

Burlington Development Review Board

149 Church Street, City Hall
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AJ LaRosa
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Springer Harris
Geoff Hand
Alexandra Zipparo
Zoraya Hightower
Jim Drummond, (Alternate)
Vacant, (Alternate)



BURLINGTON DEVELOPMENT REVIEW BOARD Tuesday February 5th, 2019, 5:00 PM Contois Auditorium, City Hall, 149 Church St, Burlington, VT Draft Minutes

Board Members Present: B. Rabinowitz, A. LaRosa, A. Hart, G. Hand, A. Zipparo, Z. Hightower

Board Members Absent: S. Harris, J. Drummond (alt.)

Staff Present: Scott Gustin, Ryan Morrison, Layne Darfler

I. Agenda

B. Rabinowitz: 99 Rose street deferral proposed

II. Communications

B. Rabinowitz: Supplemental communications submitted for 15-17 Weston and 441 Shelburne Street

III. Minutes

B. Rabinowitz: Minutes from the January 8th 2019 meeting will be discussed at the upcoming deliberation

IV. Consent

1. 19-0476CA; 180 Intervale Road (E-AE, Ward 2C) Intervale Center Inc.

Install a new driveway and parking area to the north of the farmhouse, and narrow the existing driveway to the south of the farmhouse (Project Manager: Ryan Morrison)

G. Hand and A. Zipparo Recused

B. Rabinowitz: Has the applicant received and reviewed the staff comments? Do you have any questions?

P. Dunseith: Yes, no questions

B. Rabinowitz: Do any members of the Board object to this item remaining as consent?

None

B. Rabinowitz: Any public present wish to speak about this project?

None

A. Hart: Motion to approve and adopt staff findings and recommendations

A. LaRosa: seconds the motion

4-0-0

2. 19-0496CA/CU; 99 Rose St (RM, Ward 3C) Emily Hunter and Eric Perkins

366s.f addition for Accessory Dwelling unit. (Project Manager: Ryan Morrison)

G. Hand Recused

B. Rabinowitz: Request to defer, do I have a motion?

A. LaRosa: Motion to defer to date certain February 20th, 2019

A. Hart: Seconds the motion

5-0-0

3. 19-0504CU; 49 Mansfield Ave (RL, Ward 1E) Nancy Kaplan 1998 Trust/ Andrew N. Raubvogel Living Trust

Request one bedroom bed and breakfast (Project Manager: Ryan Morrison)

B. Rabinowitz: Has the applicant received and reviewed the staff comments? Do you have any questions?

A. Raubvogel: question about condition regarding hours

A. Hart: what they are talking about are the check in and check out times, not a curfew.

B. Rabinowitz: Do any members of the Board object to this item remaining as consent?

None

B. Rabinowitz: Any public present wish to speak about this project?

None

A. Hart: Motion to approve and adopt staff findings and recommendations

Z. Hightower: seconds the motion

5-0-0

V. Public Hearing

1. 19-0436AP; 15-17 Weston St (RL, Ward 1E) Philip Irwin Aaron

Appeal of NOV 345151 relating to occupancy of a dwelling by more than 4 unrelated adults (Project Manager: Scott Gustin)

A. LaRosa Recused

W. Ward: Tri-plex in Ward 1, residential medium density zone. The newest complaint came in December 29th, 2017, regarding a complaint about having more than 4 unrelated adults in one unit. Sent a warning letter that it is a violation of the ordinance to have more than 3 unrelated adults in a unit in that zone. Received response that the owner thought the issue had been resolved in 2013, some documents such as affidavits and deeds, that went back a couple decades, that said there were regularly 5 occupants, but didn't say unrelated and didn't go back to a grandfathered date. Phone calls and emails between January 5th and 8th. Sent email to address that the evidence they submitted was not sufficient. 5 bedroom occupied by 5 people, did not state related or unrelated. No Zoning Permit was applied for or acknowledged by a Zoning Administrator. Asked for more significant proof. Requested they apply for a zoning permit or apply for a zoning determination. February 6th notified that no response had been given February 20th was given a March 15th deadline. Attorney David Greenburg responded on Mr. Aaron's behalf that they wait to make decision until April 15th, 2018 when Mr. Aaron was back in Vermont. Agreed that time would be fine. June 25th, 2018 wrote out requesting response and notification that they would proceed unless application was filed with Planning and Zoning. Didn't want to inspect over the summer as occupants may move out and wanted to wait until September for school kids to be back. Oct 4th housing inspection was scheduled. Inspector Matt Perry inspected unit 1, noted the property owner did not show up and that the building was for sale. Sale listing demonstrated that the building was occupied by 5 people. Lease for a 5 bedroom with a per room rate. Unless family that was continuing use. Decision made that the NOV be issued, October 2018 issued NOV. Appealed within 15 days. Appellant submitted documents to you. He acknowledges that it is occupied by more than 4 unrelated adults, new affidavit from Paul Mayor that notes between April 1985

