

STATE OF NEW HAMPSHIRE

SUPREME COURT

2023 Term

Docket No. 2023-0189

APPEAL OF ELIZABETH HOEKSTRA AND PETER HOEKSTRA

PLAINTIFFS'/APPELLANTS' BRIEF
for
ELIZABETH HOEKSTRA AND PETER HOEKSTRA

Pursuant to RSA 679:15, RSA 541:6 and Rule 10
from the New Hampshire Housing Appeals Board

Elizabeth Hoekstra and Peter Hoekstra
By their attorneys
Schuster, Buttrey & Wing, P.A.
By: Barry C. Schuster, Esq. - Bar # 2280
PO Box 388, 79 Hanover Street
Lebanon, NH 03766
603-448-4780
barry@ivylegal.com

Oral argument to be presented by:
Barry C. Schuster

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
QUESTIONS PRESENTED.....	4
STATUTES and ORDINANCES IN THE CASE	5
STATEMENT OF THE CASE.....	6
STATEMENT OF THE FACTS	7
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
1. Standard of Review.....	11
2. The Sunapee Zoning Ordinance Permits Travel Trailers	11
3. Reliance on “Vacation” and “Transient” Use in the Housing Board’s Decision Is Erroneous.....	14
4. The Town Admits That Renting a Travel Trailer Is Permitted.....	16
CONCLUSION.....	18
REQUEST FOR ORAL ARGUMENT AND CERTIFICATIONS.....	19
ADDENDUM - Table of Contents	20
Housing Appeals Board Court Order - April 3, 2022	21
Interim Order on Reconsideration March 6, 2023.....	29
Order on Motion for Reconsideration - May 12, 2022	30
APPENDIX - separately provided, pages 1 - 38.	

TABLE OF AUTHORITIES

CASES

<i>Appeal of Chichester Commons, LLC</i> 175 N.H. 412 (2022)	11
<i>Gaucher v. Cold Springs RV Corp.</i> , 142 N.H. 299 (1997)	13
<i>Town of Conway v. Kudrick</i> , Docket# 2022-0098	15
<i>Working Stiff Partners, LLC v. City of Portsmouth</i> , 172 N.H. 611 (2019)	11, 12, 14

STATUTES

RSA 541:6	Rehearings and Appeals	5, 6
RSA 674:16,V	Local Land Use Planning - Grant of Power	5, 13
RSA 679:15	Appeal	5, 6

QUESTIONS PRESENTED

1. Where the Town of Sunapee Zoning Ordinance permits a “travel trailer [to] be used for temporary sleeping quarters for not more than 90 days per 12-month period” and where the Town acknowledged that the Appellants “remain free to sleep in the trailer, or allow a friend, family member, or even a stranger to sleep in the trailer, for up to 90 days in a 12-month period, and they may receive compensation for that temporary use,” did the Housing Appeals Board err in finding that the Appellants may not use the travel trailer for temporary sleeping quarters for not more than 90 days for compensation?

Motion for Rehearing

2. Did the Housing Appeals Board err in stating that the temporary sleeping accommodations offered by the Appellants were “transient” and therefore not permitted by the Town?

Motion for Rehearing

3. Does the decision of the Housing Appeals Board violate the terms of the Sunapee Zoning Ordinance by prohibiting an activity specifically permitted by the Ordinance?

Motion for Rehearing

STATUTES and ORDINANCES IN THE CASE

Town of Sunapee Zoning Ordinance Section 3.40

(m) 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...

RSA 541:6

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

RSA 679:15. Appeal

Decisions of the board may be appealed to the supreme court by any party in accordance with the provisions of RSA 541 as from time to time amended.

RSA 674:16,V.

In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate and control accessory uses on private land....

STATEMENT OF THE CASE

Peter Hoekstra and Elizabeth Hoekstra reside at 25 Maple Street in the Town of Sunapee, Sullivan County, New Hampshire. They maintain a travel trailer in their backyard.

On June 13, 2022, the Town zoning administrator notified the Hoekstras that the rental of their travel trailer for short-term occupancy was not permitted by the Town. On June 29, 2022, the Hoekstras appealed that administrative decision. On July 19, 2022, the Sunapee zoning board of adjustment denied the Hoekstras' administrative appeal. On August 10, 2022, the Hoekstras filed a request for rehearing and on September 1, 2022, the zoning board denied the request for rehearing.

