

Department of Planning and Zoning

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TO: Development Review Board
FROM: Scott Gustin
DATE: May 15, 2018
RE: 18-0771AP; 12 Weston Street—Administrative Officer's Report

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Note: This is the Administrative Officer's Report; decisions on the appeal are made by the Development Review Board, which may uphold, overturn, table or modify the administrative decision. THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.

Zone: RL Ward: 1E

Owner/Appellant: Charles & Cynthia Burns / Brian P. Hehir, Esq.

Request: Appeal of notice of zoning violation #336638 pertaining to duplex use.

Overview:

The appellant is requesting that the Development Review Board declare void the notice of zoning violation (NOV) alleging an unpermitted duplex use at 12 Weston Street. The NOV was issued March 1, 2018 following extensive research into the history of the property conducted in response to a complaint from a number of residents asserting an unpermitted duplex use at the property.

The notice of appeal asserts that the city is estopped from asserting the property is in violation now, contradicting prior representations made by the city. The question of estoppel is not properly before the Development Review Board in this appeal.

The appeal also asserts that the city failed to institute enforcement action within 15 years of the date of commencement of the alleged violation. As a use violation; however, the 15-year statute of limitations does not apply. That the present use is a duplex is uncontested.

As the findings demonstrate, use of 12 Weston Street has changed over the years from a single dwelling up to four dwellings and back down to two. None of these use changes received a zoning permit.

Recommendation: **Uphold notice of violation # 336638** based on the following findings and conditions:

I. Findings:

On May 25, 2017, a complaint signed by nineteen residents of Burlington was submitted to the Planning & Zoning Department alleging an unpermitted duplex use at 12 Weston Street.

The complaint was reviewed, and a copy of the complaint was provided to the property owners and their attorney. A written response to the complaint was provided by their attorney on July 17, 2017.

The ensuing months involved research by Planning & Zoning staff into the history of uses at 12 Weston Street. Documents reviewed included zoning permits, assessor records, rental records, affidavits, warranty deeds, Burlington city directories, and Sanborn maps. As outlined in the NOV, the record demonstrates that the residence underwent multiple configurations ranging from a single detached dwelling unit, up to a 4-unit apartment house, and back down to two units. None of the changes received a zoning permit.

Following review of the matter by the City Attorney's Office, Code Enforcement, and Planning & Zoning, the NOV was issued March 1, 2018. The NOV asserted "unpermitted duplex" as the violation. The findings in the NOV are extensive and reflect the various uses of the property and associated chronology.

The NOV was appealed on March 5, 2018, within the 15-day appeal period.

The notice of appeal does not contest the findings in the NOV. Rather, the appeal asserts that the city is estopped from asserting that the property is now in violation of the zoning code. The appeal also asserts that the city did not act to enforce within 15 years of commencement of the violation.

The estoppel argument is not a consideration before the Development Review Board in this appeal. That assertion is to be weighed before the courts.

The assertion of the 15-year statute of limitations (24 V.S.A. §4454 (a)) is without merit. The statute of limitations does not pertain to use violations – it 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.

While the history of uses at 12 Weston Street is long and varied, the end result is clear and simple. None of the uses received a zoning permit. The residence was originally constructed as a single family dwelling and may continue to be used as such.

II. Recommended Motion:

Uphold the notice of zoning violation #336638.