



Municipal Regulation of Short-Term Rentals

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I. Why should my town care about short-term rentals?

Everyone knows that the short-term rental business has exploded in the last decade. The temptation to get into the business is strong; there probably are few people who haven't thought at least briefly about whether they could make a few extra dollars from renting out a room in their home a few days, or a few weekends, a year—or perhaps 365 days a year.

Although there are plenty of good things about short-term rentals, they can bring problems. Among the negative effects that many municipalities have experienced are increases in noise, littering, traffic, illegal parking, and disorderly conduct. In some cities around the country, the conversion of residential housing into short-term rental properties has exacerbated existing housing shortages and an affordable housing crisis.

Most New Hampshire municipalities have not yet expressed significant concerns about short-term rentals. Reported problems have come primarily from areas with heavy tourist traffic, like the seacoast and the White Mountains. But short-term rentals are likely to come to your town if you have, or are close to, any of these: the ocean, a lake, a ski area, a college, a hospital, a racetrack, a hiking destination, an ATV or snowmobile trail, a popular hunting area, a large business, or leaves that change colors in the fall.

There is a good chance that one or more properties in your municipality are already being operated as short-term rentals. And there is a reasonable chance that they are not in compliance with your zoning ordinance.

II. What is a short-term rental?

A. No controlling definition. Statutes and local ordinances in other states typically define a short-term rental as the rental of a residential unit, for a fee, for occupancy for less than 30 days, or less than one month, or similar language.

There is no firm definition of “short-term rental” in New Hampshire land use law, but there are two tangential statutes that define the term.

- RSA 48-A, the housing standards statute, defines “short-term rental” or “vacation rental” as “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.” See RSA 48-A:1, V.
- RSA 78-A, the meals and rooms tax statute, defines “short-term rental” as “the rental of one or more rooms in a residential unit for occupancy for tourist or transient use for less than 185 consecutive days.” See RSA 78-A:3, XX.

The 185-day standard in the meals and rooms tax statute is an aberration. (The relevance of the definition to that statute is that the meals and rooms tax is imposed on rentals of sleeping accommodations other than to “permanent residents,” defined as someone who occupies a room for at least 185 consecutive days.) A rental for less than a month is considered the standard definition.

B. Municipality may adopt its own definition. However, a municipal zoning ordinance may define terms however the municipality’s legislative body decides (with some exceptions). The definitions in RSA 48-A and RSA 78-A apply only for purposes of those chapters. A one-month or 30-day limit is not required. If a municipality chooses to regulate short-term rentals through its zoning ordinance, it may define the term however it chooses.

III. Do municipalities have zoning authority to limit or prohibit short-term rentals?

The short answer is YES.

A. Statutory authority. RSA 674:16, the zoning enabling statute, states that a zoning ordinance “shall be designed to regulate and restrict,” among other things, “the location and ***use of buildings, structures and land used for business, industrial, residential, or other purposes.***”

That is quite clear. The zoning ordinance may regulate the use of buildings for “business, industrial, residential, or other purposes”—that is, for any purpose. Various statutes and court decisions impose limits on municipal authority to regulate property uses through zoning, but there is nothing that prohibits regulation of short-term rentals.

B. The argument against allowing regulation: “It’s a residential use.” In New Hampshire, a standard argument used by those who want to prohibit municipalities from regulating short-term rentals goes something like this:

- 1) Short-term rental is a residential use; and
- 2) A municipality may not treat rental residential property differently from owner-occupied residential property. “If I have a right to live in a house that I own, I have a right to rent the house to someone else.”

Answer: It’s **not** a residential use. A room rented for a weekend does not become the temporary occupant’s residence. Renting a room to a continuing sequence of guests for a weekend or a week at a time is not the same as renting it to a tenant who resides there on a long-term basis. This is the difference between a hotel room and an apartment.

