

SHEEHEY FURLONG & BEHM
PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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SEP 22 2017

DEPARTMENT OF
PLANNING & ZONING

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PAUL D. SHEEHEY (1919-2004)

VIA HAND-DELIVERY

September 22, 2017

City of Burlington
Department of Planning and Zoning
149 Church Street
Burlington, VT 05401

Re: Zoning Permit Application/Request for Determination

To Whom It May Concern:

Please find enclosed a Zoning Permit Application/Request for Determination, together with a check in the amount of \$80.00 for the application fee.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.



Kevin A. Lumpkin

KAL/dms
Enclosures

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REQUEST FOR DETERMINATION

DEPARTMENT OF
PLANNING & ZONING

Applicant Priscilla Rassin Toomey, trustee of the Isabel Rassin Revocable Trust (dated Feb. 3, 1989), requests a determination by Planning & Zoning as to the property located at 59-61 University Terrace (the "Property") as follows.

The Property is a duplex, each side of which has 5 bedrooms. Since at least 1986, the Property has been operated as a rental property, with each of the bedrooms being rented out and occupied by tenants. At no time has the Property's use been discontinued for a period of one year or more since 1986.

On September 11, 2017, Applicant received a notice from Zoning Specialist Jeanne Frances stating that the Property is not in compliance with the "4-Unrelated Ordinance." Upon information and belief, the 4-Unrelated Ordinance came into effect in 2000 as it applies to the Property.

For the foregoing reasons, the applicant requests that Planning & Zoning issue a determination that the Property's use is a pre-existing, non-conforming use.

In support of this request for determination, the applicant attaches the following documentation:

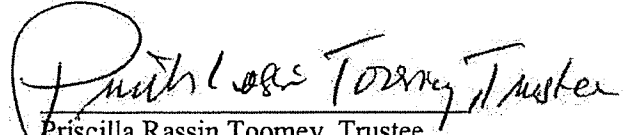
1. The affidavit of Priscilla Toomey, who has served as trustee for the trust that owns the property for over 20 years; and
2. The affidavit of Curt Wheeler, who has served as the manager of the Property since 1986.

If you require or would be assisted by any additional documents or other forms of evidence, please do not hesitate to contact my attorney, Kevin Lumpkin, at 864-9891 to discuss what additional evidence would help you make the requested determination.

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Dated at Westchester, NY this 21st day of September, 2017. DEPARTMENT OF PLANNING & ZONING


Priscilla Rassin Toomey, Trustee

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SEP 22 2017

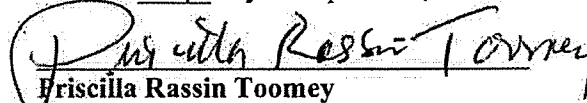
DEPARTMENT OF
PLANNING & ZONING

AFFIDAVIT

I, Priscilla Rassin Toomey, being duly sworn, hereby depose and state:

1. I am personally familiar with all of the facts deposed herein and I make this Affidavit based on my own knowledge.
2. I am the Trustee of the Trust that owns the property located at 59-61 University Terrace in Burlington, Vermont (the "Property").
3. I became Trustee in 1996.
4. In my capacity as Trustee, I have traveled to Burlington many times in connection with the Trust's ownership of the Property.
5. The Property is a duplex, each side of which has five bedrooms.
6. Since at least 1986, the Property has been rented out to tenants that occupy each of the bedrooms.
7. At no time since 1986 has the Property's use as described above been discontinued for a period of one year or more.

Dated at Westchester, New York, this 21 day of September, 2017.


Priscilla Rassin Toomey

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS

Subscribed and sworn this 21 day of ~~January~~ ^{September}, 2017.

