

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



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Case Name: Peter Hoekstra and Elizabeth Hoekstra v. Town of Sunapee
Case Number: ZBA-2022-21

ORDER

This matter concerns the appeal filed by Peter Hoekstra and Elizabeth Hoekstra (together, the “Applicant”) of a decision by the Town of Sunapee (“Town” or “Sunapee”) Zoning Board of Adjustment (“ZBA”) denying the Applicant’s administrative appeal concerning their use of a travel trailer on their property in Sunapee.

FACTS

The Applicant owns certain property located at 25 Maple Street in Sunapee, also known in the Town’s tax records as Parcel ID: 0133-0104-0000 (“Property”). Certified Record (“CR”) at pp. 1, 10. The Property is located in the Town’s Village-Residential (“VR”) district, CR 10, and is currently improved with a single-family dwelling unit that is used as the Applicant’s primary residence. CR 10. The Applicant also maintains a single travel trailer (“Trailer”) on the Property, which they use as a short-term rental.¹ CR 10, 32, 46-61. See also Applicant’s Appeal of Zoning Board Decision, ¶¶ 4, 7.

By letter dated April 19, 2022, the Town’s zoning administrator notified the Applicant that their use of the Trailer violated the Town’s Zoning Ordinance (“Ordinance”) in that it “cannot be used as a dwelling, it must be hooked up to an approved water & sewer system.” CR 1. Subsequently, as indicated in correspondence dated June 13, 2022, the zoning administrator determined that the use of the travel trailer did not violate water or sewer requirements. CR 30. At the same time, however, the zoning administrator determined that the Applicant’s use of the

¹ The record reflects that the Applicant lists the Trailer on Airbnb for nightly (*i.e.*, transient) rentals, for a fee. CR 10, 46-61. The Airbnb listing refers to the Trailer as a “camper/rv” and is advertised as a “Sunapee Harbor Minimalist Retreat.” CR 46. House rules reflect the existence of check-in and checkout times. CR 59.

Trailer for short-term rental use was prohibited under Section 4.20 of the Ordinance, CR 31, which states that “[a]ny use not specifically permitted is prohibited.” CR 213.

On June 30, 2022, the Applicant filed its administrative appeal of the zoning administrator’s June 13th determination. CR 36. The ZBA heard the Applicant’s appeal at its meeting on July 19, 2022. CR 83. At the conclusion of such hearing, by a 4-1 margin, the ZBA voted to uphold the zoning administrator’s decision and to deny the Applicant’s appeal. CR 87. A written decision dated July 19, 2022 followed. CR 89. On August 11, 2022, the Applicant filed its request for rehearing with the Town, CR 90, which was denied by the ZBA at its meeting on September 1, 2022, CR 185, with a written decision issued on September 6, 2022. CR 191.

The Applicant filed its appeal with the Housing Appeals Board (“Board”) on September 27, 2022. A prehearing conference was held on November 14, 2022, and a hearing on the merits was held on November 29, 2022. This decision follows.

LEGAL STANDARDS

The Housing Appeals Board’s review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board’s factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. See RSA 679:9. See also, Lone Pine Hunters Club v. Town of Hollis, 149 N.H. 668 (2003) and Saturley v. Town of Hollis Zoning Board of Adjustment, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

DISCUSSION

This issue in this case is discrete. It involves a straightforward interpretation of the Ordinance. Specifically, at issue is whether the Applicant’s use of the Trailer as a short-term rental is permitted under the Ordinance. As such, a review of the applicable provisions of the Ordinance is necessary.

I. The Ordinance

To begin, Section 4.20 of the Ordinance establishes a “permissive” ordinance, meaning

that all uses that are not expressly allowed are prohibited. See Working Stiff Partners v. City of Portsmouth, 172 N.H. 611, 616 (2019). Section 4.10 of the Ordinance lists permitted uses in each zoning district. Its introduction states:

The following uses are permitted in each zoning district, subject to the other provisions of this ordinance. Whenever a use is permitted by right or special exception in any district, it may be used in conjunction with any other permitted or special exception use in that district. All uses are subject to other provisions of this ordinance[.]

