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March 4, 2022

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AND EMAIL

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| J.K. “Jay” Coward  Town Attorney  Town of Highlands, NC  705 West Main Street  Sylva, NC 28779  jkcoward@chspa.com | Craig D. Justus  Attorney  The Van Winkle Law Firm  11 N. Market Street  Asheville, NC 28801  cjustus@vwlawfirm.com |

RE: Proposed Amendment to the Town of Highlands Unified Development Ordinance

Dear Messrs. Coward and Justus:

I appreciated the opportunity to speak on behalf of Save Highlands at the Town of Highlands (“the Town”) Board of Commissioners’ February 25, 2022, public hearing. During my comments, I indicated I would send the Town a written follow-up with an updated version of the proposed amendment in “Track Changes” format. This letter will serve as that follow-up. An updated version of the proposed amendment containing our tracked changes is appended to this letter.

We believe controlling authority invalidates several provisions of the Town’s proposed amendment to the Unified Development Ordinance (“UDO”). Three key proposed regulations, in particular, do not pass muster under North Carolina precedent. In addition, the proposed amendment contains a significant definitional inconsistency that warrants rectification, even if not immediately legally problematic.

First, Section 6.5 of the proposed ordinance improperly classifies the rental of residential property to tourists as a “commercial use.” North Carolina law establishes that the short-term rental of residential property does not constitute a commercial use. *See J. T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 72– 73, 274 S.E.2d 174, 180 (1981)(“Resolution of the question of the nature of the usage of the property . . . does not turn upon the economic basis upon which the property is supported. . . . That defendant is compensated for the services it renders does not render its activities at the home commercial in nature. . . . ”); *Russell v. Donaldson*, 222 N.C. App. 702, 706, 731 S.E.2d 535, 539 (2012) (“Neither the financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of [short-term rental] property from residential to commercial.”) (alteration and citation omitted). And this accepted principle, of course, preempts any contrary municipal rule. Indeed, the Town implicitly acknowledges that vacation rentals do not constitute commercial uses – Section 6.5 notwithstanding – by providing that certain vacation rentals may operate in the R-1 and R-2 residential zoning districts. In short, the short-term rental of residential property does not constitute a commercial use, and the Town cannot alter this principle via ordinance.

Second, the Town may not lawfully require owners to obtain “Zoning Certificates” for vacation rental properties. North Carolina General Statute § 160D-1207 forbids municipalities from “adopt[ing] . . . any ordinance that would require any owner or manager of rental property to . . . register rental property with the local government.” N.C. Gen. Stat. § 160D-1207(c). Based upon Sections 6.5.18.C and 6.5.19.B of the proposed amendment, the Town’s zoning certificate requirement would function precisely as – and subject property owners to the same, if not greater, burdens as – the registration requirement § 160D-1207(c) prohibits.

To “register” means to “record,” “enter,” “file,” “report,” “apply,” or “list.” Webster’s Third New International Dictionary, *Register* (1993). Likewise, a “register” is “an official or formal enumeration, description, or record of particulars”; or “a roster of individuals qualified or available for some particular end of service.” *Id.* These terms squarely describe the mechanics of the Town’s proposed zoning certificate requirement.

To obtain a zoning certificate, the applicant must formally and accurately report extensive information, including his name, address, contact information, and the particulars of his property’s design. The Town, in turn, will presumably maintain such information in an official record or database for the purpose of determining whether the property enjoys “vested status” or constitutes a valid, nonconforming use. Said differently – and plainly – the applicant must register his property with the Town so that it may efficiently track which properties may properly operate as vacation rentals. In this regard, the zoning certificate requirement is equivalent to a rental registration requirement. Furthermore, and notably, the UDO does not require zoning certificates for any other property or use, which buttresses the conclusion that Sections 6.5.18.C and 6.5.19.B constitute impermissible registration requirements. Thus, although the Town labels its proposed mechanism as a zoning “certificate,” this verbiage creates a distinction without a difference.

Third, the Town possesses limited authority to curtail property owners’ rights to maintain valid, nonconforming uses. Section 7.2.1 of the proposed amendment imposes “[l]imitations” upon the continuation of valid, nonconforming uses. However, “the right to a nonconforming use is a property right” entitled to constitutional protection. *Jarrell v. Bd. of Adjustment*, 258 N.C. 476, 481, 128 S.E.2d 879, 883 (1963) (citation and alteration omitted). Thus, the Town lacks authority to enact an ordinance or otherwise take any action designed to truncate or eliminate a property owner’s right to sustain a historical nonconformity.

