

Department of Planning and Zoning

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TO: Development Review Board
FROM: Scott Gustin *SG*
DATE: April 3, 2018
RE: 18-0556DT; 21 Peru Street

Note: These are staff comments only; decisions on projects are made by the Development Review Board, which may approve, deny, table or modify any project. THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.

Zone: RH Ward: 3C

Owner/Appellant: BPJS Management, LLC & Matt Daly, Esq.

Request: Appeal of zoning determination relative to unrelated adult occupancy of the dwelling.

Overview:

The appellant is seeking a determination relative to occupancy of the single detached dwelling unit at the subject property. Specifically, the appellant is looking to grandfather occupancy of the dwelling unit by more than 4 unrelated adults. As the property is located in the Residential – High Density zone, up to 4 unrelated adults may be allowed by right. More than 4 may be allowed only by way of Sec. 4.4.5, (d), 5, C, *Residential Occupancy Limits*, and conditional use approval or by grandfathering.

The applicant has sought an affirmative grandfathering determination relative to occupancy. Grandfathered status (i.e. pre-existing legal non-conformities) pertains to lots/parcels/structures/uses that are non-compliant with a current zoning regulation, but were compliant prior to a change in the regulations. An administrative determination that up to 6 unrelated adults may occupy the dwelling was issued; however, that determination has been appealed. The appellant asserts that there should be no limitation on the number of unrelated adults occupying the residence. During discussion and review of the file for the appeal, it has become evident that the occupancy by 6 unrelated adults was discontinued for more than a year and, therefore, occupancy by only 5 unrelated adults is grandfathered – not 6 or any greater number.

This determination and associated appeal pertain only to occupancy of the residence. Apparent onsite parking problems are not included.

Recommendation: Modify the determination to recognize occupancy by 5 unrelated adults as grandfathered based on the following findings and conditions:

I. Findings:

The appellant is seeking an affirmative determination that occupancy of the dwelling by any number of unrelated adult occupants is legitimately grandfathered. Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits*, of the Comprehensive Development Ordinance (CDO) limits occupancy of all dwelling units within the residential zones to a family as defined in Article 13. The definition of family has several subsections including (c): “No more than four unrelated adults and their children.” This provision of the CDO limits occupancy of dwelling units throughout the city’s residential zones to families with kinship, group homes, “functional families,” or up to 4 unrelated adults. This provision was originally adopted into the CDO November 2000 in just the RL and RM zones. The provision was extended to include the RH zone December 26, 2012.

Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits*, is below.

Residential Occupancy Limits.

In all residential districts, the occupancy of any dwelling unit is limited to members of a family as defined in Article 13. Notwithstanding the following, the minimum square footage requirements shall be reduced by ten (10%) percent in situations where the residential premises are owner occupied.

Subject to Conditional Use approval by the DRB, a dwelling unit may be occupied by more than four (4) unrelated adults if it contains at least twenty-five hundred (2,500) square feet excluding its attic and basement pursuant to the following:

- (i) If in a RL district, the dwelling unit also contains at least an additional two hundred fifty (250) square feet and one (1) additional parking space per adult occupant in excess of four (4); or,
- (ii) If in a RM district, the dwelling unit also contains at least an additional two hundred (200) square feet and one (1) additional parking space per adult occupant in excess of four (4).
- (iii) If in a RH district, the dwelling unit also contains at least an additional 150 square feet and 1 additional parking space per adult occupant in excess of four (4).

In order to achieve grandfathered status, the appellant needs to demonstrate, in part, consistent occupancy of the dwelling unit by a given number of unrelated adult occupants since at least December 25, 2012. The assertion that any number of unrelated adult occupants over 4, varying over time, may be grandfathered is fundamentally flawed and cannot be affirmed as addressed further below.

On December 8, 2017, the appellant submitted a zoning determination request seeking grandfathered status for occupancy by more than 4 unrelated adults at 21 Peru Street. Some key information relative to more recent occupancy of the dwelling was missing in the initial submission. The determination request was made complete December 26, 2017.

The evidence provided consisted of property leases dating from the present back to June 1, 2011. The leases demonstrated occupancy of the residence by more than 4 unrelated adults, although the number varied over time. Occupancy ranged from an initial low of 5 unrelated adults to a present high of 8 unrelated adult occupants. As of December 26, 2012 – the date of adoption of the 4 unrelated adult limit in the RH zone – the subject property contained 6 unrelated adult occupants. Before that date, occupancy was not

restricted by Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits*. Upon adoption of this provision in the RH zone December 26, 2012, a limitation on unrelated adult occupancy came into effect. Any increase in unrelated adult occupancy thereafter became an increase in nonconformity.