Pursuant to Section 4.10, the following uses are permitted within the VR district:

Permitted by Right:

Accessory Uses	Municipal Buildings & Facilities
Assembly Halls	Museums & Galleries
Banks	Nursing & Convalescent Homes
Bed & Breakfast, Tourist Homes, Inns, Lodging & Boarding Services	Playhouse/Performing Arts/Theatre
Churches	Post Offices
Day Care	Professional Offices & Clinics
Food Vendor Cart (Adopted 3/08/2022)	Restaurants (excluding Drive-in Restaurants)
Funeral Homes	Retail (up to 15,000 SF)
Home Business	Schools (Public & Private)
Home Occupation Services	Shopping Centers (up to 15,000 SF)
Laundromat & Dry Cleaners	Single-Family Dwellings
Motels & Hotels	Two-Family Dwellings
Multi-Family Dwellings (3 to 5 Units)	

Permitted by Special Exception:

Accessory use/wind generation systems (Adopted 3/10/09)
Auto, Boat & Engine Repair Shops
Marinas
Veterinarians
Yards, (Lumber, Etc.)

Finally, Section 3.40(m) relates to travel trailers. It states:

Travel Trailers, which include, but are not limited to, camper trailers, motor homes, recreational vehicles, tent trailers and truck campers, are permitted subject to the following restrictions:

- 1) The owner of a travel trailer may store up to two (2) such trailers on his/her property in as inconspicuous a location as possible;
- 2) A travel trailer may be used for temporary sleeping quarters for not more than 90 days per 12-month period unless a Certificate of Compliance is issued. Sewage disposal must be in compliance with New Hampshire Water Supply and Pollution Control regulations or approved by the Sunapee Water and Sewer Department if on municipal sewer;

- 3) All travel trailers used for temporary sleeping quarters must be in compliance with all other provisions of this ordinance including building setbacks;
- 4) If three (3) or more travel trailers are to be placed on an individual lot and used as sleeping quarters, a Site Plan Review approval must be granted by the Planning Board. (Adopted 3/9/2004)

(Emphasis added.)²

II. Canons of Statutory Construction

Interpreting a zoning ordinance is legal exercise that requires the application of rules of statutory construction. As summarized in Working Stiff, 172 N.H. at 616:

The interpretation of an ordinance is a question of law and requires us to determine the intent of the enacting body. We use the traditional rules of statutory construction when interpreting zoning ordinances. We construe the words and phrases of an ordinance according to the common and approved usage of the language, but where the ordinance defines the terms in issue, those definitions will govern. Furthermore, we determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases. When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent.

(internal citations omitted).

III. Arguments

The Applicant contends that the ZBA erred in upholding the zoning administrator's determination because the Ordinance permits the occupancy of travel trailers. The Applicant's primary argument relies upon Section 3.40(m) of the Ordinance, which provides that "a travel trailer may be used for temporary sleeping quarters for not more than 90 days per 12-month period[.]" The Applicant asserts that this language, together with the fact that rentals are permitted throughout the Town, confers them with the authority to use the Trailer for short-term rentals. The Town responds by pointing to the permissive nature of the Ordinance, as set up in Section 4.20, and contends that the Applicant's use of the Trailer for short-term rental is prohibited as it does not fall within any of the permitted uses listed in Section 4.10.

