TOWN OF WEATHERSFIELD

LAND USE ADMINISTRATOR'S OFFICE

(802)674-2626 P.O. BOX 550 ASCUTNEY, VT 05030 landuse@weathersfield.org

Planning Commission Agenda
Martin Memorial Hall – 5259 Route 5, Ascutney, Vermont 05030
Monday, 22 March 2021 – 6:30 PM

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1. Call to Order
2. Agenda Review – 22 March 2021
3. Comments from the Board and Land Use Administrator
4. Comment from Citizens regarding items not on the agenda
5. Approval of Meeting Minutes – 8 March 2021
6. Hearing on Subdivision regulation amendment proposal re: statute of limitations for open subdivision hearings
7. Hearing (cont.) on 2017 Future Land Use definitions/zoning districts
    a. RR-1
    b. Perkinsville Village area
    c. Airport
    d. RRR 3-5
8. Discussion of fees for *Bianchi* letters
9. Discussion of Gasoline/service stations – conditional use Section 7.14
10. Discussion of short term housing and stay limits for motels, hotels and transient housing
11. Discussion of Items for Future Agendas
12. Any other business that can be legally discussed
13. Adjourn

The next regularly scheduled meeting of the Planning Commission will be **Monday, April 12, 2021 – 6:30 PM**, Martin Memorial Hall.

Due to public demand and COVID-19; the Town has changed its public meeting platform from GoToMeeting to Zoom. For computer access, please go to this website, where you will find instructions and links to the meeting: https://www.weathersfieldvt.org/home/news/public-meetings-zoom

To join any public meeting via phone, dial (929) 205-6099. When prompted, enter meeting ID 542-595-4364. You will not have a participant ID. Please press # when prompted to skip this section. The passcode for all meetings is 8021.

Planning Commission
Martin Memorial Hall
5259 Route 5, Ascutney VT
Planning Commission Meeting Minutes
Monday, March, 8, 2021 7:00 PM

Planning Commission Members Present:
Paul Tillman
Tyler Harwell
Michael Todd
Howard Beach
Chris Whidden, Zoning Administrator

1.) Call to Order by Chris Whidden at 7:06pm

2.) Agenda Review – March, 8, 2021

No changes at this time.

3.) Reorganization of the Commission

Paul Tillman made a motion to appoint Howard Beach for Chair.
No Discussion
Vote – unanimous

Michael Todd made a motion to appoint Paul Tillman for Vice Chair.
No Discussion
Vote – unanimous

Chris Whidden made a motion to appoint Michael Todd as Clerk.
Chris Whidden withdrew motion.

Michael Todd made a motion to appoint Tyler Harwell as Clerk.
No Discussion
Vote – unanimous

Chris Whidden made a motion to appoint Chauncie Tillman as Recording Secretary.
No Discussion
Vote – unanimous

Paul Tillman made a motion to hold Planning Commission meetings on the 2nd and 4th Monday of every month, pending Holidays, at 6:30 PM at Martin Memorial Hall in Ascutney, VT.
No Discussion
Vote – unanimous

4.) Comments from Chair and Land Use Administrator

Howard Beach thanked Paul Tillman for his work as the Chair over the past year.

5.) Comments from Citizens regarding items not on agenda.

Tyler Harwell suggested that the Planning Commission invite the Conservation Commission to review the Land Use Map.

6.) Approval of Meeting Minutes 2-22-21

Michael Todd made a motion to accept the minutes of 2-8-21
Paul Tillman – 2nd
No Discussion
Vote - unanimous

7.) Hearing on Subdivision Regulation Amendment Proposal re: Statute of Limitation for Open Subdivision Hearings

There was a question if we opened a hearing on the Board decision. No, the Planning Commission did not. The next step would be to warn a hearing.

8.) Discussion 2017 Future Land Use definitions/zoning districts

a. Industrial – done, see mark ups
b. RR1 – still in review. Look at the definition and meaning? Size?
c. Perkinsville Village area
d. Airport – See memo from Chris Whidden in Planning Commission packet.
e. RRR 3-5

Chris Whidden made a motion to table the remaining definitions until the next meeting on March 22, 2021

Paul Tillman – 2nd

9.) Discussion of gasoline/service stations – conditional use Section 7.14

Paul Tillman made a motion to table until next meeting, March 22, 2021.

Chris Whidden – 2nd

No Discussion

Vote – unanimous

10.) Discussion of items for Future Agendas

Michael Todd wanted to add definitions on Small Hotel/Air B&B
ZBA

11.) Any other business that can be legally discussed
None

12.) Adjourn

Howard Beach made a motion to adjourn the meeting.
Michael Todd– 2nd
No discussion
Vote - unanimous
Meeting adjourned at 8:56 PM

Next Planning Commission Meeting is scheduled for Monday, March, 22, 2021 at 6:30 pm at Martin Memorial Hall.

Respectfully,
Chauncie Tillman
Recording Secretary

Planning Commission

Paul Tillman, Chair

Howard Beach, Vice Chair

Tyler Harwell, Commissioner

Michael Todd, Commissioner

TOWN OF WEATHERSFIELD

OFFICE OF THE LAND USE ADMINISTRATOR

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MEMORANDUM

TO: Weathersfield Planning Commission
FROM: Chris Whidden, Esq., Land Use Administrator
DATE: 12/21/2020
RE: Subdivision Regulation Amendment

After reviewing the Weathersfield subdivision regulations ("the regulation"), and in light of a recent hearing that was continued for several months, my office has come to the conclusion that an amendment to the regulation is necessary to protect the due process rights of interested parties as defined in the regulation.

Section 430.2 of the regulation governs hearings. 430.2.5 discusses the Planning Commission's right to recess hearings for applicants to obtain further information. However, this article does not define a statute of limitations for the applicant to respond to the Commission's request. Article 430.3 prescribes a 45-day window for the Commission to issue a decision. Thus, in interest of protecting the due process of interested parties, I hereby request this honorable Commission to amend section 430.2.5 to include "***Interested parties must respond to the Commission's request within 45 days of issuance. On the 46th day, the application will be deemed incomplete and dismissed without prejudice. This dismissal does not preclude the applicant from reapplying for the same subdivision at a later date, but not before the requested information is supplied in the subsequent application."***

If there are any further questions or concerns regarding this subdivision application, you can contact the Land Use Administrator at landuse@weathersfield.org or

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by calling the Town office at (802) 674-2626.

Sincerely,

Chris Whidden, Esq.
Land Use Administrator

Planning Commission Reporting Form for Municipal Bylaw Amendments

Town of Weathersfield, VT

Proposed amendments to the *Town of Weathersfield Zoning Bylaws*

This report is in accordance with 24 V.S.A. §4441(c) which states: "*When considering an amendment to a bylaw, the planning commission shall prepare and approve a written report on the proposal.*"

The above referenced proposed bylaws are summarized as follows:

1. **Brief explanation of the proposed bylaw, amendment or repeal; and a statement of purpose as required for notice under §4444 of this title**:

   The Planning Commission is considering an amendment to the subdivision regulations to limit the time that an applicant can keep a hearing open. Specifically, this amendment requires applicants to respond to requests for documents/information within 45 days, failure of which will result in the hearing being closed.

2. **How does the proposal conform with or further the goals and policies contained in the municipal plan, including the effect of the proposal on the availability of safe and affordable housing**:

   This amendment allows for hearings to be conducted in a more streamlined and time-sensitive process, and allows for the protection of the rights of interested parties. This conforms with the municipal plan in that it allows the plan to be carried forward in a more timely manner while protecting individual rights.

3. **Is the proposal compatible with the proposed future land uses and densities of the municipal plan**:

   Yes, the proposed amendment is consistent with the future land uses identified in the Town Plan because it allows development of parcels to take place in a more streamlined manner.

4. **How does the proposal carry out, as applicable, any specific proposals for any planned community facilities**:

   This proposal does not directly apply to any specific proposals for planning community facilities.

NOTICE OF PUBLIC HEARING

In accordance with the provisions of 24 V.S.A. §§ 4441(d) and 4444, of the Vermont Statutes Annotated, and in consideration of the stay at home guidelines in STATE OF VERMONT EXECUTIVE DEPARTMENT ADDENDUM 6 TO EXECUTIVE ORDER 01-20 with respect to the timing of a public hearing, the Planning Commission for the Town of Weathersfield, Vermont, will hold a public hearing on Monday, April 12, 2021, at 6:30 P.M., in the Weathersfield Town Office, at 5259 Route 5 in Ascutney, Vermont, to hear public comments on the adoption of proposed Zoning Map and Bylaw amendment being considered by the Planning Commission.

Statement of Purpose

The Planning Commission has voted to hold a hearing regarding the adoption of an amendment to the subdivision regulations to allow the protection of rights for interested parties and to allow for a more expeditious review process.

Geographic Areas Affected

The entire Town of Weathersfield is affected by this amendment.

Sections Headings

The proposed subdivision regulation amendment would allow for the development of the Town in accordance with the Town Plan and provide for the protection of rights for all parties involved in a subdivision application.

Persons wishing to be heard may do so in person, via remote attendance, be represented by an agent, or may file written comments with the Planning Commission prior to the hearing.

Dated at Town of Weathersfield, Windsor County, State of Vermont, this 9th day of March, 2020.

Howard Beach, Chair
Weathersfield Planning Commission

TOWN OF WEATHERSFIELD

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MEMORANDUM

TO: Weathersfield Planning Commission
FROM: Chris Whidden, Esq., Land Use Administrator
DATE: 1/21/2021
RE: Bianchi Letters and proposed fees

During my tenure as Land Use Administrator, I have answered multiple *Bianchi* requests from non-Weathersfield attorneys and title companies in the area. These requests stem from a case in which zoning violations were ruled to be clouds on marketable title. As a result, title searchers and title companies request a letter or certification from Zoning Administrators certifying that a parcel is in compliance with local zoning ordinances. Essentially, this is a certificate of occupancy that is not issued to the landowner, but rather a third party involved in the sale of a parcel. Under our current fee structure, a certificate of occupancy costs $40. The process involved in a certificate of occupancy is roughly the same amount of work as a Bianchi letter; however, there is no set fee for these types of requests at this time.

For the above reason, I hereby request that this honorable Commission consider adding a $40 fee for Bianchi requests to the Zoning Fee Schedule, and vote to move this item to a public hearing as required by Vermont law. If the Commission has any questions or concerns regarding this request, please feel free to contact me at the information found in the letterhead. Thank you for your consideration of this matter.

