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New England cities rein in short-term rentals - by Ken MacKenzie and Chris Vaccaro

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Ken MacKenzie
Dalton & Finegold, LLP

Chris Vaccaro
Dalton & Finegold, LLP

With beautiful mountains and coastlines, and world-class museums, universities, and hospitals, New England is perfectly suited for short-term rental programs such as those operated through Airbnb and similar web-based booking agents.

While Airbnb, VRBO and the like have become a well-settled part of the hospitality landscape, particularly for millennials, they continue to present challenges for the hospitality industry and now for the locales affected by their booking engines. For example, when dwelling units are used for short-term rentals, they are unavailable to long-term residents. Local tax revenues can drop when travelers seek accommodations through short-term rental programs, instead of using licensed hotels that pay room taxes. Rowdy and disrespectful behavior by transient occupants can be problematic in residential neighborhoods. Three popular New England tourist destinations, Boston, Mass., Newport, R.I., and Portsmouth, N.H. have acted to address these impacts.

Boston, MA

Boston suffers an acute shortage of housing, resulting in exorbitant rents and home prices, and transportation challenges for commuters who must travel long distances to their workplaces. Boston has tried various initiatives to create more affordable housing, such as linkage and inclusionary zoning policies that require real estate developers to build or make generous contributions toward affordable housing. Although these programs have generated some positive results, the housing shortage persists.

In 2018, with prompting from Boston-based hotels concerned about unfair competition from unregulated and untaxed transient rental properties, the Boston city council concluded that short-term rental programs exacerbated Boston's housing shortage. Boston enacted a short-term rental ordinance that became fully effective this year.

Boston's short-term rental ordinance prohibits rentals for a term of less than 28 days, except those made by natural persons who are owner-occupants living in one, two, or three-family dwellings. Housing units set aside as "affordable" (that is, price-controlled housing) cannot be used for such short-term rentals under any circumstances. Tenants cannot use their apartments for such short-term rentals. The ordinance requires owner-operators wishing to engage in such short-term rentals to first register their units with the city. It also requires web-based booking agents to enter into agreements with the city to prevent ineligible units from being listed as available for short-term rental, and to share data on short-term rental listings with the city. Violators are subject to fines ranging from \$100 to \$300 per day. Owner-operators are also responsible for collecting and remitting the 12.2% state and local room occupancy excise taxes on short-term rentals.

Soon after Boston adopted its ordinance, Airbnb filed suit in federal court, seeking to enjoin enforcement of the ordinance. After a few months of jousting between Airbnb and the city, the parties reached a settlement last August, with Airbnb agreeing to help the city ensure that only qualified owner-operators with registered units participate in Airbnb's platform. As part of this settlement, the city agreed not to give more favorable treatment to other web-based booking agents that are not part of the settlement.

Newport, R.I.

Newport's concerns about short-term rentals differ from those of Boston. While Boston's short-term rental ordinance seeks to preserve housing inventory, Newport's ordinance is focused on discouraging obnoxious behavior by short-term occupants.

A Newport city ordinance declares that short-term rentals “have been the source of noise, congestion, pollution and rowdy and disorderly behavior of tenants and persons on the property,” accommodating tenant misconduct that, “Disturbed the peace of the neighborhoods where they have occurred . . . violated the repose, comfort and quiet enjoyment of persons in their homes; [and] produced unreasonable disturbances of peace.” The ordinance is intended to control the “spring-break” atmosphere that attracts many young people to a charming city that would prefer to be known for its maritime history and elegant mansions.

Newport regulates short-term rentals with annual registration requirements and zoning restrictions limiting them to certain business districts. Operators are required to post notices on their properties, warning guests about city ordinances governing noise, dogs, trash disposal, parking, dwelling occupancy limits, and snow removal.

According to the website NewportRI.com, Newport is having difficulties enforcing this ordinance. Data made available by Airbnb through 2018 suggests that many property owners are ignoring the ordinance and listing their properties in short-term rental programs without proper registration. Newport is reassessing its enforcement mechanisms and is considering significant increases in registration fees and fines, as well as zoning law changes.