Nor does the owner’s residing on the property keep it within the definition of a residential use. If you buy a house and live in half of it, but convert the other half into a convenience store, or a bar, or a gunpowder factory, it is no longer a purely residential use. Similarly, if you use it as a hotel or a bed and breakfast, it is no longer purely a residential use.

Note: New Hampshire law (RSA 21:6-a) defines “residence” as “a person’s place of abode or domicile. The place of abode or domicile is that designated by a person as his or her principal place of physical presence to the exclusion of all others.” When a person rents a room or a house for a weekend or a week and then goes home, that rental is clearly not within the definition of “residence.” Further, the meals and rooms tax statute (RSA 78-A), the hotel statute (RSA 353), and the landlord-tenant statute (RSA 540) all recognize a difference between long-term and short-term rentals, treating the former as residential and the latter as commercial (although they draw the line at different places—185 days, one month, and 90 days, respectively). These statutes are not controlling for zoning purposes, but they reflect a general recognition that a short-term rental is significantly different from a residence.

C. Limitation on authority: RSA 48-A. There is one statutory limitation on municipal authority to regulate short-term rentals. Section 2 of the housing standards statute, which authorizes municipalities to adopt codes to remedy substandard housing, states, “The power conferred by this section shall not be used to impose any additional ordinances, codes, bylaws, licenses, certificates, or other restrictions on dwellings used as a vacation rental or short-term rental.” RSA 48-A:2. (That statute also states that, ***only for purposes of RSA 48-A***, “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.”)

This limitation clearly applies only to regulation under the housing standards statute. It was enacted in 2017 specifically to prevent municipalities from using their housing codes—not their zoning ordinances—to regulate short-term rentals. In fact, the original language of the bill that led to this enactment, HB 654 from the 2017 session, *would* have severely restricted municipalities’ authority to regulate short-term rentals through their zoning ordinances, but that language was rejected in favor of the provisions that merely restrict the use of housing codes.

IV. Other challenges to regulation of short-term rentals

A. Constitutional challenges. Property owners in New Hampshire and elsewhere have claimed that restrictions on short-term rentals are unconstitutional on various grounds, including equal protection, due process, and even the federal constitution’s commerce clause and privileges and immunities clause. These claims have been mostly unsuccessful, as they should be.

A full analysis of these constitutional claims is beyond the scope of this presentation. Suffice it to say that if the municipality does not do anything outrageous, such as openly discriminate against some property owners and in favor of others, it is highly unlikely that any constitutional challenge could succeed.

B. *Federal Communications Decency Act.* Some cities (not in New Hampshire) have enacted ordinances requiring on-line short-term rental platforms (like Airbnb and HomeAway) to provide information about hosts, listings, and guests, or otherwise assist in compliance with local zoning requirements. Those companies have challenged these ordinances based on, among other things, the federal Communications Decency Act.

Although its title doesn't sound like something that would affect land use law, the Communications Decency Act essentially says (in part) that companies that host websites cannot be held legally accountable for content published on the websites by third-party users. The claim is that this precludes a municipality from requiring the website host to enforce compliance by rental property owners. The companies have also claimed that these ordinances violate their First Amendment rights.

There may be merit to these claims. The problem can be avoided by keeping the on-line company out of it. Municipal regulation of short-term rentals (like any property) should be directed at the property and those who are using it, not at those who may be assisting in advertising its use. A short-term rental provision should not seek to obtain information from, or compel compliance by, a company that serves only as a broker.

C. *Selective enforcement.* Some short-term rental property owners have challenged municipal enforcement efforts by claiming "selective enforcement"—*i.e.*, that the municipality is enforcing its ordinance only against one or a few property owners, while others are allowed to ignore the ordinance with impunity.

Selective enforcement is a legitimate claim, but the property owner "must show more than that the enforcement was merely historically lax." It must be shown that "the selective enforcement was a conscious, intentional discrimination." *Anderson v. Motorsports Holdings*, 155 N.H. 491, 499 (2007).

