

Re-envisioning Occupancy

*Family Definitions, Group Homes, Camping by the Houseless,
and Short Term Rentals*

2021 Northern New England Planning Conference
Law Session | October 15, 2021



Panelists

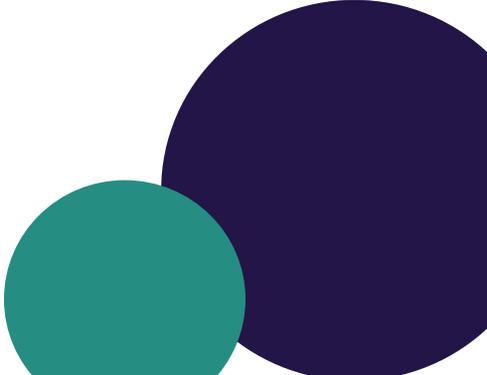
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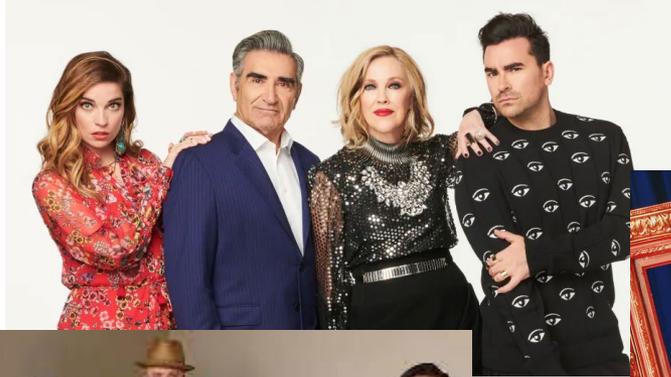
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Family & Housing



Nashua Land Use Code

HOUSEHOLD

A group of occupants of a dwelling unit restricted to the following two categories:

A. FAMILY

An individual or two or more persons related within the second degree or kinship or by marriage or adoption living together as a single housekeeping unit, including necessary domestic help such as nurses or servants not to exceed three in number.

B. UNRELATED HOUSEHOLD

A household not conforming to the definition of a "family."

(See § 190-16 for occupancy restrictions relating to nonfamily households)

Nashua Land Use Code

No household other than a family shall have a number of members exceeding the figure provided in Table 16-1 below entitled "Occupancy Restrictions":

Table 16-1: Occupancy Restrictions

Dwelling Type	Maximum Number of Occupants in Unrelated Household Per 300 Sq. Ft. of Habitable Floor Area
Single-family dwelling	1
Duplex or townhouse	1
Apartment, including accessory apartments	1.5
Bed-and-breakfast	3
Rooming/boarding, including accessory rooming/boarding	2
Dormitory	3
Fraternity or sorority	2
Nursing home	2
Elderly housing	1.5

Nashua Life Safety Code

Family:

“A group of nonrelatives living together in a nontraditional group can be the "functional equivalent" of a more traditional family unit. The factors that must be considered by the authority having jurisdiction are whether **the group shares the entire house other than individual bedrooms, lives, cooks and functions together as a single housekeeping unit and is primarily nontransient.**”



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Fair Housing Act

Fair Housing Act **prohibits discrimination on the basis of disability in all types of housing transactions.**

A person with a **Disability**:

Those individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, **alcoholism, drug addiction**, chronic fatigue, learning disability, head injury, and mental illness.

HUD: Family Definition

- 24 CFR 5.403
- Family: A family includes but is not limited to:
 1. A family with or without children (the temporary absence of a child from the home due to placement in foster care shall not be considered in determining family composition and family size);
 2. An elderly family;
 3. A near-elderly family;
 - 4. A disabled family;**
 5. A displaced family;
 6. The remaining member of a tenant family; and
 7. A single person who is not an elderly or displaced person, or a person with disabilities, or the remaining member of a tenant family.

HUD: Handicapped Family Definition

- 24 CFR § 891.505
- Handicapped family means:
 - (1) Families of two or more persons the head of which (or his or her spouse) is handicapped;
 - (2) The surviving member or members of any [family](#) described in paragraph (1) of this definition living in a unit assisted under [subpart E](#) of this part with the deceased member of the [family](#) at the time of his or her death;
 - (3) A single handicapped person over the age of 18; or
 - (4) **Two or more handicapped persons living together**, or one or more such persons living with another person who is determined by HUD, based upon a licensed physician's certificate provided by the [family](#), to be essential to their care or well being.