On September 22, 2023, the Hoekstras appealed the zoning board's decision to the Housing Appeals Board which issued an order on January 30, 2023, affirming the zoning board's decision. The Hoekstras filed a Motion for Rehearing on February 21, 2023, and the Town filed an Objection to Motion for Rehearing on February 27, 2023. In its Objection, the Town stated that "[t]hey, or any other property owners with a travel trailer, remain free to sleep in the trailer, or allow a friend, family member, or even a stranger to sleep in the trailer, for up to 90 days in a 12-month period, and they may receive compensation for that temporary use." On March 6, 2023, the Housing Board issued an Interim Order, suspending its prior Order. On March 17, the Housing Appeals Board "UNSUSPENDED and REINSTATED" its January 30, 2023 Order. The Hoekstras appeal the decision of the Housing Appeal Board. RSA 541:6; RSA 679:15.

STATEMENT OF THE FACTS

Peter Hoekstra and Elizabeth Hoekstra live at 25 Maple Street in the Town of Sunapee, Sullivan County, New Hampshire. HAB 5.¹ Their home is located in the Village Residential District (VR) in the Town. Appendix p. 20. They have a travel trailer in their backyard. *Id.* The location and maintenance of the trailer complies with the sewage disposal and setback provisions of the 2022 Sunapee Zoning Ordinance in effect at that time. HAB 6.

The Sunapee zoning ordinance permits travel trailers on one's property. Section 3.40 of the Sunapee Zoning Ordinance states:

- (m) 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....

Appendix pp. 21-22.

¹ References to the Certified Record of Appeal provided by the Housing Appeals Board are numbered HAB 0000xx. For convenience, the zeros preceding the page numbers are omitted.

The Court Record also contains a paper copy of the Certified Record of the Sunapee Zoning Board, which pages are numbered from 1 to 251. Pages from the zoning board's Record referenced herein are included in the Appendix to this Brief and identified as Appendix p. ____.

The Hoekstras have allowed their travel trailer on their owner-occupied property to be used for temporary sleeping quarters for no more than 90 days per calendar year. HAB 6. The travel trailer complies with the sewage disposal regulations and with all building setbacks. HAB 6. The Hoekstras also charge a fee to the people who have stayed in the travel trailer. *Id.*

Although the Town has permitted another property owner to maintain a travel trailer for rental on their property, Appendix pp. 18 - 19, on June 13, 2022, the zoning board administrator wrote to the Hoekstras that “if you are renting the travel trailer you are in violation of the Town of Sunapee’s Zoning Ordinance.” Appendix p. 3. On June 29, 2022, the Hoekstras appealed the zoning administrator’s decision. Appendix p. 5. The zoning board denied the appeal on July 19, 2022, stating,

For CASE #ZBA22-14: SEEKING AN APPEAL FROM AN ADMINISTRATIVE DECISION RELATING TO THE INTERPRETATION AND ENFORCEMENT OF THE ZONING ORDINANCE, SECTION 3.40, PROVIDES 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 DECISION OF THE ZONING ADMINISTRATOR DATED JUNE 13, 2022 TO BE REVIEWED. 25 MAPLE STREET

PARCEL ID: 0133-0104-0000

Has been DENIED

Appendix p. 14.

On August 10, 2022, the Hoekstras filed their request for a rehearing which the zoning board considered at its meeting on September 1, 2022. Appendix pp. 15-16. The zoning board denied the rehearing request. The decision stated:

Section 3.40(m)(2) of the ordinance states that 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.” It does not say that a travel trailer may be rented for transient occupancies. The board therefore determined after its hearing on July 19, 2022, that the use is not permitted.

Appendix p. 20.

SUMMARY OF THE ARGUMENT

The express language of the Town of Sunapee Zoning Ordinance permits travel trailers to be used for temporary sleeping quarters for “not more than 90 days per 12-month period.”

As a use permitted in all of the Town’s zoning districts, the travel trailer on the Hoekstras’ home property is subject to and complies with the additional requirements set forth in Section 3.40 of the Town’s Zoning Ordinance.