Before me: 
Notary Public

My Commission expires:

KIRK O. WARNER
Notary Public, State of New York
No. 01WA6092288
Qualified in Bronx County
Commission Expires May 19, 2019

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SEP 22 2017


AFFIDAVIT

DEPARTMENT OF
PLANNING & ZONING

I, Curtis J. Wheeler, being duly sworn, hereby depose and state:

1. I am personally familiar with all of the facts deposed herein and I make this Affidavit based on my own knowledge.
2. I have served as the Property Manager for the property located at 59-61 University Terrace in Burlington, Vermont (the "Property") since March of 1986, first for Isabel and Irwin Rassin and then for Priscilla Rassin Toomey as trustee for the trust that owns the Property beginning in 1996.
3. The Property is a duplex, each side of which has five bedrooms.
4. Since at least 1986, the Property has been rented out to tenants that occupy each of the bedrooms.
5. At no time since 1986 has the Property's use as described above been discontinued for a period of one year or more.

Dated at Burlington, Vermont, this 21st day of September, 2017.



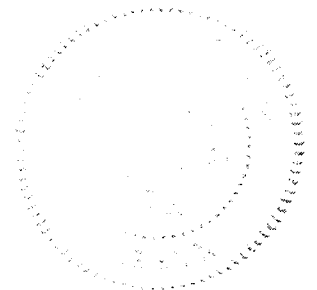
Curtis J. Wheeler

STATE OF VERMONT)
COUNTY OF Chittenden) SS

Subscribed and sworn this 21st day of September, 2017.

Before me: Karen Landry
Notary Public

My Commission expires: 2/10/2019



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WWW.SHEEHEYVT.COM

PAUL D. SHEEHEY (1919-2004)

November 20, 2017

Scott Gustin
City of Burlington
Planning and Zoning
149 Church Street
Burlington, VT 05401-8489

Re: 59-61 University Terrace

Dear Scott:

I write in connection with the pending request for a determination that my client's property at 59-61 University Terrace is grandfathered as a pre-existing, nonconforming use. Simultaneous with the application, we have submitted evidence that each side of the duplex has been rented continuously to five tenants since prior to the passage of the first 4-unrelated ordinance in 2000.

I understand from my conversations with you that the City's position is that the prohibition on multiple unrelated individuals living together dates back further than the 4-unrelated ordinance to 1970, when the zoning bylaws were amended to define a family as "[o]ne or more persons occupying a dwelling unit and living as a single non-profit housekeeping unit, but not including group quarters such as dormitories, sororities, fraternities[,] convents, and communes." In taking that position, the City relies on the Environmental Court's decision in *In re Mentas*, No. 132-6-00 Vtec, 2000 WL 34151285 (May 10, 2002) (Wright, J.).

We disagree with the City's interpretation of the phrase "group quarters." Based on my research, the phrase "group quarters" is not an oft-used term, and it is difficult to define. Indeed,

the only major instance of its use that I was able to uncover is by the Census Bureau. The Census Bureau defines group quarters as:

[A] place where people live or stay, in a group living arrangement, that is owned or managed by an entity or organization providing housing and/or services for the residents. This is not a typical household-type living arrangement. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories.

See https://www2.census.gov/programs-surveys/acs/tech_docs/group_definitions/2010GQ_Definitions.pdf.

“Group quarters” is not defined in the 1970 Ordinance, but the references to dormitories, sororities, fraternities, convents, and communes strongly suggest that it was meant to apply to the kinds of arrangements described by the Census Bureau above – atypical housing arrangements involving large numbers of people.

Five roommates living together does not fit within the Census Bureau’s definition of “group quarters,” nor does it resemble a dormitory, sorority, fraternity, convent, or commune. To the extent that the *Mentes* decision opined that a group of roommates are living in a “commune” because they “are living as a group and share household chores and responsibilities,” we respectfully suggest that the *Mentes* decision was decided incorrectly.¹

Moreover, the definition of “group quarters” is not enforceable because it is unconstitutionally vague. Regulations are unconstitutionally vague when they “fail to provide sufficient notice for ordinary people to understand what conduct is prohibited, or allow arbitrary and discriminatory enforcement.” *In re Beliveau NOV*, 2013 VT 41, ¶ 15, 194 Vt. 1. The 1970 definition of “group quarters” meets both of those tests. It is impossible for an ordinary person to understand how many unrelated persons – and under what circumstances – would convert the use of a property into “group quarters.” Stretched to its limit, the definition of “group quarters” could be applied to two unrelated people living together. And *because* “group quarters” has no readily discernible definition, holds the potential for arbitrary or discriminatory enforcement.²

For those reasons, we submit that in order to qualify as a pre-existing, nonconforming use, we must show current use only back to the passage of the first 4-unrelated ordinance in 2000. Because we have provided that proof, we request that you grant the permit application as submitted.

