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October 18, 2023

**VIA EMAIL ONLY**

Councilor Ed Cameron, Chair  
Planning & Development Committee  
City of Newburyport  
60 Pleasant Street  
Newburyport, MA 01950

RE: Short Term Rental Units (“STRUs”) Legal Questions

Dear Chair Cameron:

Both you and City staff requested that the legal advice I have provided orally on the STRUs be provided in a written legal opinion, which follows.

This advice is based on advice provided by prior counsel, my own legal research, review of the pertinent Newburyport ordinances and Massachusetts law, as well as reviews of the most current versions of the proposed ordinance. Should the language of the proposed ordinance change in any material way, my advice may also change.

1. Whether the City may treat STRU owners from outside the City differently than those owned by City residents.

No. The U.S. Constitution, specifically the dormant Commerce Clause, prohibits discrimination between “substantially similar entities”. Hignell-Stark v. City of New Orleans, 46 F. 4<sup>th</sup> 317, 326 (5<sup>th</sup> Cir. 2022). Under prior Supreme Court case law, residents and out-of-state property owners are “substantially similar. entities” Id. (citing Dept. of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008)). Thus, the Court found that a city ordinance regulating STRUs which treated residents and non-residents in a disparate manner by limiting STRUs licenses to city residents only, was unconstitutional. Similar analyses have been picked up by courts in California and Texas.

2. Whether the City may provide some type of “amnesty” that allows existing STRUs to remain in operation.

Yes. The City has some discretion in how it enforces its zoning ordinances, and cannot be compelled to enforce them in any particular way, nor does failing to enforce a particular zoning ordinance mean that it cannot be enforced again. All that being said, the best practices are for the City to be consistent in its enforcement of zoning ordinances. With that in mind, I suggest some objective standard for determining amnesty. It could be number of



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units that apply for City licensing within a certain date, or units which were registered with the Commonwealth by a certain date, or some other objective measure.

Having reviewed the most recent version of the proposed ordinance (on 10.17.23), it is my understanding that the proposed ordinance relies upon licensing date with the Commonwealth, as a type of amnesty for investor owned STRUs. This is the type of reasonable and objective measure suggested.

3. Whether the short-term rental of housing units on Plum Island is likely to be grandfathered?

Yes. I have reviewed and confirm the prior opinion provided by KP Law.

To recap, it seems reasonable, based on the prior usage of the properties on Plum Island as de facto STRUs, prior to zoning, that the use would be grandfathered. This grandfathering would be limited to Plum Island, where the prior use is part of the history of use of residential properties in that part of the City.

4. Whether the City may impose a cap on the number of STRUs.

Yes. M.G.L. c. 64G, section 14 provides that a city may limit the number of local licenses or permits to operate STRUs within the city. It states:

A city or town, by ordinance or by-law, may regulate operators registered pursuant to section 67 of chapter 62C and impose penalties for the violation of such an ordinance or by-law. A city or town, by ordinance or by-law, may:

- (i) regulate the existence or location of operators under this section within the city or town, including regulating the class of operators and number of local licenses or permits issued to operators under this section and the number of days a person may operate and rent out an accommodation in a calendar year; . . .

However, any cap should have some reasonable basis underlying the rationale for the cap number. Further, it would be more appropriate to establish the cap as part of any licensing ordinance, rather than as part of the zoning ordinance. I also note that the concept of caps on these licenses (and their regulation in general) has not yet been tested, so the seemingly broad discretion provided to cities under the general laws could be limited by a court at some later date.

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5. Whether STRUs would be a primary or an accessory use.

I have reviewed the prior legal advice provided on this question, and appreciate the detailed analysis. The key question remains the same, whether the ordinance provides for two primary uses on one parcel, or whether the uses are primary residential use, and a related accessory use. In my opinion, further drafts of the proposed ordinance have helped refine the analysis of this question.

The Zoning Ordinance defines “accessory building or use” as “[a] subordinate use, structure, or building, the purpose of which is incidental to that of the principal use or building and on the same lot.” There is lots of case law parsing the definition of accessory use, an analysis of the definition is fact dependent. However, there are key concepts that can be utilized to help determine whether STRUs are more appropriately a principal use or an accessory use.

“[A]n accessory use as both subsidiary to the primary use of the locus and related to that primary use. In many of the cases, the terms “accessory use” and “incidental use” are used interchangeably, although “accessory” imports rather more the sense of adjunct while “incidental” imports rather more the sense of subsidiary. . . [A]n accessory use must be subordinate and minor in significance, rather than primary in purpose. The accessory use must also have a reasonable relationship to the primary use. It is not quite enough that the accessory use be subordinate, ‘it must also be attendant or concomitant.’” Gallagher v. Bd. of Appeals of Acton, 44 Mass. App. Ct. 906, 907 (1997) (internal citation omitted).

In the Gallagher case, an addition which was larger than the main home, was determined not to be an accessory use. A flea market at a racetrack was also not an accessory use, nor was gravel mining on a farm. Typical accessory uses are stables (for personal not commercial uses), home offices, common driveways, private garages and the like.

Applying these concepts to the regulation of STRUs in the proposed ordinance, I conclude that STRUs are more likely to be a second primary use on the property, rather than an accessory use. Where the proposed ordinance allows the STRUs to operate year-round, and where the use could be greater in relation to the volume of the structure than the residential use (i.e., 3 of 4 bedrooms used for STRUs), the use may not be incidental to or subordinate to the primary residential use.

Instead of focusing on classifying the use as accessory, I recommend clarifying the language of the proposed ordinance to require that a lawful dwelling unit (single family, two-family, multi-family, or mixed use) is a prerequisite to allowing any STRU use of the property.

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In addition, with respect to parking, I recommend making the language clear that parking requirements for STRUs are separate and apart from the parking requirements for the prerequisite lawful dwelling unit/s.

I hope that this opinion is useful. Please contact me if you have any questions or concerns.

Sincerely,

*/s/ Karis L. North*  
Karis L. North

cc: Andy Port, Planning Director  
Jennifer Blanchet, Zoning Administrator  
Andrew Levine, Chief of Staff