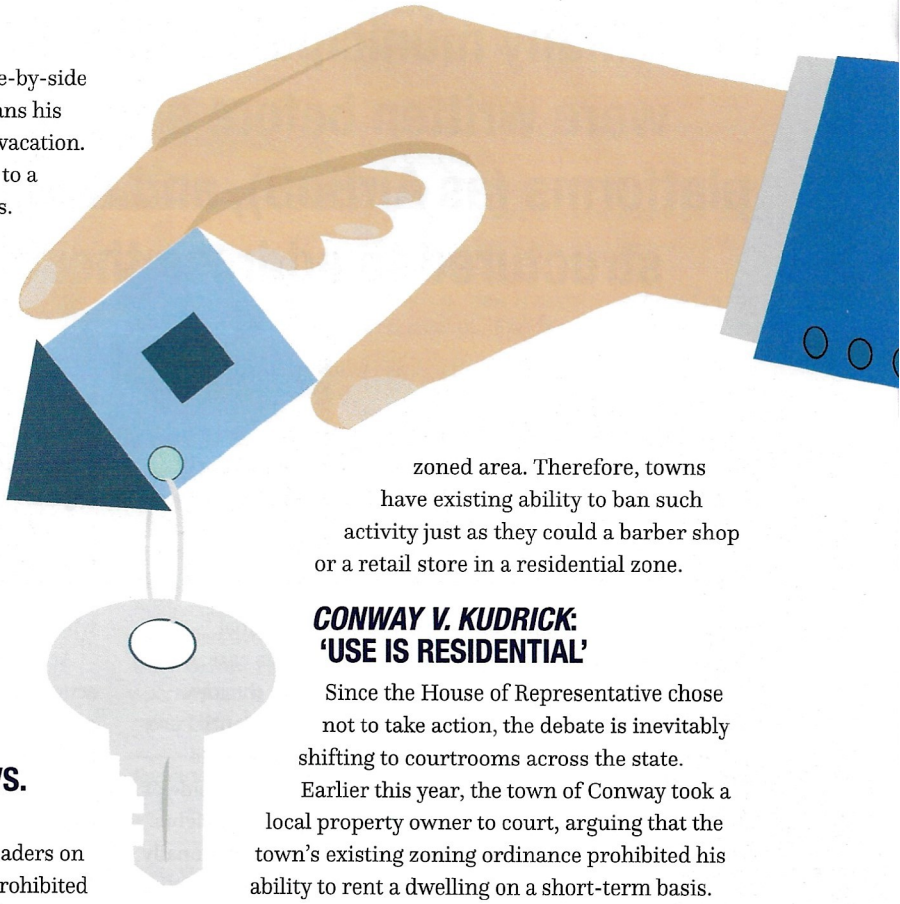
THE LONG-TERM FIGHT *OVER SHORT-TERM RENTALS*

The ongoing debate over short-term rentals highlights the conflict between private property rights and local control. With the state legislature seemingly reluctant to step in, there appears to be no definitive resolution in sight.

BY BOB QUINN



LET'S SAY MR. Smith and Ms. Jones live side-by-side in a residential neighborhood. Mr. Smith loans his home to some family friends while he is on vacation. At the same time, Ms. Jones rents her home to a young family on vacation with their two kids.

Can a town treat the two property owners differently? Both sets of guests will be using their respective properties in the same way, so should the government be able to prohibit Ms. Jones's guests simply because she is charging money, while Mr. Smith is not?

This example, and similar scenarios playing out all over the state, beg the questions: How much authority should a local government have over the use of your residential property? And where must private property rights give way to local control and government action?

These are the fundamental questions being fought over at both the New Hampshire State House and the NH Supreme Court, as towns and property owners wrestle over short-term rentals.

LEGISLATURE DEBATES LOCAL CONTROL VS. PRIVATE PROPERTY RIGHTS

Earlier this year, NHAR worked with state legislative leaders on a bill – Senate Bill 249 – to make clear that towns are prohibited from using zoning authority to ban the use of a single-family or two-family dwelling from renting on a short-term basis. NHAR argued that the legislation would protect a fundamental property right – the ability to rent one's own property.

