

**FINDINGS AND DECISION  
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

**MICHELLE ACQUAVELLA**

from an Interpretation issued by the Director,  
Department of Planning and Development

Hearing Examiner file:  
**S-08-003**

Department Reference:  
08-004/3009153

**Introduction**

The Director issued an interpretation concerning the short-term rental of condominium units in a multi-family residential zone, and Michelle Acquavella appealed the interpretation.

The appeal hearing was held on October 13, 2008, before the Hearing Examiner. Michelle Acquavella (Appellant) was represented by Courtney A. Kaylor, attorney-at-law. The Director, Department of Planning and Development, (Director or Department) was represented by Andrew S. McKim, Supervising Land Use Planner. The record closed at the conclusion of the hearing.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated.

After considering the evidence in the record, the Examiner enters the following findings of fact, conclusions and decision on the appeal:

**Findings of Fact**

Background

1. The Elektra Condominiums are addressed as 1400 Hubbell Place and are zoned Highrise Multifamily Residential (HR). The building is surrounded by HR zoning in all directions except to the north, across Boren Avenue, where the zoning changes to Neighborhood Commercial 3.
2. Twenty-four of the 200 units in the Elektra Condominium building have been advertised and made available as vacation rental units for periods of less than 30 days, and as brief as three nights. The Condominium's Declaration and Covenants (Exhibit 4) allow these short-term rentals.
3. Some of the 24 units are sometimes occupied by the unit owners, or by their visiting friends and families. Others have been occupied at times by owners or tenants for

periods of 30 days or more. All have been advertised or made available as rentals for periods shorter than 30 days. Several owners have multiple units that they make available on a short-term basis.

4. The Elektra Condominium building was permitted as a multifamily residential structure. The building and its operations have not been modified to accommodate short-term rental use: There is no maid service, room service, laundry service, or transportation service; the units have separate telephone lines and utility accounts and individually-assigned parking spaces; and those renting the units on a short-term basis receive keys to the building, which is not open to the general public.

5. Over a 456-day period in 2007-2008, 21 of the units were rented on a short-term basis from 25% to 55% of the time, with an average of 39% of the time in short-term rental use. The rest of the time, they were vacant, rented for periods exceeding 30 days, or owner-occupied. There is no information in the record showing what percentage of the time the units were actually vacant.

6. In response to complaints from neighbors, the Director took enforcement action against the Homeowners Association for the Elektra Condominiums, and subsequently against 16 individual condominium owners, alleging that the condominium units had been put to a lodging use through short-term rentals rather than a residential use, in violation of the Land Use Code.

7. Following requests for reconsideration of the Notices of Violation by the Homeowners Association and by the individual owners, the Director issued decisions on October 5, 2007 and February 5, 2008, respectively, sustaining the Notices of Violation. (Exhibits 7 and 8) Several homeowners then requested an interpretation from the Director that the short-term rental of their units constitutes a permitted residential use rather than a lodging use.

#### Director's Interpretation

8. On July 17, 2008, the Director issued Interpretation No. 08-004, which included a two-part decision. The Director determined that if a condominium unit is rented for less than 30 days during more than half of the time that the unit is actually occupied, the principal use of the unit is lodging, which is not permitted in the HR zone. The Director explained that "housekeeping unit" and "living accommodations" as used in the Code imply something more than residence for less than 30 days, and that using a 30-day period to distinguish between residency and transient occupancy is consistent with Department policy and with community understanding, as reflected in common practices related to such things as utility billings, home rentals, registering to vote and changing addresses on driver's licenses.

9. The Director also determined that if the condominium unit is occupied for more than 30 days during more than half the time the unit is actually occupied, rental for less than 30 days at other times would not qualify as a permissible accessory use of the unit and

thus, is not permitted in the HR zone. The Director reasoned that "the Code authorizes bed and breakfast use, a lodging use, as a use accessory to a dwelling unit. For single-family zones, the Code authorizes and provides standards for taking in roomers or boarders within one's home. In each of these cases however, the unit actively remains devoted to the principal use of serving as someone's long-term residence during the time that paying guests are there. These uses are different in character from one where, by the nature of the proposed rental arrangement, the active use as a long-term residence ceases for the duration of the short-term rentals." Interpretation at 8-9.

