(SEAL)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss.

13 MISC 480974 (KFS)

ROBERT S. LYTLE, as TRUSTEE OF 119 BEACH AVENUE REALTY TRUST,
Plaintiff
v.

ALANA SWIEC, ROGER ATHERTON, and MARK EINHORN, as they are MEMBERS of the ZONING BOARD OF APPEALS OF THE TOWN OF HULL, and the TOWN OF HULL,
Defendants
and
MARK GLADSTONE, DEBRAH GLADSTONE, CHARLES SCHAFFER, GAIL NUTTER, RICHARD COCHRAN, and ELLEN KEANE,
Intervenors[1]

DECISION DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert S. Lytle, as Trustee of the 119 Beach Avenue Realty Trust (Plaintiff) initiated this action on December 12, 2013, pursuant to G. L. c. 40A, §17, and G. L. c. 231A, appealing a decision of the Zoning Board of Appeals of the Town of Hull (Board), whose members are Defendants. In that decision, the Board denied Plaintiff's appeal from a Violation Notice issued by the Hull Building Commissioner which directed Plaintiff to cease and desist from his use of a single-family dwelling unit "for transient rental purposes/uses and/or

[1] Intervenors reside or own property abutting Plaintiff's property. The court permissive intervention pursuant to Mass. R. Civ. P. 24(b), on July 1, 2014, and the parties' subsequently filed "Defendants' Assented to Motion to File Amended Answers, Defenses and Counterclaims."

business/commercial use" in violation of the Hull Zoning Bylaw. The Board upheld the Violation Notice (Decision), and this appeal followed, seeking annulment of the Decision under G. L. c. 40A, §17, and a declaration pursuant to G. L. c. 231A, that Plaintiff's "use of a single family dwelling at Locus for weekly rentals to an individual or single family tenant is allowed as of right under . . . the Bylaw."[2]

A hearing on the parties' motions for summary judgment was held on July 13, 2016, at which all parties were heard. The summary judgment record includes the Bylaw, affidavits of Justine Augenstern, a Hull resident and real estate broker; and Robin S. Glazier, on behalf of Plaintiff; and affidavits of Peter Lombardo, the Building Commissioner; Hull residents, Donald F. Brooker, Donna Sullivan, David Smookler, Richard Cleverly, and Nancy Allen; and Joyce Sullivan, Hull's Director of Public Health, on behalf of the Board and Town. The following material facts are not in dispute and are established by the record, by stipulation or otherwise.

1. Plaintiff Robert S. Lytle, as Trustee of the 119 Beach Avenue Realty Trust u/d/t dated March 25, 2011, recorded with the Plymouth County Registry of Deeds (Registry) in Book 39781, at Page 284, is the owner of property known as and numbered 119 Beach Avenue in Hull (Locus), by deed dated March 25, 2011.

2. Defendant Town of Hull (Town) is a municipal corporation having its principal municipal offices located at 253 Atlantic Avenue in Hull.

3. Defendants Alana Swiec, Roger Atherton and Mark Einhorn were individual members of the Board at the time this case was filed.[3]

4. The use of the building on Locus for two residential dwellings is grandfathered as a legal pre-existing use in the "Single Family Resident District A," as shown on the Building Zone Map of the Town, and subject to the provisions of the Bylaw.

---

[2] This is one of two related cases in which two different plaintiffs appealed decisions of the Board upholding Violation Noitce issued by the Commissioner. Both Plaintiffs received notices ordering them to cease and desist from allegedly using a single-family dwelling for "transient rental purposes . . . and/or a business/commercial use" in violation of Section 31 of the Bylaw. The related case, Nantasket Real Estate, LLC v. Members of the Bd. of Appeals of the Town of Hull, 14 MISC 481299 (KFS) was stayed on September 30, 2016, at the request of the parties, pending resolution of this case.

[3] The named individual members are no longer on the Board.

5. When Plaintiff purchased Locus in 2011, one of the two dwellings was already in use for weekly summer rentals by the prior owner, Mary L. Morley. Ms. Morley and Plaintiff agreed in their purchase and sale agreement that Morley would assign to Plaintiff all existing rentals for the summer of 2011.[4]

6. Since the purchase of Locus, Robert S. Lytle (in his individual capacity) has occupied one unit as his primary residence. Plaintiff, as Trustee, rents the second unit, with a minimum rental period of one week.

7. As Trustee, Plaintiff conducts the rental business under the name "Nantasket Beach Rentals," though the Hull Town Clerk does not have a "doing business as" (d/b/a) certificate on file from Plaintiff.

