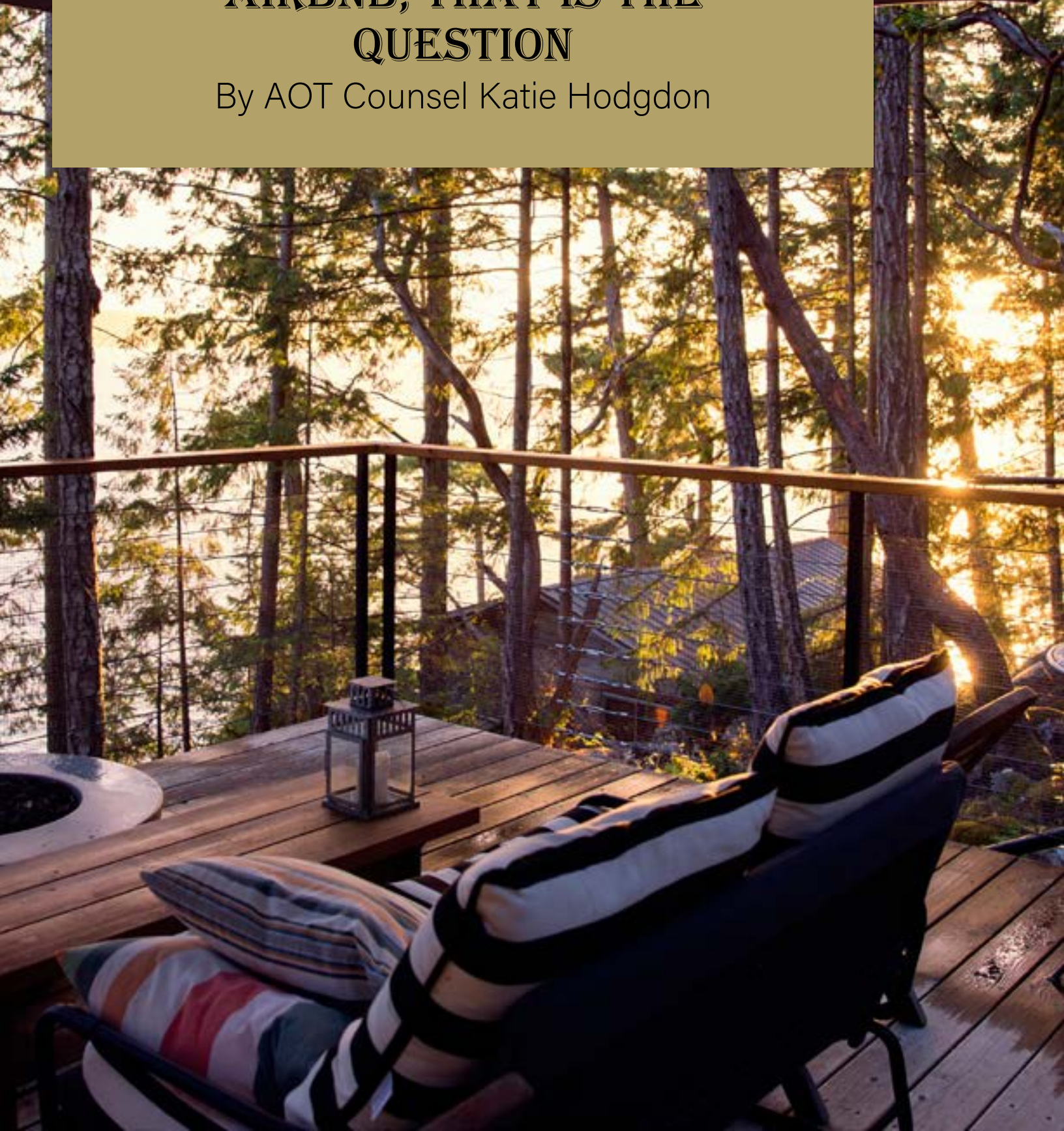


TO (REGULATE) AIRBNB  
OR NOT TO (REGULATE)  
AIRBNB, THAT IS THE  
QUESTION

By AOT Counsel Katie Hodgdon



# By now, most if not all local governments have encountered short-term rentals in their locality. This paper will provide a brief overview of the tools local governments have available to regulate short-term rentals in their jurisdiction.

## I. Comprehensive Plan (Town Law section 272-a)

A locality's comprehensive plan provides the framework and backbone for its zoning regulations. A comprehensive plan does not need to be in one "comprehensive" document or even written at all, so long as a court can ascertain that the plan exists and the locality is acting in furtherance of the plan and in the public interest (*see* Matter of Skenesborough Stone, Inc. v Village of Whitehall, 254 AD2d 664 [1998]). Of course, a written plan that has been thoroughly reviewed and analyzed prior to adoption is recommended. Towns and other local governments are empowered to adopt regulations that align with their comprehensive plan. As it relates to short-term rentals, a town will be on solid legal ground if the comprehensive plan addresses short-term rentals and any local laws adopted in congruence with the comprehensive plan are challenged.