Following an initial review of the determination request with the City Attorney's Office, a determination was issued on January 24, 2018:

This determination is in regard to the above-referenced property, specifically your request that the City of Burlington recognize occupancy of the dwelling unit with more than 4 unrelated adults at the subject property as a "grandfathered" preexisting nonconformity. The City reviewed the following documents/evidence to form its determination:

- The City's zoning permit records
- The City's property assessment records
- The City's rental registration records
- The City's 2008 Comprehensive Development Ordinance and as amended
- Cover letter dated December 7, 2017 included in determination request
- April 5, 2017 email from Caryn Long relating to the property
- Property leases dating from the present back to June 1, 2011

The subject property is located in the Residential – High Density zone. The limitation of 4 unrelated adults within a dwelling unit became effective in this zone as of December 26, 2012. The property leases for each year from June 1, 2011 to the present include more than 4 unrelated adult occupants in the dwelling.

- 5 Unrelated adult occupants from June 1, 2011 – May 25, 2012
- 6 Unrelated adult occupants from June 1, 2012 – May 25, 2013
- 5 Unrelated adult occupants from June 1, 2013 – May 25, 2014
- 7 Unrelated adult occupants from June 1, 2014 – May 25, 2015
- 7 Unrelated adult occupants from June 1, 2015 – May 25, 2016
- 8 Unrelated adult occupants from June 1, 2016 – May 25, 2017
- 8 Unrelated adult occupants from June 1, 2017 – May 15, 2018

The evidence shows that occupancy of the dwelling unit has grown from 5 unrelated adult occupants in 2011 to 8 unrelated adults presently. Since June 1, 2012, the evidence shows that there have been at least 6 unrelated adult occupants. Based on review of the evidence, it is the determination of the Planning and Zoning Department that occupancy of the subject dwelling by **6 unrelated adult occupants** is a grandfathered preexisting nonconformity. As such, occupancy of the dwelling by 6 unrelated adults is a legitimate nonconformity and may continue subject to the standards of *Article 5, Part 3: Non-Conformities* of the 2008 Comprehensive Development Ordinance and as amended. Note, however, that occupancy of the subject dwelling unit by any more than 6 unrelated adult occupants is not a legitimate nonconformity but, rather, it is an unpermitted expansion of a nonconformity.

This determination relates to the occupancy of the dwelling and to no other aspect of the property.

The appeal of the administrative determination was filed February 8, 2018, within 15 days as required.

The appeal asserts that, because occupancy of the subject dwelling has consistently exceeded 4 unrelated adults since pre 2012, the property should not be bound at all by the occupancy standards in the CDO. Rather than grandfather a particular number of unrelated adult occupants, the appeal seeks carte blanche occupancy of the residence.

The law shall not be construed to absurd results. The assertion in this appeal is absurd and conveniently ignores the limitations on nonconformities generally and the provisions of Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits*, specifically of the Comprehensive Development Ordinance.

The city has a vested interest in limiting and, eventually eliminating, nonconformities. If the subject residence were to be occupied by 4 or fewer unrelated adult occupants for one year and a day, it would lose the grandfathered status granted to it in the subject determination. If unrelated adult occupancy were to expand, it could only do so in a way that conforms to Sec. 4.4.5 (d) 5, C.

Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits* and the definition of “family” in the CDO work together to limit occupancy of dwelling units in Burlington’s residential zones. “Family” includes up to 4 unrelated adult occupants. Sec. 4.4.5 (d) 5, C, outlines criteria for more than 4 unrelated adults and the method for seeking approval. As noted previously, any expansion of more than 4 unrelated adult occupants outside of Sec. 4.4.5 (d), 5, C amounts to an increase in nonconformity and cannot be approved. The appellant has not sought expansion of occupancy under the provisions of this section.

The appeal cannot be upheld because it seeks to legitimize expansion of a nonconformity that simply cannot be approved by way of a determination. Additionally, the number of unrelated adults to be recognized as grandfathered should be reduced to 5 as, pursuant to CDO Section 5.3.4(b), “[a] nonconforming use shall not be re-established if such use has been discontinued for any reason for a period of one (1) year or longer....” Based upon the leases submitted by Appellant, it appears that occupancy by at least 6 was discontinued from May 26, 2013 to June 1, 2014, more than a year.

II. Recommended Motion:

Uphold the determination 18-0556DT with a revision to recognize the grandfathered occupancy of just 5 unrelated adults.