8. Nantasket Beach Rentals requires its renters to sign a "Nantasket Beach Rental Agreement," establishing terms and conditions such as check-in and check-out times, length of minimum stay, and maximum number of guests, among other things. Under the Rental Agreements, Nantasket Beach Rentals provides renters with linens, and bath and beach towels during their stays. There is no maid service provided.

9. Plaintiff does not hold any type of permit authorizing any of the following uses at Locus: bed and breakfast, hotel, motel, lodging/rooming house or guest house operation.

10. For an undetermined period of time, no complaints relating to noise, congestion, public nuisance or other public disturbances associated with Locus were recorded by the Hull Police or by the Hull Building Commissioner. At some undetermined point, the Commissioner received one or more complaints about Plaintiff's weekly seasonal rental of his second unit at Locus, asserting that such use was not permitted under the Bylaw.

11. The Commissioner issued a Violation Notice to Plaintiff on September 19, 2013. The Notice stated "one of the family units at [Locus] has been and/or is being used and/or made available for *transient rental* purposes/uses and/or business/commercial use," in apparent violation of Section 31 of the Bylaw.

12. The Violation Notice did not define "transient rental," and that term does not appear in the Bylaw.

13. On October 17, 2013, Plaintiff appealed the Violation Notice to the Board. A hearing was held November 21, 2013, at which the Board (by a 2 to 1 vote) denied Plaintiff's appeal and sustained the Violation Notice. The Decision was filed with the Town Clerk on December 5, 2013, and this appeal followed.

[4] The summary judgment record does not establish facts regarding how long the second dwelling unit had been rented on a weekly basis.

Bylaw Provisions Considered Legally Relevant By One or More of the Parties

14. According to Bylaw Section 1-1:

> "[t]he purpose of this bylaw is to promote the health, safety, convenience, morals or welfare of the inhabitants of the Town of Hull by regulating and restricting . . .
> a. The height, number of stories and size of buildings and structures. . .
> f. [A]nd the location and use of buildings, structures and land for trade, industry, agriculture, residence or other purpose under the Powers authorized by Chapter 40A (the Zoning Act) of the General Laws of the Commonwealth of Massachusetts and any amendments thereof."

15. Under Section 21-1(b) of the Bylaw, defining certain words and phrases, "[t]he word 'building' includes 'structure' and shall be construed as being followed by the words 'or part thereof;' the word 'occupied' includes the words 'designed, arranged or intended to be occupied." *Where the word 'use' is employed,* it shall be construed as if it was followed by the words, 'or is intended, arranged, designed, built, altered, converted, rented or leased to be used.'" (italics added).

16. Section 22-1 of the Bylaw provides: "[u]nless otherwise expressly stated, the following italic words and phrases appearing in this zoning bylaw shall have the meanings indicated by tried definitions immediately following in this section. *Words and phrases not defined in this article, but defined in the Massachusetts State Building Code, 780 CMR, shall have the meanings given in that code. Words and phrases not defined in either this article or the Code shall have the meanings as defined in the American Heritage Dictionary of the English Language."* (Italics added.)

17. Under Section 22-1, an "Accessory Building or Use" is defined as "[a] building or use on the same lot with, and *clearly incidental and subordinate* to the principal use or structure.... " (italics added.)

18. Under Article III, Section 30-3(d) of the Bylaw: "[e]xcept as provided in Massachusetts General Laws, Chapter 40A, or in this bylaw, no building, structure or land shall be used except for the purpose(s) permitted in the district as described in this section. *Any use not listed shall be construed to be prohibited.*" (italics added.)

19. Bylaw Section 31-1 lists uses permitted as-of-right in all Single-Family Residence Districts. It also sets forth, in section 31-1(d) certain allowed accessory uses customarily incidental to a permitted main use on the same [Single-Residential] premises.

20. The Bylaw is silent with respect to any minimum rental periods for single-family dwellings within the Single-Family-A Residential District.