and January 1987 mayor owned the prop and it was occupied by 5 unrelated adults at the time. Phil Aaron 2019 affidavit ads the words unrelated to the occupancy in previous affidavit. Approval of 5 unrelated requires zoning approval and conversations with city departments. Does not have functional family approval. Applicant claims discriminatory treatment. Did not include specific addresses for Code Enforcement to check but we have several properties with similar issues. This is on page 9 but we request the DRB to uphold the zoning violation; owner shall submit a lease of unit 1 for each calendar year; reduce unit 1 occupant count to 4; submit zoning application within 30 days with appropriate fee; submit zoning determination to Planning and Zoning; request agreement with zoning administration that includes reasonable timelines to cure the NOV.

A. Hart: we've had these types of cases before and the pre-existing non-conforming use has come up before; your response is to comply with the zoning offices before appealing a code enforcement action

W. Ward: Provided previous examples, this is not a new status or process. If he thought he had a grandfathered status he just needs to apply for determination and then he wouldn't have needed to come to DRB if determination was affirmative, but there was no submittal.

G. Hand: We can decide if it was grandathered now? Or not because it wasn't submitted as a determination?

K. Sturtevant: Appeal of NOV is before you, whether or not there is a violation.

G. Hand: whether satisfied or not there is a defense in them saying no I'm grandfathered, shouldn't they be able to raise that to us?

A. Hart: a lot of paperwork to review, but can't tell the owner they can't use that as a defense because they didn't follow the procedure.

B. Rabinowitz: we've had many projects come before us asking us to approve grandfathered condition, maybe because those determinations go to code enforcement and that's why we don't see them.

K. Sturtevant: there have been a number of grandfathered requests but not many get appealed

G. Hand: no legal issue in why we can't look at it as being grandfathered.

K. Sturtevant: the Ordinance has a process to review non-conformities, it has not been followed so there has not been a determination.

B. Rabinowitz: functional family and that an app has not been received or pursued. Use pre-existing use would be non-conforming. I think the issue is a legal status pre-existing. If it pre-exists before 1970 it would be grandfathered

K. Sturtevant: Yes

A. Hightower: 1970 vs 2000 date of when family definition changed

K. Sturtevant: 1970 date because of another case where the actual date was for the family definition and what applied beforehand. 1970 determined group quarters. 2000 Ordinance changed to allow for functional family. It gave opportunity for an alternate definition.

G. Hand: we need to look back to 1970, affidavits don't reach back that far?

W. Ward: correct and there are also affidavits that don't state unrelated, just 5 people. Those affidavits that don't say unrelated should not be seen as meeting that standard

K. Sturtevant: Whether or not your looking at grandfathering. Raised estoppel; board has said before it is not within the board purview to look at

P. Aaron: dealing with an alleged violation for unit 1. Object to recommendations made by zoning in their submission in response to the appeal. In submission, I made suggestion and request that recognize this is a unique situation. Asking you to reserve decision based upon the fact that these issues are being raised in the superior court currently. This board should reserve its decision until the court renders a final ruling on the issue on grandfathering and functional family and the 15 year period of time. If the board determines that unit 1 is in violation than we'll have to reduce the number of people in that house and reduce the number. If I do that and the court rules the grandfathered rights start and redefine functional family I would lose that use.

B. Rabinowitz: we've had this situation before and don't pause for pending litigations

G. Hand: we need to respect the law as it stands now until it is changed.

P. Aaron: stating I'm proceeding incorrectly, if one looks at violation there is only 2 options, remedy options or file for application to have your house declared a grandfathered house or appeal. There were 2 choices apply or appeal. Not going to go through the affidavits because we've already discussed why we don't want to make changes while the courts look at this and change it means we can keep it. Address the theory of estoppel. Judge Durkin recognizes estoppel, while rarely used does exist and is a proper argument. By virtue of the laws of estoppel the city can't enforce it

A. Hart: The Environmental Court has the ability to take estoppel into consideration, we do not.

P. Aaron: not familiar with what your jurisdictional power is with these appeals. Review entire situation and see if it's applicable. If your determination is not based on the entire situation than how can you honor the recommendations. Discussed estoppel case example. Listed why in this unique situation why estoppel is a relevant argument and why the board should consider it. If it's not in your purview than I won't waste your time.