A municipality's historical failure to enforce its zoning ordinance against short-term rental property owners does not prevent it from initiating enforcement now—so long as it does so consistently. Nor is it required to perform detective work to find every single violator; zoning violations often come to a municipality's attention only because a neighbor has complained. If the municipality undertakes enforcement as it becomes aware of potential violations, and does so fairly, that is sufficient to avoid a claim of selective enforcement.

V. Regulation of short-term rentals in the zoning ordinance

A. *Does your ordinance already regulate short-term rentals?* For municipal officials who want to regulate short-term rentals, it may seem that the obvious route is to draft a zoning amendment that directly addresses the subject. That may work, but it may not be necessary. Before embarking on a zoning amendment effort, it is suggested that the planning board review the existing ordinance to see whether it already addresses short-term rentals.

1. Is your ordinance permissive or prohibitory? There are two kinds of zoning ordinances, and each is the opposite of what it sounds like:

- a) Permissive ordinances. A permissive ordinance generally **prohibits** all uses that are not **expressly permitted** in the ordinance. If a particular use is not mentioned in the ordinance, it is not allowed in the municipality, unless it can be deemed an accessory use to a permitted use. The ordinance typically lists all the permitted uses and contains a statement saying something to the effect of “Any use of a building, structure, or land not expressly permitted in this ordinance shall be prohibited.”
- b) Prohibitory ordinances. A prohibitory ordinance **permits** all uses that are not expressly **prohibited**.

The majority of zoning ordinances in New Hampshire are of the permissive variety.

Under a permissive ordinance, short-term rentals are prohibited unless the ordinance expressly permits them. Under a prohibitory ordinance, short-term rentals are permitted unless the ordinance expressly prohibits them.

2. Are short-term rentals covered? Once you determine whether your ordinance is permissive or prohibitory, it is not enough just to look for the term “short-term rental” in the ordinance and see whether it is expressly permitted or prohibited. Unless it was recently added, the term probably does not appear, but there may other defined uses in the ordinance that could be interpreted to include short-term rentals. Some examples of defined uses that **could** include short-term rentals, depending on how they are defined in the ordinance, are:

- Bed and breakfast
- Rooming house
- Hotel
- Home rental
- Home business
- Apartment

For example, one randomly selected zoning ordinance defines “hotel” as “any building, or any part thereof, which contains one or more lodging units devoted to transient or semi-transient rental occupancy and which has a common entrance or entrances, including an inn, motel, motor inn, tourist court, boarding house, lodging house or rooming house, but specifically excepting a Bed and Breakfast Home.” The definition of “bed and breakfast home” is similar, but it has a limit of three lodging units and a requirement that the building be owner-occupied. The ordinance expressly permits both uses, but only in certain districts. If this is a “permissive” zoning ordinance (it is), and if there is no other definition that encompasses short-term rentals, then a property owner could operate a short-term rental only under the authority, and in the permitted district, for a hotel or bed and breakfast.

The planning board ought to perform a thorough review of its zoning ordinance to determine whether short-term rentals are covered, and if so under what classification. If there is a desire to have looser regulation of short-term rentals by homeowners than the existing regulations of hotels or bed

and breakfasts, an amendment to the ordinance may be necessary. In any event, the board needs to understand whether, and to what extent, short-term rentals may already be permitted or prohibited (or whether, as is certainly possible, the ordinance is too ambiguous to provide a clear answer) and determine whether it wants to change that treatment.

3. Accessory use. If the zoning ordinance cannot be interpreted to expressly permit short-term rentals, an owner could still claim that a short-term rental must be allowed as an accessory use to a residential dwelling. An accessory use is one that is “subordinate and customarily incidental to the main use on the same lot.” *Forster v. Town of Henniker*, 167 N.H. 745, 758 (2015). A common example of an accessory use is a garage on a residential lot. If residential dwellings are permitted and garages are not expressly prohibited, a garage ordinarily will be allowed as an accessory use to the house.

