

Controlling Short-Term Rentals: What Can Towns Do?

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What is a short-term rental (STR)?

No controlling definition.

Basically, the rental of one or more units for overnight lodging accommodations for up to a certain number of days, typically in a building that would otherwise be used as a residence, and which may or may not include access to cooking facilities. Some are in owner-occupied homes, some are not.

Most zoning ordinances did not define STR until recently.

Some have begun to define them.

One example: “A dwelling unit where transient lodging is provided for compensation for stays of between one and 14 consecutive nights, and where the dwelling unit would normally be considered a residential living unit not associated with regulated commercial activities such as a hotel, motel, rooming/boarding/lodging house, or bed-and-breakfast.”

Another: “An accessory use to an owner-occupied single-family residence containing, in addition to living accommodations for the owner and the owner’s family, not more than three sleeping rooms, for the purpose of providing to the general public, for compensation, lodging, with or without breakfast, for less than 30 consecutive days.”

Can municipalities regulate or prohibit short-term rentals?

- **Absolutely**. RSA 674:16 – zoning enabling statute – authorizes municipalities to “regulate and restrict . . . the location and use of buildings, structures and land used for business, industrial, residential, or other purposes.”

Don't let anyone tell you a town can't prohibit or regulate STRs!

Arguments you may hear (all of them wrong)

- Argument: RSA 48-A (housing code statute) says the statute “shall not be used to impose any additional . . . restrictions on dwellings used as a vacation rental or short-term rental.”
 - Answer:
 - That limitation applies only to the housing code statute; does not limit zoning authority.
 - Legislative history of that section states, “Everyone agrees that cities and towns are free to regulate vacation rentals under RSA 674, planning and zoning, but RSA 48-A is absolutely not appropriate.” HB 654 committee of conference report, House Calendar, June 16, 2017, page 7.

Arguments, continued

- Argument: STR is a residential use, no different from a long-term rental, and can't be treated differently.
 - Answer: Hooey. An STR is not a “residential” use—guests do not reside there.
 - RSA 21:6-a defines “residence” as a person’s “place of abode or domicile.” STR guest could not claim domicile for voting purposes.
 - Meals & rooms tax statute (RSA 78-A), hotel statute (RSA 353), landlord-tenant statute (RSA 540) all distinguish between STRs and long-term rentals—treating the former as commercial, latter as residential.
 - It's a hotel, for God's sake!

Arguments, continued

- Argument: Unconstitutional taking of property without compensation.
 - Answer: You're kidding. That argument was settled over 100 years ago.
- Argument: Selective enforcement.
 - Answer: Legitimate argument, but property owner "must show more than that the enforcement was merely historically lax." It must be shown that the selective enforcement is "a conscious, intentional discrimination."
- Argument: My STR is grandfathered.
 - Answer: Maybe, but probably not. A use is "grandfathered" if it was legal at the time it was established. It's not grandfathered just because the owner got away with it for a while. See "[But It's Grandfathered!](#)", Town & City Magazine, May 2008.

The supreme court settles it.

***Working Stiff Partners v. Portsmouth*, 172 N.H. 611 (2019)** – New Hampshire Supreme Court upheld city’s determination that a short-term rental was a “transient occupancy,” not a “dwelling unit,” and was prohibited under zoning ordinance.

- Municipal authority to prohibit/regulate STRs was not addressed directly, but court clearly recognized city’s authority to treat STRs differently from residential uses under zoning ordinance.

Should you regulate or prohibit short-term rentals?

An entirely local decision. More likely of concern in popular vacation destinations (Seacoast, Lakes Region, White Mountains), but may be a problem anywhere.

Concerns:

- Noise, disorderly conduct, trash, traffic, parking
- Safety: overcrowded houses, intoxicated guests, lack of code compliance
- Municipal resources: strain on water and sewer systems, police departments
- Effect on long-term housing market: houses converted to STRs are not available for local residents.