G. Hand: if we assume we can look at estoppel and we can't determine a grandfathered date. Do you agree the 1970 date should be looked at? If not then what date?

P. Aaron: my understanding of what occurred is that as a result of Bianchi case the legislature determined that there has to be a cut off and there has to be a stability in titles and so forth, if you do "a,b,c" in 15 year period and it is a continuous use than it is grandfathered. The city uses a stricter term than the state. Typically that's where I get caught in this issue, when we bought the property, before the change of zone, we did a very comprehensive due diligence. Retained attorney who did a title search and found that when law firm examined house we found 5 bedrooms, found unit in back and front, and in basement they found another unit. The unit in basement was done unpermitted. As a result, attorney requested code or zoning to do an examination of the house from point of view that all permits were in place and that we were buying a 5 bedroom house with two other units. Eventually with code help the basement unit was closed off and they allowed removal of all fixtures. From that point on we continuously followed through with a continued use. 1992 was the first registration and was given the lease he gave registration that showed 5 people. The city was noticed that 5 people were living there. There is instability by going back to 1970 and as my submission shows I was able to take it back to 1972 to the person who converted it to 5 bedroom. Spoke to previous owner who stated it was leased to college kids.

B. Rabinowitz: the determination that you spoke of is that in the packet you submitted?

P. Aaron: couldn't find exact document, but in that date there is an application to add another apartment and in that application the person examining they list there were 5 bedrooms. I did the history and found old owner who changed the unit to be used as college apartments. Another previous owner knew the other prior owner was going to convert it into student housing. Previous owner stated he bought it with 5 unrelated. When the law was changed, we never thought that we were out of compliance because inspectors had been through the building and registrations were submitted.

G. Hand: is the unit rented out now?

P. Aaron: Yes, rented out until May 25, 2019 to 5 College kids and then already leased out for the next year

B. Rabinowitz: The determination that you're referring to, that is not the Zoning Board of Adjustment minutes that talk about staff comments is it?

P. Aaron: there is one going further back before 1994

B. Rabinowitz: two issues that the city has presented. One being the grandfathering and is the 15 year period really what it's about or is it the 1970 date. Second is the functional family, but if functional family doesn't become an issue because it's not a legal 5 bedroom apartment than that definition doesn't become relevant.

K. Long: this is a great business plan because you turn a living room into a bedroom and get to rent it out. Place is rented per bedroom not as a home. To me that is a boarding house. Feel this place has been an eye sore in neighborhood. Pictures have been sent in over the years. Furniture left outside. Often there are cars parked against the sidewalk.

B. Rabinowitz: this may have other problems but we have limited ability here in terms of the legality

K. Long: CDO is supposed to protect the neighborhood and the residents in these homes. This is a major issue in the City of Burlington. It is a personal issue because we have to deal with the noise and the growing intensity of density in the neighborhood. Three units in a low density zone isn't allowed, glad basement unit is removed. Need to uphold and respect the laws; functional family is not renting out per bedroom.

M. Long: support code enforcement office to uphold NOV, the appeal is without grounds. This property cannot be grandfathered because another decision determined it was never legal to have more than 4 unrelated adults at this property. This is a use violation and those never become un-enforceable. The appellant held the environmental court was wrong but they don't have the authority to overrule the courts. The ordinance does make a generous exception for functional family but nothing the appellant shows supports a reason to meet those exceptions. Appellant's argue regarding discriminatory treatment is unsupported.

A. Hart: owner is requested the Board defer or not take action until a court case is decided, but wondering if are action is to go back to 4 tenants his argument is that the court ruling could make the use legal.

K. Sturtevant: The case the appellant is referring to is done, there is no case before the courts right now. That was over quite a while ago. No case regarding functional family or 15 year right now. Environmental Court upheld 240 North Ave duplex to triplex use violation which is now going to supreme court.

A. Hart: you also stated a rental registration where it stated 4 occupants, raising the abandonment or non-continuous use. There has to be non-continuous use for a year, how does the rental registration form tell us how long that was discontinued.

W. Ward: Keith Aaron's affidavit shows discovery of inaccurate registration but they submitted an additional amended form where they submit it stating 5

K. Sturtevant: you do have the decision of the Demar case where it discussed 5 bedroom or 5 occupants. You can have a family in 5 bedrooms. Had question before about what you can look at for defenses. Not looking at non-conforming use or the 15 year limits. Object to estoppel; was some confusion over the difference between grandfather and 15 year statue. They are different. Grandfathering goes to a certain date 15 year question is based off environmental court decision stating use violations do not fall into limitations.

