

December 3, 2021

Leslie R. Babb, Chairman
Board of Selectmen
Town of Freedom
33 Old Portland Road
P.O. Box 227
Freedom, NH 03836

RE: Short-Term Rentals

Dear Chairman Babb and Other Board Members:

This office represents the Mount Washington Valley Association for Responsible Vacation Rentals in connection with the regulation by various municipalities of vacation or short-term residential properties. I have been asked to address the question of short-term rentals in the Town of Freedom and that is the purpose of this letter.

I am aware of the letter to Ann Cunningham, Chair of the Freedom Planning Board, dated May 3, 2021 from Attorney John J. Ratigan which provided the opinion that short-term rentals in Freedom were prohibited because they were not expressly permitted by the Freedom Zoning Ordinance (“FZO”). I respectfully disagree with Attorney Ratigan’s opinion, for the reasons that follow.

I agree with Attorney Ratigan’s general assertion that the Town of Freedom has a “permissive” zoning ordinance, which means that uses that are not expressly permitted are prohibited. Attorney Ratigan asserts that because short-term rentals are not expressly permitted, they are prohibited. The problem with this position, is that in each of Freedom’s four zoning districts (not counting overlay districts), single family dwellings are permitted and there is no requirement that they be owner-occupied. Nor is there any prohibition against short-term rentals. Thus under the FZO, a single-family dwelling is a single-family dwelling, a residential use, regardless of who occupies it or for how long.

When one rents a property to another person or other persons, it does not change the “use” of the property. If one owns a single-family dwelling, for example, and rents it to another person or persons who similarly use the property as a single-family dwelling, the “use” has not changed. Obviously, if one rents a single-family dwelling to another party who uses the property for a commercial or retail use, the use has changed. But if the parties renting the property continue to use the property as a single-family residence, the use has not changed.

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Renting one's property is a natural incident of owning it. Unless a zoning ordinance specifically provides that a single-family residence be "owner-occupied" or provides that short-term rentals (generally defined as less than 30 days) are prohibited, then such rentals are allowed as a natural incident of owning the property. For decades, single-family dwellings have been rented to others in Freedom with no requirement that they be "owner-occupied" or only rented "long-term".

In addition to the above general principles concerning the occupancy and rental of a single-family dwelling, the specific definitions in the FZO make it clear that the rental of a single-family dwelling unit, whether short-term or long-term, is allowed. In Freedom's four principal zoning districts, single-family dwellings are allowed as a matter of right. Moreover, a "dwelling unit" is defined in the FZO as:

A room, or rooms connected together, constituting a separate, independent housekeeping establishment for owner occupancy, **rental or lease**, and physically separated. (Emphasis added.)

FZO, §2202.19 (definition of "dwelling unit"). Under the FZO, a dwelling unit, **by definition**, can be owner-occupied, rented or leased. Thus renting or leasing a dwelling does not change its use – it is still a "dwelling unit" and a permitted use.

It is also significant that the definition of "dwelling unit" allows the "rental or lease" of the dwelling unit. "Rental" generally connotes a shorter period of occupancy, while "lease" generally connotes a longer period of occupancy. In other words, the length of the occupancy by persons other than the owner does not change the use of a dwelling unit – it is still a "dwelling unit" under the FZO and a permitted use.

Nor does the fact that the single-family dwelling is rented somehow convert the **use** of the property to non-residential. This is consistent with a number of New Hampshire Supreme Court cases which hold that a change in occupancy is not a change in use. See New London Land Use Association v. New London Zoning Board of Adjustment, 130 N.H. 510 , 516 (1998) ("A mere change from tenant occupancy to owner occupancy is not an extension of a non-conforming use"); Severance v. Town of Epsom, 155 N.H. 359 (2007) (conversion of a camp from seasonal to year-round use is not a change or expansion of a non-conforming use); Dovaro 12 Atlantic, LLC v. Town of Hampton, 158 N.H. 222 (2008) (change from seasonal to year-round use not a change or expansion of use; and change from tenant occupancy to owner occupancy is not a change in use). These judicial holdings are consistent with the definition of "non-residential use" in the FZO as: "All uses of buildings, structures, and land **except single-family dwellings and multi-family dwellings.**" FZO, §2202, #45 (emphasis added). A single-family dwelling or a multi-family dwelling, in other words, is **not** a "non-residential use" under the FZO. Single-family and multi-family dwellings, no matter who occupies them or for how long, remain a residential use.

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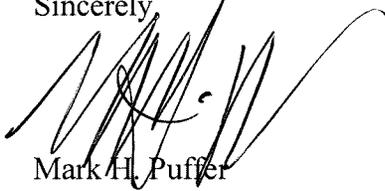
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Attorney Ratigan also suggested that the short-term rental of a single-family dwelling somehow constituted a “hotel” or a “tourist home.” First, the renting of a single-family dwelling to another person or persons is inconsistent with the common and ordinary meanings of a “hotel” or a “tourist home.” Second, the renting of a single-family dwelling fails to meet the specific definitions of “hotel” and “tourist home” in the FZO. FZO, §2202, ## 30 and 62.

Based on the above, it is clear that the short-term rental of a “dwelling unit” is not prohibited under the FZO. My client would prefer not to litigate the issue but instead wait for the New Hampshire Legislature to address the issue of short-term rentals in a comprehensive way that is fair to all parties involved: fair to municipalities; fair to short-term renters, many of whom have rented for decades; and fair to the community at large.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'MHP', with a long, sweeping flourish extending to the right.

Mark H. Puffer

MHP:sas