The Reliance on “Vacation” and “Transient” Use in the Housing Board’s Decision Is Erroneous and unsupported by the Record.

The Town has admitted that the Hoekstras “or any other property owners with a travel trailer, remain free to sleep in the trailer, or allow a friend, family member, or even a stranger to sleep in the trailer, for up to 90 days in a 12-month period, and they may receive compensation for that temporary use.”

The decisions of the Sunapee zoning board and the Housing Appeals Board are unreasonable and incorrect as a matter of law.

ARGUMENT

1. Standard of Review

Our review of the HAB’s decision is governed by RSA chapter 541... We will not set aside the HAB's order unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. The HAB's factual findings are presumed to be *prima facie* lawful and reasonable. When reviewing the HAB's findings, our task is not to determine whether we would have found differently or to rough the evidence, but, rather, to determine whether the HAB's findings are supported by competent evidence in the record ... When, as here, the HAB relied upon the record and made no independent factual findings, our review is limited to determining whether the record supports the HAB's decision.

Appeal of Chichester Commons, LLC 175 N.H. 412, 416 (2022).

The record and the language of the Sunapee Zoning Ordinance do not support the decision of the Housing Appeal Board or the Sunapee zoning board. The decision of the Housing Appeals Board is contrary to the express language of the 2022 Sunapee Zoning Ordinance, contradicts the stated position of the Town, and is unlawful and unreasonable.

2. The Sunapee Zoning Ordinance Permits Travel Trailers

The interpretation of a zoning ordinance is a question of law and requires the Court to determine the intent of the enacting body. *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 615 (2019). The Court uses “traditional rules of statutory construction” and “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.” *Id.*, at 615-616.

The parties all acknowledge that the Town of Sunapee 2022 Zoning Ordinance is a permissive ordinance, which “prohibits] all uses that are not expressly permitted, or incidental to uses so permitted, in the district in which a given property is located. Section

4.20, Sunapee Zoning Ordinance, Appendix p. 27. *See also, Working Stiff Partners*, at 616. The Sunapee Zoning Ordinance sets forth the traditional types of uses in Article IV of the Ordinance. Among the uses permitted in all zones in the Town are “accessory uses.” Appendix pp. 23-26. The right of the Hoekstras to maintain a travel trailer on their home property, which has not been questioned (Appendix p.10, line 311), is a customary and usual use incidental and subordinate to the residential use of the property. Appendix p. 28 “Accessory Uses.”

The Ordinance also includes “Additional Requirements” in Article III of the Ordinance. Within Article III, Section 3.40 provides that keeping a travel trailer on one’s property is, nevertheless, subject to certain “additional requirements” that limit the use and occupation of travel trailers, and states as follows:

(m) 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...

Appendix p. 21-22.

The Town argues and the decision of the Housing Appeals Board indicates that the Sunapee Zoning Ordinance is a “permitted use” ordinance and only those uses that are listed as permitted uses in section 4.10 of the Ordinance are permitted and that Section

4.20 prohibits all other uses. HAB 51-52. The Board and Town also argue that Section 3.40 does not create additional uses since it is titled “Additional Requirements” and not “additional permitted uses.” Town Objection to Motion for Reconsideration. HAB 65.

The Board’s decision and the Town’s argument overlook the fact that accessory uses are permitted in all zones in the Town and the maintenance of a travel trailer is a “use on the same lot that is customarily associated with, and incidental and subordinate to, the principal use of the lot.” “Accessory Uses” Sunapee Zoning Ordinance. Appendix p. 28. The ownership and maintenance of a travel trailer is a common adjunct to the ownership of one’s property recognized by the Town’s Zoning Ordinance. Like having a boat on one’s property as is common in Sunapee which is located on a lake, or motor vehicles, keeping a travel trailer at one’s home is a customary and usual accessory use and ownership of a consumer good. *Gaucher v. Cold Springs RV Corp.*, 142 N.H. 299, 302 (1997) (travel trailer is a consumer good). Although the keeping on of a travel trailer on one’s property is not listed among the Section 4.10 “uses,” Section 3.40(m) would be unnecessary were keeping a travel trailer not an accessory use to one’s home property.