Finally, the proposed amendment inconsistently defines the term “Whole House Short Term Rental” (“WHSTR”). Section 2.3 of the proposed amendment provides, in pertinent part, that a WHSTR constitutes “[t]he use of a detached dwelling unit for lodging in return for compensation whereby the entire dwelling unit is rented . . . for . . . a minimum duration of seven (7) days.” Section 6.5.18.E.2, by contrast, states that “WHSTR’s [sic] in the R-1 and R-2 Districts shall not be rented for a period of less than fourteen (14) consecutive days.” Thus, it is unclear whether every WHSTR must be rented for seven consecutive days or fourteen consecutive days (or a different duration), or whether the proposed minimum rental duration varies among zoning districts. Naturally, any definitional anomaly in the UDO could incite considerable practical and legal complications.

Thank you for considering the foregoing points. We trust the Town will properly heed all legal constraints as it studies the proposed amendment to the UDO. Please feel free to contact me with any questions or concerns.

Very truly yours,

Derek J. Allen

(Planning Board Final Draft)

**EXHIBIT A: CHANGES TO THE UDO**

1. **Section 2.3 Definitions**. Particular terms, as hereinafter set forth, within the Section 2.3 Definitions are hereby amended or added to the list of defined terms to read as follows:
   * Building, Multi-Family: Any building, other than a motel, hotel, tourist home or whole house short term rental as defined in this Ordinance, containing more than one (1) dwelling unit. This term includes single-family attached dwellings, duplexes, and apartments.
   * Duplex: A building containing two (2) dwelling units located on the same lot or parcel.
   * Dwelling, Multi-Family: A dwelling unit designed, intended or used by more than one (1) family for human habitation.
   * Lodging: The use of a building, or any portion thereof, for someone to live or stay temporarily, often for periods of less than thirty (30) consecutive days in return for the payment of compensation. Lodging includes a hotel, motel, tourist home and whole house short term rental.
   * Multi-Family Residential Use: The use of a lot or parcel for human habitation by more than one (1) family for periods that are not temporary guest occupancy within a multi-family building or a multi-family dwelling unit. This term does not include lodging uses such as a hotel, motel, tourist home or whole house short term rental.
   * Single-Family Residential Use: The use of a single-family dwelling unit by a single family for human habitation for periods that are not temporary guest occupancy. This term does not include lodging uses such as a hotel, motel, tourist home, transient dwelling lodging or whole house short term rental.
   * Temporary Guest Occupancy: The use of a dwelling unit in return for compensation where the occupancy of the structure by the paying guest or guests is for a period of less than thirty (30) consecutive days.
   * Tourist Home: A building or part thereof, not including a motel, hotel or whole house short term rental, where sleeping accommodations or lodging of not more than four (4) ~~rooms~~ bedrooms are provided to guests paying compensation, where the owner, operator or manager also stays on the same parcel during any period of guest occupancy. This term includes bed and breakfast homes, inns, rooming or boarding houses or homestays.
   * Transient Dwelling Lodging: The use of a dwelling unit for lodging for compensation whereby the entire dwelling unit is rented or occupied by a paying guest or guests for a period of less than seven (7) consecutive days.
   * Whole House Short Term Rental: The use of a detached dwelling unit for lodging in return for compensation whereby the entire dwelling unit is rented or occupied by a paying guest or guests for a period of less than thirty (30) consecutive days but no less than a minimum duration of seven (7) days. It does not include transient dwelling lodging.
2. **Section 2.3 Definitions, “Family”**. The term “Family” is hereby amended to substitute the number three (3) for the number five (5) in the first sentence of subsection B.
3. **Sec. 4.7.1 Applicability** is hereby amended to read as follows:

No person shall commence or proceed with construction of any new building ~~fence~~ ~~or wall,~~ or structure as defined herein, or with the reconstruction, alteration, repair, moving, or demolition of any existing building, or change the use of property, in any Zoning District, or as otherwise expressly noted in this Ordinance, prior to the issuance of a Zoning Certificate in accordance with the following procedures.