Here, the Applicant's argument relies on the language of Section 3.40, which arguably supports the Applicant's position when viewed in isolation. However, it does so at the exclusion of the plain language contained within Sections 4.10 and 4.20. Critically, the Applicant does not

² The record does not reveal the legislative intent behind the passage of Section 3.40(m).

purport to use the Trailer as any of the allowed uses, which include accessory uses. Rather, the Applicant's position altogether bypasses Sections 4.10 and 4.20 of the Ordinance, which list those uses that are allowed in the Town and prohibit all others. Such a position runs counter to the above-referenced rules of statutory construction, which require that attention must be paid to the ordinance as a whole, and not select provisions in isolation. See Working Stiff, 172 N.H. at 616.

The introductory language within Section 4.10 provides additional evidence that any inquiry into permitted uses in the Town must include its consideration. Section 4.10 states that the listed uses are permitted "subject to the other provisions of [the Ordinance]," and that "[a]ll uses are subject to other provisions of this ordinance[.]" Here, the use of the phrase "subject to" is telling as it indicates that the primary uses may be dependent upon, or affected by, other provisions within the Ordinance. See Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/subject%20to> (defining "subject to," in relevant part as "affected by or possibly affected by (something)" (last visited January 27, 2023). Regardless of precisely how one defines "subject to," the phrase indicates a link between the permitted uses and the remaining provisions within the Ordinance. By ignoring Sections 4.10 and 4.20 of the Ordinance, the Applicant's argument severs such link, unreasonably.

Furthermore, the location of Section 3.40(m) within the structure of the Ordinance provides additional context in this case. Whereas Article IV of the Ordinance is titled "use regulations," Article III of the Ordinance is titled "dimensional controls." Article III includes standard requirements for lot size, frontage, setbacks, etc. Specifically, Section 3.40 is titled "additional requirements," and contains miscellaneous provisions, most of which primarily relate to aspects of dimensional requirements in the Ordinance. See, e.g., § 3.40(c), (d), (f), (h), (i), (j), (l), (n), and (o). It is here – in the Article of the Ordinance titled "dimensional controls," in a section titled "additional requirements" – where Section 3.40(m) resides. In light of this organization, it is difficult to envision that the intent of Section 3.40(m) was to create a new, independent permitted use untethered from Section 4.10.

The Applicant also asserts that the Trailer falls under the definition of a "dwelling unit," which, under the Ordinance, may be rented. See Article XI (definitions). However, even if a travel trailer can be a rentable dwelling unit in theory, that fact does not automatically mean that the Applicant's particular use of its travel trailer is allowed under the Ordinance. The Town's

objection is not to the rental aspect, necessarily, but the use of the Trailer as a short-term vacation rental for transient use. The distinction may be subtle, but reference to Section 4.20's list of permitted uses provides some clarity. There, it is evident that the Town's list of permitted uses does not concern itself with the ability for one to rent property. Rather, it regulates how property can be used.

Section 4.20 also shows that the Ordinance does, in fact, allow for certain short-term sleeping accommodations in the VR district. It does so by allowing "Bed & Breakfast, Tourist Homes, Inns, Lodging & Boarding Services[,]" which Article XI defines as "[a]n owner occupied single family dwelling in which no more than ten (10) rooms are used to provide transient sleeping accommodations, with meals served to guests only."³ Thus, the Ordinance reflects a clear intent to regulate short-term transient use in the VR district, under certain conditions, including that such use take place in an owner occupied, single-family dwelling. Here, the Applicant's propose a variant of short-term transient use that is not specifically allowed under the Ordinance. As discussed previously, under the Ordinance, any use that is not specifically allowed is prohibited.

Moreover, on its face, Section 3.40(m) does not provide for "transient" sleeping accommodations, as is permitted at times under the Ordinance. "Transient" sleeping accommodations are allowed in certain districts when a property is used as a "Bed & Breakfast, Tourist Homes, Inns, Lodging & Boarding Services" or a "Hotel & Motel." See Article XI (definitions). Rather, Section 3.40(m) allows a trailer to be used for "temporary sleeping quarters." As noted by the Town, there is a material distinction between transient sleeping accommodations and temporary sleeping quarters. Based on standard dictionary definitions,⁴ the former implies brief lodging for visitors, while the latter suggests that the lodging itself is

³ The Applicant originally argued that the Trailer fell under this definition as a tourist home, CR 32, but does not present such argument on appeal.