At the same time, NHAR also recognized that towns must have the ability to protect the health and safety of both its residents and visitors. With that in mind, the legislation also granted municipalities new authority to require property owners who are hosting short-term rentals to register with the town and submit to safety inspections of their property.

The town could revoke that registration if the property had two or more proven violations of any ordinance impacting health, safety, noise, or parking. And under the proposed legislation, towns would maintain long-standing authority to police noise, parking, or health and safety violations.

While the NH Senate voted overwhelmingly to pass SB 249, when the legislation was passed to the House of Representatives, the Municipal Committee, which was charged with reviewing the merits of the bill, voted to "interim study" the legislation. Generally, a vote to interim study is a way to kill legislation without forcing legislators to go on the record for or against.

During the legislative debate, the major legal argument against the bill, primarily put forward by the NH Municipal Association, which represents the interests of towns and cities, rested on the belief that renting property on a short-term basis was a commercial use of property in a residentially zoned area. Therefore, towns have existing ability to ban such activity just as they could a barber shop or a retail store in a residential zone.

CONWAY V. KUDRICK: 'USE IS RESIDENTIAL'

Since the House of Representative chose not to take action, the debate is inevitably shifting to courtrooms across the state. Earlier this year, the town of Conway took a local property owner to court, arguing that the town's existing zoning ordinance prohibited his ability to rent a dwelling on a short-term basis. Perhaps not surprisingly, the town lost its case in the Superior Court (Conway v. Kudrick).

In the decision overturning Conway's ban, the Judge wrote that when renters use a property for ordinary living purposes, such as eating, sleeping, and bathing, "the use is residential," regardless of the rental period. In other words, the renter is using the property in the exact same manner as any owner of the property would. The fact that owners receive rental income does not detract from the residential use – otherwise, long-term rentals would also be prohibited in residential zones.

Zoning ordinances, in fact, are only allowed to deal with land use, irrespective of who is the owner, operator, or occupant of the premises. This fundamental principal is embedded in New Hampshire's zoning statute, which authorizes towns to adopt ordinances for the purpose of regulating and restricting "location and use of buildings, structures and land use for business, industrial and commercial purposes," according to RSA 674.16d.

So, the only way a town could legally treat a short-term rental differently from an otherwise legally protected residential use, such as long-term rental, is to declare that short-term rentals are a commercial use.

The Conway decision ultimately rested upon the Superior Court's determination that officials were not reading their town's own ordinance correctly. Conway's ordinance prohibited such rentals specifically in properties *without*

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cooking or kitchen facilities – facilities which Kudrick's property clearly included.

And the Judge went even further in her decision, saying that regardless of the details of a town ordinance, the renting of property on a short-term basis is a protected residential use.

NHAR INTERVENES WITH AMICUS BRIEF

This summer, Conway appealed the Superior Court's Conway decision to the NH Supreme Court. The NH Municipal Association petitioned the court to intervene in the case, out of concern that the higher court would agree with the lower court's ruling deeming short-term rentals as a residential use.

In response, NHAR leadership, realizing the case could have an impact well beyond Conway, intervened on the side of the lower court's ruling, in support of private property rights. NHAR hired Boston area law firm Robinson & Cole, nationally recognized as experts on short-term rental issues, to write the Amicus brief. You can read the full brief at NHAR.com.

More court cases are inevitable if the legislature continues to stand on the sidelines.

As Judge Ignatius wrote in her Conway decision, *"Many municipal zoning ordinances, however, were written before anyone contemplated such platforms (as AirBnB), and the ordinances are not well structured to address these new possibilities."* Conway's ordinance, for example, was undoubtedly written to regulate rental cabins and cottages, which frequently didn't have kitchens.

At this point, it appears unlikely that the legislature will take action in 2023, as members of the House of Representatives seem comfortable with letting the court system take the lead. Of course, the outcome of the various lawsuits may change the minds of certain legislators, and it seems inevitable that at some point legislators will be compelled to jump back into the debate.

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