented or otherwise provided to” such persons for “their” temporary care and lodging. According to the Merriam-Webster Dictionary, the definition and the use of the word “transient” as a noun, such as in the referenced context, is “one that is transient” or a “transient guest” where the term “transient” as an adjective means “passing through or by a place with only a brief stay or sojourn” or “staying somewhere only a short time.” In the context of the Code a “transient” is a person or guest that is only staying for a brief stay or only a short time. This comports with the common understanding and usage of the words employed.

Mr. Zbrzezni gave a further example of the meaning of “transient,” the Florida Legislature in Subsection 509.013(4)(a), Florida Statutes, defines as a transient lodging establishment: a unit, dwelling, or building, etc., rented to guests for periods of less than 30 days or 1 calendar month or that is advertised or held out as a place regularly rented for such use and duration. The Legislature clearly recognized a period of less than 30 days or 1 calendar month in duration is “transient” in nature and thus, a “brief stay” or “a short time.” The legislative intent also comports with the definition, common understanding, and usage of the word “transient” the same as its use in describing the City’s guest house and transient quarter land use. He reiterated that the Planning and Zoning Board’s unanimous decision to uphold Mr. McGarry’s interpretation has been submitted in the Exhibits as evidence for Council’s consideration.

Mr. Zbrzezni addressed a few points that were brought up by Mr. Rhodeback. He said first is the idea that somehow Mr. McGarry relied on Florida Statutes Section 509 in rendering his decision. He asked Council to defer to the decision in Mr. McGarry’s interpretation on page 2 of the Code as it applies to Mr. Fitz and on page 1 where it gives the meaning of transient. The reference to Florida Statute 509 is used merely as an example to show that even the State Legislature understands the definition of transient to mean what was already stated in the decision. The idea that somehow either Mr. McGarry or the Council attempted to rely on Florida Statutes 509 is false. The second is the argument of preemption. He reiterated that is beyond the scope of the proceedings here today. He said since it was brought up, Council can see that Mr. McGarry relied solely on the definition of guest houses and transient quarters. He brought up the issue that was addressed regarding due process and notice with respect to the Wagner matter. Mr. Rhodeback talked about the amended citation, and the scope of this proceeding has been discussed. The analysis is whether the Code Enforcement Officer and Mr. McGarry’s decision regarding that interpretation was a correct interpretation of the Code provisions. It is not a decision as to the final merits of the issue of the citation. Once the appeal process has been finalized, the matter will go back before the Code Enforcement Board and that point should be made in front of that Board. He said that Mr. McGarry’s decision is straight forward and easy to follow and he asked Council to do exactly what the Planning and Zoning Board did and that is to uphold that decision.

APPELLANT REBUTTAL

Mr. Rhodeback stated in Section 2-303 of the Code of Ordinances the interpretation and applicability of the Code provisions is an issue in this case. Mr. Zbrzezni told Council that they can only determine today whether guest houses and transient quarters are permissible within a residential district. He said it is not that simple. It is application and interpretation. Council can make a determination that their own Code is not specific enough about a particular issue. In fact Mr. Zbrzezni and Mr. Frost, attorneys for the pending Circuit Court case have argued the matter pertaining to preemption and constitutionally are more appropriate for this forum than the Circuit Court forum. He was a little perplexed as to why Mr. Zbrzezni is saying that this cannot be brought up now. Mr. Zbrzezni has said that Mr. McGarry's interpretation lies upon the common usage of the terms. There is no Webster dictionary that says transient rental is 30 days or more than one calendar month whichever is less. When the common usage is so vague and you don't know what it means, then guidance must be given to their citizens of the City of Vero Beach so they know what they are allowed and not allowed to do. If they were intending to ban all rentals for 30 days or less, then just say that. Instead what they did is say that you can't rent your house for transients for temporary lodging. If the City put in its Code no speeding is allowed in this City, he said some people would drive 35 mph in compliance with the law and other people would be driving 80 mph because speeding by itself is not specific enough. Similarly *transient* in its common usage is not specific enough for a person of ordinary intelligence to know what is permissible and what is impermissible. In regards to Mr. Zbrzezni's argument as it pertains to there was no reference in Section 509. He said back in June 2011 there was an informative interpretation memorandum that was created. It states that the City's position has always been to ban guesthouses and transient quarters. There is specific reference to Section 509.13 and it spells out that there is a 30 day limit, which is how they came up with 30 days (Mr. McGarry's words). With respect to Mr. Zbrzezni's argument as it pertains to Code Enforcement and how it is the proper venue to determine the merits of the Wagner's citation. The Code states they are limited to fact finding and questions of law. The Council determines whether due process has been given to the Wagners'. All the Code Enforcement Board can determine is if the citation was issued on this date and whether it was a violation and not whether the citation itself violates due process. That is the call of the City Council to make. The Code Enforcement Board has not been given that authority according to the Code. He said that is why the argument as it pertains to the Wagners' as far as demented citation is concerned is properly before the City Council and would not be properly heard in front of the Code Enforcement Board. In summary of his position, he said read the Code. The Code is impermissibly vague. He said even if they disagree with his interpretation of it, it has also been preempted by State Statute. If they disagree with that, they can still create an impermissible restriction on the first amendment (rights to free speech and freedom of expression).

