

Department of Planning and Zoning

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TO: Development Review Board
FROM: Scott Gustin
DATE: October 18, 2016
RE: 17-0081DT; 135 Hayward Street

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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: RL Ward: 5S

Owner/Appellant: Andrew & Daniel Rowan

Request: Appeal of adverse zoning determination relative to duplex or triplex status.

Overview:

The appellant is seeking a determination relative to duplex or triplex use of the subject property. City records demonstrate that the property had been used as a duplex and a triplex over the years. The earliest city records, assessor's data from the 1950's, do not specify a use. The earliest city record clearly noting the use is a 1979 zoning permit to install a bedroom window within an existing duplex. The building burned in 2016 and was subsequently demolished. The requested determination followed demolition and is a precursor to redevelopment of the property.

The subject property is located in the residential low density zone and is fairly small at just ~4,854 sf. The minimum lot size in this zone is 6,000 sf. For a duplex, the minimum lot size is 10,000 sf. Within this zone, single family homes are permitted, duplexes are a conditional use, and triplexes are prohibited. Use as a duplex or a triplex is nonconforming within this zone on this size lot.

An affirmative determination for either duplex or triplex use would be predicated on grandfathered status. 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.

Recommendation: **Uphold adverse determination** based on the following findings and conditions:

I. Findings:

City records indicate that the home was originally constructed in 1925. Its construction predates zoning in Burlington adopted in 1947. The earliest zoning record is a window permit issued in June 1974 to enclose the front porch with windows. The use of the property is not indicated. A subsequent zoning permit issued in December 1979 for a bedroom window notes the existing use as a duplex. An assessor's card from 1984 notes 2 living units as well. Subsequent zoning permits from 1982-1991 indicate duplex as the existing use.

October 22, 1992, a zoning permit was granted to change the duplex to a triplex with an associated parking waiver. Subsequent zoning permits through 1997 note the use as a triplex. The 1984 assessor's card noted above was updated in 1991 and notes "R3" category (triplex) but continues to note 2 living units. Assessor's records from 1993, 1994, 1995, and 1996 all note "R2" (duplex).

June 26, 1998, a zoning permit was issued to convert the triplex to a single family home. This zoning permit was relinquished October 3, 2011 based on a signed assertion that the conversion never took place.

A zoning permit issued April 26, 1999 for fencing indicates the existing use as a duplex.

The Comprehensive Development Ordinance was adopted December 2007. Minimum lot sizes of 6,000 sf and 10,000 sf for single family homes and duplexes, respectively, in the RL zone are enacted. Single family homes are permitted, duplexes are conditional use, and triplexes are prohibited.

Assessor's data from 2007-2009 notes "R1" use, but the narrative description notes 3 units. In checking with assessor's staff, this narrative states what is physically present. The assessor's inspection in 2009 revealed 3 dwelling units. In 2010, the assessor's record switches to "R2." It remains that way through 2015. In 2016, assessor's data notes "RL" (residential lot) post demolition.

The property owner, Clodomir Lascelles, passed away in December 2009. The city's vacant building records indicate that the property remained vacant from December 2009 until February 2012. This time span is more than 1 year. Within that time frame a building permit was issued for interior renovations in March 2010. It was closed out with a certificate of occupancy October 3, 2011. Minimum housing inspection was done in February 2012 as noted below.

November 22, 2010 a zoning permit was issued to remove shed, decks, repairs and replacements of trim and stairs, new windows and more. The existing use is noted as duplex.

Rental billing records for this property appear in 2011 and note 3 rental units; however, other city records indicate the property was vacant in 2011. The property was inspected by Code Enforcement for minimum housing in February 2012 following completion of interior renovations and issuance of the building certificate of occupancy. It was cleared for rental of 1 dwelling unit. In 2012 - 2016, only 1 rental unit is noted in the rental billing records. According to Code Enforcement, the most recent rental registration records (prior to demolition) indicate 2 units.

The building burned in April 2016 and was demolished following issuance of a zoning permit for demo June 24, 2016.

The determination request subject to this appeal was submitted July 20, 2016. Following research of applicable city records, an adverse determination was issued August 12, 2016 as noted below.