#### Applicable Law

10. A "use" is defined as "the purpose for which ... a structure is designed, built arranged, intended, occupied, maintained, let or leased." A "principal use" is a "use that is not incidental to another use." An "accessory use" is a use that is incidental to the principal use. SMC 23.84A.040. The Code does not define "incidental," but its commonly understood meaning is "being likely to ensue as by chance or minor consequence," Merriam-Webster Online Dictionary, or "happening or likely to happen in an unplanned or subordinate conjunction with something else." American Heritage Dictionary (4<sup>th</sup> ed.)

11. SMC 23.45.004 lists the principal uses permitted outright in multifamily residential zones. The list includes multifamily structures, but does not include short-term rental or lodging use.

12. SMC 23.42.010 states that principal uses not listed in a zone are prohibited in that zone. However, "[i]f the use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones," and therefore "should also be permitted or prohibited."

13. Subchapter III of Chapter 23.45 SMC lists accessory uses permitted in the multifamily residential zones. The list does not include short-term rental or lodging use except for bed and breakfasts.

14. SMC 23.42.020 A provides that an accessory use that is not permitted by the Land Use Code is prohibited. "The Director shall determine whether ... uses not listed as accessory uses are customarily incidental to a principal use."

15. A "residential structure" is defined as "a structure containing only residential uses and permitted uses accessory to the residential uses." "Residential use" is defined to include a "multifamily structure," which is a "structure or portion of a structure containing two (2) or more dwelling units .... SMC 22.84A.032.

16. "Dwelling unit" is defined as "a room or rooms located within a structure, designed, arranged, occupied or intended to be occupied by not more than one household as living accommodations independent from any other household...." SMC 23.84A.008.

17. A household is a "housekeeping unit consisting of any number of related persons; eight (8) or fewer non-related, non-transient persons; or eight (8) or fewer related and non-related non-transient persons ...." SMC 23.84A.016.

18. "Housekeeping" is defined as "the care or management of domestic concerns: the management of a house and home affairs". Webster's Third International Dictionary (unabridged); American Heritage Dictionary (4<sup>th</sup> ed.).

19. A lodging use is defined as "a commercial use in which the primary activity is the provision of rooms to transients. Lodging uses include but are not limited to" bed and breakfast establishments, hotels and motels. SMC 23.84A.024.

### Appeal

20. The Appellant asserts that the Director's interpretation is in error because it: 1) establishes and applies a land use regulation not found in the Code; 2) is inconsistent with the plain language of SMC 23.84.008, .016, .024 and .032, as well as dictionary definitions of terms used in the Code; 3) conflicts with established principles of statutory construction; 4) is inconsistent with the City's previous interpretations, representations and decisions; and 5) renders portions of the Code unconstitutionally vague. The appeal also asserts that the City is estopped from applying the interpretation to the Appellant, and that the Appellant's short-term rental of her property qualifies as a nonconforming use because it was begun before the interpretation was issued. The Appellant asks that the Examiner determine that the short-term rental use of condominiums in the Elektra constitutes a residential use, and that even if it does not, short-term rental would be allowed as an accessory use.

### **Conclusions**

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.88 SMC. Appeals of interpretations are "considered de novo, and the Examiner's decision is to be made upon the same basis as was required of the Director." However, the Director's interpretation is to be given substantial weight, and "the burden of establishing the contrary shall be upon the appellant." SMC 23.88.020G.5.

2. The rules used for construing statutes also apply to municipal ordinances and codes. *Spokane v. Fischer*, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988). Where the meaning of an ordinance is plain on its face, that plain meaning must be given effect. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006)(citation omitted). In the absence of a statutory definition, a reviewing body may determine the plain and ordinary meaning of unambiguous statutory terms through use of a dictionary. *Lindeman v. Kelso School Dist.*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007). "Agencies do not have the authority to make rules which amend or change legislative enactments." *Washington Federation of State Employees v. State Personnel Bd.*, 54 Wn. App. 305, 308, 773 P.2d 421 (1989).

3. Under SMC 23.84A.016, a multifamily structure is a residential use and contains two or more dwelling units. Each condominium unit fits the definition of "dwelling unit" because the unit itself consists of a group of rooms within a structure designed, arranged, and intended to be occupied by not more than one household as independent living accommodations. However short-term rental has nothing to do with design, arrangement or intentions; it is a use of the existing unit. So the correct inquiry is whether or not that use is "substantially similar" to a "dwelling unit," i.e., whether the unit is actually occupied by not more than one "household" as independent living accommodations.