The “subordinate” and “incidental” criteria require that the accessory use be “minor in relation to the permitted use and . . . bear a reasonable relationship to the primary use.” The “customarily” requirement is an important one. It requires evidence that the accessory use “has commonly, habitually and by long practice been established as reasonably associated with the primary residential use in the town.” *Becker v. Town of Hampton Falls*, 117 N.H. 437, 440-41 (1977).

A homeowner might claim that renting out a room in his or her home is an accessory use to the primary use as a residence. There is no clear, uniform answer to this, but there are some obvious cases: if the homeowner does not actually live there, but merely rents individual rooms or the entire house to short-term occupants, then the rental is not “subordinate”—it is the primary use. Similarly, if the owner occupies just one or two rooms and rents several units to short-term occupants, the rental business is not subordinate and not an accessory use.

A more difficult case is where the owners legitimately occupy the house as their primary residence and merely rent one or two rooms on a short-term basis. That may satisfy the “subordinate” requirement, but the owner would still need to establish that homeowners in the municipality have “customarily” rented rooms to short-term occupants as an incident to their use of the property as a residential dwelling. This seems unlikely in most cases; but these questions need to be resolved on a case-by-case basis. Consultation with the municipality’s legal counsel is strongly encouraged before any conclusions are drawn on whether a short-term rental is an accessory use.

4. Variance. If short-term rentals are not allowed under the ordinance, or not allowed in the district where the subject property is located, requesting a variance is always an option. As with any variance, the applicant will need to satisfy the criteria in RSA 674:33, I. Every case depends on its specific facts, of course, but it seems unlikely that many cases would be able to satisfy the “unnecessary hardship” requirement if it is applied conscientiously.

B. Amending the ordinance. If a municipality chooses to address short-term rentals directly in its zoning ordinance, it has the same options it has with respect to most other types of use: it may permit them without limitation, it can restrict their location, it can restrict their size or other attributes, or it can prohibit them altogether. (At least one New Hampshire town has prohibited them in all districts.)

Of critical importance is that the ordinance be clear, starting with the definition of “short-term rental.” The ordinance might establish a separate definition specifically for short-term rentals, or it might fold it into an existing definition of hotel, bed and breakfast, or something else.

If the ordinance is going to allow short-term rentals, the following are some of the issues that should be considered. (There are most likely several others):

- Limit on number of units per property
- Limit on number of guests per unit
- Limit on number of days per year units may be rented
- Owner occupancy requirement
- Allowance only by special exception
- Restriction to specific zoning districts
- Periodic safety inspections

Assuming the planning board has site plan review authority, other matters, such as noise, trash, parking, and hours of check-in and check-out, can be addressed there. Otherwise, they should be considered for inclusion in the ordinance. It is impossible to address every imaginable situation in a zoning ordinance, but an effort should be made to anticipate and answer as many questions as possible.

If the ordinance is going to prohibit short-term rentals, clarity is equally important. The ordinance should be very specific about what constitutes a short-term rental so there is no question about what is and is not prohibited. A statement that “short-term rentals of residential property are prohibited” will raise more questions than it answers.

Any amendment will need to be tailored to accommodate the municipality’s specific needs and to fit with the existing ordinance. ***Consultation with the municipality’s attorney and/or a professional planner is strongly recommended.***

C. Don’t forget site plan review! Some may be inclined to look at the zoning ordinance, conclude that it allows short-term rentals, and figure that’s the end of the story. It’s not. If the planning board has site plan review authority, it should apply to short-term rentals. RSA 674:43 provides for review of “site plans for the development or change or expansion of use of tracts for nonresidential uses.” Unless one accepts the shaky argument that short-term rentals are residential uses, site plan review would apply.

As mentioned above, site plan review is where the planning board can address issues like noise, trash, parking, hours of check-in and check-out. No doubt the neighbors will have something to say about these matters.