This determination is in regard to the above-referenced property, specifically your request that the City of Burlington recognize the use of the property as that of a

duplex or triplex. 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 vacant building records
- 2008 Comprehensive Development Ordinance and as amended
- Site plan included in the determination request

Based on the review of these items, it is the determination of the Planning and Zoning Department that use of the property cannot be recognized as a duplex or triplex. On October 5, 1992, a zoning permit was granted to allow conversion of a duplex to a triplex. Under the present 2008 Comprehensive Development Ordinance (CDO), this triplex amounts to a nonconformity. There are no subsequent zoning permits for a change in use except for a June 1998 zoning permit to convert to a single family home – it was relinquished July 8, 2010.

The city's vacant building records demonstrate that the building was vacant for more than 1 year starting in December 2009 and extending to February 2012. The city's rental registration records indicate that the building was re-occupied in 2012 with 2 units (duplex).

The subject property is ~ 4,854 sf and is located in the residential low density zone. Residential density is limited to 7 units per acre. Single family homes are a permitted use. Duplexes are a conditional use subject to, among other things, a minimum lot size of 10,000 sf. Triplexes are not allowed (with some exceptions). Duplex and triplex use on this property are nonconforming.

Sec. 5.3.4 Nonconforming Uses (b) Discontinuance of the CDO states that a nonconforming use shall not be reestablished if such use has been discontinued for any reason for a period of one year or longer. While city records indicate that the duplex use was reestablished following a period of vacancy greater than one year between 2009 and 2012, it was done so without express approval for the duplex use. The nonconforming use cannot be retained.

An appeal of this adverse determination was filed August 26, 2016, within the 15-day appeal period.

This matter centers on nonconformity and retention thereof. There are two central questions:
1) Was the 1+ year vacancy in 2009-2012 abandonment of the nonconforming use?
2) Regardless of the 2009-2012 vacancy, was the triplex use abandoned and replaced with an unpermitted nonconforming duplex use?

Information provided by the applicant and confirmed in city records since the adverse determination was issued addresses the first question. A building permit for interior renovations was issued 4 months after the building became vacant. It was legitimately unoccupied during the renovations and a certificate of occupancy issued in October 2011. The certificate of occupancy

cleared the way to reoccupy the building. Affidavits from the present owners state that the building was occupied by March 2012. As such, there is no 1+ year gap without work underway or occupancy, and the use was not abandoned as a result.

The matter remains, however, as to the abandonment of the nonconforming triplex use. Upon adoption of the Comprehensive Development Ordinance in December 2007, the triplex approved in 1992 would have become a pre-existing nonconforming use (grandfathered). City records conflict as to what the property was in December 2007. The assessor's data at that time notes 3 units. Both before and after that time, zoning permits note the use as duplex based on the owner's representations in the application forms. Assessor's data becomes consistent with zoning records in 2010 noting 2 living units. Nothing in the city records since December 2007 note the use as 3 units except for the 2011 rental billing (when the building was unoccupied).

The evidence suggests that use as a triplex ceased as early as 1993 (based on assessor's data) or as late as 2011 (based on rental billing data). The zoning records indicate cessation of the triplex use at least by 1999. In any event, the triplex use has been abandoned for more than 1 year, regardless of the December 2009-February 2012 vacancy for renovations. Sec. 5.3.4 *Nonconforming Uses* (b) *Discontinuance* of the CDO states that a nonconforming use shall not be reestablished if such use has been discontinued for any reason for a period of one year or longer. Discontinuance of the triplex use and replacement with an unpermitted duplex use instead amounts to replacement of one nonconformity with another, something precluded by Sec. 5.3.4. No zoning permit was ever issued for a duplex use on this property, nor could one be under the present zoning standards. The minimum lot size of 10,000 precludes approval of a duplex on this 4,854 sf property.

In summary, the record indicates that from 2012 forward the property was at most a duplex use and therefore the nonconforming triplex use has been abandoned for more than 1 year and cannot be reestablished. While the apparent and unpermitted conversion to a duplex replaces one nonconformity with another, the triplex was a pre-existing legal non-conformity due to the 1992 permit, the duplex is not. An argument might be made that a duplex is less non-conforming and should be allowed, however, that is not part of the provisions of the zoning ordinance, nor has a determination of the impact for either use been or could be made under the circumstances. A duplex cannot be allowed due, at least in part, to the small lot size. The property may be used for a single family home or other permitted or conditional use per the standards of the CDO.

II. Recommended Motion:

Uphold the adverse determination 17-0081DT.