While accessory uses are “permitted by right” in all of the zoning districts described in Section 4.10 of the Ordinance, the Town has elected to impose some limits on accessory uses and has included those limitations in Section 3.40 as authorized by RSA 674:16,V. That statute authorizes a municipality to enact zoning regulations and specifies certain ways that municipalities may regulate land uses. Section V of RSA 674:16 specifically refers to the regulation of accessory uses:

In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate and control accessory uses on private land....

Section 3.40 of the Sunapee Zoning Ordinance is such a provision that regulates and controls accessory uses on private land. Thus, if one intends to maintain a travel trailer as an accessory use on one’s property, the “additional requirements” stated in

Section 3.40(m) of the Ordinance apply. Any other reading of that section of the Zoning Ordinance, as has been argued by the Town, would render Section 3.40 superfluous. The clear and unambiguous language of Section 3.40 is that if one is to maintain a travel trailer on one's property as an accessory use, one may do so only as long as the "additional requirements" of Section 3.40 are satisfied.

Unlike the zoning ordinance in *Working Stiff Partners* which specifically excludes transient occupancies in dwelling units, *Working Stiff Partners*, 172 N.H. at 617, the Sunapee Zoning Ordinance places no limitation on whether the use of the travel trailer for "temporary sleeping quarters" may be occupied on a short-term or longer-term basis. The only "additional requirements" imposed on the maintenance of travel trailer are those included in Section 3.40(m)(2) of the ordinance that restrict occupancy to no more than 90 days within a 12-month period, and require septic compliance and compliance with building setbacks. The Zoning Ordinance also place no limits on the renting of one's property.

The right of the Hoekstras to maintain the travel trailer on their property has never been questioned. Appendix pp. 10, 15. The only objection raised by the zoning administrator, the zoning board and the Housing Appeals Board was that payment was charged for the use of the travel trailer. *Id.* Neither the Town nor the Housing Appeals Board has questioned the maintenance of the travel trailer on the owner occupied property and, as stated below, the Town has admitted that renting is, in fact, permitted.

3. Reliance on "Vacation" and "Transient" Use in the HAB's Decision Is Erroneous

The Housing Appeals Board's attempts to support the zoning board's decision by distinguishing "temporary" accommodation and "transient" accommodation - an attempt which is erroneous. In its incorrect focus on those terms, the Housing Appeals Board claims that the Hoekstras' argument "bypasses Sections 4.10 and 4.20 of the Ordinance" and that the Hoekstras are seeking to conduct a new use, namely a transient

accommodation. Order HAB p. 54. The Housing Board, however, fails to recognize or address that maintaining a travel trailer on one's home property is an accessory use expressly permitted by Section 4.10 of the Zoning Ordinance.

The Housing Appeals Board and the Town also claim that the Hoekstras seek to utilize Section 3.40 to conduct a new use - that is incorrect. That section does not create a new use, be it a transient occupancy or a temporary occupancy. Rather, that section establishes a limit on the length of occupancy in a travel trailer maintained on one's property, occupancy which is specifically permitted.

Section 3.40(m) of the Zoning Ordinance permits the occupancy of a travel trailer for up to "90 days per 12-month period." No restriction exists in the Ordinance that limits the type of occupancy - whether for vacation or temporary housing. Nothing in the Ordinance requires that occupancy be for only a day, or one week, or one a month, or for even the full 90 days. The Housing Board's decision further assumed, incorrectly, that offering the travel trailer for sleeping accommodations was for "short-term vacation rental for transient use." HAB p. 55. The Court in *Kudrick* stated that "[we, as opposed to the municipality, can no more add a durational requirement to a residential occupancy than we can to a restaurant or retail occupancy." *Town of Conway v. Kudrick*, Docket# 2022-0098. That same reasoning applies here. The travel trailer is available for temporary accommodation for any person desiring, or even in need of, housing for any temporary period of less than 90 days. The Housing Appeals Board's effort to distinguish transient from temporary is misleading in that it provides no basis to determine when the use of the travel trailer passes from transient to temporary, or in reverse.² The Board also incorrectly assumes that the use is limited to "vacation rental" which implies that a rental for a "non-

². The only use of the word "transient" in the Sunapee Zoning Ordinance occurs in the definitions of "bed & breakfast, tourist homes, inns, lodging & boarding" and "hotel and motel." Appendix pp. 28, 30. The former exist in an owner occupied residence with meals served to guests and the latter prohibit cooking facilities in the hotel/motel rooms. Neither of these definitions apply to the Hoekstras' travel trailer.

vacation” use would be permissible. Just as a durational requirement is inappropriate, a distinction between vacation accommodation and a non-vacation use is equally unsustainable and unreasonable.

