

2019 Webinar Series



Regulating Short-term Rentals in New Hampshire

Presented by:

- ▶ *Cordell Johnston, Government Affairs Counsel*
- ▶ *Natch Greyes, Municipal Services Counsel*

November 20, 2019

Our Presenters



Cordell Johnston
Government Affairs Counsel

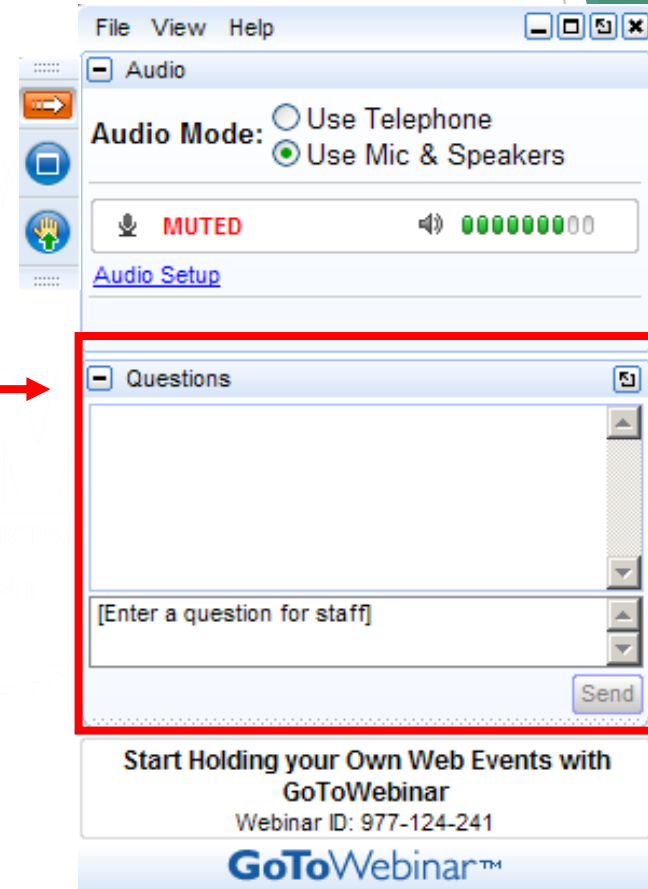


Natch Greyes
Municipal Services Counsel

How to Participate Today



- Open and close your panel →
- Submit text questions
- Q&A addressed during the webinar session →
- Poll question – just for kicks



Short-Term Rentals



- ▶ Can be an “entire place,” “private room,” or “shared room” according to Airbnb classifications.
 - ▶ Typically, self-contained, furnished bedroom/bathroom often with kitchen and other household amenities.
 - ▶ These can be anything from a room in an existing house to an accessory dwelling unit to an entire house.
- ▶ Rented for brief periods of time.
 - ▶ Not being used for permanent domicile purposes.
 - ▶ In New Hampshire, usually, a several-day to week-long stay.
- ▶ Often rented out via Airbnb, HomeAway, VRBO.

Statutory Definition?



- ▶ RSA 48-A:1.
- ▶ “Vacation rental” or “short-term rental” means any individually or collectively owned single-family house or dwelling unit or any unit or group of units in a condominium, cooperative, or timeshare, or owner occupied residential home, that is offered for a fee and for less than 30 consecutive days. For purposes of this chapter, vacation rental and short-term rental are residential uses of the property and do not include a unit that is used for any nonresidential use, including retail, restaurant, banquet space, event center, or another similar use.
- ▶ Bars regulation under housing standards statute. Does not restrict the ability to regulate through zoning.

Disparate Impacts on Communities

- ▶ Communities in tourist destinations are seeing larger demand and higher impacts, even with smaller housing stock.
- ▶ From Memorial Day (May 27) - Labor Day (Sept. 2):
 - ▶ Carroll County: 45,300 rentals
 - ▶ Hillsborough: 9,100 rentals
- ▶ That's just Airbnb!



A (Very) Local Perspective



- ▶ Jackson, N.H.
- ▶ 999 Housing Units (NH Employment Security)
- ▶ 100 Listed on Airbnb (Airbnb)
- ▶ Minimum of 10% of total housing units listed as Short-Term Rentals!

Why Wouldn't You AirBnb?: A (Very) Local Perspective

- ▶ Jackson, N.H.
- ▶ \$1 Million (Airbnb)
- ▶ For 100 STRs
- ▶ = Avg. \$10k per property this summer
- ▶ 99 Days of Rentals
- ▶ Avg. \$101.01 per day
- ▶ = ~\$3k per month.
- ▶ Average Long-Term Rental Cost Jackson: \$1,500 per month.



Attempts at Regulation: Portsmouth I

- ▶ Portsmouth Zoning Ordinance: Permissive.
 - ▶ Permissive: Prohibits all uses not expressly permitted or incidental to such uses.
 - ▶ Prohibitory: Permits all uses not expressly prohibited.
- ▶ Permissive nature of ordinance was key to keeping out “new” uses.