Certified Recovery Housing

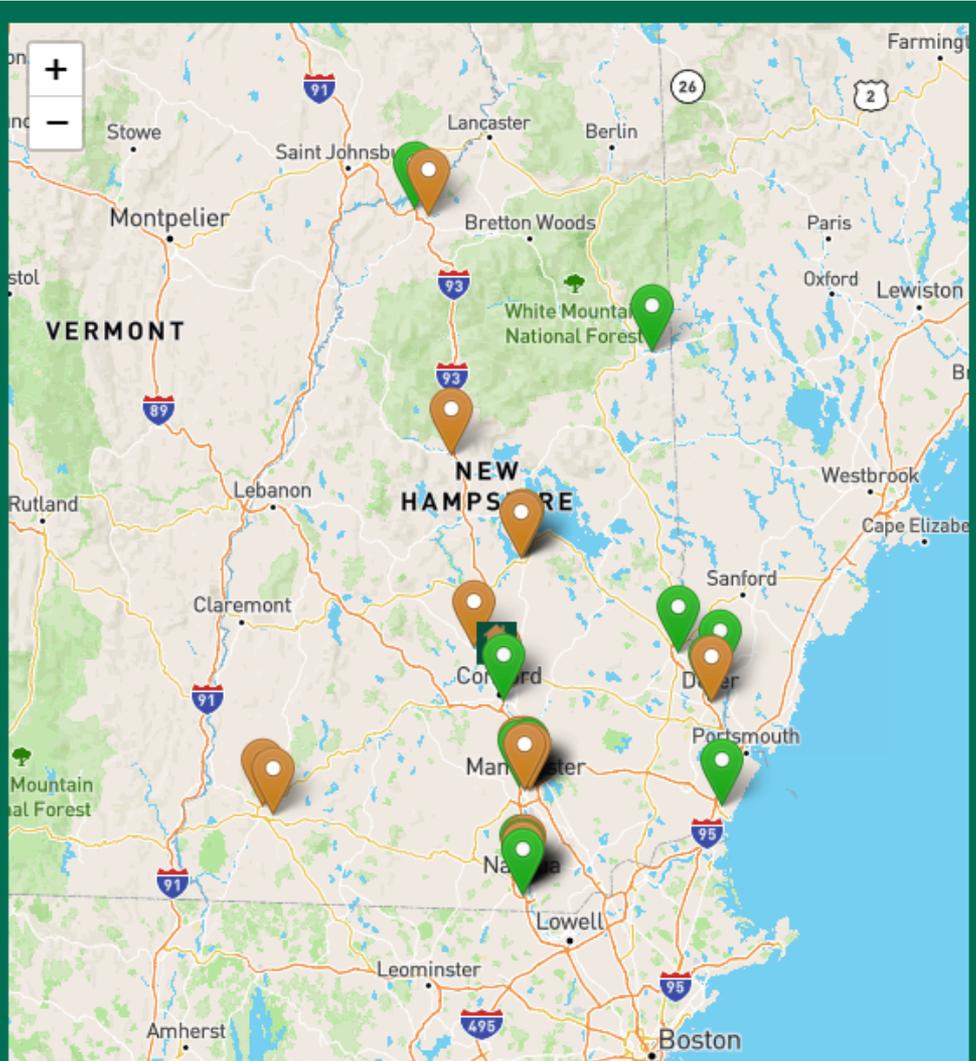


N.H. Coalition of Recovery Residences

NHCORR Certified Recovery Residences

Certification Level	Number of Residences	Total Capacity
I	2	12
II	49	679
III	7	76

Demographic	Number of Residences	Total Capacity
female-only	21	206
male-only	37	561



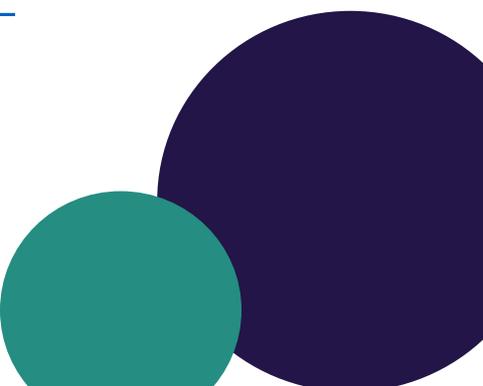


Discussion + Q&A

Additional Resources:

