

Town Counsel did not consider definition of “Dwelling” in issuing 2014 opinion on Short Term Rentals

5.1. GENERAL REQUIREMENTS

Except as provided by law or in this Bylaw in each district, no building or structure shall be constructed, used or occupied, nor shall land be used or occupied, except for the purposes permitted as set forth in Table 5.2 Schedule of Uses.

5.1.1. Prohibited Uses

1. Any use not listed in Section 5.2, Schedule of Uses, or provided for elsewhere in this Zoning Bylaw shall be deemed prohibited.

5.2. SCHEDULE OF USES

Table 5.2 - Schedule of Uses

	R3A	R1A	R30	R15	C3A	C1A	C	I	References
A. Residential Uses									
Detached single-family dwelling	Y	Y	Y	Y	N	N	Y	N	
Two-family or duplex dwelling	N	N	BA	BA	N	N	BA	BA	
Townhouse	N	N	N	BA	BA	N	N	N	Section 9.1
Multifamily dwelling	N	N	BA	BA	BA	N	N	BA	Section 9.1
Seasonal renting of rooms	Y	Y	Y	Y	Y	Y	Y	Y	Section 8.8
Bed & breakfast/inn	BA	BA	BA	BA	BA	BA	BA	BA	Section 8.8
Open Space Flexible Development (OSFD)	N	PB	N	N	N	N	N	N	Section 9.7
Upper-story units in a mixed use development	N	N	N	N	BA	BA	Y	BA	
Extended care nursing facility, assisted living or congregate care	N	BA	BA	BA	BA	BA	BA	N	Section 9.4
Hotel, motel, inn	N	N	N	N	BA	BA	BA	N	Section 8.1

Dwelling: A building occupied or suitable for occupancy as a residence but not including trailers or mobile homes however mounted or commercial accommodations offered for periodic occupancy, e.g. motel, hotel.

Dwelling, Single Family: A free-standing detached building used exclusively for residential use by not more than by one family.

Dwelling, Two Family (Duplex): A free-standing building exclusively for residential use by two families but not more than two families. Each unit shall contain not less than 700 square feet of habitable floor area.

Dwelling, Multifamily: A free-standing building used exclusively for residential use by three or more families.

Motel: The word "motel" shall include "hotel", "inn", "tourist home", "guest house", and any others of like significance.

8.8. BED AND BREAKFAST ESTABLISHMENTS

8.8.1. Seasonal Rental of Rooms

The following requirements shall apply:

1. The establishment shall be limited to not more than 3 guests;
2. Rental of rooms shall be limited to Memorial Day and Labor Day, and weekends only through Columbus Day;
3. Parking must be off street, on premises, with 1 space per room rented and 1 per owner;
4. Except for a home occupation that complies with this Bylaw, no other uses shall be permitted on the property;
5. No additions or external modifications may be made to the property for lodging use; and
6. A certificate of occupancy required and premises shall be subject to annual inspection.
7. The home shall be the legal residence of the owner with lodging as an accessory use.
8. Only continental breakfast from the common family kitchen is permitted.

8.8.2. Bed & Breakfast Inn

1. The establishment may provide lodging for 4 to 20 guests.
2. Parking shall be off street, on premises, with one space per room rented and one per owner.
3. Except for a home occupation that complies with this Bylaw, no other uses shall be permitted on the property;
4. There shall be no external additions to the property for lodging use;
5. External modifications for access and safety are permitted, but such modification shall be designed for minimum impact on abutters;
6. A certificate of occupancy is required and is subject to annual inspection;
7. The property must be served by town water and sewer; and
8. Except in the Commercial District, an open space not less than 20 feet wide shall be maintained along each lot line with grass bushes, flowers or trees to provide a buffer.

Seasonal rental of rooms: Rental of rooms to not more than 3 people in an owner-occupied dwelling between Memorial Day and Labor Day, and weekends only through Columbus Day.

Home Occupation: Self-employed resident occupants in their private homes working at an occupation which is limited to the home, carried forth at the home, employing no more than one non-resident, utilizing no outside storage, and requiring no more than two off-street parking spaces for employees and customers. Home occupation does not include any retail establishment. See Section 9.9.