Sincerely,

Chris Whidden, Esq.
Land Use Administrator

TOWN OF WEATHERSFIELD

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(802) 674-2626 P.O. BOX 550 ASCUTNEY, VT 05030 landuse@weathersfield.org

MEMORANDUM

TO: Weathersfield Planning Commission
FROM: Chris Whidden, Esq., Land Use Administrator
DATE: 12/21/2020
RE: Amendment to Section 7.14 re- development of gasoline/service stations

The Planning Commission ("the Commission") has an open hearing regarding the adoption of the 2017 Future Land Use Map and accompanying definitions as the new zoning map and definitions as part of our bylaw update project. As part of this project, gasoline and service station construction and development in Weathersfield is being examined. During this discussion, the Commission determined that it would be necessary to include language that would require new gasoline and service stations to demonstrate a need for the creation of the new station as part of a conditional use review, as well as language that would allow normal development of existing stations (such as new signs, canopies, lighting, pumps, etc).

The intent behind this proposal is allow a vehicle for the Town to limit the number of new service stations in a given area so as to provide environmental, aesthetic, and Town Plan protections, and to prevent several service stations from changing the character of the Town and neighborhoods; while simultaneously allowing new stations to come to Weathersfield in appropriate areas and allowing existing stations to upgrade and develop their existing use.

Under our current bylaws, there are 11 standards for conditional use review for gasoline/service stations (See Section 7.14(a-k). To allow the previously stated goal of

the Commission to include language requiring a demonstration of need and allowing existing stations to develop as they normally would, the Commission should consider adding two additional subsections to Section 7.14 to include subsection "l" and "m". Also, a potential issue that was not discussed in the Commission's recent meetings is the prefacing language of Section 7.14, particularly where it states "Gasoline/service stations are conditionally permitted in the *Highway Commercial* districts…". The Commission should review that language to ensure the application of this section applies to all zones where gasoline/service stations would be a conditional use under the proposed definitions.

Therefore, the Land Use Administrator proposes the following to be considered, discussed, amended, and added to Section 7.14 of the 2017 Weathersfield Zoning Bylaws:

> "(l) A new gasoline/service station shall be required to demonstrate a need for its existence at the proposed location. A need shall be deemed demonstrated when the applicant shows that a cluster of service stations does not exist in the same neighborhood, or they provide a service that is unique to the area in which they propose to serve.
>
> (m) Existing gasoline/service stations shall be allowed to develop their existing establishment, to include installation of additional pumps, canopies, signs, etc.; subject to review as outlined in these bylaws, State and Federal law, and other provisions contained in these Bylaws."

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If there are any further questions or concerns regarding this bylaw amendment proposal, you can contact the Land Use Administrator at landuse@weathersfield.org or by calling the Town office at (802) 674-2626.

Sincerely,

///original signed///
Chris Whidden, Esq.
Land Use Administrator

TOWN OF WEATHERSFIELD

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MEMORANDUM

TO: Weathersfield Planning Commission
FROM: Chris Whidden, Esq., Land Use Administrator
DATE: 3/15/2021
RE: Hotel Stay limits

The Planning Commission ("the Commission") has an open hearing regarding the adoption of the 2017 Future Land Use Map and accompanying definitions as the new zoning map and definitions as part of our bylaw update project. As part of this project, stay limits on hotels is being considered for inclusion in the Weathersfield Bylaws.

While I was unable to find any authority that directly regulates stays in hotels; generally speaking, it is accepted that hotel stays are limited to 30 days. This is because upon the 31st day, the guest may have tenants rights attached to their stay, which requires due process to terminate. Upon doing more research, it appears that the way to approach this issue is to clearly define "short term rental" and include language that any conditions that fall short of our definition would result in the classification of temporary and transient housing. There are some towns in Vermont that only allow a certain number of consecutive days paired with a set number of days that a room can be rented to an individual annually. However, this would be an enforcement issue in our Town because of resources. I have attached a few resources found online that would be worth reviewing as well in preparation for this discussion.

If there are any further questions or concerns regarding this bylaw amendment proposal, you can contact the Land Use Administrator at landuse@weathersfield.org or

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by calling the Town office at (802) 674-2626.

Sincerely,

Chris Whidden, Esq.
Land Use Administrator

MOUNTAIN TIMES

LOCAL NEWS

MARCH 3, 2021

Vermont lawmakers consider bills to regulate short-term rentals

Appendix B. 2019 Guest Arrivals and Total Host Income by County.

County	Total 2019 Guest Arrivals	Total 2019 Host Income
Addison	13,200	$1.8 million
Bennington	34,300	$6 million
Caledonia	16,500	$2 million
Chittenden	88,800	$12 million
Essex	1,500	$200,000
Franklin	5,200	$700,000
Grand Isle	400	$50,000
Lamoille	58,000	$11.2 million
Orange	6,800	$700,000
Orleans	17,400	$2.4 million
Rutland	70,700	$11.5 million
Washington	43,500	$6.3 million
Windham	52,700	$7.5 million
Windsor	35,400	$5.8 million

By Curt Peterson and Polly Mikula

Two local towns, Killington and Woodstock, currently have short-term rental regulations and now the state Legislature seems to be interested in joining the fray.

Bill H.200, introduced by Representatives Kornheiser (Brattleboro), Colburn (Burlington) and Pajala (Londonderry), claims four purposes: Protecting the residential rental market, supporting full-time residency, discouraging real estate speculation, and leveling the playing field for short-term rentals and other types of lodging.

A "short-term rental" is defined as any sleeping accommodation that is rented in exchange for a fee for less than 30 consecutive days.

Both Jim Haff, Killington selectman who supported the town's short-term rental regulations, and Dave McComb, owner of Killington Vacation Rentals, who didn't, told the Mountain Times H.200 seems superfluous.

"The state Legislature just gave local cities and towns the clear ability to regulate short-term rentals through ordinance," McComb said, which is what Killington and Woodstock have done. "That is the approach that each locale should be taking."

In fact, on Feb. 23 Town Planner Preston Bristow reported to the Killington Planning Commission that 436 short-term rental registrations had been processed, and $84,000 in registration fees had been collected, as part of Killington's recently instituted short-term rental registration program. Another 188 owners/managers were sent 15-day reminder notices on Feb. 15, of which 42 had been answered.

The Killington program provides a complaint process — mostly aimed at over-occupancy, tenant noise and parking spillover. Bristow said five noise complaints had been submitted through a hotline and all were followed-up the next day.

"My question is, why do these legislators believe they need to step in?" asked Haff. "I believe the situation will be better handled by each town as a zoning issue, as the state already allows."

State Representative Jim Harrison told the Mountain Times H.200 has been referred to the House General, Housing and Military Affairs Committee, but no action has been taken.

McComb noted that the same bill was introduced in 2020, but was not considered then. "I'm not sure why it has generated so much news this year," he said.

Section 4469 of H.200 intends to prevent absentee landlords from converting otherwise usable permanent residences for short-term rental income: "A person may not offer all or part of a dwelling unit as a short-term rental unless the person has occupied the dwelling unit as his or her primary residence for: 1) 270 days of the preceding year, or 2) if the person has owned or leased the dwelling for less than a year, more than 70% of the days that the person has owned or leased the dwelling unit."

There is an annual $130 state registration fee per short-term rental unit in H.200. Killington's registration fee ranges from $150-$250, determined by number of bedrooms.

"I'm not a lawyer," Representative Harrison said, "but the residency requirement may [raise] constitutional questions."

It would certainly put multiple short-term rental enterprises out of existence.

Other than the residence requirement and the fee schedule, H.200's health, water, sewage and safety requirements mirror those in the Killington ordinance.

Airbnb and VRBO — the largest two platforms in the short-term rental industry — have notified their clients of this potential change in Vermont and there are petitions circulating to oppose the bill.

"The Vermont Legislature is considering legislation to severely restrict short-term vacation rentals," VRBO wrote to its property owners. "H.200, sponsored by Representative Emilie Kornheiser, seeks to impose a primary residency requirement for all short-term rentals in Vermont… If this bill passes, you would not be able to use a property as a short-term rental unless it is your primary home!"

The Vermont Association of Realtors has also spoken out against the regulations: "The bill, as introduced, has the potential to eliminate the short-term rental of second homes, condominiums and any property other than a primary residence…. we will be watching this closely."

In response to this legislation, a group of Vermont short-term rental stakeholders has formed the Vermont Short-Term Rental Alliance (VTSTRA), a coalition advocating for the legal protection of short-term rentals in Vermont.

In addition to H.200, two other twin short-term rental bills that have been introduced: in the House, H.257 (first introduced in 2020) was reintroduced mid-February and would create a rental registry that includes short term rentals. In the Senate Housing and Economic Development, S.79 was introduced at the same time with the same language.

State Senator from Windsor County Alison Clarkson told the Mountain Times, "[S.79] is about rental housing health and safety, creating a rental registry for all rental housing (short- and long-term) and creating a Vermont Housing Incentive Program to encourage landlords who own blighted or vacant rental properties to bring them up to code, weatherized and back online ... we need as many affordable rental properties as possible."

While VTSTRA opposes H.200, the coalition supports "a statewide system for short-term rental registration." As well as "the enforcement of health and safety standards in order to protect the wellbeing of hosts, guests, neighbors, and communities."

"It is far more likely that the House Committee on General, Housing and Military Affairs will take up the Chairman's bill, (H.257) to address rental properties in Vermont," according to the Vermont Association of Realtors. "We will continue to monitor H.200, but we anticipate that progress on a rental registry will develop in H.257 and S.79."

The Vermont Association of Realtors "is prepared to provide comments when the bills come before their respective committees," the organization stated.

First, the bills need to be reviewed and voted out of committee and onto the House floor. Then they can be sent to the Senate for their review. This "crossover" date will likely take place on March 12.

Economic impact

Nights rented at short-term rentals are subject to Vermont's 9% Rooms and Meals Tax as well as local option taxes and must be remitted to the Vermont Dept. of Taxes if the total number of nights rented is more than 14 per property in one calendar year.
While there is no accurate data on how many short-term rentals are in Vermont, in 2018 Airbnb remitted $7.8 million in rooms and meals and local option tax revenues to the state of Vermont. Douglas Farnham, deputy commissioner of the Vermont Dept. of Taxes, estimates that Airbnb captures 50% of the short-term rental market — meaning the total tax benefit to the state is over $15 million.

The income is also a significant — and sometimes crucial — to the owner of the short-term rental, too. Arbnb reports that 55% of its hosts say that hosting has helped them afford their homes.

"That is absolutely true for me," said Andrea Weymouth, a young professional and an owner of multiple condos in Killington. "Short-term rental income helps me afford my condo and provides a bit of extra income for my family."

According to Airbnb, Chittenden County hosted the most guests in the state in 2018 with 72,300, generating $9.1 million in host income. Rutland County (which includes Killington) was second with 51,400 guests generating $7.9 million in income for hosts. Stowe is third with 330 hosts.

