

**Lenox Zoning Board of Appeals  
Minutes  
January 23, 2019  
Auditorium**

**Members present:** Acting Shawn Leary Considine, (SLC); Robert Fuster (RF); Robert Fuster Jr. (RFjr); Clayton Hambrick (CH); Ned Douglas, (ND)

**Absent with notification:** Clifford Snyder, (CS)

**Staff present:** Gwen Miller, Land Use Director (GM); Land Use Clerk Peggy Ammendola, (PA); BJ Church, Building Commissioner

**Also present:** There were 19 members of the public present, Attorney Jeff Lynch who presented the appeal and Attorney Michael Martin who represents some of the residents who have short term rentals.

The meeting was called to order at 7:00 PM.

The hearing was recorded by PA and Clarence Fanto of the Berkshire Eagle.

**Innkeepers' Appeal-Lynch- Schrimo, as counsel for Appletree Inn, Kemble Inn, Cornell Inn, Gateways Inn, Rookwood Inn, Birchwood Inn, Hampton Terrace, and Stonover Farm, appealing** "the decision of the Building Commissioner not to enforce the Zoning Bylaws against those property owners who are engaged in the rental of rooms/homes in violation of the Town of Lenox Zoning Bylaw". The referenced decision of the Building Commissioner relates to a May 16th, 2018 letter sent by the petitioners demanding that the Building Commissioner issue cease and desist orders to "all homes used by transient guests". The letter refers to a list of 77 homeowners purported to be renting "their home on a short term transient basis".~

SLC explained to all present that there are three situations when the ZBA conducts hearings and they are: requests for variances, special permits and rarely appeals of the Building Commissioner's determination.

SLC asked Attorney Jeff Lynch to start with procedural rather than substantive issues.

Attorney Lynch made the following three points:

- He asked the Board to determine whether an appeal is procedurally available.
- If the Board determined that it was, he asked the Board to look at the zoning bylaw to make an interpretation of what it means as it relates to STR permissibility under the current Lenox zoning bylaw
- Based on the Board's interpretation and their ruling in that regard, he asked that the Building Inspector enforce the zoning bylaw consistent with the Board's opinion.

Attorney Lynch stated that he never received a response within 14 days to his May 16, 2018 letter to the Building Commissioner, BJ Church. Statute directs that he should have. She did, however she did take action on Attorney Lynch's letter by issuing cease and desist letters. Shortly after sending out the letters, she rescinded her decision. Attorney Lynch's clients didn't take any action to request a follow up, but instead worked through the Planning Board's process of creating a proposed short term rental zoning by law. The Short Term Rental (STR) bylaw was taken to a Special Town Meeting in November, but failed. After that meeting, on November 8<sup>th</sup> and 9<sup>th</sup>, Scott Shortt, owner of the Kemble Inn and client of Attorney Lynch, wrote to the Building Commissioner to ask for explanations regarding the cease and desist letter and its rescension. Attorney Lynch argued that the Board should use the date of Mr. Shortt's second inquiry as the triggering date for the actual response for enforcement action. Attorney Lynch cited case

law. He argued that the date of the response from the Commissioner, even if it is late, is the measuring date. He asked that the Board make that legal interpretation. He said that the Board has within its purview to hear the appeal and go on to the second part of his request which is for the Board to make a reasoned ruling concerning its interpretation of the bylaw as it relates to the allowance or disallowance of STR in Lenox.

SLC suggested that the two issues be dealt with in two parts; first with the issue of timeliness and second with the interpretation/enforcement of the bylaw.

SLC summarized the email of January 22, 2019 from Town Counsel Joel Bard. Attorney Bard had reviewed the Innkeepers' appeal and in his response he addressed timeliness and standing. With regards to timeliness, he opined that the appeal was not filed within a timely manner. With regards to standing, he wrote that the innkeepers may not qualify as parties aggrieved, as a matter of proximity, and in his opinion, as matter of legal rights.

RF suggested to Attorney Lynch that it would be best to remove the issue of timeliness by withdrawing the appeal, returning to the Building Commissioner and starting "from scratch". The next step would be to determine if the innkeepers here are truly aggrieved.

Attorney Lynch asked the Board to take a vote on procedure at this hearing. He believed that he would rather the Board not approve the application and start anew or for the Board to decide otherwise and move forward.

SLC made the motion to allow the hearing to continue despite any issues of timeliness. RF amended the motion. He moved to not proceed further with this application as it was not timely filed. CH seconded the motion. The Board voted in favor of the motion, 5-0.

SLC explained to those present that when an application is denied, typically the petitioner needs to wait two years before re-filing. She feels that this limitation would not apply here because the requests would not be the same.

Attorney Martin who represents some of the residents who have been renting out for short terms, commented that he did not believe that the innkeepers could file again, arguing that the appeal period is over. He referred to his letter of January 22, 2019 in which he cited two cases to support his argument.

SLC asked the Board if they felt that the decision should be amended to include "to deny without prejudice".

Attorney Martin urged the Board not amend their decision.

GM commented that it was not the Board's responsibility "clear the path", but rather it was up to the innkeepers to determine how to file the next appeal and to show how it meets the procedural requirements and make their case to the Town.

SLC stated that it is not clear what it would mean to be without prejudice with this context as this is not a standard special permit or variance request.

Discussion ensued and it was agreed to not amend the decision.

RFjr made a motion to close the public hearing. RF seconded the motion and the Board voted to agree 5-0.

In closing, SLC stated this appeal was not timely and it was up to petitioner on how to decide to go ahead. She encouraged all those interested in short-term rentals in Lenox to take an active role in seeking policy resolution on the substance of the issue.

RFjr made a motion to adjourn. CH seconded the motion and the Board voted to agree 5-0. The hearing was adjourned at 8:00 PM.

Respectfully submitted,  
Peggy Ammendola