



Town of Portsmouth

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February 15, 2022

Representative Raymond A. Hull
Chair, House Municipal Government and Housing Committee
State House
82 Smith Street
Providence, RI 02901

Re: House Bill 2022 H 7201

Dear Chair Hull:

I am Town Planner for the Town of Portsmouth. I write to express the Town's strong support for passage of House Bill H 7201, sponsored by Representatives Cortvriend, McGaw, Donovan and Edwards. Attached please find a copy of a Resolution adopted by the Portsmouth Town Council in support of 2022 H 7201.

2022 H 7201 would amend the R.I. Zoning Enabling Act to clarify certain sections of the Act which authorize municipalities to adopt use regulations.

By way of background, Article V(1) of the Portsmouth Zoning Ordinance provides:

Except as otherwise provided in this Ordinance, in each district no building, structure, or land shall be used or occupied except for the purposes permitted in the accompanying Table of Use Regulations, Section B.

Proposed uses not so listed may be presented to the Zoning Board of Review by the property owner. Such uses shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed, as well as the purposes and uses generally permitted in the subject use district. The Zoning Board of Review may approve the proposed use as permitted, or deny the proposed use as not permitted, or allow the proposed use subject to a Special Use Permit.

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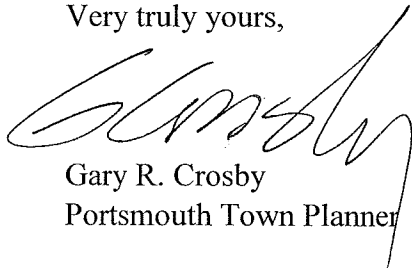
Re: House Bill 2022 H 7201

In July of 2018, Judge Van Couyghen issued a decision in a Newport Superior Court zoning appeal (Fontaine v. Edwards, et al., C.A. No. NC-2017-0261), in which the Court declared Portsmouth's non-listed uses provision invalid under the R.I. Zoning Enabling Act of 1991. The Town filed a petition for a writ of certiorari with the R.I. Supreme Court, asking the Supreme Court to exercise its discretion to review the Superior Court ruling, but the Supreme Court declined. This bill would amend R.I. Gen. Laws §§ 45-24-37 and 45-24-42 of the Zoning Enabling Act to clarify that a municipal zoning ordinance may contain a provision for consideration of non-listed uses.

Please note that this is not a "local" bill for the Town of Portsmouth. The Superior Court's decision not only impacts the Portsmouth Zoning Ordinance and adversely affects Portsmouth's citizens and property owners—the decision has serious ramifications to cities and towns across Rhode Island. Of the 39 municipalities in Rhode Island, at least 17 have a provision in their zoning ordinances allowing a town body or officer to make a discretionary determination in evaluating a non-listed proposed use. In other words, nearly half of the municipalities in Rhode Island explicitly allow the zoning board of review, council, or town official (such as a zoning enforcement officer or building official) to exercise discretion when evaluating an application for a special use permit for a non-listed use. At least six municipalities (in addition to Portsmouth) have a provision akin to the Portsmouth ordinance allowing (or requiring) a town body or officer to evaluate a non-listed proposed use against the listed uses and make some type of similarity determination on the proposal. The Superior Court's decision in Fontaine, invalidating the non-listed uses provision in Portsmouth's ordinance, casts doubt on the validity of similar provisions in many other municipal zoning ordinances as well.

The Town urges passage of H 7201. Thank you for your consideration.

Very truly yours,



Gary R. Crosby
Portsmouth Town Planner

Attachment -- Portsmouth Town Council Resolution

**TOWN OF PORTSMOUTH, RI
RESOLUTION # 2022-02-14C**

**RESOLUTION REQUESTING AND SUPPORTING LEGISLATION
TO AMEND THE RHODE ISLAND ZONING ENABLING ACT OF 1991**

WHEREAS: In 1991, the R.I. General Assembly enacted the Rhode Island Zoning Enabling Act of 1991 (P.L. 1991, ch. 307, § 1), R.I. Gen. Laws § 45-24-27 *et seq.*, (the “Act”), which required each city and town to review its zoning ordinance and make amendments or revisions as necessary to bring its zoning ordinance into conformance with the Act by December 31, 1994; and

WHEREAS: Portsmouth adopted a new Zoning Ordinance effective July 1, 1994; and

WHEREAS: In accordance with § 45-24-37 the Act (“General provisions – Permitted uses”), Article V of the Portsmouth Zoning Ordinance (“Use Regulations”) specifies uses that are permitted as a matter of right within the zoning districts of the Town; and

WHEREAS: In accordance with § 45-24-42 the Act (“General provisions – Special use permits”), Article V of the Portsmouth Zoning Ordinance specifies uses that require a special-use permit in each zoning district; and

WHEREAS: Article V(1) of the Zoning Ordinance provides as follows:

Except as otherwise provided in this Ordinance, in each district no building, structure, or land shall be used or occupied except for the purposes permitted in the accompanying Table of Use Regulations, Section B.