1. Section 6.2 Use Table is hereby amended to replace the Use Category Section

entitled “**Residential Uses**” in its entirety with the following:

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **KEY: "P" = PERMITTED "S" = SPECIAL "L" = LIMITED X = NOT ALLOWED** | | **RESIDENTIAL** | | | **NONRESIDENTIAL** | | | | |  |
| **USE CATEGORY** | **SPECIFIC USE** | **R-1** | **R-2** | **R-3** | **B-1** | **B-2** | **B-3** | **B-4** | **GI** | **NOTES:** |
| **RESIDENTIAL USES** | | | | | | | | | | |
| HOUSEHOLD LIVING | Single-family dwellings detached | P | P | P | P | P | P | P | X | Sec. 6.3.1.A |
| Single-Family Residential Use | P | P | P | P | P | P | P | X |  |
| Modular homes | P | P | P | P | P | P | P | X | Sec. 6.3.1.B |
| Manufactured homes | X | L | L | X | X | X | X | X | Sec. 6.3.1.C |
| Multi-family building, including duplexes, apartments and single- family attached dwelling | X | X | P | X | X | X | X | X |  |
| Multi-family dwelling | X | X | P | X | X | X | X | X | Sec. 6.3.2 |
|  | Multi-Family Residential Use | X | X | P | X | X | X | X | X |  |

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| ACCESSORY USES | Customary accessory outbuildings | L | L | L | L | L | L | L | X | Sec. 6.3.3.A |
| Storage outbuildings on vacant lots | L | X | X | X | X | X | X | X | Sec. 6.3.3.B |
| Fences | L | L | L | L | L | L | L | L | Sec. 6.3.3.C |
| Exterior residential security & area lighting | L | L | L | L | L | L | L | L | Sec. 6.3.3.D |
| Camping trailer, motor  home, or similar recreational vehicle | L | L | L | X | X | X | X | X | Sec. 6.3.3.E |
| Customary incidental home occupations | X | L | L | X | L | L | L | X | Sec. 6.3.3.F |

1. **Section 6.2 Use Table** is hereby amended to replace the Use Category Section

classifying “Overnight Accommodations” in its entirety with the following:

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **KEY: "P" = PERMITTED "S" = SPECIAL "L" = LIMITED X = NOT ALLOWED** | | **RESIDENTIAL** | | | **NONRESIDENTIAL** | | | | |  |
| **USE CATEGORY** | **SPECIFIC USE** | **R-1** | **R-2** | **R-3** | **B-1** | **B-2** | **B-3** | **B-4** | **GI** | **NOTES:** |
| **COMMERCIAL** | | | | | | | | | | |
| OVERNIGHT ACCOMMODATIONS- **LODGING** | Hotels and motels | X | X | X | X | L | L | X | X | Sec. 6.5.9 |
| Tourist homes (bed and breakfast) | ~~X~~ L | L | P | P | P | P | ~~L~~ P | X | Sec. 6.5.10 |
|  | Whole House Short Term Rental | ~~X~~ L | L | P | P | P | P | ~~L~~ P | X | Sec. 6.5.18 |
|  | Transient Dwelling Lodging | X | ~~X~~ L | ~~X~~ P | P | P | P | ~~X~~ P | X | Sec. 6.5.19 |

1. **Section 6.3.2 Multi-family Dwelling** is hereby amended to rename the heading “Multi-family building or dwelling” and to replace the first paragraph in its entirety with the following:

Multi-family buildings or dwellings are permitted in accordance with sec. 6.2, Use Table (with the added exception of being allowed as an accessory use for Golf and Tennis Clubs) with the following requirements:

1. **Section 6.3.3 Residential Accessory Uses and Structures** is hereby amended to replace subsection A in its entirety with the following:

A. Customary Accessory Outbuildings: Appurtenant to single-family dwellings such as private garages, noncommercial buildings such as greenhouses and workshops. No residential or lodging use of any kind is allowed.

1. **Sec. 6.3.3 Residential Accessory Uses and Structures** is hereby amended to replace subsection E in its entirety with the following:

E. Recreation Vehicle. Only one (1) camping trailer, motor home, or similar recreational vehicle may be parked on a lot or parcel within a designated approved parking space. No residential or lodging use is allowed, nor may it be connected to any water, sewerage, or power supply.

1. **Sec. 6.5 Commercial Uses** is hereby amended to replace Section 6.5.10 Tourist Homes in its entirety with the following:

6.5.10 Tourist Homes

The term Tourist Home may also mean Bed and Breakfast Home or Rooming/Boarding house.

A Tourist Home may be permitted in the Zoning Districts identified in Sec. 6.2, Use Table, and with the issuance of a Zoning Certificate.

