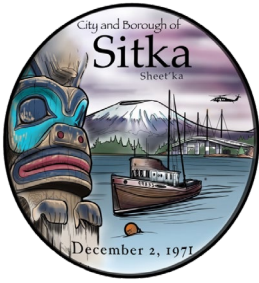


CBS Materials Submitted



City and Borough of Sitka

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A Coast Guard City

MEMORANDUM

To: Mayor Eisenbeisz and Assembly Members

Thru: John Leach, Municipal Administrator

From: Amy Ainslie, Planning Director ~~AA~~
Brian Hanson, Municipal Attorney

Date: January 19, 2022

Subject: Timby Appeal, Short-Term Rental Denial

Background

At the December 15, 2021 regular Planning Commission (PC) meeting, Ben Timby's request for a conditional use permit for a short-term rental at 717 Sawmill Creek Road was heard and considered by the Commission under case file number CUP 21-19. After information from staff, the applicant, and board discussion, the Commission denied the request unanimously (though one Commissioner, Wendy Alderson, was absent).

Per SGC 22.30.060, the Assembly functions as the board of adjustment with respect to considering appeals of variances or conditional use permits.

Analysis

Staff will provide relevant information/analysis for the claims made by the appellant.

1. Incorrect legal standard

Appellant Claim: The appellant claims that the SGC does not require off-street parking to be available, only that the negative effects that a lack of parking could create do not occur.

Planning Analysis: The requirement for two parking spaces for short-term rentals is present in the code's consideration of allowing short-term rentals broadly, including non-residential zones. References can be found in Footnote 9 of Table 22.16.015-1 and SGC 22.24.010(C)(2)(a). As a matter of fairness/consistency, this has been applied as a consistent standard to short-term rental requests with exceptions made on a case-by-case basis when shown that impacts can be mitigated. Further, the PC was unable to find that there were no negative impacts resulting from granting the permit as reflected by not adopting the required findings for conditional use permits.

Municipal Attorney Analysis: The "legal standard" spoke of by the appellant is

actually the “criteria” required under SGC 22.30.160.C (listed in the staff report provided in packet). The PC is required to make certain “findings and conclusions” to approve an application for a CUP. When considering its “findings and conclusions,” the PC is free to consider the availability, or the lack thereof, of off-street parking. The appellant had the burden of proving the proposed CUP met the criteria required by SGC 22.30.160.C, including parking considerations. The PC found that the appellant failed to meet its burden and, consequently, was unable to make the required “findings and conclusions.” The Assembly is now charged with reviewing the evidence to determine if the evidence supports the required “findings and conclusions.”

2. Violation of due process

Appellant Claim: The appellant claims that his due process rights were violated because information outside of the presented evidence was considered, there is Commission bias regarding legal nonconforming properties, and conflict of interest.

Planning Analysis: The applicant’s due process rights in terms of the ability to present evidence, testify to the Commission, and respond to Commission questions/concerns after the initial testimony period followed code requirements.

- Outside evidence: While the photos of the street parking showed that there were available on-street parking spots, a single “snapshot in time” is not necessarily representative of a street’s congestion. Commissioners are members of the local community for this reason; they are expected to have a baseline of knowledge about factors such as congestion in order to adequately consider whether their decisions will result in negative impacts to the surrounding area.
- Bias regarding legal nonconforming properties: The expression of frustration about legal nonconforming properties by a Commissioner does not necessarily represent a systemic bias, but rather the difficulty of fitting properties developed prior to zoning requirements into present day standards. While a property has legal nonconforming status for its existing uses and uses allowed by right in its zone, that is not a de facto exemption from code requirements for new use requests, making these cases more complex.
- Conflict of interest: Commissioner Katie Riley’s father (T. Riley) has short-term rental properties, one of which received a conditional use permit without two parking spaces available. That decision was made in 2018, two years before Riley’s appointment to the PC. Further, mitigations were imposed including the requirement to lease an off-street parking space from a neighboring property and providing bicycles. In discussing whether or not similar mitigations could be used in this case, Commissioners cited the lack of any off-street parking on the property or vicinity that could be dedicated to the short-term rental, making this request significantly different than T. Riley’s 2018 request. Staff has re-reviewed Riley’s financial disclosure and asked outright if there is any gain by Riley from her father’s short-term rentals, including any incentive to “reduce competition” by denying permits; none were found. Riley has voted in favor of most short-term rental permits that have come before the PC.

Municipal Attorney Analysis: Appellant claims the PC violated appellant's due process rights by considering "outside" evidence, bias of a PC member, and conflict of interest of a PC member. In its simplest form, "due process" means the protection of private rights in judicial (or quasi-judicial, like here) proceedings, which fundamentally are, among others, competence of the tribunal (no conflict of interest or disqualifying bias or prejudice of a member), service of process or voluntary appearance, presence of person affected, the right to be heard, the right to controvert facts presented against the person, and the right not to have facts presumed against the person. The Assembly is now charged with reviewing the evidence to determine if the evidence supports finding a violation of due process under any of the circumstances claimed by appellant.