American Planning Association, Zoning Practice Guide, *Modern Family: Zoning and the Non-Nuclear Living Arrangement* (May 2020): <https://planning.org/publications/document/9199648/>

Patricia Baron Pollak, “Family” Definitions & Shared Housing for Older Americans, *Planning Commissioners Journal*, Vol. 1, No. 2 (January/February 1992): <https://plannersweb.com/wp-content/uploads/2012/08/521.pdf>



Camping by the Houseless



Legal Framework

Martin v. Boise Case, setting legal precedent:

- The court ruled that enforcement of ordinances that prohibit sleeping or camping on public property against homeless individuals is unconstitutional when those individuals do not have a meaningful alternative, such as shelter space or a legal place to camp.
- Persons who are offered appropriate available shelter space, but refuse to go could still be cited, under the settlement.

Montpelier, VT Encampment Response



Moving Forward



“River Dave”: Dave Lidstone



Dave's Cabin



The Aftermath



Discussion + Q&A

Legal Resources:

- *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2017) (8th Amendment to the U.S. Constitution prohibits assessing criminal penalties to the houseless for camping on municipal property if no shelter beds are available):
https://scholar.google.com/scholar_case?case=17340329580133284185&hl=en&as_sdt=6,46&as_vis=1
- *Martin v. City of Boise*, 920 F.2d 584 (9th Cir. 2019) (denying petitions for rehearing and rehearing en banc (Berzon, C. J., submitted a concurring opinion; M. Smith C. J., submitted a dissenting opinion)):
https://scholar.google.com/scholar_case?case=10872202325524770184&hl=en&as_sdt=6&as_vis=1&oi=scholarr
- *Warren v. City of Chico*, No. 2:21-CV-00640-MCE-DMC (E.D. Cal. July 8, 2021) (City of Chico’s “shelter” for the houseless at its municipal airport, which had no walls, floor or roof, was insufficient to allow for the assessment of criminal penalties for camping on public property):
https://scholar.google.com/scholar_case?case=5802646019902131437&hl=en&as_sdt=6&as_vis=1&oi=scholarr



Montpelier, VT Resources:

- Montpelier Camping Ordinance, had a curfew for all Montpelier Parks 9:00 PM or Dusk (whichever later) to 6:00 AM: <https://www.montpelier-vt.org/DocumentCenter/View/1524/Chapter-13---Article-V-Parks-PDF>
- Coversheet to Montpelier Proposed Encampment Response Policy when Proposed to City Council by City Manager:
<https://civicclerk.blob.core.windows.net/stream/MONTPELIERVT/2fd2eef831.pdf?sv=2015-12-11&sr=b&sig=Cw6weaF3T7scFeNt2avjTi%2Biakw491%2FkDK54tgSuubU%3D&st=2021-10-04T19%3A01%3A04Z&se=2022-10-04T19%3A06%3A04Z&sp=r&rsc=cache&rsct=application%2Fpdf>
- Montpelier Proposed Encampment Response Policy adopted September 22, 2021:
<https://civicclerk.blob.core.windows.net/stream/MONTPELIERVT/b5190b6516.pdf?sv=2015-12-11&sr=b&sig=1lpswC7ooCq9b%2FN9jSkbP0b6V9UcEa7tQ0Fnezh9q5A%3D&st=2021-10-04T19%3A03%3A58Z&se=2022-10-04T19%3A08%3A58Z&sp=r&rsc=cache&rsct=application%2Fpdf>

“The Lilac House” - Portsmouth, NH



STR in Portsmouth

No STR Provision in Zoning (or elsewhere)

- Owners renovate a house on Lincoln Ave; they own and occupy the adjacent house on a separate lot
- During renovations, City received complaints about the proposed use of the property as STR; City urges owners to confer with planning staff – “may not be allowed”
- 17% STR occupancy by November 2017; no use of the subject property as a primary residence
- **Practice Note:** disposition of “ownership” is not part of this case; LLC vs. natural persons (LLC members); also consider trusts

Working Stiff Partners, LLC v. City of Portsmouth

- Complaints continue (only about use); cease and desist issued; administrative appeal to ZBA
- ZBA denies appeal – STR not a permitted use in the zone; upheld by superior court
- Supreme Court: owners argue STR fits within zoning’s definition of “dwelling unit”
- District: 1-family, 2-family, multi-family and “appropriate accessory uses” allowed; max density 12 units/acre; B&B for up to 5 guests allowed by special exception
- “Dwelling unit” definition excludes “transient occupancies, such as hotels, motels, rooming or boarding houses.”