⁴ None of these terms are defined in the Ordinance, so common dictionary definitions provide instruction. "Transient" is defined as "passing especially quickly into and out of existence" or "passing through or by a place with only a brief stay or sojourn." Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/transient> (last visited January 27, 2023). "Accommodation" is defined as "lodging, food, and services or traveling space and related services" Id. at <https://www.merriam-webster.com/dictionary/accommodation> (last visited January 27, 2023). "Temporary" is defined as "lasting for a limited time" Id. at <https://www.merriam-webster.com/dictionary/temporary> (last visited January 27, 2023). "Quarters" is defined as "to provide with lodging or shelter" Id. at <https://www.merriam-webster.com/dictionary/quarters> (last visited January 27, 2023).

somehow limited. The use of two different terms indicates a legislative intent for two different meanings. See City of Concord v. State of N.H., 164 N.H. 130, 141 (2012). The fact that the Ordinance does not allow travel trailers to be used for transient sleeping accommodations further supports the ZBA's denial of the Applicant's administrative appeal.

Finally, the Applicant contends that the ZBA's decision was unlawful because (1) the Town has previously approved an unrelated travel trailer in Town as a dwelling unit for use as a rental, see CR 93, and (2) many other short-term rentals are allowed throughout the Town. CR 94-182. Thus, the Applicant reasons, it was arbitrary and unlawful for the Town to deny its request to use the Trailer for short-term rentals.

However, the specific example cited to by the Applicant at page 93 of the record shows that the Town permitted the structure for occupancy for more than three months per year. Regardless of how the Trailer is currently being used, the face of the certificate of zoning compliance does not indicate that the structure was approved for use as a short-term rental. Likewise, with respect to the various other instances of unenforced short-term renters, the record does not address whether or not such uses violate the Ordinance. Moreover, the Applicant fails to articulate a specific legal theory that would justify its position on this issue. For example, it is unclear if the underlying theory is grounded in constitutional principles, whether the doctrine of administrative gloss should apply, or whether the Applicant is the subject of selective enforcement. Merely asserting arbitrary treatment, without specific and credible evidence, does not satisfy the Applicant's burden to demonstrate that the ZBA acted unreasonably or unlawfully in denying the Applicant's administrative appeal.

CONCLUSION

Based on the foregoing, upon a balancing of the probabilities, the Housing Appeals Board ORDERS as follows:

1. The decision of the Town of Sunapee Zoning Board of Adjustment denying the Applicant's administrative appeal is AFFIRMED, consistent with this Order;
2. The Applicant's appeal is DENIED; and

3. The Town's requests for findings of fact and rulings of law which are consistent with this Order are APPROVED; the balance are DENIED.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard

Elizabeth Menard, Clerk

Date: January 30, 2023

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ORDER

After review of Peter and Elizabeth Hoekstra's (together, the Applicant) February 22, 2023 Motion for Reconsideration and the Town of Sunapee's ("Town") objection to same, the Housing Appeals Board ("Board") RULES as follows:

The Board will only grant a rehearing motion "upon a showing that the board overlooked or misapprehended the facts or the law and such error affected the board's decision." See Administrative Rule Hab 201.32(e). Nothing in the Applicant's rehearing motion identifies any facts (as contained within the certified record) or law the Board overlooked or misapprehended that affected the decision in the instant matter.

In light of the foregoing, the Housing Appeals Board hereby DENIES the Applicant's February 22nd Motion for Reconsideration. The Housing Appeals Board's January 30, 2023 decision on the merits (Order Number 2023-007), suspended by its Interim Order dated March 6, 2023, is UNSUSPENDED and REINSTATED forthwith.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard

Elizabeth Menard, Clerk

Date: March 17, 2023