4. To be substantially similar to a "dwelling unit," short-term rentals must be made to a "household". Under SMC 23.84A.016, to qualify as a "household", those renting the condominium unit on a short-term basis must constitute a "housekeeping unit" and must also meet one of the three criteria listed in the Code section: 1) any number of related persons regardless of their length of stay; 2) eight or fewer non-related, non-transient persons; or 3) eight or fewer related and non-related non-transient persons. If they do not meet both requirements, then the unit would not qualify as a "dwelling unit" during their occupancy, and the short-term rental would constitute "lodging" under SMC 23.84A.024, which is not a permitted use in the HR zone.

5. Applying the plain meaning of the term "housekeeping," to be considered a "housekeeping unit," the person or persons who rent a condominium unit on a short-term basis would have to be authorized during their occupancy to manage the unit itself ("the house") and affairs associated with it ("home affairs").

6. Although the Director's bright-line 30-day rule would provide a reasonable distinction between residential use and transient occupancy, and would improve on unfortunate Code language, the rule is not supported by the Code. The Director argued that the 30-day rule reflects longstanding Department policy, but this policy is gleaned only from internal meeting minutes (Exhibits 9 through 11); it is not available to the public in the form of a Director's Rule or even a Client Assistance Memo. Further, as demonstrated by the Director's testimony concerning certain other jurisdictions' codes, if it is desirable to include a bright-line rule in the Code, the Council may adopt one.

7. Testimony offered at hearing indicated that some of those who rent the Appellant's condominium at the Elektra may have some authority to manage some matters associated with the unit while in residence. However, there is not sufficient evidence in the record for the Examiner to determine whether, as a general rule, the Appellant's short-term renters constitute a "housekeeping unit" for purposes of SMC 23.84A.016, such that the unit would be substantially similar to a "dwelling unit" under SMC 23.84A.008 during their occupancy. Therefore, on this record, the Examiner cannot determine whether the short-term rental of the Appellant's condominium in the Elektra is a permitted use in the zone.

8. Because the Director might determine from factual evidence that short-term rental of the Appellant's condominium is not a permitted use in the HR zone, the Examiner considers the second issue on appeal: whether short-term rental is a permitted accessory

use. The Appellant claims this use is "customarily incidental" to residential use in Seattle and points to the results of an electronic search of advertised short-term rentals within the City (Exhibit 6). SMC 23.42.020 A provides that the Director is to determine whether a use not listed as a permitted accessory use is "customarily incidental" to a principal use. It does not instruct the Director to rely on unconfirmed reports of what individual owners may be doing with their property.

9. The Director reviewed uses authorized by the Code as accessory to residential dwelling units and found that they all allowed for the dwelling unit to remain devoted to the principal use as a person's residence during the time paying guests were present. The Director was entitled to rely on these uses as indicia of the type of short-term rental use that is "customarily incidental" to a principal residential use under the Code. The *Stevens* case, cited by the Appellants for the proposition that an established domicile is not destroyed by a lengthy but temporary absence, is not on point. The Appellant did not show that domicile for purposes of access to a state's courts is equivalent to residence for purposes of determining the *use* of property. Giving the prescribed deference to the Director, the Examiner concludes that short-term rental is not a permitted accessory use in the HR zone.


10. The Appellant has met her burden of demonstrating that part of the Director's interpretation is in error and should be reversed.

11. In light of the foregoing conclusions, it is not necessary to reach the Appellant's constitutional and estoppel claims which, in any event, are beyond the jurisdiction of the Hearing Examiner. See *Yakima Cy. Clean Air Authority v. Glascam Builders, Inc.* 85 Wn.2d 255, 257, 534 P.2d 33 (1975). The issue of whether the Appellant's short-term rental use of her condominium is a nonconforming use was neither briefed nor argued, and it is dismissed.

### Decision

The Director's Interpretation is **REVERSED**, with the exception of the Director's conclusion that short-term rental of the Elektra Condominium units is not a permitted accessory use in the HR zone, which is **AFFIRMED**.

Entered this 23<sup>rd</sup> day of October, 2008.

  
Sue A. Tanner  
Hearing Examiner

**Concerning Further Review**

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. A request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued, as provided by RCW 36.70C.040.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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