

Meeting of February 20, 2018

South Portland City Council
Position Paper of the City Manager

Subject:

ORDINANCE #13-17/18 – Amending Chapter 27 “Zoning” regarding Short Term Rentals. Passed first reading on February 6, 2018. ROLL CALL VOTE. Passage requires five (5) affirmative votes.

Position:

The City Council held four workshops on the issue of Short-Term Rentals (STRs) between October 2017 and January 2018. This amendment to Chapter 27, Zoning, removes any confusion about how Short-Term Rentals relate to current lodging establishment definitions. The ordinance amendment also makes clear that land uses not explicitly allowed are prohibited. The City Council voted unanimously to adopt the Chapter 27 amendment at first reading on February 6, 2018 (6-0). The Planning Board held a subsequent Public Hearing on the amendment on February 12, 2018 and voted 5-0 to recommend City Council’s adoption of the amendment. A summary of the Planning Board hearing is included in your meeting materials.

Council is being asked to approve the second and final reading of this amendment.

Corporation Counsel Sally Daggett, Assistant City Manager Josh Reny, and Planning Director Tex Haeuser will be at Tuesday’s meeting to answer any questions Councilors may have regarding this amendment.

Requested Action:

Council passage of second reading of Ordinance #13-17/18.



City Manager

To: Scott Morelli, City Manager
From: Tex Haeuser, Planning Director 
Cc: Joshua R. Reny, Assistant City Manager and Economic Development Director
Mary Perry, Executive Assistant
Date: February 15, 2018
Re: **Proposed Amendments to the Zoning Ordinance regarding Use or Occupancy of Dwellings for Short-Term Rentals**

Planning Board Recommendation

L. Boudreau motioned that the Planning Board make a positive recommendation to the City Council for the amendments to Chapter 27 zoning regarding short term rentals as presented this evening. W. Laidley seconded; (5-0) (K. Gatti absent, District 2 vacant).

Overview

The proposed regulatory scheme for which the City Council gave First Reading approval on February 6, 2018 contained amendments to Ch. 27 Zoning as well as to the Licensing provisions in Ch. 14. Amendments to the Zoning Ordinance require a recommendation from the Planning Board, so the Planning Board held a public hearing for this purpose on February 12, 2018. Planning Board members were provided with the Ch. 14 provisions for background information, including the amendments made at First Reading, but they understood that their recommendation would only pertain to the Ch. 27 amendments.

Public Notice

Legal ads for this hearing were published in the *Portland Press Herald* on January 29th and February 5th. Similar notice was emailed to the Conservation Commission, Planning Board, and City Council. In addition, a public hearing notice was posted at City Hall on January 29th.

Comprehensive Plan

Neither the Housing nor the Local Economy sections of the 2012 Comprehensive Plan address short-term rentals in any kind of direct way. There similarly is no recommendation in the Plan related to home occupations. Preserving the character and livability of the City's neighborhoods, however, is a strong theme that runs through the Plan.

Planning Board Hearing Minutes (Draft)

Item #5. PUBLIC HEARING – Zoning Text Amendments – Amendments for Use or Occupancy of Dwelling Units for Short-term Rentals – Citywide – City of South Portland

The City Council has requested a land use determination from the Planning Board to consider proposed amendments to the Zoning Ordinance regarding use or occupancy of dwellings for short-term rentals.

Per City Ordinance Section 27-115(g), the Planning Board will, after the close of the public hearing, make a recommendation to the City Council regarding the proposed amendments.

L. Dillon said that Mr. Haeuser received a question from the public to be addressed before they begin.

T. Haeuser said he received an email from a member of the public who saw a Facebook post from Ms. Dillon where she questioned the fast pace of the process for the development of ordinances for short term rentals. The member of the public questioned if this is something a Planning Board members should be doing. He explained that 1- this was not a comment on the substance of the proposed ordinances, 2- at the time, Ms. Dillon did not know that a portion of the short term rental ordinances needed to come to the Planning Board, and 3- this is a recommendation to the City Council and is legislative in nature. He encouraged Ms. Dillon to bring it to the Board's attention. They would like to be extra careful and thorough with a vote by the Board as to whether or not members think Ms. Dillon should recuse herself. Staff does not think there is a conflict.

K. Carr said that the Board is being asked to weigh in on substance they've not seen. He pointed out that it does not seem like an issue of conflict but of bias. He would like to know what the threshold would be for bias.