Additionally, according to VTSTRA , on average Airbnb guests say 41% of their spending occurs in the neighborhood where they stay, further benefitting host towns tourism economy more broadly.

A 2020 report titled "Short-term rental units: Regulations and impacts in Vermont policy, options to address the uneven playing field," published by the Nelson A. Rockefeller Center at Dartmouth College, agreed concluding that "short-term rentals contribute positively to the Vermont tourism industry."

State or local control?

"Within Vermont, there exists a range of local regulation on short-term rentals," the Dartmouth College report continued. "Some areas have a higher concentration of units and, as a result, regulate more strictly. These areas include Killington, Stowe and Burlington."

The report went on to outline the specific policies in each of those three communities. [Editor's note: The Mountain Times includes the policy in Woodstock, too, for local comparison.]

Killington

In January of 2020, the town of Killington Planning Commission passed new zoning bylaws pertaining to short-term rentals. They state that a short-term rental qualifies a building as a "public building" and makes it "subject to the jurisdiction of the state of Vermont Division of Fire Safety."

Units with a capacity greater than eight occupants are required to obtain a Public Building Permit from the State of Vermont Division of Fire Safety. Smaller units can use a self-certification form instead.

Short-term rental owners must register and pay a fee based on the number of bedrooms in the unit, are also required to provide proof that the liability insurance. Once satisfied, hosts will receive a zoning permit for short-term rental.

Stowe

In Stowe, single-family homes, condominium units, and apartments are permitted to be rented if the rental is for one week or longer. Rentals for less than that are considered to be lodging facilities and are only permitted within certain zoning districts. Any house may be converted to a bed and breakfast, but that requires the owner or a permanent occupant to live there. Inspections are required and include code compliance in regards to egress windows, smoke and carbon monoxide alarms, stairways, and handrails. The current cost for an inspection is $125. Additionally, hosts will need insurance to cover damage and liabilities for short term renters.

Burlington

The more urban nature of Burlington differentiates it from other high-traffic tourist regions in Vermont. The city is currently in the early stages of short-term rental regulation. Ordinances have not yet been enacted, but there is a proposed framework. The city plans to differentiate between individual rooms rented out within a larger unit and entire units being rented. Homes with one or two rented bedrooms would be exempt from a registration requirement.

In residential districts, one parking space would be required for each rented bedroom or whole unit. The proposal includes expanding the current bed and breakfast zoning standards to apply to short-term rentals. It also suggests limiting the number of whole-unit rentals per building. These zoning regulations would not apply to units rented less than 10 consecutive and 30 total days in any 12-month period.

The most significant proposed regulation would require that hosts be a resident of the property of the rental unit. With regulation, the city aims to increase the housing stock available to Burlington residents.

Woodstock

The Woodstock Select Board approved short-term rental regulations on Jan. 21, 2020. They require owners of short-term rental properties to register and pay a short-term rental fee of $115 per property, plus $100 per guest room.

They also limit the number of times in a year the short-term rental may be rented to 10. If the owner occupies the building while it is being rented, the limit is 15.

Owners in five-acre residential and short-term rental zones may rent 15 times per year, with a two-night minimum. If the owner occupies the building during the rental, it is exempt from all short-term rental limits.

Other requirements for a short-term rental permit include satisfactory fire safety inspection by Woodstock's fire chief, a two-persons per bedroom occupancy, six-person maximum per household, adequate legal parking, rubbish removal, posted notice of rules regarding rubbish, parking and noise.

The regulation prohibits "weddings, parties, catered events...and outdoor activities between 9 p.m. and 7 a.m."

The owner or a manager and contact information must be identified and be available within 30 minutes at all times.

The penalty for violating a regulation is a fine of $200 per day per violation.

Local regulation, state registry

Due to the differences between communities, their make up, and unique challenges, the Dartmouth College report states: "Policies that are a good fit for Burlington may not be practical for the rural parts of the state. The tourism market in towns like Stowe and Killington may be more competitive than in other less resort-inclusive towns. It is worthwhile for the state to look at the policies proposed or already in place in these localities and selecting certain components of them is definitely feasible. However, it is

important that they keep in mind similarities and differences between these small geographic areas and the state writ large. Vermont is leading the way for statewide legislation to address short-term rental units. An option remains to decentralize the approach and have municipalities implement the conditions that best fit their local context."

The report concludes: "Short-term rentals contribute positively to the Vermont tourism industry. Guests who use intermediaries like Airbnb and VRBO patronize local businesses, such as restaurants, and contribute to secondary revenue streams for their hosts. Short-term rentals are not regulated like the traditional hotel and restaurant industry. An agreement between Airbnb and the Vermont state Legislature allows the intermediary to remit Meals and Rooms taxes. However, the state does not possess a comprehensive list of short-term rentals. This creates challenges around health and safety regulation and additional taxation."

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LOCAL NEWS

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4 comments on "Vermont lawmakers consider bills to regulate short-term rentals"

LARS MCGEE
MARCH 11, 2021 AT 12:10 PM

Most people who rent out a property they own through Airbnb or VRBO are people like myself who are just trying to make ends meet and be able to afford a small slice of Vermont. We rent out our vacation homes to pay the mortgage and the upkeep. There's no big profit to be had. I bought my vacation property in 2003 and started renting it out in 2011 after a painful divorce. I would have had to sell the house I plan to retire to someday, but renting it out enabled me to hold on to it for myself and my children on a teacher's salary. My children would have been heartbroken had I been force to sell our place. In the 10 years I have been renting it, I have yet to turn a profit (I hope to do so for the first time in this coming year). But I have paid 10's of thousands of dollars to my loyal housekeeper, local electricians, plumbers, landscapers, and carpenters, as well as 10's of thousands of dollars in property taxes and VT room taxes. Most of us are doing this out of a labor of love, and it allows for a greater supply of vacation rentals at prices that average people can afford, average people who want to come experience Vermont country life. Many are young people with children that can't afford to book 3 rooms in a hotel. Many are people from urban areas experiencing real nature for the first time. Some of them don't look like the average Vermonter, or share the same culture, but the opportunity to experience Vermont is just as good for folks from the city as it is for native Vermonters to experience them. Plus, it doesn't hurt that they bring an influx of tourist dollars to a struggling state economy. If you enact this legislation, the unintended consequences will be bad for just about everyone, except for the hotel industry. These unintended consequences include:

1. Causing a loss of tourist dollars coming into the state. Like it or not, Vermont is heavily dependent on tourist dollars, and the government could use the taxes that they pay. Where will they make up this lost revenue? That's right. They will have to raise taxes on Vermont residents if they can't get as much from people out of state.
2. Causing a loss of jobs overall in the tourist and hospitality industry. People who own short-term rentals hire housekeepers who can work for themselves and make a lot more money than they can as a full-time or part-time hourly worker for a hotel chain. The extra upkeep and repairs on short-term rentals gives extra business to blue-collar trades people who get hired to work on these houses, not to mention the construction workers who build new houses to satisfy demand and do renovations to make the properties more attractive to vacation renters.

3. Causing a glut of properties on the market and falling property values for everyone in Vermont. The goal of making housing more affordable in Vermont is a noble one. As a lifelong progressive Democrat, I get it. But what that really means is sinking property values. Want to get a home equity line of credit to pay for some renovations after the value of your home drops? Good luck! Find yourself suddenly underwater in your mortgage because of the drop in equity in your house? Too bad. The best way to make housing more affordable for everyone is to have a stronger economy with more and better paying jobs. These proposed reforms will do the opposite.
4. This is not going to help the long-term rental market either. With the loss of tax revenue from the tourist industry, loss of property taxes because of falling property values, and higher unemployment, property taxes will have to go up. This will be passed onto the consumer. Most vacation rental owners will not rent their homes out long-term. They will just sell. Increased property taxes will make long-term rents go up, not down.

More recently, I have read proposals to require state residency requirements to operate short-term rentals and requirements for owners to live on-site at least 270 days a year. The proposals would also require fire and safety code inspections. Are short-term rental owners going to be required to install fire-escapes on their vacation homes? How is this fair to people who have invested everything into their second homes and now stand to lose a good chunk of their home's value plus be unable to make any money that they were depending on to help pay the mortgage?
Instead of trying to "level" the playing field by introducing more government regulations onto the rental industry, why not level it by reducing costly regulations for the hotel and bed & breakfast industry. In this day and age of online reviews and litigation, the threat of getting bad online reviews or getting sued for everything you own is enough motivation for businesses to provide a safe clean environment. Is there any data that actually shows Airbnb or VRBO type rentals are any less safe or cleanly than hotels and Bed and Breakfasts? These regulations just lead to bloated government paying for salaries of unnecessary inspectors collecting unnecessary fees that stifle economic growth in Vermont and destroy small scale economic opportunity.

JOE DEFRANCO

MARCH 7, 2021 AT 12:09 PM

It seems to me that Bill H.200 is a short-sighted NIMBY attempt to over-regulate an already well-regulated sector of the rental market. The end result will ultimately drive much needed business away from areas that desperately need the related revenue and business. I would pose the question to these folks that continue to pose these absurd regulations as to where the lost revenue, which is already flowing and supports the local infrastructure, schools, government and the overall tax base will come from if such additional burdensome regulations are enacted?

JULIE MARKS

MARCH 4, 2021 AT 4:15 PM

Congratulations on such sound and fact-based reporting! Excellent article and synopsis of the issues Vermonters and out-of-state owners of short-term rentals are facing. The Vermont Short

Term Rental Alliance (VTSTRA) is here to support hosts who are fighting to protect their rights at their town level.

PAUL

MARCH 3, 2021 AT 7:17 PM

Congratulations to the communities most impacted by short term rental challenges on their initiatives to develop rules that benefit their communities and their property owners. The Dartmouth study is correct in their assessment that one size does not fit all.
In my opinion, the State can best benefit by supporting these local initiatives, and stepping back from being big brother/sister.

Comments are closed.

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TOWN OF WEATHERSFIELD

OFFICE OF THE LAND USE ADMINISTRATOR

(802)674-2626 P.O. BOX 550 ASCUTNEY, VT 05030 landuse@weathersfield.org

MEMORANDUM

TO: Weathersfield Planning Commission
FROM: Chris Whidden, Esq., Land Use Administrator
DATE: 3/15/2021
RE: Effect of newly passed bylaws on pending applications

The Planning Commission ("the Commission") has an open hearing regarding the adoption of the 2017 Future Land Use Map and accompanying definitions as the new zoning map and definitions as part of our bylaw update project. As part of this project, the effect of newly passed bylaws/ordinances on pending applications and hearings is being considered for the Weathersfield Bylaws.