Working Stiff Partners (cont'd)

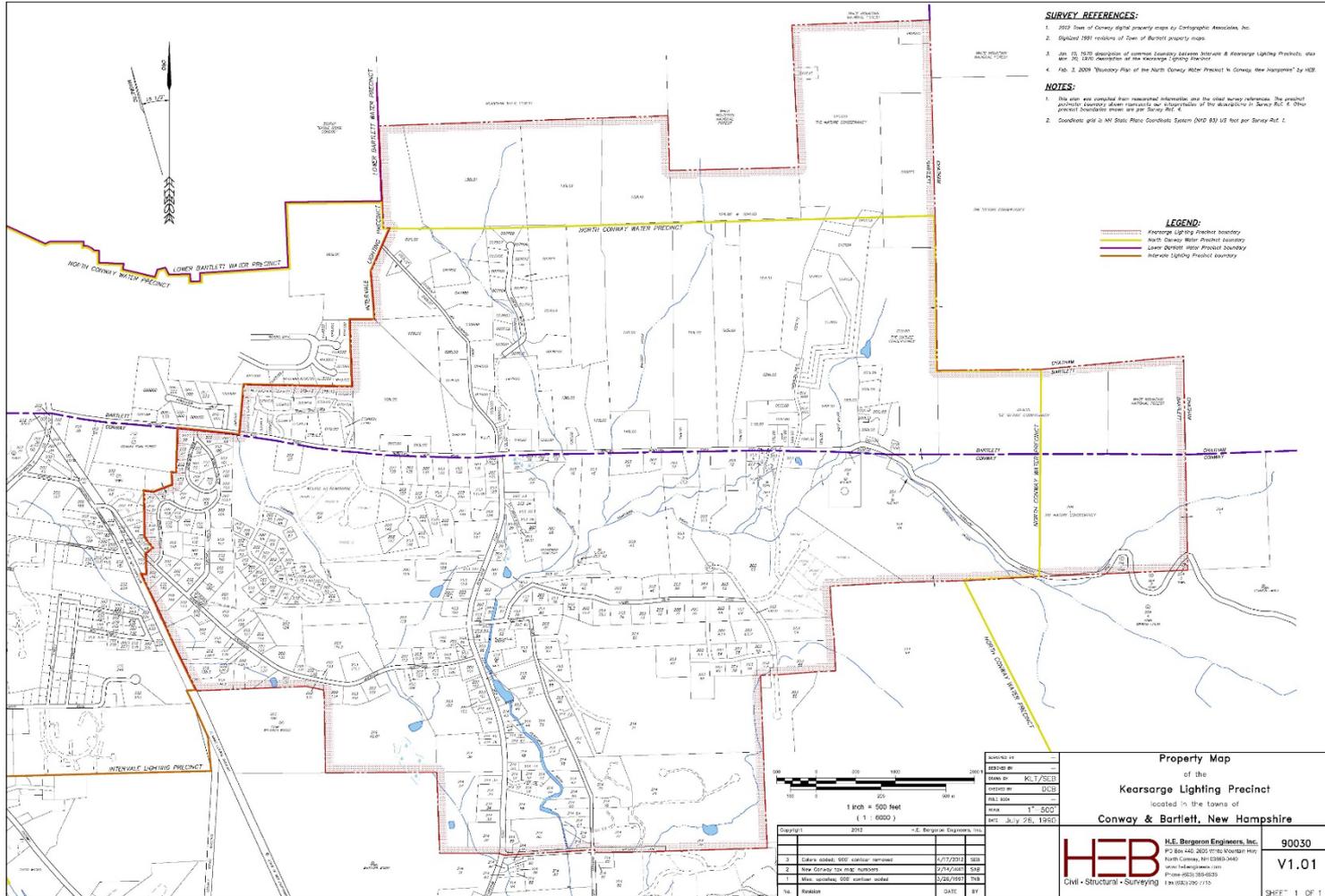
Today's Latin Lesson: "Ejusdem generis"

- "Of the same kind" – providing a list of things to create a class that is limited to similar things even if not listed
- "Transient" is undefined (dictionary: "brief stay")
- Hotel and motel: daily rates; boarding house – room rental, no separate kitchen or bathroom
- Court: STR fits within this class – unifying feature of the class is that occupancy may for as little as one day
- **Practice Pointer:** In NH, you'll have a guarantee of success if your ordinance is identical to Portsmouth's.