Some benefits: tourist activity (pros and cons), income to help homeowners pay property taxes. (The latter argument, however, is wildly exaggerated. Most STR owners bought the property as a business proposition.)

Where to begin: Identify your town's issues.

Is there a current problem?

- Illegal STRs (not permitted by the zoning ordinance)?
 - Historical non-enforcement now becoming a problem?
- STR owners taking advantage of unclear zoning ordinance?
- STRs are permitted but are causing problems?

Or concern about future problems?

- You've heard about problems in other towns.
- You're not sure what the zoning ordinance allows.

Different types may call for different rules.

- Owner-occupied: owner is a full-time resident who rents one or more rooms in part of the house or auxiliary structure (garage, carriage house).
 - Least likely to create problems.
- Seasonally owner-occupied: “snow birds” or others who live on property part of the year, rent it part of the year.
- Non-owner-occupied: Absentee owner who rents property full-time.
 - Most likely to create problems—essentially a hotel with no manager on site. Holiday Inn without the sign.
 - This has become the most common—investors buying houses and turning them into income properties.

In all cases, start with language of existing ordinance.

Most municipalities have a “permissive” zoning ordinance—any use that is not expressly permitted is deemed prohibited.

Typical language: “No building, structure, or land shall be used except for the purposes permitted in the districts as specified in this ordinance. Any use not listed shall be construed to be prohibited.”

Some have a “prohibitory” ordinance—any use not expressly prohibited is permitted.

Check your ordinance—and talk to your lawyer!

Working through the ordinance . . .

- 1) What uses are permitted in each zoning district?
- 1) Check the definition of each use. Can it be construed to allow a short-term rental?

Example:

- Ordinance permits “single-family dwellings” in residential districts.
- Defines single-family dwelling as “a detached ***residential dwelling unit*** designed for and occupied by one family.”
- Further defines “dwelling unit” as “one or more habitable rooms arranged for the use of one or more individuals living as a single housekeeping unit, together with cooking, living, sanitary and sleeping facilities.”
- Does not define “residential.”

Example, continued

Issue: Does the above ordinance allow STRs in residential districts?

Analysis:

- STR seems to fit definition of “dwelling unit”—*maybe*.
- If two or more friends who don’t ordinarily live together rent a house for one weekend, are they “living as a single housekeeping unit”?
- Even if it’s a dwelling unit, is it a “residential” dwelling unit?

Answer: Unclear! Consider amending ordinance to clarify—and talk to your lawyer!

If existing ordinance clearly disallows STRs:

(1) Enforce it!

- Code enforcement officer/governing body responsibility.
 - Gather evidence, seek voluntary compliance.
 - Cease-and-desist letter if necessary
 - But be sure to enforce consistently.

OR

(2) Amend it!

- If STRs technically violate the ordinance but are causing no problem, consider amending ordinance to allow what is already being done.
 - Maybe include conditions, such as requiring permit.
 - Or amend ordinance to allow only those that already exist.

If ordinance is unclear: options for amendment

- Prohibit all STRs.
- Allow all STRs.
- Allow some (owner-occupied) but not others (non-owner-occupied).
- Allow some in all districts, others in some districts, others not at all.
- Allow by special exception or conditional use permit—possibly different requirements depending on district and whether owner-occupied.
- Consider “grandfathering” existing STRs if no problems with them.

Possible criteria for special exception/CUP

- Building code/fire code inspection
- Owner occupancy requirement
- Limit on number of unrelated guests
- Limit on number of days rented per year
- Registration with town/city
- Parking limits
- Many other possibilities—look at other ordinances!

Remember that zoning approvals like special exceptions and conditional use permits run with the land—once granted, they stay with the property even if it is transferred.