24 VSA 4442(c)(1) states: "A bylaw, bylaw amendment, or bylaw repeal shall be adopted by a majority of the members of the legislative body at a meeting that is held after the final public hearing, and **shall be effective 21 days** after adoption unless, by action of the legislative body, the bylaw, bylaw amendment, or bylaw repeal is warned for adoption by the municipality by Australian ballot at a special or regular meeting of the municipality." Of course, municipalities have included effective date clauses to make ordinances and bylaws effective upon passing by the legislative body. So, absent a prescribed effective date, bylaws become effective 21 days after passage.

As a matter of course, applications that are filed with the Land Use Administrator's office are "open" until there is a decision made by the appropriate authority. This is evidenced by the ability of the applicant to revise, amend and add materials to the application as requested by the approval authority or by their own

volition, and the ability of the approval authority to request more information and materials. However, after a decision is made on the application, this ceases to be the case. No applicant can include further materials or alter their application once a decision is made on the application or a hearing is closed. In order to change the application after the decision, an applicant must file a new application to be reviewed by the appropriate authority. In the case of applications that require hearings by the Zoning Board of Adjustments or the Planning Commission, the application is considered "open" until the hearing is "closed." Once the hearing is closed, the applicant no longer has the ability or right to include additional information. Doing so would be a violation of Vermont's Open Meeting Law.

Thus, if a bylaw were to change while the application was still "open" then the new bylaw would be applicable to the decision. So long as the bylaw becomes effective during the open phase of an application, it should be applicable. However, if for example, a hearing has been closed, then a bylaw change occurs, the previous governing bylaw would apply to that application. So, the appropriate date to determine if an application is governed by conflicting bylaws is the date that the application becomes "closed" or decided by the appropriate municipal authority, rather than the time of filing.

It could be argued that this goes against the concept of ex-post facto enforcement. However, this is not true because the applicants are notified through public notice that specific changes are being considered by the appropriate panel, and that it may affect their application once enacted. Further, changes in the bylaws generally take 2-3 months,

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on average, which is far longer than any application or hearing should occur. So, applicants are put on notice that specific rules are changing, and when they compare it with their application, they can establish that the pending changes may affect the outcome of their application.

Further, applicants are allowed to revise and adapt their plans to conform with any changes in the bylaws that are new and deemed applicable to a pending application. To not apply the bylaws to pending applications would be to allow nonconformities to be established after the effective date of the law.

If there are any further questions or concerns regarding this bylaw amendment proposal, you can contact the Land Use Administrator at landuse@weathersfield.org or by calling the Town office at (802) 674-2626.

Sincerely,

Chris Whidden, Esq.
Land Use Administrator

TOWN OF WEATHERSFIELD

OFFICE OF THE LAND USE ADMINISTRATOR

(802)674-2626 P.O. BOX 550 ASCUTNEY, VT 05030 landuse@weathersfield.org

MEMORANDUM

TO: Weathersfield Planning Commission
FROM: Chris Whidden, Esq., Land Use Administrator
DATE: 3/15/2021
RE: "Incidental and subordinate" definitions for discussion

The Planning Commission ("the Commission") has an open hearing regarding the adoption of the 2017 Future Land Use Map and accompanying definitions as the new zoning map and definitions as part of our bylaw update project. As part of this project, the definition of "incidental" and "subordinate" as used in the Weathersfield Bylaws is being examined.

To establish the plain meaning of the words "incidental" and "subordinate," we turn to Webster's dictionary. "Incidental" is defined as **1a:** being likely to ensue as a chance or minor consequence (i.e. social obligations *incidental* to the job) **b:** MINOR sense; **2:** occurring merely by chance or without intention or calculation. The Thesaurus lists synonyms as: accidental, casual, chance, fluky (also flukey), fortuitous, inadvertent, unintended, unintentional, unplanned, unpremeditated, unwitting.

"Subordinate" is defined as **1**: placed in or occupying a lower class, rank, or position: INFERIOR (i.e. a subordinate officer) **2:** submissive to or controlled by authority **3a**: of, relating to, or constituting a clause that functions as a noun, adjective, or adverb. The Thesaurus lists synonyms as: inferior, junior, less, lesser, lower, minor, smaller.

I have attached a few resources found online that would be worth reviewing as well in preparation for this discussion as they are more on point as they apply legal

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definitions to bylaws and municipal planning.

If there are any further questions or concerns regarding this bylaw amendment proposal, you can contact the Land Use Administrator at landuse@weathersfield.org or by calling the Town office at (802) 674-2626.

Sincerely,

Chris Whidden, Esq.
Land Use Administrator

Chapter 17

Classifying Primary Uses and Determining Whether a Use is an Accessory Use

17-100 Introduction

The zoning administrator and, on appeals, the BZA often must determine whether a particular use is permitted in a zoning district, either as a *primary* (also referred to by some localities as a *principal* or *main*) use or as an *accessory* use. This chapter examines some of the key rules that apply to these determinations.

There are two types of zoning ordinances: (1) the inclusive or permissive type (hereinafter, collectively, "inclusive"), which permits only those primary uses specifically named; and (2ch) the exclusive type, which prohibits specified uses and permits all others. *Wiley v. Hanover County*, 209 Va. 153, 163 S.E.2d 160 (1968); *see also Board of Supervisors of Madison County v. Gaffney*, 244 Va. 545, 422 S.E.2d 760 (1992) (nudist club not allowed in conservation zoning district because not specifically permitted in district regulations). A zoning ordinance also may use both forms. *Wiley, supra.*

With an inclusive ordinance, the burden is on the landowner to show that a proposed primary use is permitted. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006); *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947). With an exclusive ordinance, the burden is on the locality to show that a use is not permitted, or that it falls within a classification that is excluded. *Parker, supra.*

The inclusive ordinance appears to be the more modern approach to zoning and is the more common type of zoning ordinance in Virginia.

17-200 Rules for classifying uses

Classifying a use means determining whether a particular use or activity fits within one of the uses specifically permitted by right or by special use permit in an inclusive zoning ordinance, or as one of those prohibited in an exclusive zoning ordinance. The classification of a use requires the exercise of discretion. *Ancient Art Tattoo Studio v. City of Virginia Beach*, 263 Va. 593, 561 S.E.2d 690 (2002).

Ten Rules for Classifying a Use
• When the use regulations are ambiguous, use classifications will likely be strictly construed in favor of the landowner.
• Refer to and rely on the definitions in the zoning ordinance.
• When classifying a use, all possible uses within the district should be considered.
• Use classifications should not be based on the proposed use's proximity to other uses.
• The activity itself, not the activity's accoutrements, determine the type of use.
• Whether a use is appropriate in the district may not be considered.
• Use classifications must be based on legitimate land use considerations, and not on illegitimate or personal reasons.
• For uses of structures, look to their function rather than their form.
• The use itself, not the owner or the nature of the owner, should determine the classification.
• When the use regulations are ambiguous, the purpose and intent of the district should be considered.

To classify a use, in addition to applying the rules for interpreting statutes and ordinances (see chapter 16), the following rules should be considered as well:

- *Use classifications will likely be strictly construed in favor of the landowner:* The rule that prevails in most jurisdictions, at least in the absence of any statute to the contrary, is that because zoning ordinances are in derogation of the

common law and operate to deprive an owner of a use thereof which otherwise would be lawful, they should be strictly construed in favor of the property owner. *83 Am. Jur. 2d, Zoning and Planning*, § 699; *see, e.g., Young v. Town of Vienna*, 203 Va. 265, 123 S.E.2d 388 (1962) (revenue ordinance must be strictly construed); *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000). In the context of classifying uses, this rule means that the zoning administrator and the BZA should not read an implied prohibition of a particular use into a use classification.

- *Refer to and rely on the definitions in the zoning ordinance:* Most zoning ordinances include definitions of many, if not all, use classifications. If a use is defined in the zoning ordinance, that definition must be applied. In *Coston v. Norfolk Board of Zoning Appeals*, 81 Va. Cir. 152 (2010), the petitioner challenged the BZA's decision that a moped was an automobile under the definition of "automobile" in the zoning ordinance, and therefore his moped sales use was not allowed in the C-1 zoning district. The circuit court upheld the BZA's interpretation because the definition included "any vehicle propelled by its own motor and operating on ordinary roads" and the definition included "motor scooters, motorized bicycles and the like." The court also concluded that the zoning ordinance definition was not in conflict with any State definition of the term.

- *When classifying a use, all possible uses within the district should be considered*: Although it may seem obvious, determining that a use is not allowed in a district because it does not fit within one use classification does not mean that it may not be allowed under another classification. In *Buckley v. Zoning Appeals Board*, 59 Va. Cir. 150 (2002), the circuit court held that the zoning administrator and the BZA erred when it determined that the landowner's proposed use was not allowed in the zoning district because it was a *distribution facility* (defined to mean "the intake of goods and merchandise, the short term storage of such goods or merchandise, and/or the breaking up into lots or parcels and the shipment off-site of such goods and merchandise"), a use that was not allowed in the A-3 zoning district. The landowner sorted and hauled unprocessed felled trees. The court concluded that even if the logs were goods as used in the definition of *distribution facility*, the use also was a *log yard* (defined to mean "a location where unprocessed felled trees are taken, sorted by grade and species, and hauled to prospective purchasers"), which was an agricultural, forestry and silvicultural use allowed by right in the A-3 zoning district. In *CL 11-93 & CL 11-41*, opinion letter dated November 28, 2011, the circuit court concluded that the BZA erred when it found that the landowner's proposed taxi detailing use was a by right use in the C-3 zoning district, thereby reversing the decision of the zoning administrator that the proposed use required a permit. The BZA had concluded that the proposed use fell within the by-right "similar to other by-right uses" catch-all classification. Instead, the court concluded that the zoning administrator had correctly determined that the use fell within the "vehicle service establishment" use classification, which required a permit.

- When classifying a use, find the classification that best aligns with the actual use of the property: In *In re April 23, 2015 Decision of the Bd. of Zoning Appeals*, 92 Va. Cir. 246 (2015), the zoning administrator determined that a conditional use permit was required to operate the towing yard at the time in question because the use was classified under "Junkyards for automobiles and scrap materials subject to all city ordinances" and the zoning ordinance further provided that a salvage yard was "[a]n area used for storage of waste paper, rags, scrap metal, or other junk, including storage of motor vehicles, and dismantling of vehicles, equipment, and machinery; junkyard." The trial court disagreed, concluding that the following by right use classification was more appropriate: "Truck terminals, repair shops, hauling and storage yards." The court concluded that this classification was "far more aligned with the actual use of the subject property."

- *Use classifications should not be based on the proposed use's proximity to other uses*: In *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. (former) 1981), plaintiff sought to establish a medical facility providing abortion services. The city determined that the proposed facility was not allowed in the zoning district and justified its decision because of the proposed use's proximity to single family residences, churches and schools. The court found that the city's reliance on the proposed facility's proximity to these other uses to classify the use was impermissible.

