

**TOWN OF OLD ORCHARD BEACH, MAINE
ADMINISTRATIVE REVIEW BOARD HEARING
Tuesday, November 26, 2019**

The Administrative Review Board met at 3:12 p.m. on November 26, 2019 in the Town Council Chamber. The following Board members were in attendance:

Attending: Town Manager Larry Mead
 Assistant Town Manager, Louise Reid
 Code Enforcement – Ricky Haskell
 Planner – Jeffrey Hinderliter
 Police Chief Dana Kelley
 Fire Chief Fred Lamontagne
 Marc Bourassa – Town Business Community Member
 Michael Shannon – Alternate Citizen Member of the Board

Also in attendance:

 Attorney Phil Saucier – Bernstein & Shur
 Attorney John Bannon representing Barbara Hickey & Jeffrey Fairbanks
 Barbara Hickey
 Jeffrey Fairbanks
 Resident – Kelsey Daniels – 1 Meadow Lane

The Town Manager, Larry Mead, opened the Administrative Review Board at 3:12 p.m.

The Town Manager at the beginning of the meeting read the following:

Town Manager Mead invited Attorney Bannon and the Licensees to speak to the issue. Attorney Bannon provided a written memorandum to the Board. He then spoke to the Board providing an overview of the memorandum content. The memorandum is attached and included in the Minutes.

ADMINISTRATIVE REVIEW BOARD MEETING NOVEMBER 26, 2019

This meeting is convened pursuant to Article 2, Section 18-39 of the Town's Code of Ordinances to conduct fact-finding with regard to the business license held by Barbara Hickey and Jeffrey Fairbanks for two year-round rentals at 6 Country Drive. *Board members, you have a copy of the business license before you.*

With respect to the matter we are addressing today, at the October 15th Town Council meeting the publicly noticed agenda, under the Public Hearing Business Licenses and Approval category, included consideration of the following license as written in the agenda: "Barbara Hickey & Jeffrey Fairbanks (107-3-6-15), 6 Country Drive, two year-round Condo rentals". *You have a copy of the agenda before you.* During the meeting Chair Joseph Thornton publicly read the item as it was written. There was no public comment on the item. A motion to approve was made and seconded. There was no Council discussion and the motion was approved 4-0.

In actuality the use for which the applicants were seeking a business license was not for two year-round condo rentals, as voted and approved by the Town Council, but rather was for the year-round rental of two individual rooms in a single family dwelling. *You have a copy of the license application before you.* The use mistakenly approved by the Town Council, two year-round condo rentals, is not the business activity taking place at 6 Country Drive.

The Town's Business Ordinance requires that, before the Town Council can revoke or suspend a business license, the Administrative Review Board meet to discuss the issue. Therefore, the issue for your consideration and review today, is whether the business license should be revoked by the Town Council because the activity for which the license was approved, two condo rentals, does not exist. If the Board determines that the business license should be revoked, the Board will propose a consent agreement for the license holder's consideration. If the licensee does not accept the consent agreement as proposed, the Board, through the License Administrator, shall recommend to the Town Council that the license be revoked. Action taken by the Board is advisory to the Town Council.

Should the Town Council revoke the existing business license the applicants may re-submit an application to the Town for a license for the rental of two individual rooms. I am aware that there are neighboring property owners who have raised concerns with the Town about the rental activity at the licensed address and who would prefer that the Town not grant a license for the requested use. Those concerns are not germane to the matter before this Board today. I ask that members confine their discussion to the question of whether a license mistakenly approved by Town Council for an activity that does not exist should be revoked by the Town Council.

MEMORANDUM

TO: The Town of Old Orchard Beach Administrative Review Board

FROM: Murray, Plumb & Murray, on behalf of Licensees Jeffrey Fairbanks and Barbara Hickey

DATE: November 26, 2019

RE: Objections to the Convening of the Administrative Review Board and to the Town's Challenges to the Business License Legally Granted to Mr. Fairbank and Ms. Hickey by the Town Council on October 15, 2019

A. Factual Introduction

On Friday, November 1, 2019, Jeffrey Fairbanks and his wife, Barbara Hickey, of 6 Country Drive, asked me to represent them with regard to a controversy that had arisen concerning a business license approved by the Town Council at its meeting on October 15, 2019 and issued on October 16, 2019 (hereafter the "License"). On its face, the License grants my authority to rent "2 Year Round Rentals" at their home at 6 Country Drive. A copy of that License is attached to this Memorandum as Exhibit A.

Mr. Fairbanks applied for that License on September 25, 2018. The words "condominium" and "condo" appear nowhere on the License Application. A copy of that License Application is attached to this Memorandum as Exhibit B.

On September 26, 2019, Assistant Code Enforcement Officer Rod Belanger called Ms. Hickey to ask for permission to inspect my clients' home, in connection with my clients' License Application, for compliance with the Town's ordinances and regulations. When he first arrived at my clients' home, Mr. Belanger apparently was under the impression that my clients were proposing to rent two condo units.