Example: Hanover

- “**Hosted**” STR”—single-family, owner-occupied dwelling where owner is continually present during period of rental—permitted by right in residential districts.
- “**Un-hosted** STR”—same, but where owner has vacated the premises during period of rental—permitted by special exception in residential districts.
- “**Un-hosted STR—seasonal**”—seasonal dwelling where owner has vacated the premises during period of rental—permitted in certain recreation districts.
 - Seasonal dwelling may be rented no more than 182 days per year.
- **No** investor-owned, non-owner-occupied STRs allowed anywhere.
- All STRs must register with town, and additional restrictions apply.

Example: Laconia

- Owner-occupied STRs permitted in all districts except industrial.
- Non-owner-occupied STRs permitted in Commercial Resort and Shorefront Residential districts. Permitted in certain other districts by special exception.
- STRs prohibited in industrial districts.
- All STR owners must obtain permit from city. Requirements include contact information for service of process, passing building and fire code inspections. Permit is owner-specific and must be renewed every two years.

Other examples

At least 27 municipalities have ordinances restricting STRs—some pre-existing, some recently adopted. See spreadsheet prepared by Office of Planning & Development.

Other tools: beyond the zoning ordinance

Business permit. Municipality may establish “regulations relative to businesses obtaining municipal permits.”
RSA 41:11-c (towns), 47:17, XIX (cities).

Require STR owner to obtain a permit, with appropriate conditions. Consider requirement that it be renewed periodically.

- Can be adopted by governing body—does not require town meeting vote, unlike zoning amendment.
- Unlike special exception or CUP, permit does not run with the land. Require new owner to get new permit when property is transferred.

Beyond the zoning ordinance, continued

Site plan review

RSA 674:43: Site plan review required (if your town has adopted it) for “development or change or expansion of use of tracts for ***nonresidential uses.***”

- Is a short-term rental a “nonresidential use”?
 - Almost definitely—at least if not owner-occupied.
- Apply same standards as for any other change of use.

Talk to your lawyer! (Some may disagree that site plan review is required. Ask them to explain why not.)

Court decisions: Portsmouth

Working Stiff Partners v. Portsmouth, 172 N.H. 611 (2019)

Permissive zoning ordinance permitted single-family and two-family dwelling units in residential district and defined “dwelling unit” as:

[a] building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. ***This use shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses.***

Portsmouth, continued

- Plaintiff bought a single-family house and converted it into a non-owner-occupied STR. City issued cease-and-desist order. Plaintiff appealed to ZBA, then superior court, then supreme court.
- Supreme court held that plaintiff's use of the property was for "transient occupancies" similar to a hotel, motel, etc., and thus did not qualify as a dwelling unit and was not permitted; court therefore upheld the city's decision.

Court decisions: Kearsarge Lighting Precinct

Andrews v. Kearsarge Lighting Precinct (Carroll Co. Super. Ct. Sept. 14, 2021)

Kearsarge Lighting Precinct is a village district that has zoning authority.

- Zoning ordinance states that "all residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated."
- Plaintiffs were operating non-owner-occupied STRs; received notice of violation. Appealed to ZBA, then to superior court.

Kearsarge Lighting Precinct, continued

- Plaintiffs threw out a grab bag of legal arguments, including Equal Protection Clause, Procedural Due Process, Substantive Due Process, Dormant Commerce Clause (seriously!), Privileges & Immunities Clause, unconstitutional taking, selective enforcement, legal nonconforming use.
- Claimed that district selectively enforced ordinance against out-of-state property owners, while not enforcing it against local residents.
- Court affirmed ZBA decision. Insufficient evidence of selective enforcement.
- Plaintiffs have appealed to supreme court. (Plaintiffs' brief filed 4/18/22).

Court decisions: Conway

Town of Conway v. Kudrick, Carroll Co. Super. Ct. (Jan. 25, 2022).

Town's permissive zoning ordinance allows single-family, two-family, and multi-family dwelling units in residential districts and defines "dwelling unit" as

a single unit providing complete and independent living facilities for one or more persons living as a household, including provisions for living, sleeping, eating, cooking, and sanitation.