Proposed uses not so listed may be presented to the Zoning Board of Review by the property owner. Such uses shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed, as well as the purposes and uses generally permitted in the subject use district. The Zoning Board of Review may approve the proposed use as permitted, or deny the proposed use as not permitted, or allow the proposed use subject to a Special Use Permit.

(The second paragraph of Art. V(1) is referred to as the “Non-Listed Uses Provision.”); and

WHEREAS: Several other Rhode Island municipalities have zoning ordinances which contain similar provisions setting forth a procedure whereby a municipal board or official may consider and evaluate proposed land uses that are not expressly listed in the table of uses; and

WHEREAS: On July 27, 2018, in the case of *Fontaine vs. Edwards, et al.* (C.A. No. NC-2017-0261), the Newport County Superior Court (Van Couyghen, J. presiding) issued a written decision in which the Superior Court ruled, in part, that the Non-Listed Uses Provision in Portsmouth’s Zoning Ordinance is legally invalid and prohibited under the Zoning Enabling Act; and

WHEREAS: By invalidating the Non-Listed Uses Provision, the Newport Superior Court in effect created a town-wide prohibition and exclusion of any proposed land use that is not specifically listed in the table of uses—no matter how legitimate, benign or beneficial the proposed use may be; and

WHEREAS: By virtue of the Newport Superior Court's decision and ruling, any property owner wishing to engage in a land use which is not specifically listed will now be forced to petition the Town Council to adopt an amendment to the Zoning Ordinance to add the specific new land use to the table of uses, a process which is lengthy, expensive and fraught with uncertainty; and

WHEREAS, The Town filed a petition to the R.I. Supreme Court for a writ of certiorari (Case No. SU-2018-0278-M.P.) requesting that the R.I. Supreme Court review the Newport Superior Court's decision and ruling which invalidated Portsmouth's Non-Listed Uses Provision; and

WHEREAS, The Supreme Court declined to exercise its discretion to review the Newport Superior Court's decision and ruling; and,

WHEREAS, The decision and ruling of the Newport Superior Court which invalidated Portsmouth's Non-Listed Uses Provision remains in effect; and

WHEREAS: Senate Bill S 2088 and House Bill H 7201 have been introduced in the 2022 Session of the R.I. General Assembly; and

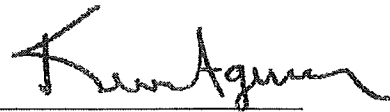
WHEREAS, These Bills would amend § 45-24-37 of the Act to add the following clarifying language: "The ordinance may provide for a procedure under which a proposed land use that is not specifically listed may be presented by the property owner to the zoning board of review or to a local official or agency charged with administration and enforcement of the ordinance for an evaluation and determination of whether the proposed use is of a similar type, character and intensity as a listed permitted use. Upon such determination, the proposed use may be considered to be a permitted use."; and

WHEREAS: These Bills would amend § 45-24-42 of the Act to add the following clarifying language: "the ordinance may provide for a procedure under which a proposed land use that is not specifically listed may be presented by the property owner to the zoning board of review or to a local official or agency charged with administration and enforcement of the ordinance for an evaluation and determination of whether the proposed use is of a similar type, character and intensity as a listed use requiring a special-use permit. Upon such determination, the proposed use may be considered to be a use requiring a special-use permit.";


NOW, THEREFORE, BE IT RESOLVED, that the Portsmouth Town Council hereby requests and urges the Rhode Island General Assembly to pass and enact Senate Bill S 2088 and House Bill H 7201, to amend § 45-24-37 and § 45-24-42 of the Zoning Enabling Act as necessary to validate the legality and efficacy of Portsmouth's Non-Listed Uses Provision and similar provisions contained in the zoning ordinances of other municipalities; and

BE IT FURTHER RESOLVED, that the Town Clerk submit a copy of this Resolution to the Town of Portsmouth's State Senator and Representatives, the Speaker of the House of Representatives, the President of the Senate, the Rhode Island Governor, and every Rhode Island municipality.

Adopted this 14 day of February 2022.



Kevin M. Aguiar, President
Portsmouth Town Council

ATTEST: 
Jennifer M. West, Town Clerk