### Temporary Moratorium on Short-term Rentals

If the town's comprehensive plan does not address short-term rentals and time is needed in order to determine how short-term rentals should be regulated, the town can adopt a moratorium on short-term rentals. A moratorium puts a temporary pause on any of the activity addressed and is enacted via local law pursuant to the town's home rule authority. The moratorium should be reasonable in length and have a valid basis, which, in this instance, could be the locality asserting that it needs time to develop short-term rentals regulations within the comprehensive plan and zoning structure within the town and the failure to implement the moratorium could result in unrestricted growth that detrimentally impacts the character of the community. At the end of the moratorium, the locality should be able to point to meaningful legislation that furthers the town's long-range goals.

If a moratorium is necessary to address short-term rentals in the town's zoning regulations, the town should ensure that it is reasonable in length and that the issue – regulating short-term rentals – is actually addressed. There should be a definitive end date, as the moratorium is a temporary land use tool and cannot be used in perpetuity. As a land

use action, the local law is subject to New York's State Environmental Quality Review Act (SEQR) and would generally be classified as a type II action with a negative declaration.

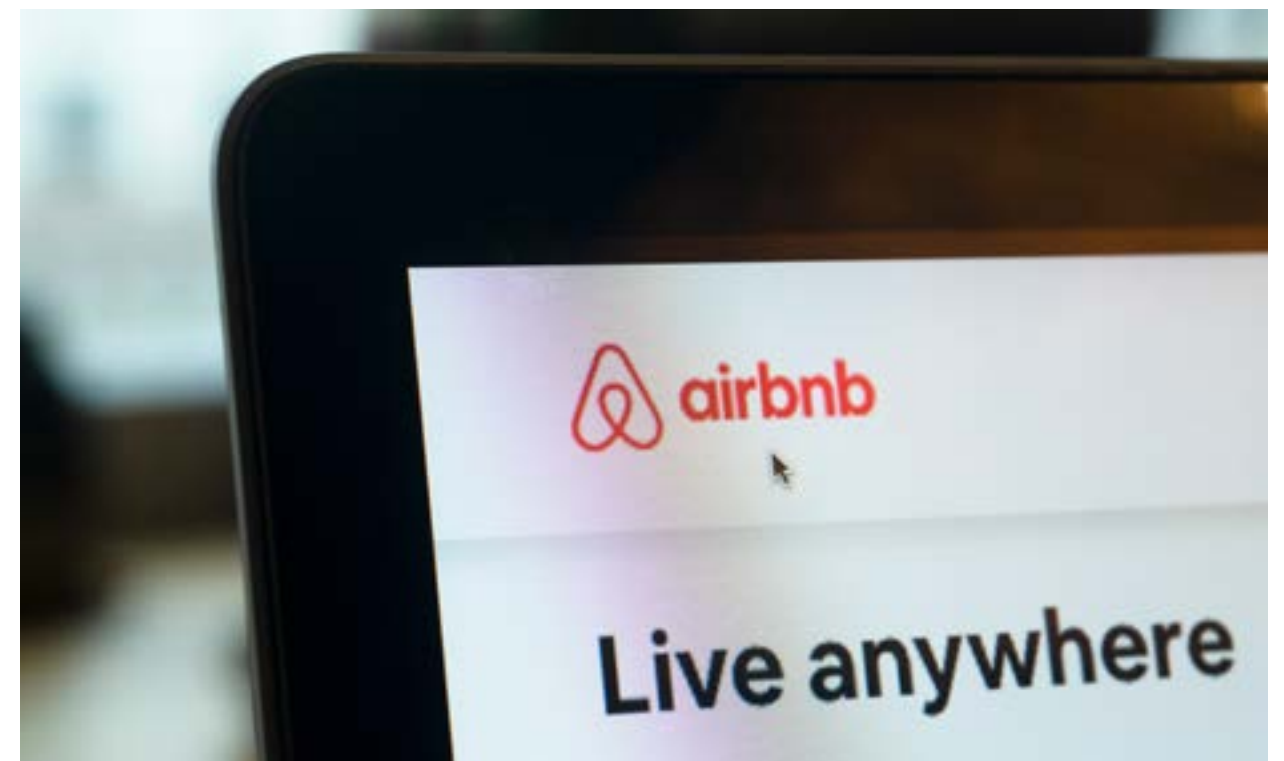
### General Zoning Authority (Town Law sections 261 and 264)

Town Law sections 261 and 264 provide towns with broad authority to adopt zoning regulations that suit the town's unique needs that are consistent with the comprehensive plan. For short-term rentals, the town can authorize their use in certain zones – eg, that short-term rentals are permitted in all residential zones – or impose durational time limits, such as only allowing one short-term rental in a 14-day period. In fact, this exact durational time limit was recently found to be a proper exercise of the town's authority under Town Law section 261, as the time limit regulates the use itself and not the owners or users (*see* Weisenberg v Town Board of Shelter Island, 404 FSupp3d 790 [2019]). It is important to ensure that any regulations adopted pursuant to this (and any) authority regulate the use and not the owner.