Elsewhere, ordinance defines lodging house, boarding houses, and tourist homes as providing "transient or semi-transient accommodations"; these are not permitted in residential district.

Conway, continued

- Ordinance defines “transient accommodations” as “living quarters which do not have a kitchen as defined in ‘residential unit.’”
- Defendant owns several non-owner-occupied STRs. Town filed action in superior court seeking order that they were prohibited under zoning ordinance.
- Court ruled against town. Defendant’s properties all included kitchens and thus were not “transient accommodations.” Issue therefore was whether they met the definition of “dwelling unit.” Court ruled that an STR was a unit providing living facilities for “one or more persons living as a household.”
- Town has appealed to supreme court. Briefs not filed yet.

Conway, continued

Conway decision is questionable for a few reasons, but the lesson is clear: make sure your ordinance has clear definitions that leave no room for doubt.

- Town lost because definition of “transient” seemed to exempt any unit that includes a kitchen, even if the occupancy otherwise is obviously transient.
- Talk to your lawyer!

Legislative efforts to restrict municipal authority

Perennial efforts by Association of Realtors and Airbnb, VRBO, etc., to prohibit municipalities from regulating STRs.

- 2017 effort ended in law that merely limits use of RSA 48-A; no effect on zoning authority.
- 2020 legislation would have prohibited any municipal regulation. Tabled in Senate and died on the table (Covid-19 casualty).

Legislative efforts, continued

This year – [SB 249](#)

No legislative body of a city [or] town . . . shall prohibit the use of a building or structure as a vacation rental or short-term rental nor prohibit the use of such structure or building as a vacation or short-term rental based on the structure or building's classification, use, or occupancy. "Short-term rental" or "vacation rental" means any single-family or 2-family building or structure, regardless of how it is owned or occupied and regardless of whether the building or structure is conforming or non-conforming, or offered in whole or in part for rental or transient use.

WOW!! Any building or structure anywhere in the state—garage, barn, sugar shack, outhouse—could be converted to STR, with no municipal veto.

Legislative efforts, continued

Status of SB 249:

- Passed Senate despite overwhelming opposition. (Why?)
- House committee voted 17-2 to recommend sending it to interim study (which would essentially kill the bill). (Two who voted no wanted to kill it outright.)
- Full House to vote May 4. Bill is on consent calendar, so interim study recommendation will likely be adopted.
- Danger is not over—Senate mischief possible. Stay tuned! Check NHMA's [Legislative Bulletins](#) every Friday.

Legislative efforts, continued

What to do *if* SB 249 or similar language passes.

- Note the operative language: “No **legislative body** . . . shall **prohibit** the use of a building or structure as a vacation rental or short-term rental.
- Applies only to a **prohibition** in the **ordinance**.
 - Ordinance may still require a special exception (which is not a prohibition) and may still impose conditions.
 - ZBA (which is not the legislative body) may deny special exception.
 - Municipality may still require registration.
- But talk to your lawyer!
- Start thinking now about amending your ordinance.

Thank you!

Feel free to contact me with questions.

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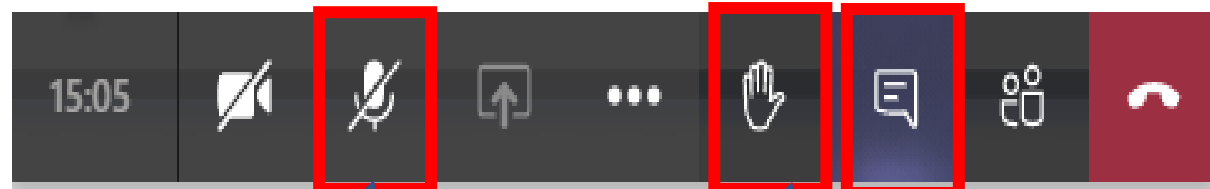
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