1. **Sec. 6.5 Commercial Uses** is hereby amended to add a new subsection 6.5.18 for Whole House Short Term Rental use to read as follows:
   * 1. Whole House Short Term Rental.
2. Whole House Short Term Rentals. Short term rentals of an entire dwelling unit known as Whole House Short Term Rentals (WHSTR) are hereby recognized as an authorized use within the planning jurisdiction of the Town of Highlands.
3. Exceptions. The following activities and / or uses shall be excepted from the application of this Section.

1. Incidental whole house short term rentals, defined to mean no more than two such rentals in any calendar year where the total annual rental period for both rentals does not exceed two weeks.

1. Use Conditions. The following requirements shall apply to any WHSTR.
2. Occupancy Limits. On those occasions when the property is being utilized for WHSTR activity, the overnight occupancy shall not exceed two persons per bedroom plus two additional persons. Provided, however, the number of bedrooms permitted for a WHSTR shall not exceed the number of bedrooms approved for the dwelling on the sewage permit issued for each property. For unpermitted properties, occupancy shall be the lesser of the total determined by the foregoing formula or twelve persons. Bedrooms used in calculating occupancy limits shall be taken from the application as affirmed by the owner/operator/manager and shall be the same as the number of bedrooms as listed on the Macon County Revenue Department’s

Property Information Card to also assure the sufficiency of the wastewater system on site.

1. ~~Maximum number of weeks. In the R-2 and B-4 zoning districts, the~~ ~~maximum number of weeks that are allowed for WHSTR use on a lot is 25~~ ~~weeks per calendar year. The intent of this provision is to only allow WHSTR~~ ~~as an accessory use within properties zoned R-2 or B-~~
2. Display of Contact Information. Operators of WHSTR shall prominently display on the exterior of the property the name and 24-hour per day, 365 days-per-year telephone number for the WHSTR operator who will take and resolve complaints regarding operation of the WHSTR and its occupants and guests. The Town will prescribe the form of this display which shall also include a telephone number to report violations of this section to the Zoning Administrator.
3. Vehicles parked in undesignated areas, or in the street so as to violate the Town’s street or parking ordinances, shall be subject to towing at the vehicle owner’s expense. ~~No more than four (4)~~ ~~cars shall be allowed to be parked on a lot being used as a WHSTR.~~ The owner shall provide one (1) on-site parking space per one (1) bedroom.
4. Trash Disposal. Household trash ~~must~~ shall be bagged and disposed of in trash receptacles. Trash receptacles shall be the size and number authorized by existing refuse contracts and shall be animal resistant. The WHSTR use ~~must~~ shall comply with Chapter 12 of the General Code of Ordinances, Solid Waste Management.
5. Noise Ordinance. The WHSTR use ~~must~~ shall comply with the Town’s

Noise Ordinance, Article II of the General Code of Ordinances.

1. Nonconforming WHSTR Compliance with Restrictions. Notwithstanding anything to the contrary in the Town’s ordinances, a vested or legal nonconforming use of property as a WHSTR ~~must~~ shall at all times comply with Section C and Section E, subsections 4, 5, and 6.
2. Contract Addendum. Every contract for a WHSTR shall contain an addendum, in a form prepared by the Town, setting forth the requirements of this Section and other applicable provisions of law. The operator shall obtain a signed acknowledgment from the renter(s) that they have received such addendum prior to delivering possession of the dwelling unit. This requirement shall be deemed satisfied if the provisions of the addendum are included as part of the rental contract.
3. Duties of the Operator to Respond to Complaints. To assure prompt response to complaints and issues concerning a WHSTR, the operator shall comply with the following:
4. ~~Maintain a call center that is staffed by a live person and fully responsive at~~ ~~any time that the property is used as a WHSTR.~~ The owner or operator shall be reachable any time the property is used as a WHSTR.
5. Continuously maintain on file with the Town the operator’s current address,

telephone number, and facsimile number and/or email address.

