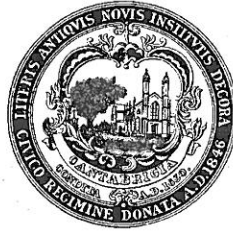


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

June 26, 2017

Louis A. DePasquale
City Manager
City Hall
Cambridge, MA 02139

Re: Awaiting Report #17-46 of 6/12/17 Re: proposed Short Term Rental zoning ordinance amendment, Chapter 4.60: "Clarification on the feasibility of grandfathering non-conforming use as it relates to existing short term rentals;" and Awaiting Report #17-48 of 6/12/17 Re: "Clarification if it is allowed for an owner occupied small two family home to be treated as an owner occupied single unit STR"

Dear Mr. DePasquale:

This is in response to the two legal questions asked by the City Council related to the petition by the City Council to amend the Zoning Ordinance to create a new Chapter 4.60 to regulate short-term rentals ("STR"). A copy of the STR ordinance, as amended and passed to a second reading at the City Council meeting of June 12, 2017, is attached ("the Amendment"). The Amendment defines "Short-term rental" as "Any rental in a residential dwelling stipulated to be less than 30 consecutive days and used for residential purposes only." The City Council has requested a legal opinion concerning two issues (stated above): the first concerns whether existing buildings at which short-term rentals have been occurring will be "grandfathered" if the Amendment passes, which would mean that those in control of those buildings could lawfully continue to use the buildings for short-term rentals and not be subject to the new STR requirements in the Amendment. The second issue concerns whether a change could be made to the Amendment to delete the proposed provisions allowing for "Owner-adjacent units" to be used for STRs, and instead expand the proposed definition of "Operator-occupied unit" to allow STRs in "an owner occupied small two family home."

A. Grandfathering

G.L.c.40A, §6 provides that:

...a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance....

This language protects “pre-existing nonconforming” uses from being subject to a zoning law change advertised and enacted after the use was already lawfully in existence, even if the zoning law change, if it did apply to the use, would otherwise make the use illegal. A use of property that lawfully existed prior to the enactment of a zoning ordinance and that would require a special permit under the ordinance were it not preexisting qualifies as a nonconforming use for the purposes of G.L.c.40A, §6. Shrewsbury Edgemere Assocs. Ltd. Partnership v. Bd of Appeals of Shrewsbury, 409 Mass. 317, 321 (1991). Any use that commences after the date on which a notice of a public hearing to consider a proposed zoning change is first published must comply with that zoning change if enacted. The right to continue a nonconforming use is not personal to the owner or occupant on the date of the zoning change; the grandfathering protection relates to the nonconforming use itself. Revere v. Rowe Contracting Co., 362 Mass. 884, 885 (1972).

Similarly, Cambridge Zoning Ordinance §8.11 provides:

This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or structure or of land, to the extent to which it is used at the time of first publication of notice of public hearing by the Planning Board of applicable provisions of this or any prior Ordinance, but it shall apply to any change of use thereof....

Also, Cambridge Zoning Ordinance §8.21 provides:

Any nonconforming structure or use which existed at the time of the first notice of public hearing by the Planning Board of the applicable provision of this or any prior Ordinance or any amendment thereto may be continued or changed to be conforming....

Applying these principles to the Amendment means that if an STR use was lawfully in existence prior to the first publication of notice of the public hearing on the Amendment, then such STR use would be grandfathered so that it is not subject to the requirements of the Amendment. Whether a particular property was lawfully in use for STRs will require an analysis of that property. However, some general observations can be made. First, under the existing Zoning Ordinance provisions, STRs are allowed only in limited circumstances as “transient accommodations.” See CZO §4.30 Table of Use Regulations, at §4.31. The categories of transient accommodations allowed are: “Tourist house in an existing dwelling;” “Hotel or motel;” and “Lodging House.” These transient accommodations are allowed in some zoning districts as of right, they are not allowed in other zoning districts, and they are allowed by special permit issued by either the Board of Zoning Appeal or the Planning Board in other zoning districts. So, an STR use that was occurring in a zoning district in which no transient accommodations are allowed, or only allowed by special permit that has not been obtained, cannot be grandfathered because it was not lawfully in existence.