4. **The Town Admits That Renting a Travel Trailer Is Permitted.**

The Housing Board notes that the Town claims that there is a “material distinction between transient sleeping accommodations and temporary sleeping quarters.” HAB p.55. However, despite that statement in the Board’s order, the Town has made it clear that the renting, *per se*, of the travel trailer is not a violation of the Ordinance. In the Town’s Pre-Hearing Memorandum it submitted to the Housing Appeals Board, the Town states that,

The town has not prohibited the applicants from renting their trailer; it has prohibited their renting it as a short-term vacation rental....
No one has said that “renting, as an activity,” is prohibited. Renting is not an activity - it is a financial relationship, and the Ordinance does not concern itself with financial relationships. It is correct, as the applicants have argued, that the Ordinance does not generally distinguish between owning and renting a property.

HAB pp. 41-42; Appendix pp. 35-36.

The Town repeated this approval in its Objection to Hoekstras’ Motion for Reconsideration, where the Town stated,

[The Hoekstras], or any other property owners with a travel trailer, remain free to sleep in the trailer, or allow a friend, family member, or even a stranger to sleep in the trailer, for up to 90 days in a 12-month period, and they may receive compensation for that temporary use. They are merely prevented from using the trailer as a short-term lodging business that is the functional equivalent of a hotel.

HAB p. 66; appendix p. 38.

The definitions in the Zoning Ordinance make clear that the use of the travel trailer is not a “hotel” since the Zoning Ordinance defines “hotel” as a building or group of buildings providing sleeping accommodations for

persons on transient basis. Meals may be served to guests but cooking facilities are not allowed in individual rooms.

Appendix p. 30.

The Town also sought to classify the travel trailer as a “tourist home” even though the definition of a “tourist home” requires rooms in a single family dwelling “with meals served to guests only,” neither of which occurs here. Appendix pp. 4, 28.

More appropriate to describe the Hoekstras’ travel trailer is the definition of a “dwelling unit” which is defined as,

One room, or rooms connected together, constituting a separate, independent housekeeping establishment for owner occupancy, rental or lease, and physically separated from any other rooms or dwelling units which may be in the same structure. For the purpose of this definition, an independent housekeeping establishment includes the following minimum attributes: space devoted to kitchen facilities for the storage, preparation and consumption of food (including counters, cabinets, appliances, and a sink for washing dishes), space for one or more bedrooms for sleeping, and a bathroom with a tub and/or shower.

Appendix p. 29.

The Hoekstras’ travel trailer has a kitchen, bedroom, bathroom and living area, for which the Hoekstras offer it “for rental or lease.” Appendix pp. 6-7.

If, as the Town acknowledges, the Hoekstras may offer the use of the trailer for sleeping accommodations and receive compensation for that use, then what remains of any objection by the Town? The Ordinance is clear that accessory uses are permitted subject to the limitations set forth in Section 3.40. No objection has ever been presented to the Hoekstras for having the travel trailer on their property and maintaining that travel trailer on their property or that having a travel trailer on their property is not an accessory use to the primary residential use of their property. Any claim by the Town to the contrary is belied by the fact that the Town has previously approved the rental of a travel trailer. Appendix pp. 18 - 19. As for the renting of temporary accommodations, the zoning board’s Record includes nearly 100 pages of Airbnb rentals in the Town. Zoning Board

Certified Record pages 92 - 182.³

The Hoekstras have complied with Section 3.40 of the Ordinance which imposes limitations on their use of the travel trailer, prohibiting it from being used for sleeping accommodations for more than 90 days per 12-month period. The Town has admitted that receiving compensation for such use is permitted. The decision of the Housing Appeals Board is erroneous in that it contradicts the language of the Zoning Ordinance and the Town's stated position that receiving compensation for the use of the travel trailer for temporary sleeping quarters for not more than 90 days per-12 month period is permitted.

