
TO: Christopher Clark, Harwich Town Administrator (*By Electronic Mail Only*)

FROM: John W. Giorgio, Esq., KP Law, Town Counsel

RE: Short-Term Rental Legislation

January 8, 2019

Now that the Short-Term Rental Law has been enacted, KP Law will be sending out general guidance to our municipal clients. We are also expecting that the Department of Revenue will be issuing guidance documents in the near future. However, the Town may want to consider certain actions at the 2019 Annual Town Meeting to implement the new law. To that end, I am providing you with a preview of available options as you are preparing the warrant.

Local Acceptance

There are, in fact, three local acceptance options available under the new law and one additional local option the Town may wish to consider:

1. The new law, Chapter 337 of the Acts of 2018 (the Act), revises G.L. c. 64G, §3A, to include short-term rentals among the list of establishments subject to the local excise tax. Specifically, the new law authorizes a local excise upon the transfer of occupancy by the operator of a room in a bed and breakfast establishment, hotel lodging house, short-term rental or motel located within the Town at a rate of not more than 6%.

The Act defines short-term rental as:

an owner-occupied, tenant-occupied or non-owner occupied property including, but not limited to, an apartment, house, cottage, condominium or a furnished accommodation that is not a hotel, motel, lodging house or bed and breakfast establishment, where: (i) at least 1 room or unit is rented to an occupant or sub-occupant; and (ii) all accommodations are reserved in advance; provided, however, that a private owner-occupied property shall be considered a single unit if leased or rented as such.

It is my understanding, however, that the Town previously accepted G.L. c. 64G, §3A and set the rate at 4%. Accordingly, there is no need for the Town to accept the new §3A which extends the local excise tax to short-term rentals. Section 15 of the Act provides: "A city or town that accepted section 3A of chapter 64G of the General Laws before July, 1, 2019 shall be deemed to have accepted said section 3A of said chapter 64G for the purposes of this

act.” However, if the Town wishes to change the percentage amount of the tax, a new Town Meeting vote would be required.

Please also be advised, however, that if the Town previously voted a home rule petition to establish a rooms excise tax on short-term rentals, it is unlikely that the General Court will act on any such petitions in light of the passage of the new Act.

The new tax will apply to a change of occupancy starting on or after July 1, 2019, that is booked on or after January 1, 2019. It is expected that the Department of Revenue will shortly be issuing guidance to municipalities and operators as to the specifics of charging and remitting the tax to the Commonwealth.

2. The new law adds G.L. c. 64G, §3D (a) which authorizes a community impact fee of not more than 3 per cent of the total amount of rent for each transfer of occupancy of a professionally managed unit. A professionally managed unit is defined as “1 of 2 or more short-term rental units that are located in the same city or town, operated by the same operator and are not located within a single-family two-family, or three-family dwelling that includes the operator’s primary residence.” Adoption of the community impact fee is only available if the Town accepts or has already accepted section 3A, and the acceptance vote for section 3D(a) must be separate from the vote to accept section 3A. Unlike the rooms tax under section 3A, which is paid to the Commonwealth and then remitted to the Town quarterly, the community impact fee under section 3D (a) is paid monthly by the operator directly to the Town and the Town is required to dedicate not less than 35% of the community impact fees it receives to affordable housing or local infrastructure projects.

3. The new law also adds G.L. c. 64G, §3D(b) which would allow the Town, upon an acceptance vote by Town Meeting, to impose a community impact fee of not more than 3% upon each transfer of occupancy of a short-term rental that is located within a two-family or three-family dwelling that includes the operator’s primary residence. The same requirements for payment directly to the Town and dedicating not less than 35% of the short-term rental impact fees to affordable housing or local infrastructure projects apply as well.

4. Although this next option has been available since enactment of the Municipal Modernization Act in 2016, it may be of particular relevance with the passage of the Short-Term Rental Legislation. If the Town accepts G.L. c. 40, §5B, the Town can dedicate not less than 25% of the local rooms excise tax to any stabilization fund. This would include any new revenue generated from short-term rentals. The Town must accept paragraph 4 of §5B at Town Meeting, establish the stabilization fund (if an appropriate one does not already exist), and designate the percentage of the room excise (not less than 25%) to be deposited in the stabilization fund. No further appropriation into the fund is required. For example, if the Town desires to dedicate 50%

of the new rooms excise for affordable housing purposes, Town Meeting would have to vote by a two-thirds vote to establish a new Affordable Housing Special Purpose Stabilization Fund, vote to accept Paragraph 4 of G.L. c. 40, §5B, and vote that 50% of the rooms excise tax to be deposited into the fund. One potential drawback of this approach is that any appropriation from the stabilization fund by Town Meeting would require a two-thirds vote, and the revenue so dedicated would not be available for appropriation for general fund expenses.