Kearsarge Lighting District

V1.01
SHEET 1 OF 1

90030
Property Map
Kearsarge Lighting Precinct



SURVEY REFERENCES:

1. 1919 Town of Conway digital property maps by Cartographic Associates, Inc.
2. Digitized 1950 replicas of Town of Bartlett property maps.
3. Jan. 10, 1970 description of water boundary between Interlake & Kearsarge Lighting Precincts, also Mar. 20, 1970 description of the Kearsarge Lighting Precinct.
4. Feb. 2, 2009 "Boundary Plan of the North Conway Water Precinct in Conway, New Hampshire" by HEB.

NOTES:

1. This map was compiled from referenced information and the stated survey references. The precinct boundary lines shown are not intended to be authoritative in any way. If there is a discrepancy between this map and any other official record, the official record shall prevail.
2. Coordinates are in NAD 83 State Plane Coordinate System (NAD 83) US feet per Survey Ref. 1.

LEGEND:

- Kearsarge Lighting Precinct boundary
- North Conway Water Precinct boundary
- Lower Bartlett Water Precinct boundary
- Interlake Lighting Precinct boundary

DATE	2012	BY	J.E. Bergeron Engineers, Inc.
1	Client added, 900 colorbar removed	1/17/2012	HEB
2	New Survey for map numbers	7/14/2012	HEB
3	Map numbers, 900 colorbar added	5/28/2012	HEB
4	Revised	5/28/12	HEB

Property Map
of the
Kearsarge Lighting Precinct
located in the towns of
Conway & Bartlett, New Hampshire

 HEB Civil • Structural • Surveying	H.E. Bergeron Engineers, Inc. P.O. Box 440, 2600 White Mountain Hwy. North Conway, NH 03860-0440 www.hebereng.com Phone: (603) 355-0525 Fax: (603) 326-7110	90030 V1.01
	SHEET 1 OF 1	

Andrews v. Kearsarge Lighting Prec.

Zoning: “All residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated.”

- Substantive due process challenge: “The court concludes that maintaining the residential character of a community is a legitimate governmental interest. ...as applied to short-term rentals, the Guest Provision is rationally related to that interest because it requires owners of short-term rental properties to reside at the property and monitor and resolve problems their guests may cause.”
- Does not amount to a prohibition against all rentals; apartments may legitimately be regulated in a different manner

Conway, NH



**TOWN OF CONWAY FILES PETITION IN COURT
TO STOP SHORT-TERM RENTALS**



Conway Zoning

Special exception for single-family to multi-family conversions (identical language in many districts)

- “All of the dwelling units shall be used for long-term residency; short-term transient occupancies of less than 30 consecutive days of any dwelling unit is prohibited.”

Special exception for ADUs (replaces owner-occupancy requirement)

- “Both the primary single-family dwelling and the accessory dwelling unit shall be used for long-term residency, and short-term transient occupancy of either dwelling unit is prohibited.”

STR Policy- Burlington Context



STR Policy Goals

A Council Resolution established goals for the policy:

- limit the number of housing units that can be converted for [STR] purposes; and
- ensure that those conversions are contributing to the city's efforts to preserve and expand permanently affordable housing; while also
- preserve some flexibility and ability to earn greater income for Burlington homeowners; and
- recognize that some supply of [STRs] benefits the Burlington economy

Key Questions

Major discussion topics from a Joint Committee Process:

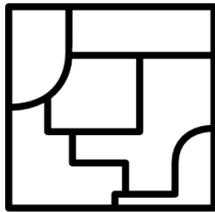
- What are the types of STRs we want to see in Burlington, and which do we want to limit?
- What are the appropriate tools to limit the overall number of short-term rentals?
- How permissive or restrictive should this policy be, based on information available?
- Getting it right vs. getting something done

Regulating Host Occupancy

Host occupancy emerged as the most debated, most influential tool for the number of STRs city-wide:

- **Main purpose: limiting the conversion of properties from long-term housing to 100% short-term rental use**
- Enables flexibility for residents to use their own homes, properties they live in to generate income
- Requiring for all STRs would be most limiting, not requiring would be most permissive. Committee recommended a hybrid (for now).
- Other tools explored but not recommended: city-wide cap on STRs, cap on STRs by individual host, limit days per year STR rented, financial disincentives (i.e. applying Housing Replacement)

Bulk of regulation outside Zoning



Zoning Ordinance

- Defines STR
- Allows STRs as a “Special Residential Use” anywhere residential uses are permitted
- Updates & clarifies other definitions/standards for lodging



Minimum Housing Code

- Defines an STR as a form of rental housing
- Sets STR limits by building and when host must live on site
- Includes minimum life safety standards for STRs
- Requires annual registration

Discussion + Q&A

Conway, NH

- Conway, NH Regulations of Short-Term Rentals Accepted by the Board of Selectmen:
<https://conwaynh.org/wp-content/uploads/2020/12/STR-Regulations-Accepted-by-BOS.pdf>
- News Story Regarding Enforcement of the Short Term Rental Regulations:
https://www.conwaydailysun.com/news/local/conway-selectmen-to-move-against-short-term-rentals/article_a32bc88a-a2a8-11eb-b184-9ff45590849e.html
- News Story on *Town of Conway v. Kudrick; NH Mountain Rentals*:
https://www.conwaydailysun.com/news/local/str-owner-responds-to-conway-with-own-claims/article_90f3a2b8-ea57-11eb-93a1-e3d9f8e736c0.html

Portsmouth, NH

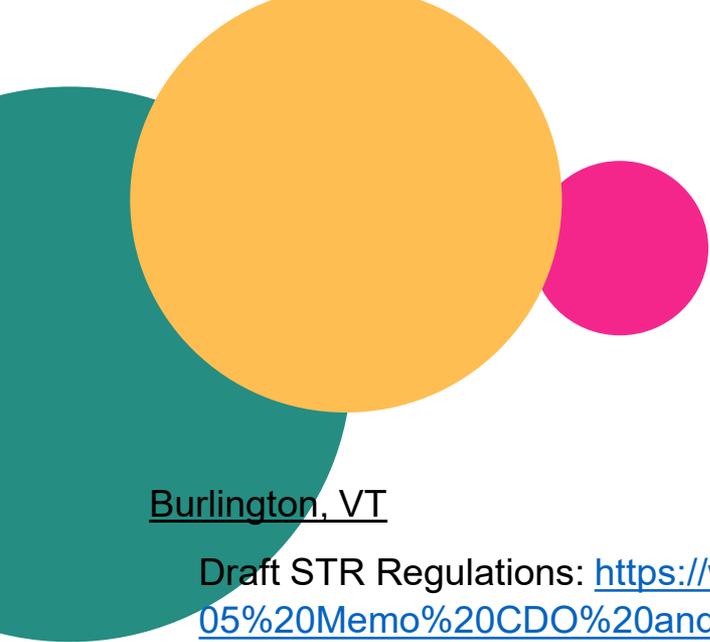
Working Stiff Partners, LLC v. City of Portsmouth, 172 N.H. 611 (2018):

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-07/2019067workingstiff.pdf>

Kearsarge, NH

Andrews v. Kearsarge Lighting Precinct, NH Superior Court Docket No. 212-2018-CV-00049:

https://drive.google.com/file/d/1y0fSd2lIXaTDVsh1K_vKFDnk-Jza971r/view



Burlington, VT

Draft STR Regulations: <https://www.burlingtonvt.gov/sites/default/files/ZA-20-05%20Memo%20CDO%20and%20CH%2018%20for%20CC%201st%20Read%20packet%20for%20CDO%20website.pdf>

Woodstock, VT

Village of Woodstock Short Term Rental Ordinance: <https://townofwoodstock.org/wp-content/uploads/2019/12/STR-ordinance-approved-11.12.2019.pdf>

Hamilton, PA

Slice of Life, LLC v. Hamilton Township Zoning Hearing Board, 652 Pa. 224, 207 A.3d 886 (Penn. 2019) (holding that a zoning ordinance defining family as “a single housekeeping unit” excludes purely transient use of a property located in a residential zoning district):

<https://law.justia.com/cases/pennsylvania/supreme-court/2019/7-map-2018.html>