Additionally, presumably most STRs that are hotels, motels or lodging houses that have been lawfully in existence (which would include being licensed by the License Commission) are relatively easily identifiable. These would be grandfathered to the extent the terms of the Amendment apply to them, and could be explicitly excluded from the operation of the Amendment if language is added to that effect. As the definitions of the Amendment are currently drafted, it is not clear that hotels, motels and lodging houses are outside the scope of the definition of “short-term rental.”

Whether a pre-existing use has been a lawful “tourist home in an existing dwelling” will require individualized analysis. As stated, to the extent such a use was made in a zoning district in which it is not allowed, or allowed only by a special permit that was not obtained, it will not be grandfathered. To the extent such a use was made in a district in which the use is allowed as of right, then the issue becomes whether such a use meets the definition of “tourist home in an existing dwelling.” The CZO does not provide a definition of “tourist home.” The CZO definition of “dwelling” in Article 2.000 is “A building or structure used in whole or in part for human habitation, but not a trailer.” A working definition of “Tourist House” was provided in an internal Memorandum of Understanding from 1996 as follows:

“Tourist House” (including “bed and breakfasts”)—a private owner-occupied house where rooms are rented for transient occupancy and a breakfast is usually included in the rent. The breakfast may be provided in a common space. Cooking facilities are not provided within the rooms. [All accommodations are reserved in advance.] [Bed and breakfasts must include breakfast in the rent.] [Three or fewer rooms exempted from licensing requirement; four or more rooms require license.]

Based on this definition, a bed and breakfast that was lawfully operating prior to the Amendment because it was a lawful “tourist home in an existing dwelling,” and which would otherwise be included in the short-term rental definition of the Amendment, could be grandfathered from the provisions of the Amendment.

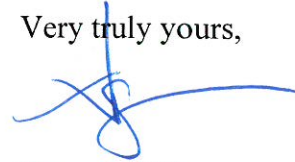
If an existing STR has been in existence, and has not fit within one of the allowed uses currently in the CZO, it was not lawfully in existence and will not be grandfathered. CZO §4.13 provides: “No building, structure, or land in any district may be used, erected or designed to be used, in whole or in part, for any use not listed in Section 4.30, except nonconforming uses which may be continued under the provisions of 8.20.”

B. Use of Small Two Family Home for Short Term Rental as Operator-Occupied Unit

The second issue relates to amending the existing Amendment language to delete the proposed provisions allowing for “Owner-adjacent units” to be used for STRs, and instead to expand the proposed definition of “Operator-occupied unit” to allow STRs in “an owner occupied small two family home.” It is not clear exactly what is intended by the word “small.” Use of the word small implies that “medium” and “large” two family

homes would not fit within the definition. Some floor area figure or other objective measurement is advisable to provide clarity for residents and enforcement officials as to what is intended. Also, from the minutes of the Ordinance Committee meeting of June 12, 2017, it appears that this proposed definition change to “Operator-occupied unit” would only apply in circumstances where “one family uses bedrooms in both small units....” It is not clear whether this means that when the two family home is not being used as an STR, both of the homes must be used together by one family, or whether the two family home may only be rented short-term to one family. If the intent behind the proposed change is clarified, appropriate language can be provided.

Very truly yours,



Nancy E. Glowa
City Solicitor



CITY OF CAMBRIDGE
Community Development Department

IRAM FAROOQ

*Assistant City Manager for
Community Development*

Sandra Clarke

*Deputy Director
Chief of Administration*

To: Louis DePasquale, City Manager

From: Iram Farooq, Assistant City Manager for Community Development

Date: June 20, 2017

Re: Awaiting Report #17-47, Council Order #O-17 from 6/12/17: To provide to the City Council a more detailed breakdown of owner adjacent full unit statistic short term rentals

The City Council petition to regulate the operation of Short-Term Rental residential units defines two categories of eligible units: "Operator-Occupied" Units and "Owner-Adjacent" Units.

- Operator-Occupied Units must serve as the primary dwelling for either an owner or a primary leaseholder.
- Owner-Adjacent Units include those located in a building of "with four or fewer total units where all units are owned by the same person, and one of the four units is used as the primary place of residence for the owner."