Cape and Islands Water Protection Fund

In addition, Harwich is included in the Cape Cod and Islands Water Protection Fund which is a Trust established pursuant to §2 of the Act (G.L. c. 21C, §19).

G.L. c. 64G, §3C provides for a 2.75% additional rooms excise tax to be collected by the Commonwealth for transfers of occupancy of units located in Towns on the Cape and Islands. Those funds are deposited directly into the Fund and are dispersed by the Management Board to member towns for water abatement projects. There is no local acceptance required by Town Meeting to implement this provision.

The Town may not withdraw from the Fund for a period of one year after the effective date of the Act. See §12 of the Act. Because the Act did not include an emergency preamble, the Act will become effective 90 days after December 28, 2018, which is the date the Governor approved the Act, or March 28, 2019. Accordingly, the Town Meeting cannot vote to withdraw from the Fund unless the effective date of the withdrawal is March 28, 2020, or later. The Town could, therefore, ask Town Meeting to vote to withdraw from the Fund at the 2019 Annual Town Meeting as long as the vote specifies that the withdrawal will not take effect until March 28, 2020.

Withdrawal requires a two-thirds vote of Town Meeting, but the Town may not withdraw during the term of any financial assistance awarded from the Fund. If the Town withdraws and then subsequently votes to rejoin the Fund, the Town will be ineligible for grants and subsidies for a two-year period.

A Management Board is established, and each member town will have one representative of the Board, who is appointed by the Select Board but must include either a member of the Select Board, the Town Administrator, or "other municipally employees professional staff." The Management Board is required to make "an equitable distribution among participating municipalities consistent with revenue deposited from each municipality." The term "equitable distribution" is not defined, so it remains to be seen how the Management Board, once it is established, will allocate the available funds. In this regard, both the Cape Cod Commission and the Martha's Vineyard Commission are required to provide administrative and technical support to the Management Board and may be compensated for such support from the Fund. In addition,

the Management Board may, pursuant to a Memorandum of Understanding with the DEP, expend up to 10% of the annual revenue in the Fund to contract with a regional planning agency, an institution of higher education or non-profit corporation to evaluate and report on the efficacy of adaptive management measures to reduce nitrogen pollution, monitor water quality, and conduct water quality monitoring. Accordingly, I do not expect that the full amount of the 2.75% tax will be available for distribution by the Management Board.

Local Regulation

Finally, §14 of the Act expressly authorizes a municipality by ordinance or bylaw to regulate operators subject to the rooms excise tax and who have registered pursuant to G.L. c. 62C, §67. The bylaw may:

(i) regulate the existence or location of operators under this section within the city or town, including regulating the class of operators and number of local licenses or permits issued to operators under this section and the number of days a person may operate and rent out an accommodation in a calendar year;

(ii) require the licensing or registration of operators within the city or town; provided, however, that a city or town may: (A) accept a certificate of registration issued to an operator in accordance with section 67 of chapter 62C in lieu of requiring an operator to obtain a local license or registration under this section; or (B) issue a provisional license or registration to permit an operator to offer accommodations on temporary or seasonal basis;

(iii) require operators to demonstrate that any properties or premises controlled, occupied, operated, managed or used as accommodations subject to the excise under this chapter are not subject to any outstanding building, electrical, plumbing, mechanical, fire, health, housing or zoning code enforcement, including any notices of violation, notices to cure, orders of abatement, cease and desist orders or correction notices;

(iv) require properties or premises controlled, occupied, operated, managed or used by operators as an accommodation subject to the excise under this chapter to undergo health and safety inspections; provided, however, that the cost of any inspection conducted under this section shall be charged to and solely paid by the operator under this section; provided further, that after any initial health and safety inspection, the city or town may determine the frequency of any subsequent inspections;

(v) establish a civil penalty for violation of an ordinance or by-law enacted pursuant to this section; provided, however, that a city or town that suspends or terminates an operator's right to operate an accommodation for a violation of any ordinance or bylaw shall notify the commissioner of revenue of the suspension or termination; and

(vi) establish a reasonable fee to cover the costs associated with the local administration and enforcement of regulating operators and accommodations.