Attempts at Regulation: Portsmouth II

- ▶ General Residence A:
Areas for single-family,
two-family, multifamily
dwellings.
- ▶ 1-5 room B&Bs by
Special Exception.
 - ▶ Special Exception:
Use that is
permitted, subject
to specific
conditions that are
set forth in the
ordinance.
- ▶ Hotels, motels, inns,
and boarding houses
expressly prohibited.




Working Stiff Partners, LLC v. City of Portsmouth

- ▶ Company, owned by two individuals, purchased a 4-bedroom house in the General Residence A Zone.
- ▶ Individuals lived in an adjacent house on a separate lot.
- ▶ No one lived in the 4-bedroom as a primary residence.
- ▶ Company did not apply to Portsmouth for a special exception for a B&B.
- ▶ Instead, company advertised property on Airbnb, HomeAway, and VRBO for daily rental as suitable for family parties, wedding parties, and corporate stays, and able to accommodate up to nine guests.
- ▶ City issued cease-and-desist.




Working Stiff Partners, LLC v. City of Portsmouth (Cont.)

Company argued use as short-term rental fell under definition of “dwelling unit.”



City argued that the use is a “transient occupancy” which the ordinance expressly excludes from the definition of “dwelling unit.”



Court analyzed definitions, noting “transient” was not defined, but reasoned that it contemplated the provision of lodging to paying guests on a daily basis.

Open Questions



What if the house served as a primary residence for someone? Would the short-term rental be an “accessory use?”

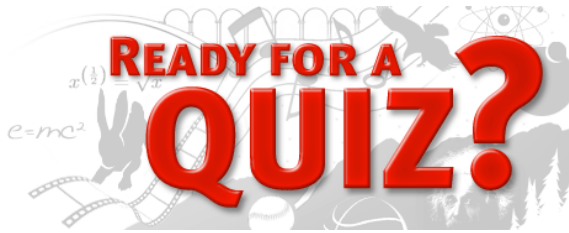


What if the company applied for the B&B special exception? Would the City be obligated to allow its use as a short-term rental?



How far does this case really go in telling us how to regulate short-term rentals?





According to Airbnb, how many “active hosts” were there in New Hampshire in 2018?

1. 3
2. 35
3. 350
4. 3,500
5. 35,000

Regulating Short-Term Rentals



- ▶ Although there may be some health or safety concerns, short-term rentals are best regulated as land-use concerns.
 - ▶ Zoning Ordinance is key.
- ▶ Learning from *Working Stiff*
 - ▶ Clear definitions are important.
 - ▶ Revised definitions may be *more* important for many municipalities.
 - ▶ Answering the open questions is important -
 - ▶ Are there definitions in your ordinance which would allow a short-term rental to sneak in?
 - ▶ Does your ordinance consider short-term rentals accessory uses?

Examine Existing Zoning Ordinance



Before doing anything else, examine the existing zoning ordinance for your municipality.



Remember, Portsmouth didn't do anything to try to regulate short-term rentals. They already had a permissive ordinance.



If your ordinance is permissive and has no allowable use consistent with short-term rentals, then they are already prohibited.

Grandfathering: RSA 674:19



- ▶ A zoning ordinance amendment "shall not apply . . . to the existing use of any building."
- ▶ Grandfathering *shall not* apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.
- ▶ Municipalities can't regulate existing short-term rentals, if they're already allowed!

Options for Regulation



Allow short-term rentals



Outright ban on short-term rentals



Allow short-term rentals with a conditional use permit



Allow short-term rentals via special exception

Allowances or Bans?

- ▶ Is the ordinance “permissive” or “prohibitory”?
 - ▶ Most are “permissive”
- ▶ Ordinance should consider defining “short-term rental” vs “long-term rental”
 - ▶ Remember *Working Stiff*
 - ▶ *NHMA recommends short-term rental = a rental for less than 30 days.
- ▶ Also possible to create “prohibitory zones”
 - ▶ Allows any use not strictly prohibited.
 - ▶ May open up land uses not contemplated by drafters.

Conditional Use Permits



- ▶ Authorized by RSA 674:21,
 - ▶ A.K.A. The “Innovative Land Use Control” Statute.
- ▶ Paragraph II states that an ordinance “may provide for administration, including the granting of conditional or special use permits, by the planning board, board of selectmen, zoning board of adjustment, or such other person or board as the ordinance may designate.”
- ▶ Allows municipality to determine which municipal entity best positioned to grant the conditional permit.*
 - ▶ *Planning Board review is required.
 - ▶ Review must result in written comments.

Special Exceptions



The ZBA, not the selectmen, would review applications and determine whether the special exception requirements are satisfied.



Ordinance must specifically permit the use.