REBUTTAL

Mr. Zbrzezni stated that Mr. Rhodeback continues to reference a 30-day cut off point. He told Council that the vote of this Council's inquiry today is Mr. McGarry's decision as to the Code Enforcement Officer's interpretation application. He said nowhere in Mr. McGarry's decision

did they see any reference to a 30-day requirement. He asked Council to keep this in mind. Mr. Rhodeback brought up a memorandum that has not been presented today. He reiterated that the scope of the inquiry today is Mr. McGarry's decision and Mr. McGarry's decision in no way relies on Florida Statutes 509. He continues to assert the fact that the Code Enforcement Board certainly has the authority and regularly decides whether or not someone has received the proper notice of a citation as well as the opportunity to correct it. The claim that there was not proper notice is something that should be submitted to the Code Enforcement Board. Mr. Zbrzezny reiterated that guesthouses and transient quarters are not permitted in any residential zoning district.

APPELLANT SUMMATION

Mr. Rhodeback stated that the City of Vero Beach's Municipal Code of Ordinances does not give enough guidance to a person of ordinary intelligence to determine what exactly a prohibited guesthouse and transient quarters are. For that reason it is impermissibly vague and nobody should receive a citation until that issue is fixed. The other issue is even if you disagree with that, this issue has been preempted by State law. State law says that local governments are not to issue any regulations as it pertains to the frequency or duration of short term rentals and Ordinance 2015-02 does just that. He said if they disagree with his arguments about preemption there is still in their definition of transient and occupancy an impressive regulation and restriction on freedom of speech. He said for all of these reasons, the interpretation as determined by Mr. McGarry should be overturned. Ordinance 2015-02 is not proper and should not be upheld therefore citations should not be issued in these cases.

COUNCIL DISCUSSION

Ms. Graves asked if they were talking about what a reasonable intelligent person believes is permissible or impermissible. She said for example, if they are running one of these rentals, would a reasonable intelligent person believe that they have to get a license in order to do that. Would they call their local government to find out how to obtain that license and then would a reasonable person be told those licenses are not given because this is not permitted within our City according to the Code. She doesn't understand if a reasonable intelligent person is told no that the license is not permitted she would not understand how that would be too vague. She said with regards to speeding, a reasonably intelligent person who has a driver's license in the State of Florida and has passed their driver's test has been given guidelines. She said there are assumptions out there that reasonably intelligent people should be able to make. In her opinion what they did with Ordinance 2015-02 is clear up the authority of their Planning Director to interpret the Code. There was an appeal taken to the Planning and Zoning Board, which they upheld and she would uphold that decision also.

Mr. Old agreed with the comments made by Ms. Graves. He feels there has been a long discussion about this and for no one to understand that they can't rent for 30-days he finds unbelievable. He said the City has a practice of not allowing someone to rent for 30-days or

less and the community is stepping up and saying that is what they would like to have and that is what they have been trying to implement.

Mrs. Turner stated that she is opposed to short term rentals. She believes in home rule and the City has the right to determine what they want in their community. But the reality of the situation is that their Code as originally drafted was deficient. The Planning Director and the City Attorney failed to modify the Code prior to the enactment of the State Statutes in June 2011. The shortfalls of the original Ordinance were clear to everyone on the Council when they approved moving forward with the modifications to that Ordinance. Probably those modifications will be an issue for the Courts and whether they were able to make those modifications to the Ordinance following the State Statute. She said although Mr. McGarry's interpretation may echo their preference for restricting 30-day or less rentals, it is not what the Code says. She said their laws must be clear. This hearing is not to create laws, but to interpret the law as it stands. Therefore she objects.

MOTION FOR THE FRITZ CASE

Mayor Winger made a motion that based on the competent substantial evidence presented and the applicable Code provisions, we affirm the Planning and Zoning Board's decision upholding the Planning Director's interpretation of the subject land use regulations. Mr. Old seconded the motion and it passed 3-1 with Mr. Old voting yes, Ms. Graves yes, Mrs. Turner no and Mayor Winger yes.

MOTION FOR THE WAGNER CASE

Mayor Winger made a motion that based on the competent substantial evidence presented and the applicable Code provisions, we affirm the Planning and Zoning Board's decision upholding the Planning Director's interpretation of the subject land use regulations. Ms. Graves seconded the motion and it passed 3-1 with Mr. Old voting yes, Ms. Graves yes, Mrs. Turner no and Mayor Winger yes.

4. ADJOURNMENT

Today's meeting adjourned at 10:25 a.m.

/tv