Under this section, the Town may publish a public registry of all short-term rental accommodations including where the accommodation is located. This is an interesting provision because under section 1 of the Act, the state will be establishing a registry of all operators but is limited to only listing the name of the street and the municipality where the listing is located. If the Town is interested in developing its own regulations for short-term rentals, including limiting the number of licenses issued, we would be happy to work with the Town in drafting an appropriate bylaw. In this regard, however, you may be aware the city of Boston has been sued by Airbnb in connection with their respective ordinances regulating short-term rentals, and there have been some threats by the lodging industry to challenge at least the registry provisions of the new Act. It may, therefore, be prudent to wait until the Courts have addressed these legal challenges before proceeding with the enactment of a local bylaw.

It is important to note that the new law does not specify whether the bylaw must be a general bylaw or a zoning bylaw. Furthermore, there is nothing in the new law that would preclude the adoption of a Board of Health regulation to address health and safety issues. It may come down to how the Town intends to regulate short-term rentals, if at all. As a general rule of thumb, a local general bylaw would be appropriate to establish a licensing and registry scheme, or to limit the number of licenses than can be issued. If, on the other hand, the Town is only interested in establishing an inspection program, a Board of Health regulation may be more appropriate for a health and safety inspection protocol. If the Town wanted to limit short-term rentals to particular areas within the town and/or to require a special permit use, a Zoning Bylaw would be the appropriate mechanism.

Please let me know how the Town would like to proceed and whether you want us to draft some or all of the local acceptance provisions outlined above.

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MASSACHUSETTS DEPARTMENT OF REVENUE

Christopher C. Harding, Commissioner

CONTACTING DOR ABOUT THE NEW SHORT-TERM RENTAL LEGISLATION

- Review the FAQs at www.mass.gov/dor and check back for updates before calling DOR
- **Inquiries from local government officials:**
 - Contact the Division of Local Services, Attorney of the Day at 617-626-2400 or dlslaw@dor.state.ma.us
- **Inquiries from rental property operators or intermediaries:**
 - If FAQs do not answer your question, call DOR at 617-887-6367
 - If the contact center is not able to answer your question, send an e-mail to Jennifer DeSimone, Director of the Problem Resolution Office, at desimonej@dor.state.ma.us

Short-Term Rentals Frequently Asked Questions

Overview

Legislation was recently signed into law which subjects short-term rentals of property to the room occupancy excise, G.L. c. 64G, as of July 1, 2019. You can find the new law on the [General Court Website](#). DOR anticipates issuing detailed guidance to explain the administration of the new law.

In the meantime, the following provides important information about the new law for those currently participating in the short-term rental economy.

The new law imposes state and local excises on short-term rentals of property for more than 14 days in a calendar year, starting July 1, 2019 for which a rental contract was entered into on or after January 1, 2019.

All short-term rental operators will be required to register with DOR. Operators may choose to allow an intermediary or other agent to handle the rental of their property and register with and submit returns and tax due to DOR on their behalf.

What is subject to the excise

1. What is a short-term rental?

A short-term rental is an occupied property that is not a hotel, motel, lodging house or bed and breakfast establishment, where at least 1 room or unit is rented out by an operator through the use of advance reservations. A short-term rental includes an apartment, house, cottage, and condominium. It does not include property that is rented out through tenancies at will or month-to-month leases. It also does not include time-share property. A short-term rental is a rental that is not for more than 31 consecutive calendar days.

2. Who is a short-term rental operator?

A short-term rental operator can be an owner, lessee, sublessee, the holder of a mortgage, licensee, or anyone else operating a short-term rental. An operator does not have to be a resident of Massachusetts or a Massachusetts-based business for the short-term rental rules to apply.

3. Who is an intermediary or operator's agent?

An intermediary is anyone besides an operator that helps arrange a short-term rental and who also charges rent on behalf of the operator. An intermediary includes a broker, hosting platform, or operator's agent.

An operator's agent is anyone who manages a property for rent or books reservations of a property for rent on behalf of an operator. An operator's agent includes a property manager, property management company, or real estate agent.

4. What is considered to be "rent" that is subject to the room occupancy excise?

The total amount of rent that is subject to the excise includes all amounts charged by an operator, intermediary or operator's agent to an occupant, including service charges, cleaning charges if they are required for occupancy. If the total amount of rent is less than \$15 per day, no tax is required to be collected.

