

THE STATE OF NEW HAMPSHIRE

City of Keene

Zoning Board of Appeals

ZBA 18-18

MOTION FOR REHEARING

Now comes Hundred Nights, Inc. by and through counsel, John P. Rab, Esq., and moves the board to rehear its decision denying an appeal of an administrative decision and in support thereof, states as follows:

On August 30, 2018, in response to a request that the use of the Hundred Nights Homeless Shelter be defined a hotel rather than a lodging house for purposes of the City of Keene Zoning ordinance, the Zoning Administrator issued a written decision determining that “based on the current use and configuration, the Hundred Night Shelter is considered to be a Lodging House under the City’s Zoning Ordinance, and not a hotel.” The within appellant timely filed an appeal pursuant to RSA 674:3 I (a) (1) which provides:

- (a) The zoning board of adjustment shall have the power to:
- (1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16.

On October 1, 2018 the Zoning Board of Adjustment did not take testimony on or make a decision with respect to the merits of the appeal. Rather, it summarily denied the appeal on jurisdictional grounds “because there was no enforcement action by the Zoning Administrator and based on the Zoning Ordinance before the Board” (emphasis added). In its short deliberation the board characterized the appeal as a request to render an “advisory opinion” and apparently relied on the holding of Perron v. City of Concord, 102 N.H. 32 (1959).

For reasons set-forth below, the decision of the Zoning Board of Adjustment denying that it had authority and jurisdiction to hear the appeal is unlawful and unreasonable mandating that the board rehear the matter.

It is settled law that the Zoning Board of Adjustment is without authority to render an advisory opinion concerning the meaning of a zoning ordinance or its application to a particular set of circumstances, but has jurisdiction to interpret the zoning regulations upon an appeal from an interpretation of the ordinance by the Zoning officer. Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 22, Powers of ZBA, Sec. 22.02; 4P. Salkin, Anderson’s American Law of Zoning, Sec. 40.5 (5th ed). It is clear that the board of adjustment decides cases where a claim is made that the

administrative official has incorrectly interpreted the terms of the ordinance such as a district boundary or the exact meaning of an article or a term. Decisions made by the administrative officer involving what the ordinances says and means are appealable. NH Office of Strategic Initiatives, Zoning Board Handbook (2017), II-2 & II-3.

The board's reliance on Perron v. City of Concord, 102 N.H. 32 (1959) was misplaced and an error of law. That case involved an appeal of an administrative officer's decision that a proposed office use was not an accessory use within the zoning ordinance. The applicant appealed that decision to the ZBA and also sought a ruling "as to what parts of the application are considered proper and what parts are considered improper." The board ruled on the office use issue but declined to issue an advisory opinion as to what is proper and what is not. The board's decision was upheld by the Superior and Supreme Court. That case did not involve an "enforcement action by the Zoning Administrator." Rather it involved, as in the present matter, an appeal of an interpretation of the ordinance by the zoning administrator. The Supreme Court ruled that "While the board is authorized on appeal to make such orders or decisions as ought to be made. . . its duty did not extend to the rendition of an advisory opinion and was satisfied by its finding that the requested use was not an accessory use within the ordinance". As applied to the appeal of Hundred Nights it is clear that the appeal is an appeal of a decision made by the Zoning Administrator and not a request for an advisory opinion.

The implicit finding that there must be a preceding "enforcement action" in order for the board to have the jurisdiction to hear an appeal of a decision made by the Zoning Administrator is also an error of law. RSA 674:16 only requires that the decision be "made by an administrative officer in the enforcement of any zoning ordinance. . ." Implicit in the board's decision is the notion that enforcement of an ordinance must include affirmative action of some sort such as the issuance of a cease and desist order or the denial of a requested permit. Such notion is not legally sustainable.

Words and phrases of an ordinance should be construed according to the common and approved usage of the language. Anderson v. Motorsport Holdings, LLC, 155 N.H.491 (2007); Harrington v. Town of Warner, 152 N.H. 74 (2005). "Enforcement" is the "carrying out of a mandate or command." (Blacks Law Dictionary, 6th ed. 1990, p. 528, Col. 2), Merriam-Websters Collegiate Dictionary defines "enforce" in the legal context as "to carry out effectively." Websters Unabridged 2nd ed. defines enforce as "to put and keep in force". . . "as in to enforce a rule." Websters New International defines enforce "as to put in force; to cause to take effect; to give effect to; to execute with vigor". . . "as to enforce the law." Under RSA 676:5 (11) (b). "A decision of an administrative officer includes any decision involving construction, interpretation or application of the terms of the ordinance." It does not necessarily need to be in the context of an "enforcement action." An administrative decision interpreting an ordinance carries out, puts into force, or gives effect to the terms of the ordinance.

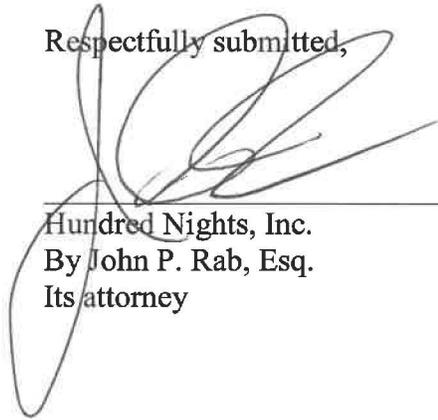
Issuing a decision involving construction, interpretation or application of the terms of the zoning ordinance is "enforcement" of the zoning ordinance under the

common and approved usage of the definition of “enforce.” The issuance of the decision of the zoning administration in this matter was clearly made in “the enforcement” of the ordinance. The institution of an “enforcement action” is not required in order to vest jurisdictional authority for the ZBA to consider the within appeal. To hold otherwise, denies the appellant any right to appeal a decision of the Zoning Administrator which materially affects the shelter’s present and future operation and existence.

Wherefore, it is respectfully requested that this board rehear its decision that it lacks authority and jurisdiction to consider the appeal.

Dated: October 30, 2018

Respectfully submitted,



Hundred Nights, Inc.
By John P. Rab, Esq.
Its attorney