Municipal courts do not hesitate to assess fines against owner-operators who get caught violating Newport’s ordinance. For example, when an owner-operator of a particularly notorious short-term rental property failed to properly register her property in 2017, a municipal judge fined her a total of \$15,000, with \$3,800 payable immediately and the remaining \$11,200 suspended, provided that she ceases the illegal rentals. This fine may seem high, but it becomes less severe when one considers that owner-operators in Newport can make thousands of dollars in short-term rental revenues in a single week during the summer.

Portsmouth, N.H.

Portsmouth’s zoning ordinance prohibits “transient occupancies,” such as hotels and motels, in general residential districts. Nevertheless, property owners in residential districts continue to operate short-term rentals, and sometimes litigation results.

The New Hampshire Supreme Court decided one such lawsuit last month, in *Working Stiff Partners, LLC v. City of Portsmouth*. In that case, the plaintiff made a four-bedroom house in Portsmouth available for short-term rental through websites. The home was located in a residential zoning district, where transient occupancies were forbidden. While renovations were underway, neighbors complained to the city officials, who warned the plaintiff that short-term rentals might not be allowed at that location. The plaintiff ignored the warning, and offered the house on Airbnb at daily rates. The neighbors’ complaints intensified, and the city’s code enforcement officer issued a cease and desist order to the plaintiff.

The plaintiff appealed to the Portsmouth zoning board of adjustment, which upheld the cease and desist order. The plaintiff then appealed to the trial court, without success. The plaintiff took its case

all the way to the Supreme Court, claiming that the house was a legal dwelling unit permitted under the zoning ordinance. The Supreme Court was not convinced. Employing a careful reading of the Portsmouth zoning ordinance, the Supreme Court concluded that the plaintiff's short-term rental program involved prohibited "transient occupancies," and affirmed the decisions of the enforcement officer, zoning board of adjustment, and the trial court.

The web-based short-term rental industry will likely enjoy continuing growth in New England. In the meantime, the hospitality industry will have to adapt to an ever-evolving competitive paradigm, and more and more local governments can be expected to seek creative ways to regulate and tax this industry. Recent developments in Boston, Newport, and Portsmouth are only the beginning of this inevitable process.

Ken MacKenzie is partner of Dalton & Finegold, LLP and a member of the International Hospitality Consultants (ISHC).

Formerly MacKenzie was the co-leader of the hospitality and recreation group at Goulston & Storrs. MacKenzie represents institutional investors, private equity funds, investment managers, pension funds, university endowments, REITs, major lending institutions and developers in the acquisition, financing and disposition of all classes of real estate assets both nationally and internationally.

MacKenzie specializes in transactions involving hospitality assets and has significant experience in large-scale joint-ventured deals, often involving non-profit institutions such as universities or hospitals. He frequently assists clients in structuring their responses to RFPs for complex mixed-use projects.

MacKenzie received his A.B. from Dartmouth College and his J.D. from Boston University School of Law, where he graduated magna cum laude. MacKenzie is admitted to practice law in the state of Massachusetts.

Chris Vaccaro is a partner in Dalton & Finegold LLP's commercial real estate department. Vaccaro represents developers and financial institutions in commercial transactions, including acquisitions, construction, condominiums, financing, litigation, zoning appeals, leasing, permitting, and loan restructuring. He has authored dozens of articles discussing legal issues and trends affecting the commercial real estate industry.

Vaccaro is a member and former chair of the board of directors for Bridgewell, a leading human services nonprofit serving developmentally disabled individuals in Middlesex and Essex Counties. He is a former chair of the Reading zoning board of appeals.

Vaccaro received his B.A., cum laude, from Tufts University, and his J.D., cum laude, from Boston College Law School, where he was a managing editor of the Boston College Law Review. He is admitted to practice law in Massachusetts and Texas, and with the United States District Court for Massachusetts.