Registration Information

5. How do I register as an operator?

All operators must register with DOR using MassTaxConnect. DOR is currently working on making changes to the registration process due to the new law. Check this page for more information in the near future.

6. How do I register as an intermediary or operator's agent?

An intermediary or operator's agent must register in the name of the operator with DOR using MassTaxConnect. DOR is currently working on making changes to the registration process due to the new law. Check this page for more information in the near future.

7. I am an intermediary or operator's agent. Do I have to register under each operator's name?

No, you will only need to register one time, but you may need to provide DOR with information about each operator you are working with. DOR is currently working on making changes to the registration process due to the new law. Check this page for more information in the near future.

8. What should I do until I can register with DOR?

Operators, intermediaries or operator's agents may continue to enter into rental contracts until the registration process is up and running. Such contracts should contain provisions stating that all state and local taxes are due to the operator, intermediary or operator's agent.

9. I only rent my property a few days a year. Do I have to register or collect the tax?

No matter how many days you rent out your property each year, you must register with DOR using MassTaxConnect. However, if you rent out your property for 14 days or less in a calendar year, you are not required to collect any tax. If that exception applies to you, you must let us know at the time of registration that you will not be renting out your property for more than 14 days. DOR is currently working on the registration process due to the new law. Check this page for more information in the near future.

Return and Payment Information

10. How do I file returns and pay the taxes due?

Room occupancy returns are due monthly, on or before the 20th day of the month reporting tax collected for the previous month. The state excise and any local option excise, including the Convention Center Financing fee and the new Cape Cod and Islands Water Protection Fund excise are to be paid with the return. DOR is currently working on making changes to the forms due to the new law. Check this page for more information in the near future.

11. When is the first return and payment due for short-term rentals after July 1, 2019?

Starting July 1, 2019, the first return and payment is due on August 20, 2019. After that date, returns are due on the 20th day of each month.

12. How much tax am I required to collect?

The total amount of tax required to be collected will depend on where the short-term rental is located. The following is a breakdown of the various state and local excises that may apply.

State excise 5.7% (Note that while the statute provides for a 5% rate, an uncodified surtax adds .7% to the rate)

Local option excise 0-6.5% (the rate varies depending on the city or town; Visit the Division of Local Service's [Municipal Databank](#))

Convention Center Finance fee 2.75% (only for Boston, Worcester, Cambridge, Springfield, West Springfield, and Chicopee)

Cape Cod and Islands Water Protection Fund excise 2.75% (only for those cities and towns in those localities that are currently a member of the Fund)

Community Impact fee 0-3% (the rate will vary depending on whether a city or town votes to adopt this fee)

13. My rental begins in June, 2019 but ends after July 1, 2019. Is my rental subject to tax?

No, the new law imposes tax on short-term rentals that begin on or after July 1, 2019. If your rental begins before July 1, 2019, it is not subject to tax.

14. I only rent my property at certain times of the year. Do I have to file a return even if I have no rental every month?

The new law requires DOR to issue regulations to minimize the administrative burden for certain operators who do not rent their property every month. DOR is currently working on the return filing process. Check this page for more information in the near future.

15. What is a rental contract?

A rental contract is an agreement by an operator, intermediary or operator's agent to rent a property to an occupant for a certain time period. The rental contract must create a binding obligation between the operator, intermediary or operator's agent and the occupant.

16. What records do I need to keep as an operator?

An operator is required to keep records relating to charges and receipts for all transfers of occupancy, as well as copies of returns filed. You can find more information on specific records to be kept by clicking on the Record Retention Regulation link at the bottom of this page.

Local Municipal Information

17. How do I know if a local option excise applies to my short-term rental?

If a city or town currently has already adopted a local option room occupancy excise, the local option automatically applies to a short-term rental starting July 1, 2019 for which a rental contract was entered into on or after January 1, 2019. No further action is required by these cities or towns to impose the local option on short-term rentals. You can find a listing of municipalities that have a local option by visiting the Division of Local Service's [Municipal Databank](#).

18. Where can I find information about other rules or regulations imposed by cities and towns?

For information about local rules, including whether a city or town is a member of the Cape Cod and Islands Water Protection Fund or has adopted a community impact fee and how to pay that fee directly to the city or town, you should check with local officials in the city or town in which the rental property is located.