S. Daggett concurs; it's a related topic of bias. There are two different types: one based on familial bias and another based on state of mind. As Mr. Haeuser indicated, the Board is being asked for a recommendation on the zoning ordinance, which is legislative. The bias isn't quite as high as a quasi-judicial matter. She thinks it's a low threshold but to be extra cautious, she would like Ms. Dillon to give her take on whether she has prejudged the issue of the Chapter 27 Zoning ordinance. She would like Ms. Dillon's piece stated on record and the remaining Board members can decide.

L. Dillon said the purpose and nature of her post was to inform people in her network that this was something going on. What was not included in the description was that she encouraged people to reach out to City Councilors and posted link to their contact information. She expressed an opinion on how quickly she thought the process was happening and wasn't sure that there were as many voices heard as there could have been.

K. Carr asked if she has interest in short term rentals. **L. Dillon** said no, she does not operate one or know anyone who does.

M. DeRose said she thinks this came up fast. A few days ago, she didn't think they would discuss this tonight.

L. Boudreau said it seems like the opposite—this has been going on for some time. It didn't occur to her that it would come before them. If you read the papers, eventually you come towards some thoughts of your own because it's being discussed so much. Like Ms. DeRose, she was blown away when it got here. It is challenging for Planning Board members to know if things will hit their plate. She doesn't think there was a conflict of interest or pre-established bias. The City Council had four if not five public workshop discussions.

W. Laidley thinks it's been percolating for months; he can't see that any member of the public has been denied the opportunity to provide input. He wasn't sure it would ever land in front of them. He thinks it's to her credit to encourage people to reach out and can't see there's conflict or bias; she was encouraging more public input.

K. Carr said for him, perhaps it is because he lives most of his working life in the public sector where one needs to be transparent, the reason he asked the question of threshold is because he thinks it's clear the threshold is higher in a quasi-judicial role than in their quasi-legislative role. He respectfully disagrees with his colleagues—he always thinks something will end up with them. He is conservative and he recommends recusal but he is happy to go along with the wishes of the Board as a whole. He asked Ms. Daggett about format or protocol.

S. Daggett said there should be a formal motion to allow or not allow Ms. Dillon to participate with everyone voting except Ms. Dillon. It's a low threshold so if they allow Ms. Dillon to participate she believes a court would uphold that.

L. Boudreau motioned to allow Ms. Dillon to participate in the discussion of short term rentals and sees no conflict or bias that would alter their recommendation tonight. W. Laidley seconded; (3-1) (K. Carr opposed, L. Dillon abstained, K. Gatti absent, District 2 vacant).

T. Haeuser introduced the item. He stated that he provided the first reading position paper and ordinance for Chapters 14 and 27. These show the background and approach the City is using in regard to short term rentals. They also have the ordinance amendments and language. For example, "short term rental" itself is defined in

Chapter 14. He read this aloud. The bulk of the ordinance language has to do with licensing and is Chapter 14. There are a few modifications to definitions that are appropriate for Chapter 27 zoning. This is what the Board will make a recommendation on.

Legal ads for this hearing were published in the *Portland Press Herald* on January 29th and February 5th. Similar notice was emailed to the Conservation Commission, Planning Board, and City Council. In addition, a public hearing notice was posted at City Hall on January 29th.

He gave a brief timeline of the discussion up to this point. On February 6th, the City Council gave First Reading approval to both the Chapter 14 and Chapter 27 amendments. The vote was 6-0 (Rose absent) in both cases. Two amendments were approved for the Chapter 14 amendments. One was to allow otherwise noncompliant short term rentals through September 15th for rental contracts signed no later than February 6th. The other was to allow short term rentals not only in single-family homes and duplexes but also in three- and four-unit owner occupied buildings. In all cases there can be only one short term rental per building. Final action on Chapters 14 and 27 will happen next Tuesday, February 20th. Staff recommendation is for approval.

PUBLIC HEARING OPEN

Russ Lunt, Brigham St., feels for Ms. Dillon and doesn't think she did anything wrong. The public has had more than enough chances to give input. This is a hot issue.

L. Boudreau asked if the amendments were passed.

S. Daggett said the thought process was to adopt a comprehensive regulatory scheme and put it all in Chapter 14 because there can be quicker enforcements this way. If someone registers or doesn't, officials will have ability to chase violations faster than under traditional zoning, which is lengthier and doesn't guarantee the results the City Council wanted. Then, they made limited but surgical amendments to the zoning ordinance to show that everything is under Chapter 14. One thing that came out of the discussion was housekeeping: the zoning ordinance doesn't currently say that if a use isn't listed as either a permitted use or special exception use, that it is prohibited. This may have been how the ordinance has been interpreted over time but doesn't say it expressly. This is something that has been added in and other changes were tidying up definitions and references to Chapter 14. Code Enforcement will still field complaints, but they get turned over to the

Clerk and not the Board of Appeals. For the two amendments last Tuesday, those were Chapter 14 and did not affect Chapter 27.