* * * * *

"Rule 56(c) of the Massachusetts Rules of Civil Procedure . . . provides that a judge shall grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Attorney General v. Bailey, 386 Mass. 367, 370-71 (1982) (citations omitted). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that the record entitles it to judgment as a matter of law. Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 711 (1991). Evidence submitted is viewed in the light most favorable to the non-moving party. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

I. G. L. c. 40A (The Zoning Act), § 17

The court's review of the Decision pursuant to G. L. c. 40A, § 17, "involves a 'peculiar' combination of de novo and deferential analyses[.] Although fact finding . . . is de novo, a judge must review with deference legal conclusions within the authority of the board." Wendy's Old Fashioned Hamburgers of N.Y. v. Bd. of Appeal of Billerica, 454 Mass 374, 383 (2009), quoting Pendergast v. Bd. of Appeals of Barnstable, 331 Mass. 555, 558 (1954). Without giving evidentiary weight to a board's factual findings, the decision of a board "cannot be disturbed unless it is based on a legally untenable ground, or is based on an unreasonable, whimsical, capricious or arbitrary exercise of its judgment in applying land use regulation to the facts as found by the judge." Id., at 381-382, citing MacGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 639 (1970).

Local zoning boards also have some discretion in interpreting their own zoning bylaws. Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley, 461 Mass. 469, 470 (2012); Wendy's, 454 Mass at 383. The deference owed by a reviewing court is justified because of a board's

"special knowledge of 'the history and purpose of its town's zoning by-law.'" Wendy's, 454 Mass. at 383, citing Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 669 (1999). A judge must give "substantial deference" to the board's interpretation. Id., citing Manning v. Boston Redev. Auth., 400 Mass. 444, 453 (1987). However, incorrect or unlawful interpretations of a bylaw are not afforded deference. Shirley Wayside Ltd. P'Ship, 461 Mass. at 475.

a. Bylaw Interpretation

The terms and phrases contained in a bylaw should be interpreted in the context of the by-law as a whole and, "to the extent consistent with common sense and practicality, they should be given their ordinary meaning." Hall v. Zoning Bd. of Appeals of Edgartown, 28 Mass App. Ct. 249, 254 (1990). The court also looks to the intent of the local legislative body, which is controlling, and construes the by-law's provisions to effectuate the municipality's intent in adopting it. King v. Zoning Bd. of Appeals of Chatham, 30 Mass. App. Ct. 938, 940 (1991). A by-law's intent is determined by analyzing the terms, provisions and subject matter to which it relates. Where its language is clear and unambiguous, no further interpretation is necessary. Murray v. Bd. of Appeals of Barnstable, 22 Mass. App. Ct. 473, 478 (1986).

b. The Board Erred In Using Sources Outside The Bylaw To Define "Use" And "Transient."

Plaintiff resides in a lawful pre-existing two-family dwelling located in the Single Family-A Residential Zoning District. Each of the two units constitutes a single-family dwelling, which is attached to the other, and it is the two-family use of Locus that the parties agree is legally grandfathered. Bylaw Section 31-1 lists uses allowed in this residential zoning district. The Section does not mention rental use of single-family residential dwellings. The Commissioner, however, issued a Violation Notice for Plaintiff's illegal rental of one unit on

Locus as a "transient rental." In reasoning through whether the Commissioner acted properly, the Board looked to and incorporated definitions from sources outside the Bylaw to define a "transient rental" as a rental for less than thirty days. It also sought to define "use" by reference to sources outside the Bylaw.

Bylaw Section 22-1 directs the Board to the Massachusetts State Building Code (Building Code) for guidance on interpreting terms the Bylaw itself does not define: "[w]ords and phrases *not defined in this article*, but defined in the Massachusetts State Building Code… shall have the meanings given in that code." (Italics added). The Board relied on the Building Code, which itself incorporates the International Building Code and International Residential Code for One and Two Family Dwellings for guidance on the terms "transient" as well as "use." As a result of that analysis, the Board determined that "transient" is defined as the "occupancy of a dwelling unit or sleeping unit for not more than 30 days." See Building Code, 780 CMR § 310.2, and therefore upheld the Commissioner's determination that one-week rentals are not permitted in the Single-Family-A District.

However, the Board's analysis is not supported by the Bylaw. There was no reason to turn to the Building Code for the definition of the word "transient" as that word does not appear in any applicable Bylaw provision regarding residential uses, and where the word "transient" does appear, it does not inform the question before the Board and this court.[5] While the rules of statutory interpretation provide undefined words in a statute be given their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose, see Commonwealth v. Gove, 366 Mass. 351, 354 (1974), terms that do not appear in the Bylaw

[5] The Bylaw references "transient boats" in the Waterfront District in Section 33-1, and "transient patrons" in a Flexible Plan Development in Section 43-2.

cannot simply be added. Apparently, the Board focused on the word "transient" because that is the word the Commissioner used in the Violation Notice. See fact par. 11, above.)

