

# MEMORANDUM

To: City of Newburyport Zoning Board of Appeals

From: Karis North, City Solicitor

Re: Advice concerning Short Term Rental Units

Date: April 18, 2024

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You asked a series of questions concerning the newly enacted Short Term Rental Unit (STRU) Ordinance. As I respond to the questions, please keep in mind that there are no bright line rules here. As you know, a special permit is discretionary, and issuance of a permit is in the best judgment of the ZBA, relying on the factors outlined in the Ordinance, and applying the specific facts of each application to those factors.

## **Questions and Responses:**

A new zoning ordinance enables investor-owned short term rental units (STRUs) to get a special permit from the ZBA. Special Permit criteria 6 and 7, shown below, says that the ZBA must consider whether an application “would impair the integrity or character of the district” and “could be detrimental to the character of said neighborhood”.

Question 1. When the ZBA receives an STRU application, must the ZBA approve it since this use has now been enabled by the City Council, or does the ZBA have the latitude to turn down an application if it decides that it impairs or is detrimental to the character of the neighborhood?

Response 1. No, as noted above, a special permit is a discretionary instrument. In making its determination, the ZBA must base its decision on the requirements of the ordinance, and the facts in the record. A court would give a board reasonable deference in making its determinations, so long as the decision is not unreasonable, arbitrary, capricious, or legally untenable. Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 73 (2003).

Question 2. If the ZBA has latitude, and the STRU is on a very residential street, would reasonable grounds to turn it down be that it affects the character of the residential neighborhood by being a business?

Response 2. The specific facts of the STRU, the impacts from the STRU, and the details of the neighborhood would be important here, but, a blanket proposition that every STRU is detrimental to a residential neighborhood could be considered arbitrary and capricious, since the Ordinance allows STRUs in residential neighborhoods.

Question 3. If the ZBA has latitude, and the STRU has a history of complaints in its neighborhood, would reasonable grounds to it turn down be that it affects the character of the neighborhood because of its history of complaints?

Response 3. Again, it will depend on the specific facts. The ZBA would have to sort through the specific facts presented in the record, and be careful to distinguish between facts, opinions, and complaints. Information from zoning enforcement, the building inspector, and the licensing commission could be relevant to that discussion.

Question 4. If the ZBA approves a special permit for an STRU which has a history of complaints in its neighborhood, and an abutter appeals the decision on the basis of it affecting the character of their neighborhood, would they likely prevail in a court challenge?

Question 5. If the ZBA approves a special permit for an STRU on a very residential street, and an abutter appeals the decision on the basis of it affecting the character of their neighborhood, would they likely prevail in a court challenge?

Responses to 4 and 5. It is impossible to predict the outcome of any court challenge because the specific facts are important. As noted above, there is some discretion for the ZBA, but in making any decision, it should ground that decision in the facts presented in the record (not just opinions, or complaints), and then do its best to clearly apply the facts to the elements of the Ordinance, explaining the basis for the decision.

The Massachusetts Zoning Manual gives the following example:

In Corey v. Rector, 24 Land Ct. Rptr. 430 (2016) (Long, J.), the Land Court reversed a special permit-granting authority's finding that a proposed project would not be substantially more detrimental to the community. The project involved the conversion of a one-story residential cottage on the quiet side of Commercial Wharf in Nantucket Harbor to a significantly larger, two-story “commercial transient cottage” with a new second story and a ground-level footprint nearly two-thirds larger than the existing structure. The special permit-granting authority's finding that the owner's management plan for the property would adequately protect the peace and quiet enjoyment of the neighbors was unreasonable. No such plan had been agreed to or was in place, and the owner would have little control over the members of the public who would lodge in the cottage or use the new means of public access to visit the area.

The important takeaways from this decision are that the impact was of a significant scale, and that the “management plan” which was intended to protect the neighborhood was illusory. But as you can see, the case turns entirely on the specific facts of the particular permit.