



City of Seattle

Gregory J. Nickels, Mayor

Department of Planning and Development

D. M. Sugimura, Director

**INTERPRETATION OF THE DIRECTOR
UNDER SEATTLE MUNICIPAL CODE TITLE 23**

**Regarding the Use of the
Property at
1400 Hubbell Place**

**DPD Interpretation No. 08-004

(Project No. 3009153)**

I. BACKGROUND

This interpretation was requested by attorney Courtney Kaylor on behalf of a number of individuals who own units in the Elektra Condominiums and have rented them out on a short-term basis.

In response to complaints by neighbors, the Department took enforcement action, initially against the Homeowners' Association (File No. 1010817) and subsequently against sixteen individual owners (File Nos. 1013731, 1013733, 1013738, 1013742, 1013743, 1013745, 1013746, 1013747, 1013752, 1013754, 1013756, 1013758, 1013759, 1013760, 1013761, 1013811), alleging, among other things, that these units had been in use as lodging rather than in residential use.

Reconsideration of these notices of violation (NOVs) was requested, under Seattle Municipal Code (SMC) 23.90.014. In decisions dated October 5, 2007 and February 5, 2008, Diane Davis of DPD sustained the NOVs.

This interpretation was subsequently requested, to address whether or not the short-term rental activity in the building is consistent with residential use, as defined in the Land Use Code and allowed in the zone. The practice of renting units for less than 30 days is referred to as short-term rental in this interpretation.

II. FACTS

1. The 16-story building now occupied as the Elektra Condominiums at 1400 Hubbell Place was built as an apartment building in 1949. A substantial addition, the northern portion of the building, also approved as apartment units, was built in 1956-1957. The building was subsequently converted to condominiums. For purposes of use regulations, the Land Use Code does not distinguish between residential units rented as apartments and those separately owned as condominiums. A storage area was converted into three additional units in 1996. There are now approximately 200 units in the building.

2. The property is currently zoned HR: Highrise Multifamily Residential. With the exception of bed-and-breakfast establishments within individual dwelling units, lodging uses, including hotels, are not permitted in HR zones. Prior to 1982, the site was zoned RMV 150: Multifamily Residential, Highest Density, Variable Height. Hotels were permitted as an administrative conditional use in that zone
3. Twenty-four of the units in the Elektra Condominium building have been the subject of enforcement action by DPD. These units have been advertised and made available as vacation rental units, for periods of less than 30 days, and as brief as three nights. Short-term rentals of this nature are authorized under the building's condominium declaration.
4. Based on the Department's records and the description in the request for interpretation, the circumstances differ among these 24 units. Some are occupied at times by the owners, or their visiting friends and families, and made available for rental at other times. Some have been occupied at times, by owners or tenants, for periods of 30 days or more. However, all of the 24 units have been advertised or made available at times as rentals for periods shorter than a month. Several owners have multiple units which they make available on a short-term basis.
5. The building was permitted as a multifamily residential structure. The request for interpretation indicates that the building and its operations have not been modified to accommodate short-term rental uses. There is no maid service, room service, laundry service or transportation service. The units have separate telephone lines and utility accounts, and individually-assigned parking spaces. Parties renting units on a short-term basis are given keys to the building, the entrance of which is not open to the general public.
6. The interpretation request included a table reflecting usage, over a 456-day period, of the 21 units owned by the homeowners who participated in this request for interpretation. On average, these units were rented on a short-term basis 39 percent of the time, with a range from 25 percent to 55 percent. The table indicates that for the remainder of the time, the units were owner-occupied, rented for periods exceeding 30 days, or vacant. The table does not provide a further break-down showing how much time the units were vacant as opposed to occupied by the owner or rented for periods of 30 days or more.
7. The Ronald McDonald House, a facility at 5130 - 40th Avenue NE provided for patients at Children's Hospital and their families, was approved in 2001 as a congregate residence.
8. The Alaska Building, at 618 Second Avenue, has been undergoing renovation, to be occupied largely as a hotel. However, new portions of the structure above the zone's height limit are required to be in residential use, and proposed units in those areas have been approved as residential apartments, in accordance with that requirement. Other rooms within the structure are categorized as hotel rooms. Some floors of the building include both residential units and hotel rooms.

