



CODE ENFORCEMENT OFFICE

645A Pine St, PO Box 849
Burlington, VT 05402-0849
VOICE (802) 863-0442
FAX: (802) 652-4221

TO: Development Review Board

FR: Jeanne Francis, Assistant Zoning Administrative Officer,
Code Compliance and Enforcement

DT: May 15, 2018

RE: Report on **Appeal #18-0861AP**; Appeal of an Administrative Officer's Zoning Notice of Violation (ZV # 333035) issued on March 20, 2018, for "for increasing number of residential units from 9 to 10 without zoning approval" for Premises Located at 19-21 South Willard Street, Burlington, Vermont.

Note: This is the Administrative Officer's report; decisions are made by the Development Review Board, which may overturn or uphold the Zoning Administrator's Decision. **THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.**

Location: 19-21 So Willard St, Burlington, VT

Tax Lot # 045-2-254-000

Appellant: WHN Properties, LLC

Representatives: Kevin A. Lumpkin, Esq.

Applicable Regulations: CDO Articles 2, 3, 5, 8, 12 and VSA § 4451

Appeal # 18-0861AP

Appeal: Sec. 12.2.2 Appeals of Administrative Officer Decisions

- Appeal filed at the Planning/Zoning office on April 4, 2018

Name and address of appellant:

WHN Properties, LLC
PO Box 4045
Burlington, VT

Brief description of the property with respect to which the appeal is taken

The subject property address is 19-21 So Willard St, Burlington, VT 05401, Tax Parcel ID # 045-2-254-000.

Appellant's reference to the regulatory provisions applicable to that appeal

Appellant asserts that the City is estopped from enforcing any purported violation and also barred from doing so pursuant to CDO 5.3.2. and 24 V.S.A. §4454 as certain departments of the City have been aware of the 10th unit.

City's Response:

The City approved a "Special Exception Use" change in the number of units (8 to 9) on June 3, 1969, under Title 27, Chapter 1, Section 6509-5A. There are no zoning permits on record (Zoning would have the underlying authority to consider such requests) approving a change in use from 9 to 10. The Appellant believes the permit for such a change in use has been misplaced, however, Appellant has not provided a copy of such a permit if one did exist, nor has any evidence been submitted to suggest that there is any such permit.

The matter of estoppel is not property before the Development Review Board. A request for relief based upon estoppel is a matter to be weighed by a court of law.

As a use violation, V.S.A. 24 §4454 (the 15-year statute of limitations) does not apply. V.S.A 24 § 4454 pertains only to physical violations such as unpermitted structures. "A use violation that has never been legally established (and therefore cannot establish itself as a lawful nonconforming use) can be subject to an enforcement action at any time, particularly when the alleged use violation is ongoing." *In re Budget Inn NOV (Appeal of DAAT, Inc., David Singh from City of Barre DRB)*, 2013 WL 657039 (Vt. Super. Env'tl. Div. Nov. 19, 2013). Also see *City of Burlington v. Richardson*, 2006 WL 4088224 at 5 (Vt. Env'tl. Ct. June 27, 2006) (use violations are an exemption from 24 V.S.A. §4454 as use violations are analyzed as continuing or recurring violations). The Development Review Board has consistently applied this standard.

City's Submittals

- ZP approved on May 21, 1969.
- NOV Dated March 20, 2018

CDO Article 2. Enforcement

Sec. 2.7.5 Observation or Complaints of Violations

... that have been taken.

The observation of a violation on the part of the administrative officer shall be considered an Investigation, and the alleged violator may be issued a notice of zoning violation or a municipal civil complaint ticket.

CDO Article 3. Applications, Permits, and Project Review

Sec. 3.1.2 Zoning Permit Required

Except for that development which is exempt from a permit requirement under Sec. 3.1.2(c) below, no development may be commenced within the city without a zoning permit issued by the administrative officer including but not limited to the following types of exterior and interior work:

(a) Exterior Work:

...

- 3. Change of use or expansion of use.
- 16. Site improvements...