The Board also argues that "use" required further definition from the Building Code and other outside sources. This analysis fails for a different reason. Under Section 21-1(b), "use" is unambiguously defined in the Bylaw: "[w]here the word 'use' is employed, it shall be construed as if it was followed by the words, 'or is intended, arranged, designed, built, altered, converted, rented or leased to be used.'" This definition is clear, and the word "use" cannot be categorized as "not defined," requiring additional clarification by reference to its meaning in the Building Code.

II. Plaintiff's Rental Use Is Not An Accessory Use But Was Operated As A Commercial/Business Use.

Plaintiff argues that even if short term rentals are not an allowed use in the Single-Family-A Residential District, his rental of the second dwelling at Locus is allowed as an accessory use pursuant to Section 31-1(d) of the Bylaw. However, that reasoning ignores the definition of "accessory" set forth in Section 22-1. Under that section, a use which is "*clearly incidental and subordinate* to the principal use or structure ... shall be considered an accessory use." He argues that seasonal weekly rentals are a customary practice for many homeowners in Hull. Whether that is so remains undetermined and beyond the scope of this summary judgment motion and the record. However, the Board properly determined that Plaintiff's short term rental use of one dwelling unit on Locus is not allowed as an accessory use to Plaintiff's primary residence.

The Violation Notice included the Commissioner's determination that Plaintiff's use constituted a business and/or commercial use. The Board, in the final point of its Decision, adopted the words of the then-Chairperson:

> "I am going to default back and agree with [the Commissioner] that *unless the use is specifically authorized and stated (in the bylaws), it is therefore excluded* . . . . Nothing convinced me that this one particular activity at this particular address is included in the language we have available to us." (Italics added).

This reasoning tracks with Bylaw Section 30-3, that any use not specifically listed in the Bylaw is deemed prohibited. While the Board stopped short of explicitly defining or categorizing Plaintiff's use, it determined that Plaintiff's weekly seasonal rentals are prohibited because such use is not specifically allowed, is inconsistent with single-family use, and is not otherwise allowed as an accessory use.

This court limits its determination, as did the Board, to this particular property, without considering the still-heavily disputed allegations as to the custom and practice throughout Hull raised as an issue in this and the related case. The issues remaining in this case are indicative of the tensions in Hull and other municipalities between property owners utilizing shared hotel and accommodation applications, such as Airbnb, HomeAway, or, in this particular case, Vacation Rental By Owner (VRBO), and their neighbors, town, zoning boards, and others concerned with short-term rentals in residential zoning districts. Here, the Board determined that Plaintiff is essentially operating a commercial enterprise in a single-family residential zone and further determined Plaintiff's weekly rental use is inconsistent with the purpose of a single-family residence district, even if the use of Locus is grandfathered as a lawful, pre-existing two-family dwelling.

While this court does not adopt all of the Board's analysis, this court must uphold the Board's decision if it determines, which this court does, that the Board's ultimate conclusion is supported by the facts presented on this summary judgment record. This court finds the Board's Decision was not arbitrary, capricious, whimsical or unreasonable and should be affirmed.

Accordingly, Plaintiff's Motion for Summary Judgment is **DENIED**, and Summary Judgment is **GRANTED** to Defendants. The Decision to uphold the Commissioner's issuance of a Violation Notice is **AFFIRMED**. The Board's request for injunctive relief is **GRANTED** to the extent Plaintiff may not rent the second dwelling unit at Locus for weekly periods. The court declines to set any minimum rental period, as that question is beyond the scope of this summary judgment motion, and the court did not agree with the Board's analysis that the Bylaw inferentially mandates a minimum rental period of thirty days by incorporating the definition of the word "transient" from the Building Code.

Under the remaining counts of the complaint, Plaintiff seeks a declaration against the Town that the Decision is a "de facto effort to amend the provisions of the [Bylaw] without clearly prescribed statutory procedures mandated by G. L. 40A, § 5" (Count Five), and constitutes "a violation of equal protection and a deprivation of a protected property interest without due process of law, in violation of the 14th Amendment of the United States Constitution and of substantive rights of due process available under applicable law in the Commonwealth of Massachusetts" (Count Six). These counts were not pressed at summary judgment, and are not determined here.

The parties should report to the court on or before June 9, 2017, whether they will proceed further with respect to the counts not disposed by this decision. If they do not intend to do so, or if the court does not receive guidance from the parties timely, the court will issue a judgment affirming the Decision and dismissing the case.

Karyn F. Scheier
Justice

Date: May 23, 2017