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July 13, 2016

City of Portland
ATTN: Anne Machado
389 Congress Street
Portland, ME 04101

Re: Feddersen NOV - 481 Danforth Street – 71-A-1 (the "Property") – R-4 Residential Zone – Alleged Violation – Unauthorized Rental to "Transient Guests"

Dear Ms. Machado:

This Opinion supplements my Application for Interpretation in response to the enforcement action. The Notice of Violation dated May 25, 2016 orders that 481 Danforth Street (which is located in the R-4 Residential Zone, and is a 3-unit multifamily dwelling) must be used *exclusively* for residential occupancy by families", and not rented short-term, by what she calls "transient guests".

The Petitioner disagrees. This Appeal submits that for an owner occupied residence in the residential zone, a short-term rental or guest stay is accessory to a residential use.

The Zoning Administrator references, §14-47, which defines the term "dwelling" among other terms as: "Not more than sixteen (16) individuals living together in a dwelling unit as a single nonprofit housekeeping unit…" "Transient Guest" is defined as "A person who occupies a facility offering accommodations on an overnight basis for compensation and whose actual occupancy is limited to no more than fifteen (15) days out of any sixty-day period". (§14-47). The Administrator asserts that "Because the rental of residential dwelling[1] units to someone for fewer than 15 days out of a sixty-day period constitutes a rental to "transient guests" rather than to a family, such rentals are not permitted in the R-4 zone (§ 14-102)." The Administrator apparently relied upon the definition of "*Transient guest*": A person who occupies a facility[2] offering accommodations on an overnight basis for compensation and who actual occupancy is limited to no more than fifteen (15) days out of any sixty-day period").

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[1] The NOV does not assert that any existing dwelling unit at 481 Danforth Street is unlawful, only that the short term use is unlawful. Assuming the use of the term dwelling in the Ordinance implies any degree of permanence, it would be the physical permanence of the structure that would be implied (see Your Home, Inc. v. City of Portland, 432 A.2d 1250, 1254 (Me. 1981)), not the permanence of the occupants of the building, who could be living there. A dwelling could be occupied by the owner, a month to month tenant at will, a weekly renter, or an overnight renter.

The NOV is in error in several material respects:

1. The NOV does not consider the fact that §14-102 permits accessory uses In the R-4 district[4], and that the rental of a dwelling unit on an opportunistic basis when not occupied by the owner is a customary and subordinate activity relating to ownership.

2. The NOV relies upon the limitations applicable to *transient guests*, although those limitations apply to hostels, and rooming units *within* a dwelling unit. The limitation does not apply to the rental of an *entire* dwelling unit, as was the short term rental at 481 Danforth Street. Although §14-404(e) states that: "The term *accessory use* shall include only the letting of rooms *within* an existing dwelling unit in certain limited cases, these limitations are directed at the maximum number of occupants and rooms let within a dwelling unit. They do not apply to the renting of the entire dwelling unit on less than a month to month basis, as occurred here. Since the alleged violation was the rental of an entire dwelling unit, §14-404(e) is not relevant. *See* Fruchter v. Zoning Bd. of Appeals of Town of Hurley, 133 A.D.3d 1174, 20 N.Y.S.3d 701 (3d Dep't 2015) (determining that since the short-term rental of a home did not fall under the definitions of "bed and breakfast" or "hotel", such short-term rental of the dwelling unit was allowable); Atkinson v. Wilt, 94 A.D.3d 1218, 941 N.Y.S.3d 798 (3d Dep't 2012) (annulling as irrational the zoning board of appeals' finding that a short-term rental of an entire home violated the zoning code). Additional authority can be found at 2 Rathkopf *The Law of Zoning and Planning* § 23:4 (the d.). It is evident that the limitations on rental activity among the various definitions of §14-47 were intended to apply to definitions for bed and breakfasts, hostels, and comparable rooming house activity (to certain irrelevant substantive provisions, as in §14-136), and not to the activity described in the NOV.