¹ It is worth noting that the *Mentes* decision was not appealed to the Vermont Supreme Court, and so it is not mandatory precedent for Vermont courts.

² That is not to say that the City has arbitrarily or discriminatorily enforced the definition – only that the vagueness of the definition allows for such enforcement.

Scott Gustin
November 20, 2017
Page 3

Please do not hesitate to contact me at (802) 864-9891 with any questions.

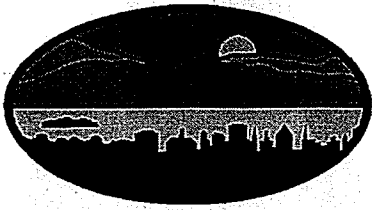
Sincerely,

SHEEHEY FURLONG & BEHM P.C.



Kevin A. Lumpkin

KAL/dms



ZONING DETERMINATION

ADVERSE

City of Burlington, Vermont
Department of Planning and Zoning

Application Date: 09/22/2017

Appeal Expiration Date: 12/14/2017

Project Location: 59-61 UNIVERSITY TERRACE

District:

Owner: Priscilla R. Toomey

Ward: 8E

Address: 44 Merriam Place
Bronxville, NY 10708

Tax ID: 050-3-036-000

Determination Type: Residential - Other

Determination Description:

Determination of pre-existing, non-conforming use of 5-person occupancy (unrelated tenants) of each of the two duplex units.

Zoning Review #18-0323DT

Decision Type: Administrative

Decision: Adverse

See Determination Findings

Decision Date: November 29, 2017

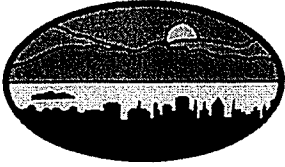
Zoning Administrative Officer

An interested person may appeal a decision of the Zoning Administrator to the Development Review Board until 4 pm on December 14, 2017.

Fee Type	Amount	Paid in Full	Balance Due: \$0.00
Application Fee:	\$80.00	Yes	Date Paid: _____ Check # _____

Building Permit Required: **No**

Permit Received By: _____ Date: _____



City of
Burlington, Vermont
149 Church Street

Zoning Determination – Findings

ZP #: 18-0323DT

Tax ID: 050-3-036-000

Issue Date: November 29, 2017

Decision: Adverse

Property Address: 59-61 UNIVERSITY TERRACE

Description: Determination of pre-existing, non-conforming use of 5-person occupancy (unrelated tenants) of each of the two duplex units.

This determination is in regard to the above-referenced property, specifically your request that the City of Burlington recognize 5-person occupancy (unrelated tenants) of each of the two duplex units as grandfathered (legally pre-existing non-conformity). 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 Sanborn maps from 1919, 1938, 1962, and 1984
- Affidavits of
 - Priscilla Rassin Toomey
 - Curtis J. Wheeler
- *In re: Appeal of John Mentas*, Docket No. 132-6-00 Vtec (Vt. Env'tl. Div. October 22, 2001 and May 10, 2002)
- Burlington zoning regulations including, but not limited to, the following versions: 2008 Comprehensive Development Ordinance and as amended, ZA #2000-01 Residential Districts Established passed November 22, 2000, and Burlington Zoning Ordinance approved December 21, 1970