- *The activity itself, not the activity's equipment and materials, determine the type of use*: General use classifications such as *agricultural* or *commercial* can sometimes be problematic because those terms, even if defined, are broad in scope and likely come with a number of assumptions. For example, in determining whether a landscaping business is an agricultural or a commercial use, the zoning administrator would err if he simply followed this analysis:

Landscaping business → Plant stock and small tractors → Agricultural use

The equipment and materials of the landscaping business – plant stock and small tractors – do not in and of themselves, determine whether the use is agricultural or commercial. In fact, continuing with the landscaping business example, the courts have uniformly concluded that a landscaping business is not an agricultural use where the business had a number of employees who worked off-site, the plant stock was stored on the property to be used in landscaping jobs, and equipment stored on the property was used in the landscaping jobs. *See, e.g., Town of Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95 (1953); *Petitti v. Plain Township Board of Zoning Appeals*, 2003 Ohio 8449 (2003) (unpublished); *Winnebago County v. Wilson*, 98-3114 (Wis. Ct. App. 1999) (unpublished).

- *Whether a use is appropriate in the district may not be considered*: The determination of what uses are appropriate within a particular zoning district is a legislative function reserved to the locality's governing body. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). Thus, the role of the zoning administrator and the BZA is not to determine what types of uses they feel are appropriate in the zoning district, but only to give meaning to the use classifications the governing body has decided to allow in the district.

- *Use classifications must be based on legitimate land use considerations, and not on illegitimate or personal reasons*: A use classification should not be based or swayed by illegitimate or personal reasons. *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989). *Marks* is instructional even though it is not a use classification case. In *Marks*, a palmist sought a conditional use permit and the city initially supported granting the permit. However, after certain local citizens displayed overt religious hostility to the presence of the palmist, the city council denied the permit. The federal court of appeals concluded that the city council had improperly denied the permit. The court said that the public's negative attitudes, or fears, unsubstantiated by factors which are properly cognizable in a zoning proceeding, were not permissible bases for a land use decision. In *P.L.S. Partners, Women's Medical Center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788 (D.R.I. 1988), the center obtained a building permit for a "health care facility," a use allowed by right in the underlying zoning district. When residents complained that the center would be providing abortions, the zoning inspector changed the use classification to "hospital," a use that required a special use permit. The center brought a civil rights action. The court held that singling out abortion services for special treatment under the zoning ordinance by classifying the use as a hospital rather than as a health care facility violated equal protection. The city had classified emergency centers, out-patient clinics, and physician's offices that performed other minor surgical procedures as health care facilities.

- *For uses of structures, look to their function rather than their form*: Generally, the function, rather than the form, of a structure is relevant to defining the use under the zoning ordinance. *Fritts v. Carolinas Cement Company*, 262 Va. 401, 551 S.E.2d 336 (2001) ("silos" used as warehouses were properly classified as a warehouse use).

- *The use itself, not the owner or the nature of the owner, should determine the classification*: Ownership does not determine how a use is classified. *Maxey v. Board of Zoning Appeals*, 480 N.E.3d 589 (Ind. App. 1985); *Gallagher v. Zoning Board of Adjustment*, 32 Pa D&C 669 (1963) (proposal to use single-family dwelling for religious broadcasting is not a church).

- *Consider the purpose and intent of the district*: When the use regulations are ambiguous, the purpose and intent of the zoning district and the nature of the uses allowed by-right and by special use permit should be considered to understand the zoning district.

- *Consider the legislative history*. The legislative history may provide evidence as to whether a particular use is allowed in the district or allowed by a special use permit. In *Virginia Psychiatric Co. v. Zoning Appeals Board of Fairfax County*, 47 Va. Cir. 36 (1998), the circuit court considered the record of the BZA hearing when it granted a special use permit for a nursing home in affirming a later decision by the BZA that a residential treatment facility was not within the scope of the original permit.

One Way to Reduce the Need to Classify Uses
• The traditional way in which uses have been classified in a particular zoning district has been to list in the district regulations the uses that are allowed by right and by special use permit. For example, a commercial zoning district's regulations might list dozens of retail sales shops with great specificity – gifts shops, clothing shops, shoe shops, department stores, drug stores, stores selling musical instruments, stores selling photography equipment, and so on. If someone proposes to sell something not included in the list, the zoning administrator must determine whether it is allowed.
• Consider replacing the traditional list with broad, defined, categories such as "retail sales."

This list of rules is not exhaustive. The first task for the zoning administrator and the BZA when classifying a use is to read the language in the zoning ordinance and apply a reasonable interpretation using the plain and natural meaning of the terms used, within the context they are used.

The classification of some uses is self-evident and simple. Other uses may not easily fit into a classification or may be difficult to classify, such as when the use is conducted indoors or in a difficult-to-observe location, the use is conducted in a manner in which its impacts are outside of the normal hours when the zoning official can observe the activities (*e.g.*, overnight storage of equipment), or when the landowner or occupant is conducting the use in a manner that prevents it from being easily classified.

The zoning official must collect information that will allow her to make an informed decision as to how a use should be classified. In order to collect the necessary information, it is suggested that she look to the following sources:

Collecting Information to Classify a Use
• Ask the owner to describe the nature of its activities in writing.
• Ask the owner for permission to enter the property or buildings to observe the activities; if permission is denied, seek an administrative search warrant to conduct an inspection to determine whether the use is permitted in the zoning district.
• Interview neighbors.
• Observe the use at various times of the day and week to understand its dimensions.
• For commercial and industrial uses, collect descriptions of the use from telephone book and newspaper advertisements or the business's website.
• For suspected commercial and industrial uses that you question whether they are being forthright in their descriptions of their use, conduct an internet search of the business.
• For certain uses, search State records for state-issued permits (*e.g.*, permit issued for a trash hauler) and licenses (*e.g.*, a Class A contractor's license).
• Search court records and published court decisions involving the person or business for descriptions of the nature of the activities.

17-300 Accessory uses

Each primary use allowed is accompanied by a range of accessory uses. The issue of whether a use is an accessory use arises in various situations. For example, a landowner may claim that a use not otherwise allowed in the zoning district as a primary use is, in fact, accessory use to a permitted primary use.

Because a limited number of Virginia cases have considered the issue of accessory uses, this section relies heavily on cases from other states. A short survey of uses that have been found or not been found to be accessory follows section 17-324.

17-310 The nature of accessory uses

An *accessory use* is commonly defined to be a use that is subordinate and customarily incidental to the primary use. *See Wiley v. County of Hanover*, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968). For example, Albemarle County

defines an "accessory use, building or structure" to mean "[a] subordinate use, building or structure customarily incidental to and located upon the same lot occupied by the primary use, building, or structure, and located upon land zoned to allow the primary use, building or structure provided that a subordinate use, building or structure customarily incidental to a primary farm use, building or structure need not be located upon the same lot occupied by the primary farm use, building, or structure." *Albemarle County Code § 18-3.1.* In addition, a locality may expressly delineate those uses that it deems to be accessory. *See, e.g., Carter v. Bavuso*, 2014 WL 3510293 (2014) (Virginia. Supreme Court, unpublished).

"The rule of accessory use is a response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. Even though a given use of land is not explicitly allowed, it is nonetheless permissible if it may be said to be accessory to a use that is expressly permitted." *Town of Salem v. Durrett*, 125 N.H. 29, 32, 480 A.2d 9, 10 (1984). An accessory use "must be one 'so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it." *Whaley v. Dorchester County Zoning Board of Appeals*, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1994) (parking 18-wheel truck overnight and on weekends at owner's home was not an accessory use on a residentially-zoned parcel). The Alaska Supreme Court has observed that the accessory use cases throughout the United States "uniformly give accessory use a fairly narrow meaning." *Dykstra v. Municipality of Anchorage*, 83 P.3d 7, 10 (2004).

17-320 The key criteria for determining whether a use is accessory

The two key criteria for determining whether a use is accessory are whether the use is *subordinate* to a lawful primary use and whether it is *customarily incidental* to a primary use. These key requirements are commonly used terms to define *accessory use* in zoning ordinances throughout the United States, and are discussed at length in the following sections. Whether a use is accessory is a matter to be determined from the evidence. *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968).

17-321 The use must be subordinate to the primary use

A landowner claiming that a use is accessory must first demonstrate that the use is *subordinate* to an identified primary use. The term *subordinate* is defined by *Webster's Dictionary* to mean "placed in or occupying a lower class or rank: inferior." A *subordinate* use incorporates the requirement that the accessory use be minor in relation to the permitted primary use. *Dykstra v. Municipality of Anchorage*, 83 P.3d 7 (2004); *Becker v. Town of Hampton Falls*, 117 N.H. 437, 374 A.2d 653 (1977).

Common Factors to Consider in Determining Whether a Use is Subordinate
• Area devoted to the use.
• Frequency of the use.
• Active versus passive activities.
• Number of employees and work hours.
• Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use.

The relevant factors in determining whether a particular use is subordinate to a primary use will depend on the circumstances. Following are some of the factors that should be considered:

- *Area devoted to the use*: The area devoted to the use in relation to the primary use should be considered. However, the fact that a use occupies less area than the primary use does not necessarily make it subordinate, and the fact that a use occupies more area than the primary use does not necessarily preclude it from being subordinate. For example, on a 1-acre lot with a primary residential use, gardening would nonetheless be subordinate to the primary use even though the gardened portion of the lot may consume more than 90% of the lot's area. In *McLane v. Wiseman*, 84 Va. Cir. 10 (2011), the fact that inoperable or junk vehicles occupied a large portion of the landowner's residentially-zoned parcel was a key factor in the court concluding that the vehicles were not accessory to the primary residential use. In *Gavis v. Board of Zoning Appeals of the City of Winchester*, 1985 WL 306753 (1985), the circuit court found that proposed garage and storage facilities that would be 41% the floor

space of the four apartments the facilities would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a customary or incidental use.

- *Frequency of the use*: The time devoted to the use in relation to the primary use may be a relevant consideration. *Orion Sporting Group, LLC v. Board of Supervisors of Nelson County*, 68 Va. Cir. 195 (2005) (sporting clays facility was a year-around activity; hunting preserve limited to eight months per year). A seasonal activity, in relation to a year-around primary use, would likely be considered to be subordinate to the primary use. Conversely, a purported year-around accessory use would not be subordinate to a seasonal primary use.

- *Active versus passive activities*: The relative intensity of the use, and the resulting impacts on the land and the neighboring properties, should be considered. For example, as between a landscaping business and a nursery, the landscaping business is often the more intense use because it may have a business office, employees and landscaping vehicles and equipment coming and going, as well as a storage yard where landscaping equipment and materials are stored and equipment is maintained. A nursery, on the other hand, may be limited to an area where plants are stored and watered until they can be used in the landscaping work.