9. The Land Use Code does not provide a minimum length of time that someone must occupy a space in order for that occupancy to be considered a residential use rather than a lodging use. It has been the Department's general practice to regard facilities where the typical length of stay is less than 30 days as lodging rather than residential uses.
10. The request for interpretation points to Director's Rule 7-83 in support of the contention that the units in question are legally in residential use. DR 7-83 describes features that are considered evidence that an area qualifies as a separate dwelling unit, for purposes of code enforcement against illegal units. A copy of that rule is appended as Exhibit A.

III. LAW

1. SMC 23.84A.024 defines a lodging use as:

“Lodging use” means a commercial use in which the primary activity is the provision of rooms to transients. Lodging uses include but are not limited to the following uses:

1. “Bed and breakfast” means a lodging use, where rooms within a single dwelling unit are provided to transients by a resident operator for a fee by prearrangement on a daily or short-term basis. A breakfast and/or light snacks may be served to those renting rooms in the bed and breakfast.
2. “Hotel” means a lodging use, located in a structure in which access to individual units is predominantly by means of common interior hallways, and in which a majority of the rooms are provided to transients for a fee on a daily or short-term basis.
3. “Motel” means a lodging use, located in a structure in which access to individual units is predominantly by means of common exterior corridors, and in which a majority of the rooms are provided to transients on a daily or short-term basis, and in which off-street parking is provided on the lot.

This definition changed slightly in January of 2007, adding the statement that lodging uses “include but are not limited to” hotels, motels and bed and breakfasts. The former definition merely provided that lodging uses included those three specific types of use. The definitions of the three specific types of lodging uses remained the same.

2. SMC 23.84A.032 defines multifamily structure, a subcategory of residential use, as:

a structure or portion of a structure containing two or more dwelling units, but does not include a single-family dwelling unit.

3. SMC 23.84A.008D defines a dwelling unit as:

a room or rooms located within a structure, designed, arranged, occupied or intended to be occupied by not more than one household as living accommodations independent from any other household. The existence of a food preparation area within the room or rooms shall be evidence of the existence of a dwelling unit.

4. SMC 23.84A.016 defines a household as:

A housekeeping unit consisting of any number of related persons, eight or fewer non-related non-transient persons, or eight or fewer related and non-related non-transient persons, unless a grant of special or reasonable accommodation allows an additional number of persons.

5. SMC 23.42.010 provides:

Principal uses not listed in the respective zones...[in the Land Use Code] shall be prohibited in those zones. If a use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones, therefore, and should also be permitted or prohibited.

6. SMC 23.42.020 A provides in part:

Any accessory use not permitted by Title 23, either expressly or by the Director, shall be prohibited. The Director shall determine whether any accessory use on the lot is incidental to the principal use on the same lot, and shall also determine whether uses not listed as accessory uses are customarily incidental to a principal use.

IV. CONCLUSIONS

1. This request for interpretation raises two questions: The first one is whether the rental and occupancy of dwelling units, for less than 30 days may be categorized as a principal residential use for purposes of the Land Use Code, or whether the rental and occupancy for less than 30 days should be regulated as a lodging use. The second question is whether rental of a unit for periods less than 30 days may be permitted as an accessory use if that unit is devoted to long-term residential use at other times.
2. The use established for the Elektra by permit is a multifamily residential structure. By definition, that means a structure or portion of a structure containing two or more dwelling units. A dwelling unit is designed, occupied or intended for occupation by not more than one household as living accommodations. A household is a housekeeping unit. By contrast, the primary activity in a lodging use is the provision of rooms to transients.
3. Although the code doesn't define housekeeping unit, living accommodations, or transient, these words draw a distinction between occupying a space as one's home and occupying a space as a paying guest. The words housekeeping unit means something more than just a person or group of people. It is an individual or group that keep a house as a unit. Likewise, living accommodations means something more than rooms. When you ask someone where they live, the general understanding that guides a response is the individual's permanent residence, not where they pay to stay for a short-term while they are away from their permanent residence.