When my clients explained that they only planned to rent two *bedrooms* in their home and showed Mr. Belanger those bedrooms, Mr. Belanger was satisfied that the proposed rental of the two bedrooms complied with all pertinent Town regulations. He personally wrote on the application form the language, "2 units (rent 2 bedrooms)." Later on September 26th, Mr. Belanger dated and signed the boxes signifying that the License Application complied with the Town's ordinances and regulations governing (a) "Zoning/Land Use," (b) "Building/Structural," (c) "Electrical" (d) "Plumbing," and (e) "Fire." When Mr. Fairbanks came to Town Hall to pay the License Application fee, Susan

Bellavance kindly explained that she had had to charge him the fee for two individual dwelling "units" because the license application form does not include a category simply for the year-round rental of bedrooms. However, Mr. Belanger, who was also present, assured Mr. Fairbanks that "everything was alright" with the License Application.

At its meeting of October 15, 2019, the Town Council approved my clients' License Application. The Town Council's agenda described my clients' application as seeking to license "two year round condo rentals." However, my clients had no input into the drafting of that agenda; and, as noted before, the License Application does not include the words "condominium" or "condo." Legally, the Town Council could only approve the language of the specific License Application before it – which, in this case, was an application for a license to rent *two bedrooms* in my clients' home.

No one from the public, and no member of the Town Council, spoke for or against granting of my clients' license application for the year-round rental of two bedrooms. The Board voted unanimously to grant the License. The following day, Planning and Code Administrative Assistant Susan Bellavance issued the License itself to my clients.

Fifteen days later, Town Planner Jeff Hinderliter wrote an e-mail to the Town Manager, arguing that the rental of rooms, with casual kitchen access, in a single family home, falls exclusively within the definition of a "rooming house," and is therefore not a permitted use in the R-4 Zone. Although the Town Manager agreed with Mr. Hinderliter's interpretation, the Town Manager nevertheless asserted that (a) "I have little doubt that there are other properties in OOB that are currently renting one or more single rooms for transient occupancy through Airbnb or vrbo and would, therefore, be classified as rooming house, and (b) *"I am not inclined at this time to go hunting for these types of rentals."* (emphasis added) A copy of the Town Manager's e-mail is attached to this Memorandum as Exhibit C.

The agenda for the Town Council's meeting on November 19, 2019 contained an item that would have called for the Council to vote to amend its October 15th approval of my clients' License Application so that it referred expressly to "two year round bedroom rental." It had been anticipated that the Council would vote to remove that item from the agenda, "without prejudice," meaning that it could be placed on the agenda for a future Town Council meeting. Instead, the Town Council voted to remove the item "*with* prejudice," a term not contained in the Council's Rules of Procedure set forth in Part I, Subpart A, Chapter 2 of the Town Code of Ordinances. Presumably that vote would signify that matter could not appear on a future Town Council Agenda.

B. This Meeting of the Administrative Review Board is Not Authorized under the Code.

On November 13, 2019, the Town Manager sent me an e-mail calling for a meeting of the Administrative Review Board with regard to my clients' license. The calling of this meeting is contrary to the Code because it has been preceded by none of the following events which, under Section 18-39 of the Town's Business Ordinance, are prerequisites for the calling of such a meeting:

1. The Town has neither revoked my clients' License nor followed any of the procedures for doing so set forth in Section 18-39 of the Business Ordinance. Neither the Town Council, the building inspector, nor the Town Manager have purported to suspend my clients' license temporarily pending a Town Council hearing on suspension or revocation. Even if they had, such a temporary suspension would be unlawful under Section 18-39(a) because this situation does not meet the following standards of the Business Ordinance for a temporary suspension:

(a) it is not true that "the continued operation of the licensed business or activity constitutes an immediate and substantial threat to the public health and safety;" and

(b) the Town has failed to provide my clients with "written notification of the suspension and the reasons therefor." Although the Town seems to assume that my clients know the reasons why the Town questions the validity of their license, in fact, my clients do not know what regulations or ordinances the Town alleges they have violated. The Town has sent them neither a notice of violation nor any other writing informing them of how they have allegedly violated the Code.

2. Section 18-39(b) is not applicable here, either, because the Council has neither scheduled a hearing on suspension or revocation of my clients' license nor expressed any intention to do so. Moreover, the Town Council has voted to remove this item from its agenda "with prejudice."

C. There are No Legal Grounds for Revoking My Clients' License.

We have heard, informally, that the Town classifies my clients' rental as a "rooming house," which is not permitted in the R-4 Residential District. The Town has no legally-enforceable basis to characterize my clients' rental of two bedrooms in their home as a "rooming house."

Because the term “rooming house” is not defined in the Zoning Ordinance, it is to be given its “commonly accepted meaning.” The standard dictionary definition of a “rooming house” is “a house where lodgings are provided for rent.” <https://www.merriam-webster.com/dictionary/rooming%20house> My clients’ rental of two bedrooms in the home they occupy as their principal residence fails to meet that definition for at least four reasons:

First, the common meaning of “rooming house” is a house where the renting of lodgings is the *principal* use. The principal use of my clients’ home is as a single-family dwelling.