- *Number of employees and work hours*: The number of employees assigned to a use may be a relevant consideration. Although in most cases one may expect that the accessory use will have fewer employees than the primary use, that is not always the case. For example, a primary equipment storage yard use may have a single employee assigned to work on storage-related activities. However, the maintenance of the stored equipment could be considered to be a permitted subordinate use, even though there are more employees performing equipment maintenance work.

- *Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use*: The use must truly be subordinate to the primary use and not simply be a different, alternative or additional use. For example, in *Orion Sporting Group, LLC, supra*, the circuit court found that a proposed sporting clays facility was not subordinate to a hunting preserve because the evidence showed that the sporting clays facility was a different and alternative use for those who did not wish to participate in hunting. The court found that the sporting clays facility was a separate primary use of the property. In *McLane v. Wiseman*, 84 Va. Cir. 10 (2011), the court affirmed the decision of the BZA that the storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel was an alternative use to the residence, not a subordinate use, because of the landowner's purpose in having the vehicles and the area occupied or extent of the vehicles.

As part of this analysis, recognize that multiple uses on a parcel may each be classified as primary uses – some of which may be permitted in the zoning district, some of which may not be.

17-322 The use must be customarily incidental to the primary use

A landowner claiming that a use is accessory must next demonstrate that the use is *customarily incidental* to the primary use. Although the Virginia courts have not examined the meaning of this commonly used term, the courts from other states have considered it on numerous occasions. In general, a use that is *customarily incidental* to a primary use implies that the use flows from, naturally derives or follows as a logical consequence of, or is a normal and expected offshoot from the primary use. *Town of Alta v. Ben Hame Corporation*, 836 P.2d 797 (Utah Ct. App. 1992) (boarding houses, lodging houses, hotels are not accessory to permitted primary use in agricultural-residential zoning district). Some courts have said that the terms *customarily* and *incidental*, though often linked in definitions of *accessory use*, impose distinct requirements that warrant separate analysis.

17-323 The meaning of the word *customarily*

A *customarily* incidental use is one that has "commonly, habitually, and by long practice been established as reasonably associated with the primary . . . use." *Becker v. Town of Hampton Falls*, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977) (holding that a barn constructed to house heavy construction equipment on residentially zoned land was not accessory to primary residential use); *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn.

509, 264 A.2d 552 (1969); *Carmel v. City of Old Town*, 2001 Me. Super. LEXIS 24, 2001 WL 1719191 (2001); *McKinney v. Kent County Board of Adjustment*, 1995 Del. Super. LEXIS 83, 1995 WL 109032 (1995).

Although a rare association of uses cannot qualify as customary, the uses need not be joined in a majority of the instances of the primary use. *Town of Salem v. Durrett*, 125 N.H. 29, 480 A.2d 9 (1984); *Southco, Inc. v. Concord Township*, 552 Pa. 66, 713 A.2d 607 (1998) (a use may be customarily incidental to a primary use even where there is no evidence that a majority, or even a substantial number, of similar properties are engaged in a similar accessory use). However, the lawful occurrence of the use must be more than unique or rare. *Lawrence, supra.* The use must be "common enough so that it can be said to be a known and accepted incidental use." *County of Lake v. La Salle National Bank*, 76 Ill. App. 3d 179, 182, 395 N.E.2d 392, 394 (1979) (determining whether a trailer for a groundskeeper's sleeping quarters was accessory to the operation of a golf course). In other words, a use is *customarily* incidental "when it is so necessary or so commonly to be expected in connection with the main use that it cannot be supposed that the ordinance was intended to prevent it." *Grandview Baptist Church v. Zoning Board of Adjustment*, 301 N.W.2d 704, 708-709 (1981) (holding that 32 by 42 foot steel storage building was not accessory to a church in a residential zoning district; of 50 churches examined, it was the only one with a steel storage building).

Common Factors to Consider in Determining Whether a Use is Customary
• The size of the parcel.
• The nature of the primary use of the parcel.
• The use made of the adjacent parcels.
• The economic structure of the area.
• Whether the proposed use is customary within the locality and the region.

Some of the factors that are relevant to determining *custom* are the size of the parcel in question, the nature of the primary use of the parcel, the use made of the adjacent parcels and the economic structure of the area. *Lawrence, supra.* The zoning administrator and the BZA need to determine whether the proposed use is customary within the locality and the region. For example, the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with a residential use include garages, swimming pools, decks, gazebos, small sheds and small-scale gardening; the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with an agricultural use include barns, sheds, silos, the storage of farm equipment and machinery, and the raising of crops and livestock.

17-324 The meaning of the word *incidental*

The term *incidental* incorporates "the concept of [a] reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use." *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969); *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 641 N.E.2d 1334 (1994) (gravel removal for commercial purposes was not accessory to a permitted agricultural use, even though the removal of the gravel would allow creation of a Christmas tree farm).

Survey of Uses Found to be and not to be Customarily Incidental	
Customarily Incidental	**Not Customarily Incidental**
Pigeon house customarily incidental to a family dwelling. *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968). Storage of decommissioned trucks as sources of parts customarily incidental to a milk trucking. *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 587 A.2d 1205 (1991).	Sporting clays facility not customarily incidental to a hunting preserve. *Orion Sporting Group, LLC v. Board of Supervisors of Nelson County*, 68 Va. Cir. 195 (2005). Storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel not customarily incidental to residential use given the purpose for the vehicles and the area occupied by the vehicles. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011).

Survey of Uses Found to be and not to be Customarily Incidental	
Customarily Incidental	**Not Customarily Incidental**
Crematorium customarily incidental to a cemetery. *McCormick v. City of Alexandria Bd. of Zoning Appeals*, 5 Va. Cir. 313 (1986); *Laurel Lawn Cemetery Association v. Zoning Board of Adjustment of Towship of Upper Deerfield*, 226 N.J. Super. 649, 545 A.2d 253 (1988).	Outside storage of goods, materials, and equipment composed of appliances, pieces of wood, pipes, and other miscellaneous items, on property zoned Retail Commercial was not customarily incidental to a primary use because it was not stock or inventory of the business. *Vaughn v. City of Newport News*, 20 Va. App. 530, 531-532, 458 S.E.2d 591, 591-592 (1995)
Stone crushing customarily incidental to a quarry. *James H. Maloy, Inc. v. Town Board of Guilderland*, 92 A.D. 2d 1056, 461 N.Y.S.2d 529 (1983).	Proposed garage and storage facilities that would be 41% the floor spaces of the four apartments they would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a customary or incidental use. *Gavis v. Board of Zoning Appeals of the City of Winchester*, 1985 WL 306753 (1985).
Heliport customarily incidental to a construction business. *State v. P.T. & L. Construction Co., Inc.*, 77 N.J. 20, 389 A.2d 448 (1978).	Parking 18-wheel truck overnight and on weekends at owner's home on residentially-zoned land not customarily incidental to a residential use. *Whaley v. Dorchester County Zoning Board of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1994).
Toilet customarily incidental to a campground. *Hardy v. Zoning Board of Review of Town of Coventry*, 119 R.I. 533, 382 A.2d 520 (1977).	Boarding houses, lodging houses, hotels not customarily incidental to a permitted primary use in agricultural-residential zoning district. *Town of Alta v. Ben Hame Corporation*, 836 P.2d 797 (Utah Ct. App. 1992).
Restaurant customarily incidental to a bowling alley. *Gross v. Zoning Board of Adjustment of City of Philadelphia*, 424 Pa. 603, 227 A.2d 824 (1967).	Barn constructed to house heavy construction equipment on residentially zoned land not customarily incidental to a residential use. *Becker v. Town of Hampton Falls*, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977).
Day care center operated "for the instruction and education of the children who attend," and which was "viewed by the pastor, by the employees, and presumably by those who have chosen for their children to attend, as in fact an extension of the ministry" of the church, was customarily incidental to the church use. *Harvest Christian Center v. King George County Board of Zoning Appeals*, 55 Va. Cir. 279 (2001).	32 by 42 foot steel storage building not customarily incidental to a church in a residential zoning district. *Grandview Baptist Church v. Zoning Board of Adjustment*, 301 N.W.2d 704 (1981). Sleeping quarters for employees not customarily incidental to a restaurant. *Charlie Brown of Chatham, Inc. v. Board of Adjustment for Chatham Township*, 202 N.J. Super. 312, 495 A.2d 119 (App. Div. 1985). Shredding and storage of aluminum not customarily incidental to a beer business. *Wegner Auto Co., Inc. v. Ballard*, 353 N.W.2d 57 (S.D. 1984). Used car lot not customarily incidental to an auto repair shop. *Fleury v. Town of Essex Zoning Board of Adjustment*, 141 Vt. 411, 449 A.2d 958 (1982). Pharmacy not customarily incidental to a doctor's office. *In re Porter Medical Associates Use Change Permit*, 139 Vt. 132, 423 A.2d 491 (1980). Restaurant serving alcohol not customarily incidental to an office use. *Tollway North Office Center Central National Bank in Chicago v. Streicher*, 83 Ill. App. 3d 239, 403 N.E.2d 1246 (2d Dist. 1980). Tire storage not customarily incidental to a retail tire store. *Hopewell Township v. Wilson*, 46 Pa. Commw. 442, 406 A.2d 612 (1979).

17-330 An accessory use may not become a lawful nonconforming primary use

An accessory use may not become a lawful nonconforming primary use. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979). *See chapter 18 for a discussion of nonconforming uses.*

In *Knowlton*, the owners had operated a hog farm, and garbage was hauled onto the property to feed the hogs. In

1959, Fairfax County enacted a zoning ordinance that permitted hog farming, but did not permit the general trucking business, which therefore became a nonconforming use. Eventually, the hog farm use terminated, but a waste hauling operation continued and expanded over the years. One of the questions the Virginia Supreme Court considered was whether the waste hauling operation was a nonconforming primary use, since it had begun as an accessory function of the hog farm. The Court stated: "It is true that trash collection . . . was related to the hog raising operation permitted by the ordinance. But a use accessory or incidental to a permitted use 'cannot be made the basis for a nonconforming principal use.'" *Knowlton*, 220 Va. at 575-576, 260 S.E.2d at 236.

In *Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County*, 7 Va. Cir. 201 (1983), the circuit court concluded that a crusher that was accessory to a nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use.

In *Gwinn v. Lester*, 1991 WL 835353 (1991), the circuit court found that the landowners could not continue to park a dump truck on their residentially-zoned parcel where a prior regulation merely required that each parcel have one vehicle space per family unit and at that time parking the dump truck on the parcel had begun, the parcel had been used for a farm and a residence. The current regulations prohibited parking dump trucks of a certain size in residential zoning districts. Assuming that the parking space requirement under the former regulations was a "use," the court held that parking the dump truck was only accessory to the farm and residence use and when the property ceased to be used for that primary use, parking the dump truck -- an accessory use – could not become a nonconforming primary use.

