

**Town of Kennebunk Zoning Board of Appeals
Notice of Decision**

To: US Hotels New England LLC
c/o Ralph W. Austin, Esq.
234 Main St., P.O. Box 468
Biddeford, ME 04005-0468

Date: May 24, 2018

Dear Mr. Austin:

On May 21, 2018, the Zoning Board of Appeals acted on your client's application for two proposed changes in non-conformance and made the following findings of fact and conclusions of law:

Findings of Fact

1. The subject property is 0.91 acres in size and is located at 11 Doane's Wharf Road (hereinafter, "Property"). It is located in the Resource Protection underlying zoning district and in the Shoreland Overlay District. The Property is further identified as Assessor's Tax Map 88, Lot 68.
2. The owner of the Property is US Hotels New England LLC (formerly known as HIOS Hospitality LLC).
3. The applicant is US Hotels New England LLC (the "Applicant"), which has demonstrated a legal interest in the Property by providing a copy of a deed dated January 14, 2005, and recorded in the York County Registry of Deeds in Book 14350, Page 115.
4. The Property is currently improved with four cottage structures—A, B, C and D. Three of the cottages (A, B, and C) are currently used as rental cottages and one (D) serves as a "function hall." Two of the cottage structures (C and D) are used on a year-round basis, while the other two (A and B) are currently used only on a seasonal basis.
5. The applicant proposes to (i) change the non-conforming use of one of the buildings (Cottage D) on the Property from a function hall to a rental cottage; and (ii) use two of the buildings (Cottage A and B) on a year-round rather than seasonal basis.
6. A complete application was submitted on April 6, 2018.
7. A Public Hearing was held on May 21, 2018, at which the Applicant was represented by Ralph W. Austin, Esq.
8. Other relevant facts are as follows:
 - The Applicant testified that Cottages A and B are currently used on a seasonal basis from April 1 until December 31, but there is no evidence in the record that the "seasonal" designation was ever imposed as a condition by the Town; rather, it appears

to have been noted by the Code Enforcement Officer as the manner in which the Applicant and predecessor-in-title had used those cottages historically.

- The Applicant is proposing to use Cottages A and B year-round by adding usage during the time period of January 1 until March 31 on an annual basis. Cottages C and D are already used year-round, and the Property is currently maintained (including snow removal) all year long.
- The current use of the Property is lodging, which is defined in the Zoning Ordinance as “an overnight accommodation with sleeping arrangements provided for a fee.”
- As a function hall, Cottage D can hold up to 50 persons for events, and the Applicant has held 8 or 9 events from January 1, 2018 to the date of the public hearing. The frequency of events typically increases during the busy summer months. If used as a rental cottage, Cottage D would be used by only 2 or 3 guests at a time.
- Members of the public who commented on the application during the public hearing generally spoke favorably of the Applicant’s use of the Property, but some raised concerns about whether the proposed changes in use would result in increased traffic and congestion on Doane’s Wharf Road and vicinity.

Conclusions

Based on the above stated facts, the Zoning Board of Appeals makes the following conclusions:

A. The proposed use of Cottage D as a rental cottage rather than a function hall does not constitute an expansion of a non-conforming use.

1. Article 5, Section 7 of the Zoning Ordinance applies to this application because the Property is located within the Shoreland Zone.

2. Article 5, Section 7(C)(D)(1) of the Zoning Ordinance provides:

Expansions. Expansions of non-conforming uses are prohibited, except that non-conforming residential uses may, after obtaining a permit from the Planning Board, be expanded within existing residential structures or within expansions of such structures as allowed in Section 7(C)(1)(a) above.

3. Article 2, Section 2 (Definitions) provides:

ENLARGEMENT OR EXPANSION OF USE: Any intensification of use in time, volume, or function, whether or not resulting from an increase in the footprint, height, floor area, land area or cubic volume occupied by a particular use.

4. The proposed use of Cottage D as a rental cottage rather than a function hall does not constitute an impermissible expansion of a non-conforming use under the Zoning Ordinance

because it will not result in an intensification of the lodging use of the Property. The Board finds, based on the testimony of the Applicant and other evidence in the record, that the use of the Property will actually become less intense if Cottage D is used as a rental cottage, as there will be fewer guests using the building and parking in the parking area than when Cottage D was used as a function hall.

B. The proposed use of Cottages A and B on a year-round basis does not constitute an expansion of a non-conforming use.

1. The same ordinance provisions as outlined in Section A are applicable here.

2. The proposed use of Cottages A and B on a year-round basis does not constitute an impermissible expansion of a non-conforming use under the Zoning Ordinance because it will not result in an intensification of the lodging use of the Property. The Applicant's proposal is to add usage of Cottages A and B during three winter months (January through March) to the current usage of April 1 to December 31. The Board finds, based on the testimony of the Applicant and other evidence in the record, that these three months are much less busy than the months of current usage. Moreover, the Property is already used for lodging on a year-round basis for Cottages C and D, and the Property is therefore maintained throughout the year, including snow removal in the wintertime. Therefore, taking into consideration the totality of the Property and the manner in which it is currently used by the Applicant, the actual lodging use of the Property will not be intensified in time, volume or function.