Based on the review of these items, it is the determination of the Planning and Zoning Department that insufficient evidence has been provided to grandfather 5-person occupancy (unrelated tenants) of the subject dwelling units. Grandfathered or pre-existing legal non-conformities pertain to lots/parcels/structures/uses that are non-compliant with a current zoning regulation, but were compliant prior to a change in the regulations. While Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits*, was approved in November 2000, pursuant to *In re: Appeal of John Mentas*, Docket No. 132-6-00 Vtec (Vt. Env'tl. Div. October 22, 2001 and May 10, 2002), the city's zoning ordinance in effect prior to the November 2000 amendment prohibited occupancy of dwelling units as "group quarters". The case found "shared student housing" to be "group quarters." The inclusion of the "group quarters" exclusion can be found in the Burlington Zoning Ordinance starting in 1970 (Burlington Zoning Ordinance approved December 21, 1970). As such, evidence would need to be provided that the occupancy of the requested units was 5 unrelated persons prior to December 21, 1970 and has continued as such. Such evidence was not provided and therefore, the grandfathering determination request must be DENIED.

SHEEHEY FURLONG & BEHM
PROFESSIONAL CORPORATION

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PAUL D. SHEEHEY (1919-2004)

VIA HAND-DELIVERY

December 14, 2017

City of Burlington
Department of Planning and Zoning
149 Church Street
Burlington, VT 05401

Re: Appeal of Administrative Decision No. 18-0323DT

To Whom It May Concern:

Please find enclosed an Appeal of an Administrative Decision Request with attached supplement providing pertinent information, for appeal of the above-referenced Administrative Decision, together with our firm check in the amount of \$250.00 for the appeal filing fee. Also enclosed is my Notice of Appearance on behalf of the appellant.

Please contact me if you have any questions.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.



Kevin A. Lumpkin

**CITY OF BURLINGTON
DEVELOPMENT REVIEW BOARD**

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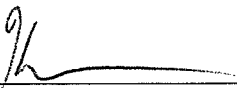
DEPARTMENT OF
PLANNING & ZONING

**IN RE: APPEAL OF PRISCILLA RASSIN
TOOMEY, AS TRUSTEE OF THE ISABEL
RASSIN REVOCABLE TRUST, OF
ADMINISTRATIVE DETERMINATION
NO. 18-0323DT**

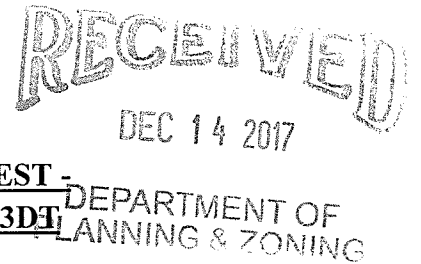
NOTICE OF APPEARANCE

NOW COMES Kevin A. Lumpkin, Esq., of the law firm of Sheehey Furlong & Behm P.C., and hereby enters his appearance on behalf of appellant Priscilla Rassin Toomey, as Trustee of the Isabel Rassin Revocable Trust, in the above-captioned matter.

Dated at Burlington, Vermont, this 14th day of December, 2017.



Kevin A. Lumpkin, Esq.
Sheehey Furlong & Behm P.C.
30 Main St., Gateway Sq., 6th Floor
PO Box 66
Burlington, VT 05402-0066
Telephone: (802) 864-9891
Facsimile: (802) 864-6815
E-Mail: klumpkin@sheeheyvt.com



SUPPLEMENT TO
APPEAL OF ADMINISTRATIVE DECISION REQUEST -
ADMINISTRATIVE DETERMINATION NO. 18-0323DT

Pursuant to Section 12.2.2, Appeals of Administrative Officer Decisions, of the 2008 Comprehensive Development Ordinance, as amended, of the City of Burlington, Applicant Priscilla Rassin Toomey, trustee of the Isabel Rassin Revocable Trust (dated Feb. 3, 1989), appeals Administrative Determination No. 18-0323DT issued on November 29, 2017, regarding the property located at 59-61 University Terrace (the “Property”) as follows.