Differences between Special Exceptions and Variances

Special Exceptions

- ▶ Permission to do something zoning ordinance permits under specific circumstances
- ▶ Must be in zoning ordinance!

Variances

- ▶ Permission to do something not permitted by zoning ordinance
- ▶ Five criteria, RSA 674:33, I

- ▶ Permits and Exceptions cannot be granted on a personal basis!
 - ▶ *Vlahos Realty Co. v. Little Boar's Head District*, 101 N.H. 460 (1958)
 - ▶ Permit for ice cream stand was “non-transferable” and “shall not be applicable to any lessee.” I.e. “personal” permit.
 - ▶ “[Z]oning conditions and restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised.”
 - ▶ “[Z]oning ordinances apply to land and not to individuals.”

No Personal
Conditional
Use Permits
or Special
Exceptions!

Owner Occupied/Primary Residence = Accessory Use?



- ▶ Accessory use is “customarily incidental and subordinate” to principal use.
- ▶ *Working Stiff* Footnote 2
 - ▶ “[T]his case does not present us with the occasion to address whether short-term rentals are allowed under the ordinance as an accessory use to a permitted principal use.”
- ▶ Definition of “accessory use” in municipal ordinance may determine whether the use is “customarily incidental and subordinate.”
 - ▶ However, be careful of someone renting out a single bedroom in a multi-bedroom home vs. most bedrooms in a multi-bedroom home.

Municipal Permitting of Businesses: RSA 41:11-c

- ▶ “The selectmen may establish regulations relative to businesses obtaining municipal permits.”
 - ▶ Note: “selectmen” not “legislative body.”
- ▶ Legislative History:
 - ▶ Discussion on house painting companies.
- ▶ No court challenges, to date.
- ▶ If regulate STRs, probably must regulate all “lodging establishments” for equal protection purposes.
 - ▶ What does that mean for B&Bs?



Conclusion



Regulating short-term rentals is still relatively uncharted territory.



Working Stiff provides some guidance, but not as much as we'd like.



Common sense approaches using available tools can help municipalities chart the course that's best for their own communities.

Upcoming Webinar



nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org

Upcoming Webinar



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Upcoming Webinar



Upcoming Workshop



New Final Overtime Rule *Workshop For Cities and Towns*

1:30 pm—3:00 pm
(Registration starts at 1:00 pm)
Friday, December 13, 2019

NHMA Offices
25 Triangle Park Drive, Concord

On September 24, 2019, the U.S. Department of Labor (USDOL) announced a final rule issued under the Fair Labor Standards Act (FLSA) to allow 1.3 million workers to become newly entitled to overtime by updating the earnings thresholds necessary to exempt executive, administrative or professional employees from the FLSA's minimum wage and overtime pay requirements. The new final rule becomes effective January 1, 2020, less than three months away!

Join Steven McKinney, the Community Outreach Specialist for the Northern New England District Office of the United States Department of Labor, Wage and Hour Division (USDOL) who will discuss, among other requirements, the salary and compensation levels needed for workers to be exempt and review how nondiscretionary bonuses and incentive payments factor into the new rule.



Registration Open!

To register online, please visit www.nhmunicipal.org and click on the Calendar of Events.

Cancellation must be received 48 hours in advance. If cancellation is not received 48 hours in advance, NHMA will charge you \$20 to cover workshop costs, including any meals.

Questions? Please call 800.852.3358, ext. 3350 or email NHMAregistrations@nhmunicipal.org

Upcoming Workshops



2020 Town & School Moderators Workshops

Beginner & Advance Training Available

Traditional Meeting

9:00 am - 1:00 pm

Saturday, February 15

Snow date: Saturday, February 22
25 Triangle Park Drive, Concord

Only \$65

SB 2 Meeting

9:00 am - 1:00 pm

Saturday, January 11

Snow date: Saturday, January 18
25 Triangle Park Drive, Concord



Attendees will receive a copy of NHMA's 2020 edition of *Town Meeting and School Meeting Handbook*.

Topics include:

The Basic Law of Town, Village District and School District Meeting

Statutes governing the moderator's duties at town, village district and school district meetings will be discussed along with issues related to warrant articles, the operating budget, secret ballot voting and other town meeting issues. These topics will be addressed in two concurrent sessions tailored for new and experienced moderators. Ample time will be devoted to questions and answers.

Strategies for Running a Smooth Meeting

Moderators are faced with a challenging task: keeping meetings focused and fair to all participants, while effectively facilitating the flow of debate. This session will highlight suggested strategies for running respectful and efficient meetings.

Sample Scenarios

A series of sample scenarios will help attendees prepare for a wide range of meeting challenges.

Register online at www.nhmunicipal.org under **CALENDAR OF EVENTS**.

Online pre-registration required one week prior to each date.

Questions? Call 800.852.3358, ext. 3350 or email

NHMAregistrations@nhmunicipal.org



for joining us today



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