- K. Carr** said to Corporation Counsel's point, they have a relatively new disruptive technology that was not anticipated by the ordinance. Sometimes they have to revisit language to bring it into the modern world.
- L. Boudreau** thinks the City Council spent a painful amount of time on this. She thinks they tried to be fair and the zoning provisions they've been provided are acceptable to Planning Board regulations and land use. She doesn't see why this wouldn't get approval tonight. She thinks in Chapter 14, under "Purpose," they captured the purpose and sentiment in that paragraph.
- T. Haeuser** said there was a gentleman who came up at the last Council meeting and commented that it looks like both groups are unhappy and that means they're succeeding—compromises are being made. He apologized that he didn't remember the gentleman's name. There were accusations that the Council only listened to one side, but this was an astute comment.
- W. Laidley** is conflicted on the issue—you want to let people use their property to its best use, and technology enables that. However, much was not anticipated by the Comprehensive Plan. If people are using property in ways that make neighbors pay costs, what costs are the neighbors paying? Noise, parking, etc. Whoever wrote the regulations have tried to cover all the bases and he thinks they've done good work even though it's taken four or five months. He will support this but wonders if they need more staff to administer it. Everything comes with a cost and it looks like the City Clerk's office will need more support for doing licensing and enforcing the issues.
- K. Carr** reminded the Board that their question is narrow—Chapter 27.
- M. DeRose** will support this. She thinks they've done a thorough job.
- L. Dillon** thinks it's wise to add in the differentiation and description incorporated in the definition section. She asked if there was consideration of unintended consequences or substantial departure where language has been added to existing definitions rather than crafting something new. She referenced Section 27-119 and said she's curious if there's thought as to why this type of language wasn't included before and if there could be an unintended consequence. She's also curious if the City is aware and have had the benefit of considering legal updates and best practices like those to be presented at the April 4th Maine Municipal

Association workshop about regulating vacation rentals. She asked if anyone representing the City has had the benefit of that type of information in their crafting of this.

T. Haeuser said yes to the latter. He's accompanied Assistant City Manager Joshua Reny and others to these workshops. As far as unintended consequences, he's not sure what Corporation Counsel would say, but this is what he always understood our ordinance to be—if it wasn't listed, it wasn't permitted. The benefit of that is that it's fairly clear and straightforward and if someone had a use that didn't fit in but wanted to, they could come in and have it listed through an amendment process. He thinks this was a needed housekeeping item.

K. Carr said he's okay with the text amendments. As for unintended consequences, listening to Council meetings on this, the one area he's concerned about is if this will yield a proliferation of ADUs. ADUs could be used as a short term rental and he's not sure that that level of commercial use was anticipated when the Council authorized ADUs. He thinks it's something the City will have to keep an eye on. He is encouraged by the fact that City staff has been rigorous in the review of ADUs and the Planning Board is picky about things like life safety code and differentiation of space.

L. Boudreau agreed with that. They've seen increasing numbers of ADUs. She's always had a concern about what that represents in their zoning and their Residential A zones. It would be nice if this reflected to Council that they have concern about proliferation of ADUs and to that they need to keep an eye on it. She said that it's here tonight with Mr. Loring building a house when she looks at this zoning. What it does for her is that it helps stop something that is very counter to what they're trying to do, which is increase the housing supply. Reading numbers in the newspaper, she thought it about how it takes them a long time to get 200 units available. They aren't seeing this type of development in the City and when they talk a lot about increasing supply and affordability, short term rentals seem counterproductive. It supports this zoning change.

W. Laidley said there's been discussion about raising a fund for legal expenses to file a suit. He asked Corporation Counsel what route a suit might go if it gets filed.

S. Daggett said the case could be in state or federal court. Without knowing what the claims are against the City, it's hard to speculate. South Portland isn't the first municipality to deal with this issue and short term rentals have been an issue in other tourist areas. They have looked at other provisions and know which have been challenged successfully and successfully defended. She doesn't know if any

challengers will come up with a novel legal theory, but without knowing if a lawsuit will get filed it's hard to speculate.

PUBLIC HEARING CLOSED

L. Boudreau motioned that the Planning Board make a positive recommendation to the City Council for the amendments to Chapter 27 zoning regarding short term rentals as presented this evening. W. Laidley seconded; (5-0) (K. Gatti absent, District 2 vacant).