P. Aaron: would like to clarify 15 Weston St was not converted a living room to bedroom. Actually has 5 actual bedrooms, tenants pay 1 fixed rent for the entire rent for the entire house not per bedroom. Given wrong case, corrected 240 North Ave. they are bedrooms with egress window, life safety, dimension, safety.

K. Aaron: no parties in house, lived in that house all summer.

B. Rabinowitz: Closed public Hearing

2. 19-0355CA; 441 Shelburne St (RM, Ward 5S) 441 Shelburne Rd, LLC

Convert boarding house and duplex to 10 unit residential apartments with associated site improvements. Reapplication for expired zoning permit. (Project Manager: Scott Gustin)

Z. Hightower: Recused

B. Rabinowitz: re-opened the hearing a couple specific items to look at, the parking and the timeline for completion. Submitted info, provide summary

M. Richardson: Timeline is, agree to start siding within 2-3 months the parking management and completion of project within 2 years; starting 2-3 months. Board needs to consider budget, this project was thrown off course by permitting costs.

A. Hart: having your builders take longer to do work doesn't add costs; you've have over 2 years to finish this. Looking forward, start within 2-4 months. Reasonable to hold you to a completion date to siding work. Suggestion?

M. Richardson: 1 year term for siding

B. Rabinowitz: it seems it could be done quicker, is this rented out?

M. Richardson: no, its not vacant either; need to get it done sooner but need more funding

G. Hand: commit to start within 2-3 months, why would it take another 9-10 to get the rest up.

M. Richardson: we have to remove and rebuild the 435 portion and the only thing remaining is floor joists; studs replaced/reinforced and then foundation is being reinforced, just finished that a month ago. Requires jacking and shifting the house. All under the approved plans. We have half of the bldg. sheathed, not on 435. Only south side is ready for siding.

G. Hand: permits have a time period for a reason, one of those is the impact on the neighborhood. Your permit expired, but you're coming back asking us for another 2 years. With a shortened time frame we were looking at approval, but now you're asking your neighbors for another 2 years. Project done within 2 years.

B. Rabinowitz: exterior work stating within 2-3 month? Parking Management plan, car share membership incentive

M. Richardson: correct need to complete south end framing then we can start siding. Not trying to be difficult. There are 4 car share sites within 5 mile range, closest is on locust. Reminder that keeps getting noted, reminder letter about permit expiring. That was sent to an old email. That is the reason I never really knew that I had a one year extension period. Staff report makes it seem like I blew off a reminder. When discussing permit expiration with Scott Gustin he mentioned a reminder email but I never got it, it was sent to an old email.

A. Zipparo: the email was incorrect but you were aware of when the permit was going to expire; those reminders are courtesy letters not required. Staff does that as an extra step.

M. Richardson: was notified when permit was picked up, the engineers stated they lost track of the time as well.

J. Govoni: sympathetic to situation and appreciate that it is a challenging and ambitious project. It greatly impacts the neighborhood and own property. It has caused significant damage to my property. Best outcome is that it gets completed as soon as possible. Don't know if I see any good faith dealing evidence.

B. Rabinowitz: any activity on north end of the house?

J. Govoni: yes, I want to be generous to Mitchell but it is greatly challenging; there has been work on the end facing me and there has been challenges that are ongoing.

M. Richardson: I have tried to be pleasant and understanding to all the neighbors. Have been given a lot of positive feedback, Jeff is the only negative response. Damages to his fence occurred and we tried to remedy but was given too high of a quote. Trash has been removed; dumpster on his side has been moved. He has had a long time of conflict with the property. I've taken it over for the last 3 years and am just asking for a little time.

B. Rabinowitz: Close the public hearing

VI. Adjournment

The meeting was adjourned at 6:40 PM

Layne Darfler, Planning Technician

Date

Plans may be viewed in the Planning and Zoning Office, (City Hall, 149 Church Street, Burlington), between the hours of 8:00 a.m. and 4:30 p.m.

Participation in the DRB proceeding is a prerequisite to the right to take any subsequent appeal. Please note that ANYTHING submitted to the Planning and Zoning office is considered public and cannot be kept confidential. This may not be the final order in which items will be heard. Please view final Agenda, at www.burlingtonvt.gov/pz/drb/agendas or the office notice board, one week before the hearing for the order in which items will be heard.