Second, the Zoning Ordinance defines a “lodging establishment” as “a hotel, motel, bed and breakfast establishment or inn.” My clients’ home is none of those things. (Although the Zoning Ordinance does contain a definition of “boarding house,” it is inapplicable to my clients because it applies only to a “building in which *more than two* but not more than nine guestrooms are offered for lodging with meals for compensation.” (emphasis added))

Although the Housing Ordinance does contain a definition of “rooming house,” the Zoning Ordinance does not incorporate the Housing Ordinance by reference. Therefore, the Town may not legally import that definition into the Zoning Ordinance. *Camplin v. Town of York*, 471 A.2d 1035 (Me. 1984).

Third, and perhaps most importantly, the Town is legally barred from contending that my clients’ rental of two bedrooms in their home is prohibited in the R-4 Zone. Section 78-96 of the Zoning Ordinance grants the Board of Appeals the “power and the duty to hear and decide appeals where it is alleged that there is an error in any order, decision, or determination made by the code enforcement officer in writing.” However, any such appeal must be filed “no later than 30 days after the written order, decision or determination from which the appeal is taken.” If an aggrieved party fails to file an appeal to the Board of Appeals within that 30-day period, the Code Enforcement Officer’s decision becomes administratively final and is no longer subject to future challenge.

The same rules that are imposed upon *citizens* with respect to appeals from a code enforcement officer’s written determination apply equally to *the municipality and the Code Enforcement Office*. If neither the Code Enforcement Office nor any other Town official appeals a code enforcement officer’s written determination within 30 days after that determination, neither the Town nor any of its agencies may thereafter challenge the validity of that determination or of any permit or license granted pursuant to that determination. *Juliano v. Town of Poland*, 725 A.2d 545 (Me. 1999). Mr. Belanger determined that my clients’ license application complied with all of the Town’s “Zoning/Land Use” ordinances on September 26, 2019. Therefore, any appeal from that determination had to be filed, if at all, by October 28, 2019. No such appeal was filed. Under *Juliano*, therefore, the Town cannot

now contend that my clients' rental of two bedrooms in is prohibited in the R-4 District or by any other provision of the Zoning Ordinance.

Finally, given the Town Manager's statement that he is "not inclined at this time to go hunting for these types of rentals," the Town cannot, consistent with fairness and equal protection, subject my clients to enforcement actions that the Town expressly does *not* plan to take against other persons who are renting rooms in exactly the same fashion as my clients.

Mr. Fairbanks stated that the application he submitted specified two bedroom rentals. Town Manager Mead said that the Town Council Agenda mistakenly described the license to be for two condo rentals, as did the Order voted on and approved by Council. The Town Manager did indicate that at the Public Hearing no one spoke for or against the item and there were no comments by the Town Council so the Application for the License was approved for the year-round rental of two bedrooms. The Applicants acknowledged they were present for the Council Hearing.

Board Member, Michael Shannon, indicated that he felt that since an error had been made that he would recommend that the Licensee give up his license, resubmit a license application with the fees waived or refunded and paid again with the new application, and that this be submitted again to the Town Council. Fire Chief Fred Lamontagne suggested that a Consent Agreement could be provided indicating the need for giving up the License, re-issuing a new license for the actual use, with the fees waived.

MOTION: Fire Chief Fred Lamontagne motioned and Michael Shannon seconded that the Licensees agree to voluntarily give up the issued business license as mistakenly approved and issued; and the Licensees can either re-submit the application for a business license and application fees would be waived; or receive a refund of their application fees and decide whether they wish to re-apply for a business license or not re-apply.

There was discussion about the word “mistakenly” and it being removed from the Motion.

MOTION: Michael Shannon motioned and Marc Bourassa seconded to Amend the main Motion by removing the word mistakenly.

VOTE: Unanimous.

Town Manager Mead called for a vote on the main Motion, as amended.

VOTE: Yea: Larry Mead, Ricky Haskell, Jeffrey Hinderliter, Fred Lamontagne, Marc Bourassa, Michael Shannon

Nay – Chief Dana Kelley

The vote on the Main Motion as amended passed six to one

MOTION: Marc Bourassa motioned and Ricky Haskell seconded to adjourn the Administrative Review Board at 4:58 p.m.

VOTE: Unanimous.

Respectfully Submitted,

**V. Louise Reid
Secretary to the Administrative Board**

I, V. Louise Reid, Secretary to the Administrative Review Board of Old Orchard Beach, Maine, do hereby certify that the foregoing document consisting of six (6) pages is a true copy of the original Minutes of the Administrative Hearings held on Tuesday, November 26, 2019.

Administrative Review Board Meeting Minutes of 11 26 19 Barbara Hickey/Jeffrey Fairbanks