The Owner-Adjacent definition would apply in two, three and four unit buildings with exclusively residential uses where one of the units is owner-occupied. The definition would also include buildings that are classified as single family homes with an accessory apartment, since accessory apartments are defined as separate dwelling units.

The Owner-Adjacent definition would not apply in any building in which the owner does not reside, nor in the following types of buildings in which the owner may reside:

- A condominium building with two, three or four units where any unit is under separate ownership from the others.
- A mixed-use building with non-residential uses in addition to residential dwelling units.
- A building on a residential parcel including two or more residential buildings, where the owner lives in a separate single-family building.

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Data extracted from the Assessing Department data system indicates the following number of existing buildings could contain an “Owner-Adjacent” unit under the proposed definition:

Units in Structure	Existing Buildings
Two Units	1,729
Three Units	675
Four Units	77
Total	2,481

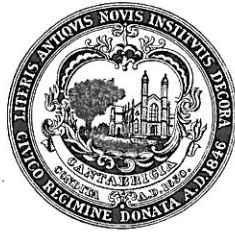
Each building would be allowed up to one Owner-Adjacent unit, so a theoretical maximum of up to 2,481 such Owner-Adjacent short-term rentals might be allowed. This figure represents approximately 4.7% of the total housing stock as determined by the Community Development Department as of June 2016, though it is unlikely that the full number of such units would be made available for Short Term Rental. It should also be noted that existing conditions could change due to alterations of buildings or changes in ownership.

Additional arrangements that might allow a unit to qualify as an Owner-Adjacent Unit include two- to four-unit condominium buildings where all units are owned under the same name by an owner-occupant of one of the units. With the data currently available, we are unable to estimate the number of buildings meeting this criterion, but expect that they are few in number.

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Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

June 26, 2017

Louis A. DePasquale
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Short Term Rentals Zoning Petitions

Dear Mr. DePasquale:

This legal opinion is provided in response to a request by Councilor Nadeem Mazen at the City Council's June 12, 2017 meeting, that the City Solicitor provide an opinion "whether the Cockrill, et al., Short Term Rentals Petition (the "Cockrill Petition"), which received a recommendation from the Planning Board to not adopt and unfavorable recommendation from the Ordinance Committee, would impact whether the City Council Short Term Rentals Petition (the "City Council Petition") could be refiled if said petition were not ordained by the City Council prior to its expiration date of August 29, 2017." In our opinion, unfavorable action on the Cockrill Petition would not prevent the City Council Petition from being refiled and considered by the City Council within two years because the Planning Board recommended adoption of the City Council Petition, and because the Cockrill Petition is substantively different from the City Council Petition.

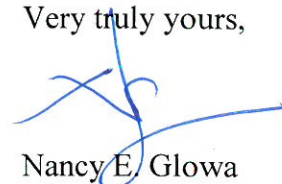
General Laws c.40A, §5, ¶6 provides, "[n]o proposed zoning ordinance [] which has been unfavorably acted upon by a city council [] shall be considered by the city council [] within two years after the date of such unfavorable action unless the adoption of such proposed ordinance [] is recommended in the final report of the planning board."

Here, on May 23, 2017, the Planning Board voted to recommend adoption of the City Council Petition. Therefore, even if the Cockrill Petition is not favorably acted upon, the City Council would not be barred from refiled and considering the City Council Petition within two years of the unfavorable action because the City Council Petition was recommended by the Planning Board. However, if the City Council were to vote not to adopt the Cockrill Petition, the Cockrill Petition could not be considered by the City

Council again within two years because the Planning Board voted not to recommend adoption of the Cockrill Petition.

Additionally, even without a vote by the Planning Board to recommend a proposed zoning petition, the two-year bar on resubmitting a proposed ordinance only pertains to that specific proposal brought by that proponent, and not a different proposal concerning the same subject matter submitted by a different proponent. Massachusetts Zoning Manual §3.5.7 (Mass. Cont. Legal Educ. 5th ed. 2015). The Cockrill Petition and the City Council Petition both concern the same subject matter, short term rentals, but the petitions are substantively different, and brought by different proponents. Therefore, if the City Council unfavorably acts upon the Cockrill Petition, the City Council Petition can be refiled if no action is taken on it before its expiration, and the City Council will not be barred by the two-year bar on repetitive petitions, pursuant to G.L. c.40A, §5, ¶6.