C. The proposed use of Cottage D as a rental cottage rather than a function hall is less or no more nonconforming than the existing situation.

1. Article 5, Section 2 (Definitions) defines a "change of use" as any "use which differs significantly from the previous use of a building or land."

2. Article 5, Section 9 of the Zoning Ordinance provides:

A nonconforming aspect of a lot or building may be changed if the Code Enforcement Officer determines that it is no more nonconforming than the existing situation. In the case of a change in a nonconforming use, the Board of Appeals shall make the determination of whether the change is to a use that is less or no more nonconforming than the existing situation. In making its determination, the Board of Appeals shall apply the standards of Article 7, Section 1A.

3. The Board finds that the proposed change in use meets the eight (8) approval standards set forth in Article 7, Section 1A:

(1) The Board finds that this standard is met because the conversion of the function hall to a rental cottage would reduce the overall number of people and vehicles traveling to and from the Property, thereby reducing the vehicular and pedestrian traffic and potential hazards.

(2) The Board finds that this standard is met because there will be fewer vehicles parked in the Property's parking area along the Kennebunk River, thereby reducing the

risk of any water pollution, and because there will not be any changes to the footprint of Cottage D or any other physical changes to the Property in connection with the proposed change in use.

(3) The Board finds that this standard is not applicable to the proposed change of use because the existing lodging use does not produce any smoke, dust or other contaminants.

(4) The Board finds that this standard is met because there will be no change to the existing buildings on the Property and there will be less traffic and impact on the surroundings as a result of the conversion from a function hall to a rental cottage.

(5) The Board finds that this standard is met because no physical changes to the Property have been proposed in connection with the change in use.

(6) The Board finds that this standard is met because the Applicant is proposing to continue the overall lodging use of the Property, and the Board did not receive any evidence of depreciation of value of surrounding properties into the record.

(7) The Board finds that this standard is met because there is no proposed change in the footprints of the buildings on the Property in connection with the change in use.

(8) The Board finds that this standard is not applicable because the proposed use is not residential.

4. Having applied the standards set forth in Article 7, Section 1A, and because the Board has determined that the Applicant meets each of those standards, the Board therefore concludes that the proposed use of Cottage D as a rental cottage rather than as a function hall is less or no more nonconforming than the existing situation.

D. The proposed use of Cottages A and B on a year-round basis is less or no more nonconforming than the existing situation.

1. The same ordinance provisions as outlined above in Section C are applicable here.

2. The Board finds that the proposed change in use meets the eight (8) approval standards set forth in Article 7, Section 1A:

(1) The Board finds that this standard is met because, as described in Section B above, the proposed change in use does not constitute an expansion or intensification of the use of the Property, which is already used by the Applicant for lodging on a year-round basis.

(2) The Board finds that this standard is met because there will not be any changes to the footprint of Cottages A and B, nor any other physical changes to the Property, in connection with the proposed change in use.

(3) The Board finds that this standard is not applicable to the proposed change of use because the existing lodging use does not produce any smoke, dust or other contaminants.

(4) The Board finds that this standard is met because there will be no change to the existing buildings on the Property, and because any increase in traffic or impact on the surroundings as a result of the use of Cottages A and B during three winter months will be minimal.

(5) The Board finds that this standard is met because no physical changes to the Property have been proposed in connection with the change in use.

(6) The Board finds that this standard is met because the Applicant is proposing to continue the overall lodging use of the Property, and the Board did not receive any evidence of depreciation of value of surrounding properties that is part of the record.

(7) The Board finds that this standard is met because there is no proposed change in the footprints of the buildings on the Property in connection with the change in use.

(8) The Board finds that this standard is not applicable because the proposed use is not residential.

4. Having applied the standards set forth in Article 7, Section 1A, and because the Board has determined that the Applicant meets each of those standards, the Board therefore concludes that the proposed use of Cottages A and B on a year-round basis is less or no more nonconforming than the existing situation.

Decision

Based on the above findings of fact and conclusions of law, as well as the application, supporting information submitted, and the testimony and evidence submitted at the public hearing, the Zoning Board of Appeals votes to approve, subject to the conditions of approval set forth below, the following: (1) the application for a change in non-conforming use to use Cottage D as a rental cottage rather than a function hall; and (2) the application for a change in non-conforming use to use Cottages A and B on a year-round rather than seasonal basis.

Conditions of Approval

1. None of the cottages on the Property shall be permitted to have any cooking appliances, including without limitation ovens, stove-top ranges, microwave ovens, toaster ovens or hot plates. The CEO is authorized to inspect the Property to confirm compliance with this condition of approval.

2. None of the cottages on the Property shall be converted to residential dwelling units.

Appeal

Any appeal from this decision must be made within 45 days of the date of the Zoning Board of Appeals' vote on the original decision, in accordance with 30-A M.R.S. § 2691(3)(G).

Dated: May 24, 2018

By: 
William Macdonald, Chair