17-340 The character of the primary use determines the character of the accessory use, and the accessory use must be allowed in the zoning district

The very nature of an *incidental* use (see section 17-324) requires that the accessory use be of the same use classification (*i.e.*, commercial, residential, agricultural or industrial) as the primary use. *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005) (because the mining operation was not allowed in the residential zoning district, the mining access road, which was accessory to the primary mining use, was likewise not allowed in the residential zoning district); *Carolinas Cement Co. v. Zoning Appeals Board of Warren County*, 49 Va. Cir. 463 (1999) (the character of the primary use determines the character of the accessory use: "the focus of the analysis is on the character of the activity on the property rather than the physical characteristics of the structures housing the use").

17-350 Primary and accessory uses on a split-zoned parcel

Occasionally, a single parcel may have multiple zoning designations, such as when a single 10-acre parcel abutting a highway has 2 acres of commercially zoned land abutting the highway and the remaining 8 acres are zoned residential or agriculture. The issue that typically arises in a split-zoned parcel situation is whether the access or some other accessory use is permitted on the portion of the parcel within one zoning district to serve the primary use which is on the portion of the parcel within another zoning district. Whether an accessory use may be located on a portion of the parcel subject to different zoning regulations will depend on the applicable zoning regulations.

In *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005), the Virginia Supreme Court considered whether a mining operation allowed by special use permit on the agriculturally zoned portion of a 139-acre parcel could construct an access road across the residentially zoned portion of the parcel to serve the mining operation. The residentially zoned portion of the parcel was situated between the agricultural use portion and a public highway. Although the special use permit request applied only to the part of the parcel located in the agricultural zoning district, the "operation plan narrative" that the mining operator submitted with its special use permit application included a proposal to construct an access road across the portion of the parcel zoned for limited residential use to transport raw materials from the mining site to the public highway.

The Orange County zoning ordinance at issue in *Capelle* defined *accessory use* as "a secondary and subordinate use or structure customarily incidental to, and located upon the same lot occupied by, the main use or structure." In holding that the mining road could not be used on the portion of the parcel zoned for limited residential use, the

Court relied on the regulations for the portion of the parcel zoned for limited residential use, which further limited accessory uses to those customarily incidental to the listed permitted uses in the limited residential zoning districts. The Court also relied on another provision in the zoning ordinance that provided that "any use not expressly permitted or permitted by special use permit in a specific district is prohibited." Because the mining operation was a use neither allowed by right nor by special use permit in a limited residential zoning district, the access road to the mining operation was prohibited in the limited residential zoning district.

In *Gilbert's Corner Limited Partnership v. Loudoun County Board of Zoning Appeals*, 1990 Va. Cir. LEXIS 472, 1990 WL 751280 (1990), the two tracts at issue were zoned commercial on one side and agricultural on the other. The landowners proposed to develop the commercially zoned land for retail, office and personal service uses and to use portions of the agriculturally zoned lands for drainfields for the waste generated from the commercial uses and for road access to the commercial uses. The zoning administrator and the BZA determined that the drainfields and private roads that would serve the commercial uses were not allowed in the agricultural zoning district, and the landowners appealed. The circuit court affirmed the BZA's decision on these issues, holding:

> Thus, "to the extent such uses are accessory uses, the principal use to which they are incidental or subordinate must be a permissible use." In the instant cases, the commercial development planned for the portion of the properties zoned C-1 is not a use specifically permitted by right or by special exception in the "A-3" district.

Gilbert's Corner, 1990 Va. Cir. LEXIS at 8-9, 1990 WL 751280 at 3.

The following cases from other jurisdictions pertain to split-zoned parcels: *Dupont v. Town of Dracut*, 41 Mass. App. Ct. 293, 670 N.E.2d 183 (1996) (split-zoned parcel; access and parking on commercially zoned portion of parcel, which prohibited residential uses, could not serve multi-family dwelling in residentially zoned portion of parcel); *Wolf v. Zoning Board of Adjustment*, 79 N.J. Super. 546, 192 A.2d 305 (1963) (split-zoned parcel; parking lot on residentially zoned portion could not serve restaurant in commercially zoned portion); *Park Construction Co. v. Planning & Zoning Board of Appeals*, 142 Conn. 30, 110 A.2d 614 (1954) (split-zoned parcel; residentially (R-6) zoned portion could not serve as access to multi-family residentially zoned portion).

The rule distilled from the split-zoned parcel cases is that, where a parcel is located in two different zoning districts, an accessory use may not be established in one zoning district to serve a primary use in the other zoning district if the primary use is not allowed in the zoning district in which the accessory use is located. *See, e.g., Dupont, supra.* Another rule obtained from these cases is that an accessory use takes on the use characteristics of the primary use it serves. For example, a parking lot on commercially zoned land serving dwellings on residentially zoned land is a residential use; a parking lot on residentially zoned land serving a restaurant on commercially zoned land is a commercial use. *See section 17-340.*

17-360 Accessory uses on differently zoned and separate parcels

Whether an accessory use serving a primary use may be located on a separate parcel within a separate zoning district will depend on the applicable zoning regulations.

In *Carolinas Cement Co. v. Zoning Appeals Board of Warren County*, 49 Va. Cir. 463 (1999), the circuit court concluded that a private road on an agriculturally zoned parcel would not be accessory to a proposed cement and fly ash distribution facility on an industrially zoned parcel.

A number of cases from other jurisdictions have concluded that an accessory use could not be located on a separate parcel that was subject to different zoning regulations: *Teachers Insurance & Annuity Association v. Furlotti*, 70 Cal. App. 4th 1487, 83 Cal. Rptr. 2d 455 (1999) (commercial building's use of portion of alley in residential zone was commercial in nature and violated residential zoning district regulations); *Atria, Inc. v. Board of Adjustment*, 438 Pa. 317, 264 A.2d 609 (1969) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel); *Williams v. Bloomington*, 108 Ill. App. 2d 307, 247 N.E.2d 446 (1969) (residentially zoned parcel could not be used to provide access to serve an adjoining commercially zoned parcel); *Sprague-Covington Co. v. Zoning*

Board of Review, 102 R.I. 317, 230 A.2d 419 (1967) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel); *San Francisco v. Safeway Stores, Inc.*, 150 Cal. App. 2d 327, 310 P.2d 68 (1957) (residentially zoned easement may not be used to provide access to commercial use on adjoining parcel); *Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 109 N.E.2d 597 (1952) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel).

17-370 Specific accessory uses may be excluded from a zoning district

A locality may exclude specific accessory uses from a district by regulation. *Wiley v. County of Hanover*, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968) ("Had it been the purpose of the ordinance to prohibit the raising, sheltering or harboring of pigeons or other fowl in a residential district, as the county claims, this could easily have been accomplished by a simple and direct provision to that effect").

Lawrence v. Zoning Board of Appeals

Supreme Court of Connecticut

Nov 25, 1969

158 Conn. 509 (Conn. 1969)

An "accessory use" of property under a zoning law is a use which is "customarily incidental" too its principal or main use. In such a context, the word "incidental" means that the use must be, not the primary one, but one subordinate in its significance. It is net enough, however, that the use be subordinate; it must also be attendant or concomitant. The word "customarily," when used in the same context, requires that the use be scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. The zoning enforcement officer of North Branford ordered the plaintiff, who resided on a one-and-one-half-acre plot he owned in a residential and agricultural district in the center of town, to cease maintaining goats and chickens thereon. The defendant board, after a full hearing, determined that the keeping of such animals was not, as the plaintiff claimed, an accessory use to his dwelling and affirmed the action of the zoning enforcement officer. The applicable town ordinance defines an accessory use as one which is subordinate and customarily incidental to the main building and use on the main lot. Since it was peculiarly within the knowledge of the board to determine whether the raising of goats and chickens here was an accessory use and since, on the record, it could not be said that the board acted illegally or abused its discretion in deciding that issue, the trial court should have dismissed the plaintiff's appeal from the board's action.

County and tried to the court, O'Sullivan, J.; judgment sustaining the appeal, from which the defendant appealed to this court. Error; judgment directed.

Charles A. Sherwood, with whom was Joseph B. Lukas, for the appellant
510 (defendant). *510

Pasquale Young, for the appellee (plaintiff).

THIM, J.

The plaintiff, James Lawrence, purchased a plot of approximately one-and-one-half acres on Church Street in the center of North Branford in April, 1966. He resides in a house on the property with his wife and five children and had kept twenty-six chickens and two goats, which he used to feed his family. On September 8, 1966, the zoning enforcement officer for the town ordered Lawrence to cease maintaining the goats and chickens, and the defendant, the zoning board of appeals, affirmed the action of the enforcement officer after a full hearing. Lawrence appealed this decision to the Court of Common Pleas, which rendered judgment sustaining his appeal. From that judgment, the board has appealed to this court.

The decision of the case turns on the interpretation of the pertinent provisions of the North Branford zoning ordinance, which are set forth in a footnote and their application to Lawrence's property.[1] Lawrence's property
511 is in an R-40 residence *511 and agriculture district, and the basic issue which

to be engaged in farming, nor does he rely on what would be an accessory use to farming as justification for the continuance of his raising of chickens and goats. His sole claim is that the use in question is permitted as an accessory use to a dwelling.

[1] "[North Branford Zoning Regs. (1962)] 39-11. R-40 — RESIDENCE AND AGRICULTURE DISTRICT. A. Permitted uses: (1) Any use permitted in R-60 Residence and Agriculture District, except: (a) Biding stables, kennels, veterinarian and small animal hospitals. B. Space requirements. See Article V. C. Parking requirements. See Article VIII." "39-10. R-60 — RURAL RESIDENCE AND AGRICULTURE DISTRICT. A. Permitted uses: (1) Dwellings. (2) Farming, except mink, fox and hog farms. . . . (10) Accessory uses and buildings, including roadside stands for local produce. . . ." "39-6. DEFINITIONS. ACCESSORY BUILDING OR USE — One which is subordinate and customarily incidental to the main building and use on the same lot. . . ."

A zoning ordinance is a local legislative enactment, and in its interpretation the question is the intention of the legislative body as found from the words employed in the ordinance. Fox v. Zoning Board of Appeals, 146 Conn. 70, 73, 147 A.2d 472. The words employed are to be interpreted in their natural and usual meaning. See State ex rel. Higgins v. Civil Service Commission, 139 Conn. 102, 114, 90 A.2d 862. The ordinance in question defines an accessory use as one which is subordinate and customarily incidental to the main building and use on the same lot. The crucial phrase "customarily incidental" is typically present in this type of legislation. 1 Anderson, American Law of Zoning 8.26. While the necessity for permitting accessory uses must be admitted, the objectives of the comprehensive plan will be jeopardized if "accessory use" is so broadly construed as to allow incompatible uses to invade the district. Ibid.