1. Non-Compliance with WHSTR Zoning Permit and Regulations.
2. Failure to comply with the standards and regulations as found in this Section shall be enforced by the remedies and penalties as provided in Chapter of the Code of Ordinances of the Town of Highlands.
3. If three (3) violations are committed within a twelve (12) month period, the WHSTR owners’ rights shall be suspended for six (6) consecutive months.
   * 1. Transient Dwelling Lodging
4. Transient Dwelling Lodging. Short term rental of an entire dwelling unit known as Transient Dwelling Lodging (TDL) is hereby recognized as an authorized use within the planning jurisdiction of the Town of Highlands. Except as provided herein, on and after , it shall be a violation of these zoning regulations to operate a TDL without a development approval from the Town (i.e., Zoning Certificate).
5. Use Conditions. The following requirements shall apply to any TDL.
   1. Occupancy Limits. On those occasions when the property is being utilized for TDL activity, the overnight occupancy shall not exceed two persons per bedroom plus two additional persons. Provided, however, the number of bedrooms permitted for a TDL shall not exceed the number of bedrooms approved for the dwelling on the sewage permit issued for each property. For unpermitted properties, occupancy shall be the lesser of the total determined by the foregoing formula or twelve

persons. Bedrooms used in calculating occupancy limits shall be taken from the application as affirmed by the owner/operator/manager and shall be the same as the number of bedrooms as listed on the Macon County Revenue Department’s Property Information Card to also assure the sufficiency of the wastewater system on site.

* 1. Display of Contact Information. Operators of TDL shall prominently display on the exterior of the property the name and 24-hour per day, 365 days-per-year telephone number for the TDL operator who will take and resolve complaints regarding operation of the TDL and its occupants and guests. The Town will prescribe the form of this display which shall also include a telephone number to report violations of this section to the Zoning Administrator.
  2. Parking. Occupants or guests of any TDL shall not park vehicles on the property other than within parking area(s) designated on the application for the TDL Zoning Certificate and in compliance with Article IV of the General Code of Ordinances, Stopping, Standing and Parking and Article 9 of this Ordinance. Vehicles parked in undesignated areas, or in the street so as to violate the Town’s street or parking ordinances, shall be subject to towing at the vehicle owner’s expense. The owner shall provide one (1) on-site parking space per one (1) bedroom.
  3. Trash Disposal. Household trash shall be bagged and disposed of in trash receptacles. Trash receptacles shall be the size and number authorized by existing refuse contracts and shall be animal resistant. The TDL use shall comply with Chapter 12 of the General Code of Ordinances, Solid Waste Management.
  4. Noise Ordinance. The TDL use shall comply with the Town’s Noise

Ordinance, Article II of the General Code of Ordinances.

* 1. Nonconforming TDL Compliance with Restrictions. Notwithstanding anything to the contrary in the Town’s ordinances, a vested or legal nonconforming use of property as a TDL shall at all times comply with Section B and Section D, subsections 4, 5, and 6.
  2. Rental’s of less then 14-days in the R-2 zoning district, shall be regulated by location and adjacent land use.

1. Contract Addendum. Every contract for a TDL shall contain an addendum, in a form prepared by the Town, setting forth the requirements of this Section and other applicable provisions of law. The operator shall obtain a signed acknowledgment from the renter(s) that they have received such addendum prior to delivering possession of the dwelling unit. This requirement shall be

deemed satisfied if the provisions of the addendum are included as part of the rental contract.

1. Duties of the Operator to Respond to Complaints. To assure prompt response to complaints and issues concerning a TDL, the operator shall comply with the following:
   1. The owner or operator shall be reachable any time the property is used as a TDL.
   2. Continuously maintain on file with the Town the operator’s current address, telephone number, and facsimile number and/or email address.
2. Non-Compliance with TDL Zoning Permit and Regulations.
   1. Failure to comply with the standards and regulations as found in this Section shall be enforced by the remedies and penalties as provided in Chapter of the Code of Ordinances of the Town of Highlands.
   2. If three (3) violations are committed within a twelve (12) month period, the WHSTR owners’ rights shall be suspended for six (6) consecutive months.
3. **Section 7.1.1 Purpose** is hereby amended to add a new sentence at the end that reads: “The provisions of this Section are intended and designed to limit substantial investment in nonconformities and to bring about eventual elimination or lessen their impact upon surrounding conforming uses in order to preserve the integrity of the area in which it is located.”

Section 2. SEVERABILITY. Should any section or provision of this ordinance be declared invalid by any court of competent jurisdiction, such declaration shall not affect the validity of any ordinance as a whole or any part thereof which is not specifically declared to be invalid. If any court of competent jurisdiction invalidates the application of any provision of this ordinance, then such judgment shall not affect the application of that provision to any other building, structure or use not specifically included in that judgment.

Section 3. EFFECTIVE DATE. This Ordinance shall take effect and be in force from the date of its adoption by Town Council.

READ, APPROVED AND ADOPTED this the day of , 2021.

TOWN CLERK MAYOR

Approved as to form:

TOWN ATTORNEY