4. When a party rents and stays in a suite for only a three-day period, it strains credulity to say that they live there. Although the Department does not have documentation, it is reasonable to presume that: 1) most, if not all, of the parties taking advantage of the short-term rentals in the Elektra have not changed their drivers' licenses to reflect the address, or otherwise used it as their address for official business; 2) the parties taking advantage of the short-term rentals in the Elektra did not give the Elektra as their home address when registering to vote; and 3) people who rent units for periods less than a month typically do not set up individual accounts with utilities during that period, even if that would be permissible under their rental agreement.
5. People who rent their homes typically pay their rent on a monthly basis, and have month-to-month tenancies, except where even long periods are agreed to in leases. Utilities, an essential component of keeping house, are billed on a monthly basis. The Department's practice, drawing the line between residency and transient occupancy at 30 days, is consistent with common understanding in the community, as reflected in state laws, and common practices with respect to home rentals and utility billing.
6. Based on the above reasoning, the Department's practice of distinguishing between lodging and residential uses based on whether the typical length of stay is at least 30 days is reasonable, supported by the language of the Land Use Code, and supported by common understanding as reflected in law and common practices.
7. It is argued, based on the way hotel is defined, that a building cannot be regulated as a lodging use unless more than half of the units in the building are devoted to lodging rather than long-term residential use. Only 13.5 percent of the units in the Elektra have been made available on a short-term basis. On this basis, it is argued that those units cannot be regulated as a lodging use, and must be regarded as a permissible residential use. The Department disagrees for several reasons.
8. SMC 23.40.002 requires "the establishment or change of use of any structures, buildings or premises, or *any part thereof*" by permit. It is permissible to establish different principal uses in different portions of a single building. As noted in the request for interpretation in footnote 9, it is not uncommon for residential and lodging uses to be established in different areas of the same building. Although the majority of the rooms in the Elektra, as a whole, are not used on a transient basis, the use of portions of the building for transient accommodations is substantially similar to a lodging use rather than a residential use.
9. This sort of arrangement, combining lodging and residential uses in a single structure, was found at 1633 Bellevue Avenue that was the subject of Interpretation No. 91-013. In that interpretation the Department indicated what features were necessary to establish the ground level as a hotel use separate from the residential use above. The Department did not take the position that the entire building would be regulated as a single-purpose residential structure unless more than half of it was used for short-term rentals. More recently, with the renovations of Alaska Building under way at 618 - 2nd Avenue, a mix of hotel and residential units has been approved, with both uses sometimes provided on the same floor.

10. Furthermore, if a use does not precisely fit the use categories defined in the code, the Department may determine under SMC 23.42.010 that the use is substantially similar to other uses permitted or prohibited in a zone, and should be permitted or prohibited on that basis. Even if an area within a building did not precisely meet the definition of hotel, it may be determined to be substantially similar to hotel use and regulated accordingly. In the case of units that are never used as a home on a long-term basis, there is not a basis in code or policy for asserting that those units should be regulated as residential simply because most of the units in the building are used for residential purposes.
11. Under a recent code amendment, language was added to the definition of lodging use indicating that lodging uses include but are not limited to bed and breakfast, hotel and motel uses. Based on this, even if it were determined that the units in question did not meet the definition of a hotel, they nevertheless could be regarded as a lodging use, if they are devoted to a commercial use in which the primary activity is the provision of rooms to transients.
12. Based on the above reasoning, the Department concludes that portions of a structure, or individual units, may be found to be in lodging use, and regulated accordingly even if the majority of the units in the building are devoted to long-term residential use.
13. The request for interpretation points to Director's Rule 7-83 (appended to this Interpretation) as support for the premise that the units at issue are in residential rather than lodging use, as regulated under the Land Use Code. DR 7-83 lists 14 different features which "shall be considered evidence of the existence of *more than one* dwelling unit." This rule was adopted to address illegal or bootleg dwelling units, such as those that had been added within existing single-family houses. The purpose of the rule was not to assist in distinguishing between hotel rooms and residential units and, in fact, some of the features listed as indicators of separate dwelling units are not uncommon in hotel rooms or suites.
14. The Department has faced the issue of distinguishing between lodging and residential uses in the past. In general this question has arisen in the context of how a facility that has been proposed but does not yet exist should be categorized. We have recognized that there is not a great difference in physical layout between apartments that will be used as someone's home on a long-term basis and lodging rooms or suites that will be used on a shorter-term basis.
15. The definition of dwelling unit reflects the concept that the use of a space may be evaluated based either on the arrangement of the space or on the actual behavior of the occupants: A dwelling unit is "a room or rooms located within a structure, *designed, arranged, occupied or intended to be occupied* by not more than one household as living accommodations independent from any other household."

When a question arises about how a use should be categorized at a time when the structure or use is proposed and not yet in place, the Department must consider the plans and the intended use of the space as expressed by the applicant. On occasion the

Department has required modification of the layout, or changes to the proposed operations, in cases where the proposed improvements appear to more readily lend themselves to some other use than what has been proposed.