In the Fox decision, supra, 74, we had occasion to define accessory use as "a use which is customary in the case of a permitted use and incidental to it.

The word "incidental" as employed in a definition of "accessory use" incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word "subordinate" included in the definition in the ordinance under consideration. But "incidental," when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of "incidental" would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

The word "customarily" is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of "incidental," it should be applied as a separate and distinct test. Courts have often held that use of the word "customarily" places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use of the land. See 1 Anderson, loc. cit. In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine whether it has commonly, habitually and by long
513 practice been established as reasonably *513 associated with the primary use. As stated in 1 Rathkopf, Zoning Planning (3d Ed.), p. 23-4: "In situations where there is no . . . specific provision in the ordinance, the question is the extent to which the principal use as a matter of custom, carries with it an incidental use so that as a matter of law, in the absence of a complete prohibition of the claimed incidental use in the ordinance, it will be deemed that the legislative intent was to include it."

In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the

In the light of the analysis above of what is meant by "accessory use," it can be seen that the application of the concept to a particular situation "may often present and depend upon questions of fact, or involve or be open to a legal exercise of discretion by the administrative officials and the board of appeals." Chudnov v. Board of Appeals, 113 Conn. 49, 55, 154 A. 161. As to the application of the regulations to Lawrence's situation, it became the duty of the zoning board of appeals to decide, within prescribed limits and consistent with the exercise of a legal discretion, the application of the ordinance to the instant facts. Connecticut Sand Stone Corporation v. Zoning Board of Appeals, 150 Conn. 439, 442, 190 A.2d 594. Because the
514 board was determining *514 the reasonableness of the decision of the zoning enforcement officer, it was acting administratively in a quasi-judicial capacity in applying the regulations. See Pascale v. Board of Zoning Appeals, 150 Conn. 113, 116, 117, 186 A.2d 377. Even though the board was not acting in a legislative capacity as would a zoning commission in making a change of zone, nevertheless its determination of the applicability of the ordinance, as we have construed it, to Lawrence's situation lay within its sound discretion. Rocchi v. Zoning Board of Appeals, 157 Conn. 106, 110, 248 A.2d 922; Thorne v. Zoning Board of Appeals, 156 Conn. 619, 238 A.2d 400; Florentine v. Darien, 142 Conn. 415, 115 A.2d 328. "In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal." Toffolon v. Zoning Board of Appeals, 155 Conn. 558, 560, 236 A.2d 96.

The instant case called for a determination by the board of whether the raising of chickens and goats was an accessory use — one which was subordinate and customarily incidental to property located in the center of town and used for residential purposes. Such a determination is one peculiarly within the knowledge of the local board. See Stern v. Zoning Board of Appeals, 140 Conn. 241, 245, 246, 99 A.2d 130.

livestock may only be permitted in conjunction with farming. Following the decision on accessory use, the board suo motu considered whether a use variance should be granted. The members ruled that no variance was justified, and their decision on this issue is not raised on appeal. The board's decision that the particular use in question was not an accessory use is reasonable in the light of other decisions on similar issues. "Absent an ordinance which includes the raising of fowl, hogs, or other animals, the courts have hesitated to attribute to the legislative bodies the intent to admit these uses to residential districts as agricultural or farming uses." 2 Anderson, American Law of Zoning 11.05, p. 260: also see Chudnov v. Board of Appeals, 113 Conn. 49, 55, 154 A. 161.

"The basic issue before the court below was whether the . . . [plaintiff] proved that the action of the board of appeals was illegal." Fox v. Zoning Board of Appeals, 146 Conn. 70, 75, 147 A.2d 472. Upon the record we cannot say that the board acted illegally or abused its discretion, and an examination of the memorandum of decision of the trial court indicates that it merely substituted its discretion as to the application of the ordinance to Lawrence's situation for that of the board.

The trial court was in error in sustaining Lawrence's appeal from the decision of the zoning board of appeals affirming the action of the zoning enforcement officer.

State of Vermont
Superior Court—Environmental Division

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ENTRY REGARDING MOTION

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In re Gould Accessory Building Permit (After Remand) Docket No. 14-1-12 Vtec
(Appeal from Town of Monkton Development Review Board decision)

Title: Motion for Summary Judgment (Filing No. 4)
Filed: May 23, 2012
Filed By: Interested Person Town of Monkton

Response in opposition filed on 6/1/12 by Applicants/Appellants Donald and Julie Gould
Reply filed on 6/6/12 by Town of Monkton

___ Granted _X_ Denied ___ Other

Donald and Julie Gould (Applicants) appeal a decision by the Town of Monkton Development Review Board (the DRB)[1] denying their application for a building permit to construct an accessory building on property they own in the Town of Monkton, Vermont (the Town). Now pending before the Court is the Town's motion for summary judgment. Applicants filed a response in opposition, to which the Town replied. In its motion, the Town contends that Applicants' proposed construction does not qualify as an accessory dwelling under 24 V.S.A. § 4412(1)(E).

A court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); see also V.R.E.C.P. 5(a)(2); Travelers Ins. Cos. v. Demarle, Inc. USA, 2005 VT 53, ¶ 3, 178 Vt. 570 (stating that the party moving for summary judgment bears the burden of proof). We will "accept as true the [factual] allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material," and we will give the non-moving party the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356.

Title 24, Section 4412(1)(E) of the Vermont Statutes Annotated provides that "[n]o bylaw shall have the effect of excluding as a permitted use one accessory dwelling unit that is located within or appurtenant to an owner-occupied single-family dwelling. An accessory dwelling unit means an efficiency or one-bedroom apartment that is clearly subordinate to a single-family dwelling . . . ." 24 V.S.A. § 4412(1)(E) (emphasis added). The Town of Monkton Zoning Regulations define "accessory use or building" as "a use or building customarily incidental and subordinate to the principal use of building [sic] and located on the same lot." Regulations § 130.

In its motion for summary judgment, the Town contends that Applicants' proposed dwelling does not qualify as an accessory dwelling under 24 V.S.A. § 4412(1)(E) because its use is

[1] This matter was before the DRB after a remand order issued by this Court. See In re Gould Accessory Dwelling Application, No. 33-3-11 Vtec (Vt. Super. Ct. Envtl. Div. Aug. 23, 2011).

not subordinate to that of the principal dwelling.[2] The Vermont Supreme Court has previously interpreted "subordinate" to mean "holding a lower rank, class, or position." In re J.D. Associates, 2004 WL 5582887, slip op. at 2 (Vt. 2004) (unpublished mem.) (quoting Black's Law Dictionary 1439, 1540 (7th ed. 1999)); see also E.C. Yokley, Zoning Law & Practice 8-2 (4th ed. 2001) ("'Incidental and subordinate' means a use that is minor in relation to the permitted use and bears a reasonable relationship to it.").

In support of its motion for summary judgment, the Town points to Section 2730(b)(4) of the 2006 Vermont Fire and Building Safety Code (the Code). That Section refers to 24 V.S.A. § 4412(1)(E) and states that "[a] common driveway, shared water and waste water systems, and a common electrical service entrance are examples of an accessory dwelling unit being clearly subordinate to a single-family dwelling." The Town relies on Section 2730(b)(4) to argue that the proposed dwelling is not subordinate to the existing single-family dwelling because it will be served by a separate driveway, a separate well, and possibly a separate electrical service entrance.[3] In response, Applicants do not dispute that their proposed dwelling will have a separate driveway and a separate well. Instead, they argue that the Code does not apply to their building permit application.

We need not decide whether the Code does in fact apply to the application before us because even if it does apply, the Code's plain language indicates that the factors it lists are mere examples of factors that may indicate that an accessory dwelling is subordinate to a single-family dwelling. See In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262 (stating that when interpreting zoning ordinances and statutes, courts will "construe words according to their plain and ordinary meaning"). There is nothing to indicate that the list of factors is comprehensive, or that each of those factors are required for an accessory dwelling to be considered subordinate to the principal dwelling.

Thus, although it is undisputed that Applicants' proposed dwelling will have a separate driveway and a separate well, it does not follow that the Town is entitled to summary judgment on the question of whether the proposed dwelling is subordinate under 24 V.S.A. § 4412(1)(E) and therefore qualifies as an accessory dwelling. It remains unclear whether the dwellings will share an electric service entrance or what the septic service will be. It also remains unclear whether the use of the proposed dwelling will be minor in relation to the use of the existing single-family home. See E.C. Yokley, Zoning Law & Practice 8-2 (4th ed. 2001). Neither party has provided factual allegations to this effect.

The Town also cites the Town of Charlotte Land Use Regulations and the Town of Hinesburg Zoning Regulations (collectively, Regulations) in support of its motion for summary judgment. Those Regulations require that an accessory dwelling unit share a common driveway with the principal dwelling. However, Applicants' proposed dwelling is located in the Town of Monkton, not in the Towns of Charlotte or Hinesburg. Thus, the Regulations that control zoning in those towns have no bearing on the matter before us. The parties have not pointed us to any such requirement in the Town of Monkton Zoning Regulations.

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[2] To qualify as an accessory dwelling, Applicants' proposed dwelling must meet all of the requirements found in 24 V.S.A. § 4412(1)(E). In the motion currently pending before us, the Town disputes only whether Applicants' proposed dwelling is subordinate to their principal residence. Thus, we address only that portion of Section 4412(1)(E) here.

[3] The Town concedes that the proposed dwelling will share septic services with the primary residence, although it contends that the Vermont Agency of Natural Resources has not yet received an application or granted a permit for such septic services.

The Town has therefore presented the Court with insufficient undisputed facts to show that Applicants' proposed dwelling is not subordinate to the existing single-family dwelling under 24 V.S.A. § 4412(1)(E). Consequently, we must **DENY** the Town's motion for summary judgment. We will proceed to trial as scheduled on **Tuesday, June 19, 2012 at 9:00 a.m.** in the Addison County Superior Court.[4]

_____ June 7, 2012

Thomas G. Walsh, Judge Date

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Date copies sent to: _____ Clerk's Initials _____

Copies sent to:

Applicants/Appellants Donald J. and Julie Gould, pro se

David Rath, Attorney for Town of Monkton

[4] Applicants have filed a motion entitled "motion to have this matter decided on the statutory criteria of 24 VSA 4412 [sic]." Further, in their opposition to the Town's motion for summary judgment, Applicants ask that their claim for money damages under Article 7 of the Vermont Constitution be preserved for presentation to a Vermont Superior Court at a later date. This Court will address those issues at the beginning of the June 19, 2012 trial.