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January 22, 2014

BY FIRST CLASS MAIL AND BY
ELECTRONIC MAIL selectmen@townoflenox.com

Hon. David Roche and
Members of the Board of Selectmen
Lenox Town Hall
6 Walker Street
Lenox, MA 01240

Re: Regulation of Short-Term Rental of Dwellings

Dear Members of the Board of Selectmen:

You have asked that we review several documents provided to the Board regarding the short-term rental of homes in the Town, that is, the rental of homes for periods of less than one month. These documents raise several issues and concerns, but particularly allege that the Town's Zoning Bylaw prohibits such short-term rentals. I will review the zoning issue in detail immediately below and then briefly touch on other issues raised. With respect to the zoning questions, it is my opinion that the Town's Zoning Bylaw does not prohibit the short-term rental of homes.

Zoning

I have analyzed the Zoning Bylaw to determine whether there are any regulations pertaining to the rental of entire dwellings, including One- or Two-Family Dwellings, Apartment Units or Townhouses, for periods of less than 30 days. Although the Town has a number of provisions governing the rental of "rooms," it is my opinion that these provisions cannot be read to restrict either the long- or short-term rental of entire dwellings. Further, it is my opinion that the seasonal limitations in the Bylaw with respect to rental of rooms cannot be interpreted as imposing durational limitations on the rental of entire dwellings.

The Bylaw Table of Use Regulations, Section 3.1, allows the following types of residential dwellings in specified zoning districts:

- Section A.1 – Detached dwellings on a separate lot by not more than one family
- Section A.2 – One two-family or one duplex dwelling on a separate lot
- Section A.3 – Townhouse
- Section A.5 – Apartment Building
- Section A.10 – Conversion of an existing dwelling to accommodate not more than six families
- Section A.12 – Dwelling units located above the first story of a non-residential use.

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In my opinion, there is no language in the Bylaw which can be interpreted as regulating short-term rentals of the above dwellings. Neither Section, 3.1, Table of Use Regulations, nor the Section 10 Definitions of these types of dwellings indicate any durational limits or restrictions on these types of dwellings.

The Bylaw does define "Family" as "an individual residing in one dwelling unit, or any number of related individuals or up to four unrelated individuals living as one housekeeping unit and using in common among them one set of cooking and food storage equipment and facilities." This definition, or very similar ones, are common in zoning bylaws. It is meant to prevent overcrowding of dwellings, but it is not relevant to the issue of regulating short-term rentals.

Perhaps the confusion on this issue is based on those parts of the Bylaw which regulate short-term rental of rooms. The Bylaw imposes a number of restrictions concerning the renting of rooms in dwellings. In particular the Bylaw allows the following rental uses:

Section A.6 – Rental of rooms in a 1 or 2 family dwelling from June 1 through Labor Day

Section A.7 – Seasonal Bed & Breakfast In-Home Stay/Room Rental (Seasonal): Renting of rooms in a 1 or 2 Family dwelling from Memorial Day weekend through Labor Day and on weekends through Columbus Day. Limited to 3 guests

Section A.8 – Renting of rooms in an existing dwelling to not more than 3 persons.

Section A.9 – Bed & Breakfast Inn: Renting of rooms in an existing 1 or more family dwelling to 4 to 20 guests

In my opinion, it is notable that these provisions pertain to the "renting of rooms" and not to the rental of *entire* dwellings. In fact, with respect to the Bed & Breakfast room rentals (Sections A.7 and A.9 of the Table of Use Regulations), the Definitions in Section 10 of the Bylaw specifically require that the home be the legal residence of the owner. A Bed and Breakfast In-Home Stay/Room Rental (Section A.7) has the further requirement that the "principal use is a private home for its owner with lodging as an accessory use." Thus, it is my opinion that Sections A.7 through A.9 address a type of use that is different from the rental of entire dwellings. The use of a dwelling as a private home with an accessory lodging component is, in my opinion, clearly different from an owner vacating and renting an entire dwelling. Thus, in my opinion, it is a reasonable interpretation of the Bylaw that the separate use classifications allowing the rental of rooms within a dwelling would not also cover the rental of the entire dwelling.

In light of this interpretation of the Zoning Bylaw, it is my opinion that there should be no Town-initiated zoning enforcement against owners of properties who periodically rent their dwellings for periods of time less than 30-days in duration. Of course, if the Building Inspector is requested in writing to enforce the Bylaws against property owners of short-term rentals, he must respond in accordance with the requirements of G.L. c.40A, §7.