By contrast, when the structure and activity are already in place, and information is available to us about how the facility is actually being used, the Department is able to evaluate the use that is occurring. An assessment of use that considers the actual activity would be superior to an assessment that considers the use that appears likely based on the layout.

16. In the case of the proposed mixed-use structure at 1633 Bellevue Avenue, addressed in Interpretation 91-013, an applicant proposed a building with hotel rooms on the ground floor and apartments above; each use having a very similar layout.

Under the code then in effect in commercial zones, a mixed-use building was permitted outright without a limit on the number of residential units. In contrast, a single-purpose residential building required conditional use approval and was subject to a density limit. In this interpretation, where the use was proposed, and the space in question would need to be in lodging rather than residential use, but the plans appeared to be configured in a way that made residential use likely, the Department required physical and programmatic features more common of hotels for the ground floor in order for the owner to take advantage of the code benefits given to mixed-use building.

17. This request for interpretation raises the question whether the Department's treatment of the Elektra is consistent with its handling of the 1633 Bellevue Avenue and Ronald McDonald House projects. In those cases, the Department had to determine how a proposed use should be categorized based on the plans and the applicants' representations about their intentions.

In contrast, with the Elektra, the Department is able to consider whether the actual occupancy of certain units has been as living accommodations for households, or as transient occupancy inconsistent with use as a residence. Although the units in the Elektra that have been used for short-term rentals lack some of the features that might lead the Department to categorize their use as lodging, the Department is able to make a use determination based not only on their design, but also on undisputed information that those units have been made available for short-term rental.

18. The question now is, notwithstanding the design and arrangement of the units, is the primary function of particular units the provision of rooms to transients on a commercial basis? The answer to that question may be different in the case of different units. Based on the information provided, only one of the units, #1114, was rented on a short-term basis on more than 50 percent of the days for which data was collected. Clearly the primary use of that unit was to provide rooms to transient guests on a commercial basis.

With respect to the other units however, the periods when the units were vacant were not differentiated from when they were owner-occupied or rented on a long-term basis. In evaluating the main use of those units, the Department believes it is appropriate to

disregard the periods when it was vacant and consider only those times when the unit was in use. For example, if in the course of a year, a unit was vacant half of the time, occupied by a single tenant for a two-month stretch, and rented on a short-term basis for a total of four months, the Department would conclude that short-term rental was the principal use over that year.

19. Even if a unit is owner-occupied most of the time, or rented on a typical month-to-month basis most of the time, the question remains whether rental of the units on a short-term basis at other times may be permitted as an accessory use. It may not. An accessory use is one that is incidental to a principal use. According to SMC 23.42.020, the Department is responsible for determining whether a use not specifically regulated as an accessory use under the code is customarily incidental to a principal use. The Code authorizes bed and breakfast use, a lodging use, as a use accessory to a dwelling unit. For single family zones, the code also authorizes and provides standards for taking in roomers or boarders within one's home. In each of these cases however, the unit actively remains devoted to the principal use of serving as someone's long-term residence during the time that paying guests are there. These uses are different in character from one where, by the nature of the proposed rental arrangement, the active use as a long-term residence ceases for the duration of the short-term rentals.
20. The argument is presented that some owners are able to afford to maintain their units as separate homes for their occasional use by renting them out at other times. This is not a basis for saying that the rental activity is customarily incidental to the residential use. If this were a basis for allowing the rental use, operation of any otherwise illegal commercial business in the space in order to pay the mortgage would also be allowed as an accessory use.
21. The request for interpretation documents that other homes of various types around the city have been advertised as available for short-term rental. Regardless of whether this practice occurs elsewhere in the city, this practice is not commonly accepted as customary and the Department does not recognize it as an accessory use of a residence.

V. DECISION

As described in the request for interpretation, the units belonging to the Elektra Owners who joined in the request all fall under one of two categories:

If a unit is rented on a short-term basis meaning for periods less than 30 days, more than half of the time the unit is occupied, the principal use of the unit is a lodging use it being, more similar to a hotel than a residential use. This use is not permitted in the HR zone.

Alternatively, if a unit is occupied on a long-term basis more than half of the time the unit is occupied, short-term rental of the unit at other times would still not qualify as a permissible accessory use of that unit. This use also is not permitted in the HR zone.

In summary, short-term rental of units under either category is not consistent with the use of the structure established by permit and is not permissible under the applicable zoning.

Entered July 17, 2008

(signature on file)

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