Very truly yours,



Nancy E. Glowa
City Solicitor



City of Cambridge
Inspectional Services Department

Short Term Rental Ordinance
Recommended Inspection Criteria

General

- a. Minimum floor area and dimensions for all habitable and sleeping rooms in the rental and egress areas
- b. Minimum glazing area for daylight in sleeping rooms and other habitable rooms rented
- c. Minimum quantity of accessible, operable windows for fresh air, or adequate mechanical ventilation.
- d. Location of mechanical intake openings compliant with residential building code for separation distance from noxious contaminants
- e. Existing conditions that are non-conforming with current reference codes will be grandfathered unless the Authority Having Jurisdiction deems the condition to be an imminent safety hazard

Exterior

Egress to public way:

- a. Provide means of egress (lighting, signage, hardware)
- b. Tripping Hazards
- c. Handrails/guardrails provided and at adequate heights, including rooftop egress
- d. Lighting at egress door – motion activated or on timeclock

Interior

Life Safety Systems

- a. Smoke & carbon monoxide detectors – in correct locations, operable; log of when batteries last replaced
- b. Check for general fire hazards: exposed wiring, presence of extension chords on appliances and equipment

Egress

- a. Each dwelling unit must have at least one egress door (side-hinged) leading to the public way with clear dimensions of code compliant size with readily openable hardware not requiring a key or special knowledge. Each side of the exterior door must have a code compliant, level landing.
- b. Egress from a habitable level (including basements and attics) that does not have an egress door to the public way or a yard, must be by ramp or stairway
- c. Every habitable room and sleeping room that is rented must have an emergency escape and rescue opening directly onto the public way, or yard or court that leads to the public way. Emergency escape and rescue openings must meet the requirements of the building code for minimum opening area and dimensions and maximum sill height, including window wells below grade and bulkhead doors.
- d. Hallway and stairway clearances for width and height shall be subject to review and approval for safety by the inspectional services department where less than the code required minimum
- e. Check that no egresses are blocked or permanently locked, hardware is code compliant



City of Cambridge
Inspectional Services Department

- f. Handrails and/or Guardrail provided
- g. Lighting – provided in common stairways and egress doors with motion activation or on timeclock
- h. The path to the exterior door cannot require travel through a garage

Heating Systems & Other Utilities

- a. Operable and able to provide minimum/maximum temperature during winter months to all spaces in rental portion of unit

Windows

- a. At least one operable window provided in each sleeping room or habitable room that is rented. Where adequate mechanical ventilation is provided, windows need not to be operable.
- b. For a rented room on a floor level in which there is only one egress door, one window in the room must be an emergency escape and rescue opening, with minimum opening dimensions and sill height. Bulkhead enclosures which serve as emergency egress must comply with minimum open area and other applicable requirements.

Bathrooms

- a. At least one working bathroom with water closet, lavatory, and shower or bathtub
- b. Water temperature of fixtures (both hot and cold water must be provided)
- c. Soap and dispenser provided, toilet paper provided
- d. Loose tile finish on floors and walls, loose accessories
- e. Bathtub and shower floors and walls must be finished with non-absorbent surfaces to code required minimum distance above finish floor level
- f. One operable window (see code for min. opening) or adequate mechanical ventilation
- g. Safety glazing shall be provided in all shower or bathtub glass surrounds, doors with glass and any windows in hazardous locations (as defined by the residential building code)

Kitchen

- a. Provide a sink with hot and cold running water
- b. Refrigerator is turned on and cooled to code required temperature

Reference Codes and Standards:

International Residential Code 2015

Massachusetts Residential Code 8th Edition 780 CMR 51.00

Massachusetts Public Health Code 105 CMR 410 : Minimum Standards of Fitness for Habitation

NFPA Standards as required by the Cambridge Fire Department



City of Cambridge
Inspectional Services Department

Inspection Timeline:

ISD anticipates that the inspection of 1,000 short term rental units to the above criteria would require the labor equivalent of two full time inspectors over a period of approximately six months. This caseload could be accomplished by adding one full time inspector to the housing group, and supplementing with existing staff.

Attachment: Short Term Rental Inspections zoning. (CMA 2017 #190 : AR Response RE: short term rentals (4) awaiting reports)