(b) Interior Work:

- 1. Increase in habitable living space (including, but not limited to, attic, bedroom, basement, garage, ...)
- 2. Installation of additional kitchen.
- 3. Change in use.
- 4. Increase or decrease in number of units

CDO Article 5 Citywide General Standards

Appellant stated he will argue the 15-year statute of limitations. However, that argument is misplaced. As indicated above, use violations are exempt from the zoning statute of limitations. “A use violation that has never been legally established (and therefore cannot establish itself as a lawful nonconforming use) can be subject to an enforcement action at any time, particularly when the alleged use violation is ongoing.” *In re Budget Inn NOV (Appeal of DAAT, Inc., David Singh from City of Barre DRB)*, 2013 WL 657039 (Vt. Super. Env'tl. Div. Nov. 19, 2013). Also see *City of Burlington v. Richardson*, 2006 WL 4088224 at 5 (Vt. Env'tl. Ct. June 27, 2006) (use violations are an

exemption from 24 V.S.A. §4454 as use violations are analyzed as continuing or recurring violations).

It is also worth noting that Appellant did not seek a determination as a pre-existing legal nonconformity—“grandfathering”. To be determined to be a pre-existing legal nonconformity, one must demonstrate legal compliance with the zoning regulations prior to the change in the regulations that made, in this instance, the use, nonconforming.

CDO Article 12. Appeals, Conditional Uses, Variances

- Appellant filed a complete appeal as directed under CDO Article 12 Sec. 12.2.2

24 V.S.A. §4451. Enforcement, penalties

- (a) Any person who violates any bylaw after it has been adopted under this chapter or who violates a comparable ordinance or regulation adopted under prior enabling laws shall be fined not more than \$200.00 for each offense. No action may be brought under this section unless the alleged offender has had at least seven days' warning notice by certified mail. An action may be brought without the seven-day notice and opportunity to cure if the alleged offender repeats the violation of the bylaw or ordinance after the seven-day notice period and within the next succeeding 12 months.

Summary

In 2017 Code Enforcement Office issued a notification letter to Appellant of an alleged change in use – 9 units to 10 without zoning approval. The Appellant responded that the unit was “grandfathered” to which Code replied, that is not a decision of the Code Enforcement Office but of the Administrative Officer. Code suggested he request a determination. Although Appellant did meet with the Zoning Administrative Officer regarding the matter, such a request was never submitted (CDO Section 2.7.11 Appropriate Action).

On March 20, 2018 a Notice of Violation was issued to Appellant for increasing the number of residential units from 9 to 10 without zoning approval. Appellant met with Project Manager at Planning/Zoning Office and was informed the Property does not meet density requirements for another unit.

May 15, 2018 DRB Report
19-21 South Willard St
Burlington, VT
[ZL 18-0861AP](#)

Appellant reviewed his options with City Departments and met with them on April 17th . Appellant sent an email on May 1, 2018 stating he has the opportunity to purchase additional land from Property located at 17 So. Willard Street and requested to enter into an Agreement to bring Property into compliance. No agreement has yet been executed.

CONCLUSION:

The City has provided sufficient evidence that violations noted in the March 20, 2018 NOV #333035 for *increasing the number of residential units from 9 to 10 without zoning approval* are founded and enforceable.

Any increase in the number of dwellings after 1962 would require zoning approval. There is no zoning permit enabling 10 dwelling units at the subject property. Use violations are exempt from the statute of limitations contained in 24 V.S.A. §4454. Appellant did not submit a determination request as outlined under CDO Sec. 2.7.11.

To date, May 8, 2018, Violation at property has not been remedied.

The Code Enforcement Office, under the auspices of the Zoning Administrator, hereby requests the Development Review Board to uphold their decision that violations cited under NOV #333035 are viable and continue at said Property. Further, we request the Board condition the following:

1. Within 30 days from date of DRB decision, Owner shall enact a Stipulation Agreement with the City with a reasonable timeline in which to remove the violation and convert the space back to its prior state or obtain zoning approval for the 10th unit; an administrative fee would be required.