Other localities have enacted a permit system regulating short-term rentals through the general authority provided in Town Law section 261 – this is separate and distinct from a special use permit, which has certain notice and public hearing requirements. If the town opts to offer a use variance as opposed to a permit or special use permit for a short-term rental property, the use variance runs with the land and is not specific to any owner.

### Special Use Permits (Town Law section 274-b)

Special use permits allow localities to require authorization of a



particular use that is otherwise permitted in the zoning code to be subject to the requirements imposed by the special use permit. Towns can and are encouraged to place conditions on special use permits. When regulating via special use permits, the town board designates the body / authority that reviews the permits, such as the planning board. Once a permit application is received, a public hearing should be conducted within 62 days, although this timeframe can be extended by mutual consent. At least 10 days before the public hearing, notice has to be sent to both the applicant and the county planning board. A decision must be filed with the clerk within five days from the date of the decision. Any aggrieved applicants can commence an Article 78 proceeding within 30 days of the decision.

When regulating short-term rentals by special use permit, the town should indicate in the enabling legislation that the permits are a privilege that can be revoked for failure to comply, and that all qualified applicants may not receive a permit if there is a limit on the number of permits issued. This ensures that any aggrieved applicants will not prevail on any unconstitutional takings claims. Other issues to address in the short-term rental permitting scheme structure include (note: this list is not exhaustive, and other considerations can be included):

- Renewals (Annual? Biennial?);
- Garbage removal;
- Safety requirements (compliance with fire code / maximum occupancy requirements / smoke and carbon monoxide

**Towns must ensure to regulate *the use* as opposed to the owner or occupant of the property, and to that end, should not impose any residency requirements on short-term rentals, as this has been found to violate the Commerce Clause of the US Constitution.**

- detectors, fire extinguishers, emergency evacuation plans);
- Inspection requirements (eg, inspection by code enforcement officer necessary before permit is issued);
- Duration of permitting process;
- Ability of code enforcement officer to impose reasonable conditions that directly relate to the use of the property;
- Enforcement and penalties; and
- List of primary contacts.

**Town Law sections 130 and 136**

In additional to the explicit zoning authority provided in Town Law sections 260 and 264, Town Law section 130 grants towns the authority to adopt ordinances that, among other things, promote the public welfare, address health and safety regulations, and regulate hotels, motels, boarding rooms and the like, specifying their manner of running and ensuring cleanliness and fire protection, while Town Law section 136 provides the authority to adopt ordinances that license and regulate inns, boarding houses, rooming houses and the like. In this regard, towns are using their police power and general authority to regulate short-term rentals. While these laws specifically empower towns to adopt ordinances using this authority, towns also have the ability to adopt local laws under this framework pursuant to Municipal Home Rule Law. As local laws have the presumption of validity in court if challenged, any localities seeking to regulate short-term rentals using Town Law section 130 or 136 should do so by way of adopting a local law as opposed to an ordinance.

In summary, towns can and should regulate short-term rentals to align with their comprehensive plan. There are a number of legislative tools available, although any of these tools should be adopted as a local law to enjoy to presumption of validity in court.



**Inside Scoop**

**Definitions Are Important When Drafting Local Laws Regulating Short-term Rentals**

When drafting any local law regulating short-term rentals, clear and concise definitions are important. The town should ensure that short-term rentals are specifically defined and encompass what the town is seeking to regulate- if the definition is vague then a property owner can likely prevail if their use of the property is not included in the regulatory scheme (see *Fruchter v Zoning Bd. of Appeals of Town of Hurley*, 133 AD3d 1174 [2015], where the town issued an order to remedy for an owner illegally operating a bed & breakfast or hotel and the court found the short-term rental was neither a bed & breakfast [no food was served] nor hotel [there was no common entrance area] and therefore not subject to the town’s order to remedy).

# *...For more information*

If you have any questions regarding regulating short-term rentals, please contact Katie Hodgdon, Counsel at [khodgdon@nytowns.org](mailto:khodgdon@nytowns.org). Sample local laws regulating short-term rentals and recommended definitions are available upon request.





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