3. Full Faith and Credit

Appellant Claim: The appellant claims that the Full Faith and Credit Clause of the U.S. Constitution requires that residents and non-residents be treated equally under law, and that denial of his permit results in unequal treatment regarding rights to use of the property by residents (which does not require parking as a legal nonconforming residential use) and non-residents (short-term rental that does require parking).

Planning Analysis: While short-term rentals are primarily used by non-residents, they can also be utilized by residents as well. The basis for denial (lack of parking) applies to all potential users. Further, residents and non-residents alike both have rights to use the property for zoning code compliant uses.

Municipal Attorney Analysis: Appellant claims the PC violated the "Full Faith and Credit Clause" of the U.S. Constitution (Art. 4, Sec. 1) by treating "residents" unequally to "non-residents" with respect to parking. Appellant has misapplied the "Full Faith and Credit Clause." In its simplest form, this clause requires the State of Alaska (and its governmental subdivisions like CBS) to give foreign (other states) judgments, statutes, and records full faith and credit. Here, there is no foreign judgment, statute, or record that is being considered for application. In this instance, the Assembly has nothing to consider.

4. Equal Protection

Appellant Claim: The appellant claims that the right to use his property for economic purposes has been violated, as well as reiterating the concerns addressed under due process.

Planning Analysis: The City and Borough of Sitka has the authority to govern, and in some cases restrict, uses of property pursuant to locally adopted zoning regulations. Regardless of status as a code-compliant property or a legal nonconforming property, owners of property in residential zones do not have a guaranteed right to use their property as a short-term rental.

Municipal Attorney Analysis: Appellant claims the PC violated appellant's equal protection rights by interfering with appellant's right to use his property and, essentially, for the same reasons argued under his "due process" violation claim. In its simplest form, the "Equal Protection Clause" of the Alaska Constitution (Art. 1, Sec. 1) provides that "all persons are equal and entitled to equal rights,

opportunities, and protection under the law.” In determining whether there has been a violation of equal protection rights, the Alaska Supreme Court applies an analysis which is summarized as follows: The ordinance is presumed constitutional. If the ordinance is “facially” challenged (apparently not so in this case), the ordinance is upheld even if it might occasionally create problems in its application when it “has a plainly legitimate sweep.” If the ordinance is challenged as having a “discriminatory purpose”, the ordinance violates equal protection only if two groups of people “similarly situated” are treated differently but are entitled to equal treatment. To be considered “similarly situated”, the municipality’s reasons must be considered. To assert an equal protection violation, one must demonstrate that the challenged ordinance treats similarly situated persons differently. There is a flexible three-step sliding scale analysis that won’t be repeated here. Case law holds that government action that burdens only economic interests generally receive only minimum scrutiny. Here, appellant has claimed an economic burden so, in that instance, only minimal scrutiny is required. As for the other claims of violation of equal protection, appellant has failed to show that there are two groups of people similarly situated that are treated differently. Here, property owners are treated the same, as well as visitors whether in-state or out-of-state. Suffice it to say, appellant has not met his burden with respect to his equal protection claims.

Recommendation

First, the chair of the board should set time limits for presentations (staff and appellant) and for rebuttal (staff and appellant). If other members of the board would like to challenge the time limits, a motion should be made specifying the desired time limits, and if it passes, the time limits specified in the motion will be used.

The recommended process for this hearing is outlined in SGC 22.30.180:

1. Staff presentation. Members of the hearing body may ask questions.
2. Applicant presentation. Members of the hearing body may ask questions.
3. Testimony or comments by the public germane to the matter. Questions directed to staff or the applicant shall be posed by the chair at its discretion.
4. Rebuttal, response or clarifying statements by the staff and the applicant.
5. Evidentiary portion of the hearing closed.
6. Board deliberation and decision.

Per SGC 22.30.170, the Assembly must take one of the following actions:

- Grant the permit or appeal in whole or in part
 - Approve as recommended
 - Approve with additional conditions
 - Modify the request with or without the applicant’s concurrence
- Deny the permit or appeal in whole or in part
 - Deny – reapplication or resubmittal is permitted
 - Deny with prejudice – Reapplication or resubmittal is not allowed for one year

- Remand for further proceedings
 - Remand to a future Assembly meeting and specify additional information needed for consideration
 - Remand to another body (Most likely, this would entail remanding the decision back to the Planning Commission with a request to consider new information or factors not present in their first hearing, or to another board/commission for a recommendation with a final decision made by the Assembly).

A motion sheet is provided to you with recommended motions for each of these possible outcomes.

Encl: Appellant submittal
CUP 21-19 Materials submitted for Planning Commission packet
Draft minutes from December 15, 2021 on CUP 21-19
Motion sheet