3. The NOV failed to consider that at common law the owner of property to rent owner property on such terms as the owner may choose, that the Portland zoning ordinance is in derogation of that right, and that such ordinance must be strictly construed.[5]

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[2] The term *facility* is not defined. However, a *dwelling* unit is defined, as a "self-contained dwelling unit". Although a dwelling unit could be a *facility* if rooms were let separately to guests, that is not the case here, as the entire unit is let, to a group of persons within the definition of a family, but on a short term basis.

[3] As a NOV asserts that the short term use of the dwelling unit is "unauthorized", it is possible that the Administrator mistakenly believed that these short term rentals were within the definition of a *hostel* or a *bed and breakfast* or another definition of an activity involving short term residential occupancy requiring *authorization*.

[4] §14-102(b)(3) lists "Accessory uses customarily incidental and subordinate to the location, function, and operation of principal uses, subject to the provisions of section 14-404 (accessory use) of this article" among the permitted uses in the district.

[5] As a general rule, the owner of land in fee has the right to use the property for any lawful purpose, and any claim that there are restrictions upon such use must be clearly established. Limitations or restrictions by implication are not favored, and must be strictly construed. Jordan v. Orr, 209 Ga. 161, 71 S.E.2d 206, 207 (1952); Shoaf v. Bland, 208 Ga. 709(2), 69 S.E.2d 258 (1952) Town of Union v. Strong, 681 A.2d 14 (Me. 1996).

The concurring opinion of Justice Bench in Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207, 212 (Utah Ct. App. 1998) is particularly on point:

> "Despite Sandy's ability to pass an ordinance to restrict short-term leasing, as discussed above, we must construe existing zoning ordinances strictly against the city. Thus, we must conclude that short-term leases of residential properties are not prohibited by the zoning ordinance. §§15-7-3(a) and 15-7-5(a) of the Code "represent [only] the broad goal sought to be achieved by the [city] in enacting regulations governing" uses of properties in these zones. [citation omitted]. Through the purpose declaration, Sandy explained what its goal was in establishing the residential zones. It then enumerated specific regulations to meet that goal. "By satisfying the actual regulations enumerated in §§15-7-3(b)(2) and 15-7-5(b)(2)] the [use of the properties] has mete the legal requirements of th[ose] section[s]," *id.* (emphasis added, and thus, met the general purpose of the statute. Although we recognize that short-term leases *may* disrupt the residential environment of a neighborhood in some instances, by failing to prohibit short-term leases, Sandy City has implicitly determined that such practices are conducive to a residential environment. In other words, "[w]e will not find a violation of law simply because [the permitted use may appear] inconsistent with the general intent statement.... when [the use] is in compliance with the substantive provisions of the ordinance").

The Administrator also assumed that the occupants she has prohibited would not qualify as *families* under the Ordinance. They could well be families visiting Portland, or persons awaiting the availability of longer term housing. Finally, the question is not whether the City of Portland could or should prohibit the short term rental of dwelling units, but whether it has actually done so in its Zoning Ordinance (with the intent to prohibit short term rentals).

CONCLUSION

The NOV raises the question of whether the short term rental of an otherwise lawful dwelling unit is prohibited by the Portland City Code, merely because a rental period of the dwelling unit falls within a limitation in the definition of *transient guest* in §14-47. The limitations in the definition of *transient guest* and/or §414-404(e) are irrelevant to Mr. Feddersen's short term rentals of an entire dwelling unit. If there was any intention to prohibit the short term rental of entire dwelling units, this intention was very poorly expressed in the ordinance. Any reasonable construction of the Portland Zoning Ordinance under applicable rules would not prohibit such rentals. The City Code does not prohibit short term rental of entire dwelling units (as an accessory use), as it is expressly made a permitted activity in the R-4 zoning district.

Please advise if you have any questions concerning the above.

Regards,

Paul S. Bulger

PSB/cmk

cc: Kenneth Thomas