CITY OF SOUTH PORTLAND

LINDA C. COHEN
Mayor

SCOTT T. MORELLI
City Manager

EMILY F. SCULLY
City Clerk

SALLY J. DAGGETT
Jensen Baird Gardner & Henry

District One
CLAUDE V.Z. MORGAN

District Two
KATHERINE W. LEWIS

District Three
EBEN ROSE

District Four
LINDA C. COHEN

District Five
ADRIAN T. DOWLING

At Large
MAXINE BEECHER

At Large
SUSAN HENDERSON

IN CITY COUNCIL

ORDINANCE #13-17/18

THE COUNCIL of the City of South Portland hereby ordains that Chapter 27, "Zoning," of the "Code of Ordinances of the City of South Portland, Maine" be, and hereby is, amended as follows (additions are underlined; deletions are ~~struck out~~):

CHAPTER 27

ZONING

ARTICLE I. ADMINISTRATIVE PROVISIONS

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GENERAL PROVISIONS

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Sec. 27-112. Conformity.

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(f) Occupancy or use of dwellings for short-term rentals are subject to the requirements of Chapter 14 of the Code of Ordinances.

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Sec. 27-119. Prohibited uses.

Subject to the provisions herein governing lawfully existing nonconforming uses, any use not expressly enumerated herein as either a permitted use or a special exception use shall be considered prohibited in that zoning district.

Secs. 27-~~119~~-120 - 27-130. Reserved.

ARTICLE II. DEFINITIONS

Sec. 27-201. Definitions.

Except where specifically defined herein, all words used in this Chapter shall carry their customary meanings. Words used in the present tense include the future, and the plural includes the singular; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the word "shall" is always mandatory; and "occupied" or "used" shall be considered as though followed by the words "or intended, arranged, or designed to be used or occupied."

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Bed & breakfast inn. A private residence that offers sleeping accommodations on a transient basis to the general public ~~to lodgers~~ in 12 or fewer rooms for rent, in the innkeeper's (owner or operator) principal residence while renting rooms to lodgers, and serves breakfasts at no extra cost to its lodgers. For the purpose of this definition, a lodger means a person who rents a room in a bed & breakfast establishment for fewer than 30 consecutive days. The term does not include a short-term rental as defined herein and regulated under Chapter 14 of the Code of Ordinances.

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Dwelling. A building designed or used as the living quarters for one or more families. The term shall not be deemed to include a bed & breakfast inn, hotel, inn, motel, rooming house or trailer.

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Home occupation. An occupation or profession which is: Customarily carried on in a dwelling unit or in a building or other structure accessory to a dwelling unit; carried on by a member of the family residing in the dwelling unit; clearly incidental and secondary to the use of the dwelling unit for residential purposes and does not detract from the basic character of the neighborhood; conforms with the following conditions:

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(e) The home occupation shall not use more than twenty-five (25) per cent of the total floor area of the residential structure.

(f) The following are examples of permitted uses under this definition:

- (1) Office of doctor, dentist, lawyer, engineer, or member of similar recognized profession.
- (2) Office of teacher or musician.
- (3) Office of real estate broker or salesman or insurance agent.
- (4) Use of premises for dressmaking or millinery.
- (5) Letting of rooms or taking of boarders [for 30 or more consecutive days to the same person\(s\)](#), to a maximum of two (2) persons, conducted by resident occupants only.
- (6) Family day care home.
- (7) Group day care home.

(g) The following uses are specifically prohibited [as a home occupation](#):

- (1) Tourist camps, cabins, [bed & breakfast inns, inns,](#) motels, hotels, ~~and~~ mobile home parks [and short-term rentals](#).
- (2) Restaurants or other public eating places.

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Inn. A business conducted in a building and containing one to twenty sleeping rooms rented on a transient basis to the general public for a period not to exceed 90 days in any 120 consecutive day period. Public dining facilities may be included but no cooking facilities or kitchens are permitted in any of the rooms rented to the public. [The term does not include a short-term rental as defined herein and regulated under Chapter 14 of the Code of Ordinances.](#)

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[Short-term rental means the use, control, management or operation of a dwelling unit or accessory dwelling unit, in whole or in part; for dwelling, sleeping or lodging purposes; for less than 30 consecutive days; for compensation, directly or indirectly. Short-term rentals are not available to walk-ins who arrive without a reservation. Short-term rentals do not have signage either on- or off-site identifying, advertising, and/or providing way finding related to the use of the dwelling unit for lodging purposes. The term shall not be deemed to include a bed & breakfast inn, hotel, inn, motel, rooming house, trailer or home occupation.](#)

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Fiscal Note: Less than \$1,000

February 6, 2018