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Related Issues

I note that many comments have been made regarding the “lost” room occupancy excise taxes with respect to short-term rentals. General Laws c.64G, §3A allows municipalities to collect a local excise tax for rental of rooms “in a bed and breakfast establishment, hotel, lodging house, or motel.” In my opinion, this would not permit the collection of an excise tax for the periodic short-term rental of entire dwellings. I understand that some Cape Cod towns have petitioned the Legislature to enact legislation allowing municipalities to collect this excise for short-term rentals, but I am not aware of such efforts having succeeded yet.

Another issue I noted among the comments is the public safety concern over the possible condition of the dwellings being rented. As a general matter, these types of issues would fall within the jurisdiction of the Building Inspector. Some towns have addressed this via a rental registration system. I am attaching to this letter an example from the Town of Dennis, a bylaw entitled “Housing Space & Use By-law”, which requires that any property which will be leased be registered with the Town’s Board of Health. I understand that there had been a particular concern in Dennis that rental houses contain functioning smoke detectors. I include this simply as one example.

Several other issues simply do not involve the Town. For example, unfortunate situations such as potential renters being defrauded through the internet by unscrupulous third parties who collect “down payments” for Lenox properties they do not own or situations in which properties may not be adequately insured are simply not within the Town’s jurisdiction.

Liability

Finally, you have asked what liability the Town might have in relation to any of the above issues. It is my opinion that none of these issues would expose the Town to liability. As described above, it is my opinion that there are no Town bylaws being violated by these short-term rentals. Even if there are found to be violations of some Town bylaws or regulations, barring unusual circumstances, there is no liability for failing to enforce local rules. The law recognizes that it is not feasible to enforce all violations and, therefore, relieves public entities from that global obligation.

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Please do not hesitate to contact me should you have further questions concerning this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Joel B. Bard".

Joel B. Bard

JBB/jmp
Enc.
487256/LENX/0001

HOUSING SPACE & USE BY-LAW



SECTION I

Any owner and/or agent who shall offer for rent or lease any building or portion thereof to be used for habitation, other than a licensed premise, shall first register with the Health Department, who shall determine the number of persons said building or portion thereof can legally accommodate. Any building or portion thereof regulated by the provisions of the Space & Use By-Law shall have conspicuously posted on the premises a Certificate of Registration, supplied by the Dennis Health Department, specifying the number of people assigned to occupy and/or use each dwelling. A Certificate of Registration shall be issued at the discretion of the Health Director and in accordance with regulations of the Sanitary Code of Massachusetts and the Town of Dennis Zoning Laws, that said building and/or premises are in compliance with said codes. The owner and /or agent shall keep a record of names and addresses of lessees and dates of occupancy, making this information available to the Town's regulatory agencies, upon request.

SECTION II

The owner, agent, or tenant of rental property may be found in violation of this by-law if the number of occupants exceeds that specified by the Certificate of Registration, or exceeds the allowable number determined by the health inspector, if no such registration shall be in effect.

SECTION III

There shall be an annual fee set by the Board of Selectmen for each owner to register each habitable dwelling covered under Section I. Said registration and Certificates of Registration are not transferable. Failure to register, and failure to obtain, or to post the Certificate of Registration constitute violations of this by-law.

SECTION IV

The owners of all rental units, as described in Section I above, shall be required to certify annually to the Dennis Health Department that operating smoke detectors have been placed in rental units. The smoke detectors and locations thereof shall be satisfactory to the Dennis Fire Department.

SECTION V

Any person found in violation of any provision of this by-law shall be punished by a fine of not more than Two Hundred Dollars (\$200.00) in accordance with the following schedule of fines, and each day that the violation continues shall constitute a separate offense:

- For the first offense, the fine shall be \$50.00 or a warning at the discretion of the enforcement officer.
- For the second offense, \$100.00
- For the third and subsequent offenses, \$200.00

Notice of violation and procedure shall be in accordance with M.G.L. Chapter 40, Section 21D, (Non-Criminal Disposition).

APPROVED: STM- October 25, 1973 ATM- May 3, 1988
AMENDED : STM- March 18, 1976 ATM- May 2, 1989
 ATM- May 6, 1980 ATM- May 4, 1993
 ATM- May 5, 1987