CONCLUSION

The only basis of the zoning board's decision was that renting a travel trailer was not permitted under the Ordinance. The zoning board acknowledged that travel trailers are permitted throughout the town and only the Hoekstras' rental of their travel trailer was not permitted. The Housing Appeals Board upheld that decision relying on the incorrect assumption that the trailer was used only for "short-term vacation rental for transient use." HAB p. 55.

Maintaining a travel trailer on one's property is a permitted use, one accepted by the Town. The only limits on such use are stated in Section 3.40. The Town acknowledges that the Hoekstras may receive compensation for the use of their trailer. That is consistent with the Zoning Ordinance which imposes no limits on renting one's property.

The decision of the Housing Appeals Board is unreasonable and erroneous and should be reversed. The decision of the Sunapee zoning board is unreasonable and illegal and should be reversed.

³ Due to the volume of these pages that contain advertisements for Airbnb rentals in Sunapee, they are not included in the Appendix but the pages may be reviewed in the paper copy of the ZBA Certified Record provided to the Court by the Housing Appeals Board.

REQUEST FOR ORAL ARGUMENT

The plaintiffs, Elizabeth Hoekstra and Peter Hoekstra, request that Barry C. Schuster, Esq., be allowed to present their oral argument before the Court.

I further certify, pursuant to Rule 16(3)(I), that the appealed decisions are in writing and appended to the brief.

Respectfully submitted:
Elizabeth Hoekstra and Peter Hoekstra
By their Attorneys:

September 27, 2023

By: /s/ Barry C. Schuster
Barry C. Schuster, Esq., Bar #2280
Schuster, Buttrey & Wing, P.A.
79 Hanover Street, P. O. Box 388
Lebanon, N.H. 03766
603-448-4780
barry@ivylegal.com

CERTIFICATION OF SERVICE

I, Barry C. Schuster, certify that on this 27th day of September 2023, I filed the foregoing Brief with the New Hampshire Supreme Court by using the NH e-filing system and caused a true copy of the foregoing Brief to be served on Cordell Johnston, Esq., counsel for the Town of Sunapee, by means of the court's electronic filing system.

/s/ Barry C. Schuster
Barry C. Schuster, Esq. #2280

CERTIFICATE OF COMPLIANCE

I, Barry C. Schuster, hereby certify that Plaintiffs-Appellants' brief complies with the word limitation prescribed by Rule 16(11) of the Supreme Court Rules, contains 3,538 words, excluding parts of the brief exempted by Sup. Ct. R. 16(11). This brief also complies with the typeface and type style requirements of Sup. Ct. R. 16(11), and has been prepared in font size 13, type style Times New Roman, with a line space setting of 1.5.

September 27, 2023

/s/ Barry C. Schuster
Barry C. Schuster, Esq. #2280

ADDENDUM TO BRIEF

CONTENTS

Housing Appeals Board Court Order - January 30, 2023 21

Interim Order on Reconsideration March 6, 2023 29

Order on Motion for Reconsideration - March 17, 2023 30

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
Visit us at <https://hab.nh.gov>

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

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD

Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
Visit us at <https://hab.nh.gov>



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

INTERIM ORDER

On February 22, 2023, Peter and Elizabeth Hoekstra filed their Motion for Reconsideration. On February 27, 2023, the Town of Sunapee filed its Objection to such motion. Consistent with RSA 541:5, and until further orders are issued, the Housing Appeals Board ("Board") SUSPENDS its January 30, 2023 decision (Order Number 2023-007) on the merits of the above-captioned appeal to allow the Board time to conduct a full and complete review of the arguments.

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

Elizabeth Menard

Elizabeth Menard, Clerk

Date: March 6, 2023

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
Visit us at <https://hab.nh.gov>

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

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:**

A handwritten signature in blue ink that reads "Elizabeth Menard".

Elizabeth Menard, Clerk

Date: March 17, 2023