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August 29, 2016

HAND DELIVERY

Mary O'Neil
City of Burlington, Department of Planning and Zoning
149 Church Street
Burlington, VT 05401

***Re: 75 Orchard Terrace
Request for Amendment of Existing Permit and Conditions***

Dear Mary,

This letter is in response to the decision of the Development Review Board to re-open the hearing in order to further discuss the "boarding house use" of 75 Orchard Terrace (the "Property").

To recap our application and testimony, until the mid-1980s, the Property was used as a single family home. In 1983, the Property was approved as "one apartment and a boarding house for not more than four persons" with a requirement that two off-site parking spaces be provided. There was no requirement that the Property be "owner-occupied". Despite the fact that there is no evidence of the prior owner providing the required off-site parking since 1988, and the fact that the Property has been used as a single family home for the last twenty years, the City has taken the position that the approved use continues to be "one apartment and a boarding house for not more than four persons" with a requirement that two off-site parking spaces be provided. As a result of a 2008 change in the permitted and conditional uses in the Residential High Density district, the Property cannot be used as a single family home despite its original and long-time use as such.

In order to make the Property comply with the current approval and address the off-site parking issues, we sought to simply amend the approved use to reduce the boarding house use to being "not more than two (instead of four) persons", thus reducing the off-site parking requirement to one space and seeking a waiver for that one parking space.

At the hearing we agreed that in order to obtain the parking waiver, we would not object to a condition of approval generally limiting the house to being used as a single dwelling with a boarding house use for not more than two persons, which dwelling shall be owner occupied within two years of the date of approval.

We understand that in deliberations on the application, a question arose regarding whether the proposed use of the Property was a “duplex or two dwelling unit house” and not a “boarding house”. Simply, the house has only one kitchen, one address and one set of utilities: one electric meter, furnace and cold and hot water supply. To have a second dwelling unit the Property would have to have a second kitchen, which it will not. The CDO defines dwelling unit as:

*“Dwelling Unit: A room or set of rooms fitted with a private bath, **kitchen**, and living facilities comprising an independent, self-contained dwelling space occupied by a family and where rooms are not let to individuals. Kitchen, living and shared bathroom facilities must be separate and distinct from bedroom facilities”.*

In order to further clarify any misunderstanding, we are attaching a revised floor plan which removes an ‘apartment’ label which was inadvertently left on the plan from a prior version.

We also understand that a question has arisen how the proposed use of the Property qualifies for a Boarding House because our current plan to let to up to two persons in a suite of two rooms containing one bedroom and one attached bathroom (but no kitchen) (Bedroom 1 on the attached plan).

The 1983 Zoning Ordinance defined “Boarding and rooming house” as

Boarding or rooming house: A building or premises where rooms are let to individuals, other than transients, and where meals may be regularly served in a common dining area for compensation. Hotels, motels, apartment houses, inns, tourist homes and/or lodging houses shall not be considered boarding or rooming houses.

The current CDO defines “Boarding House” as

Boarding House: A building or premises where rooms are let to individuals for compensation for a period of time greater than thirty (30) days, and where meals may be regularly served in a common dining area. Hotels, motels, apartment houses, bed and breakfasts, dormitories, sorority, fraternities and historic inns, shall not be considered boarding houses.

The common applicable element of the 1983 Zoning Ordinance and the current CDO is:
“A building or premises where rooms are let to individuals”

Neither ordinance provides that the “rooms” have to be “bedrooms”. The CDO separately defines the term “bedroom” as *“A room located within a housing unit that is used primarily for*

sleeping purposes by human occupants and that contains at least seventy (70) square feet of floor area". In addition, the CDO defines "Dwelling Unit" as "A room or set of rooms fitted with a private bath, kitchen, and living facilities".

By defining "bedrooms" in the Ordinance and using the term in numerous places, it is clear that when the Ordinance uses the word "rooms" in the definition of "Boarding House" or in the definition of "Dwelling Unit", it does not mean "bedrooms". The maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) applies here. *Clymer v. Webster*, 156 Vt. 614, 625, 596 A.2d 905, 912 (1991). If the CDO intended for that the "rooms" to be let in the definition of "Boarding House" were intended to be "bedrooms", then the Ordinance would have used the term "bedrooms" but it did not and by using the word "rooms" and not "bedrooms", the implication is that the intent was not to require the "rooms" be "bedrooms".

The Vermont Supreme Court has long held that

The restrictions of zoning statutes and zoning ordinances authorized by statute are in derogation of the common law and should be strictly construed. When exemptions appear in favor of the property owner, the exemptions should be construed in favor of the owner. Ordinances cannot be enlarged by implication.

In re Willey, 120 Vt. 359, 140 A.2d. 11(1958). See also *In re Appeal of Bennington School*, 2004 VT 6 (2002-367).

Therefore, the key element in the use of the dwelling as a "Boarding House" is the number of persons not the number of bedrooms—in this case, we are proposing a maximum of two boarders. Of course, should we chose, one of the other three bedrooms in the house could also be let to a boarder provided there were not more than a total of two boarders in the house.

Accordingly, we respectfully request approval with a suggested approval as follows:

The current permitted use of "one apartment and a boarding house for not more than four persons with two on-site parking spaces required for the apartment and two off-site parking spaces required for the boarding house use" is amended as follows:

"The property at 75 Orchard Terrace is approved as one single dwelling with a permitted boarding house use with rooms let to no more than two persons, subject to the conditions that: (1) the dwelling shall be owner occupied within two years of the date of approval and (2) two on-site parking spaces shall be required for the dwelling and the one additional parking space required for the boarding house use is waived".

Please do not hesitate to contact me if you have any questions or comments.