Applicant requested a determination by the Planning & Zoning office that the property at 59-61 University Terrace is grandfathered as a pre-existing, nonconforming use. Simultaneous with the application, the applicant submitted evidence that each side of the duplex has been rented continuously to five tenants since prior to the passage of the first 4-unrelated ordinance in 2000.

In the Administrative Determination, the Planning & Zoning office did not disagree that the applicant submitted sufficient evidence to establish grandfathering back to 2000. Instead, it took the position that the prohibition on multiple unrelated individuals living together dates back further than the 4-unrelated ordinance to 1970, when the zoning bylaws were amended to define a family as “[o]ne or more persons occupying a dwelling unit and living as a single non-profit housekeeping unit, but not including group quarters such as dormitories, sororities, fraternities[,] convents, and communes.” In taking that position, Planning & Zoning relies on the Environmental Court’s decision in *In re Mentos*, No. 132-6-00 Vtec, 2000 WL 34151285 (May 10, 2002) (Wright, J.).

Applicant disagree with the Planning & Zoning’s interpretation of the phrase “group quarters.” Based on research conducted by undersigned counsel, the phrase “group quarters” is

not an frequency used term, and it is difficult to define. Indeed, the only major instance of its use that undersigned counsel was able to uncover is by the Census Bureau. The Census Bureau defines group quarters as:

[A] place where people live or stay, in a group living arrangement, that is owned or managed by an entity or organization providing housing and/or services for the residents. This is not a typical household-type living arrangement. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories.

See https://www2.census.gov/programs-surveys/acs/tech_docs/group_definitions/2010GQ_Definitions.pdf.

“Group quarters” is not defined in the 1970 Ordinance, but the references to dormitories, sororities, fraternities, convents, and communes strongly suggest that it was meant to apply to the kinds of arrangements described by the Census Bureau above – atypical housing arrangements involving large numbers of people.

Five roommates living together does not fit within the Census Bureau’s definition of “group quarters,” nor does it resemble a dormitory, sorority, fraternity, convent, or commune. To the extent that the *Mentes* decision opined that a group of roommates are living in a “commune” because they “are living as a group and share household chores and responsibilities,” applicant respectfully suggest that the *Mentes* decision was decided incorrectly.¹

Moreover, applicant argues the definition of “group quarters” is not enforceable because it is unconstitutionally vague. Regulations are unconstitutionally vague when they “fail to provide sufficient notice for ordinary people to understand what conduct is prohibited, or allow arbitrary and discriminatory enforcement.” *In re Beliveau NOV*, 2013 VT 41, ¶ 15, 194 Vt. 1.

¹ It bears noting that the *Mentes* decision was not appealed to the Vermont Supreme Court, and so it is not mandatory precedent for Vermont courts.

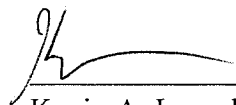
The 1970 definition of “group quarters” meets both of those tests. It is impossible for an ordinary person to understand how many unrelated persons – and under what circumstances – would convert the use of a property into “group quarters.” Stretched to its limit, the definition of “group quarters” could be applied to two unrelated people living together. And *because* “group quarters” has no readily discernible definition, holds the potential for arbitrary or discriminatory enforcement.²

For those reasons, in order to qualify as a pre-existing, nonconforming use, applicant must show current use only back to the passage of the first 4-unrelated ordinance in 2000. Applicant has provided that proof. For that reason, this Board should reverse Planning & Zoning’s decision to require proof dating back to 1970, and direct Planning & Zoning to issue the requested grandfathering determination.

Dated at Burlington, Vermont, this 14th day of December, 2017.

PRISCILLA RASSIN TOOMEY, AS
TRUSTEE OF THE ISABEL RASSIN
REVOCABLE TRUST

By:



Kevin A. Lumpkin, Esq.
Sheehey Furlong & Behm P.C.
30 Main St., Gateway Sq., 6th Floor
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Telephone: (802) 864-9891
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² That is not to say that the City has arbitrarily or discriminatorily enforced the definition – only that the vagueness of the definition allows for such enforcement.