

## Burlington Development Review Board

149 Church Street, City Hall

Burlington, VT 05401

[www.burlingtonvt.gov/pz/DRB](http://www.burlingtonvt.gov/pz/DRB)

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### BURLINGTON DEVELOPMENT REVIEW BOARD Tuesday November 17, 2015, 5:00 PM Contois Auditorium, City Hall, 149 Church Street, Burlington, VT Minutes

**Board Members Present: Austin Hart, Jonathan Stevens, Brad Rabinowitz, Alexandra Zipparo, Wayne Senville, A.J. LaRosa**

**Board Member Absent: Israel Smith, Geoff Hand**

**Staff Present: Scott Gustin, Mary O'Neil, Anita Wade**

#### I. Agenda

Changes: 99 Loomis St and request to postpone public hearing.

34 Spring St applicants could not make meeting and request to be rescheduled to December 1<sup>st</sup>.

#### II. Communications

Two project deferrals Requests.

Updated 2016 DRB meeting schedule.

#### III. Minutes

#### IV. Consent

##### 1. 16-0406CA/CU; 69 Scarff Avenue (RL, Ward, 5S) Matthew H. Leach

Construction of new single family dwelling with attached garage.

(Project Manager, Mary O'Neil)

M.O'Neil - staff has received landscaping plan for the project which was a condition of the permit. Board keeps this as a consent item.

A.Hart - questioned if applicant was satisfied with review of staff recommendations and approval.

M.Leach – applicant said this information was sent to architect. Applicant is fine with the single car garage door being 10 foot or less.

B.Rabinowitz - motioned to approve application adopting staff findings and recommendations.

J.Stevens - seconds the motion.

A.Zipparo – questions the process, asking if DRB approval should be based upon the review the landscaping plans.

M.O'Neil – landscaping plans have been submitted. Board may choose to look at these plans singularly or review within the entire submission.

J.Stevens – may be sensible to defer this item until the deliberative session.

B.Rabinowitz – the landscape plan can be reviewed by staff.

A.J.LaRosa – agrees to have it reviewed by staff.

J.Stevens – seconds the motion to have the permit approved based on staff review and findings of the landscaping plan.

A.Hart – the motion is approved upon staff findings and conditions and the additional review of the landscaping plan.

Board Vote: 6-0-0

#### V. Public Hearing

##### 1. 16-0477AP; 99 Loomis Street (RL, Ward 1E) Jonathan Lubis

Appeal of Zoning Violation #291859 relative to occupancy by unrelated adults.

(Project Manager, Jeanne Francis)

A.J.LaRosa recused from item.

A.Hart – the party has asked for a deferral.

*The programs and services of the City of Burlington are accessible to people with disabilities.*

*Individuals who require special arrangements to participate are encouraged to contact the Department of Planning & Zoning at least 72 hours in advance so that proper accommodations can be arranged. For information call 865-7188 (TTY users: 865-7142).*

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J.Stevens – asks a procedural question on how the request for a deferral was made.  
S.Gustin – request was received as a written record through email.  
K.Sturtevant - confirms a deferral and continuance.  
A.Hart – makes a motion for deferral for date to be determined no later than three months.  
B.Rabinowitz – seconds the motion.  
Board Vote: 5-0-1

**2. 16-0239CA; 18 Adsit Court (RL, Ward 1E) Eugene Day III**

Appeal of zoning permit denial to replace main and center wooden porch posts with PT lumber, also replace railings/cross bars with PT lumber. Replace wooden porch ceiling in-kind. Replace wooden flooring with composite material. (Project Manager, Scott Gustin)

G.Day applicant is sworn in.

J.Stevens – mentions the burden of proof is on the administrator.

A.Hart - swears in staff and applicant, asking staff to present first.

S.Gustin - applicant submitted an application and was denied accord to sec 5.4.8 based on materials being used in a historic designated area. Listing shows in pristine condition, with front porch as the primary façade, which is where porch floor is being replaced. Sec 5.4.8 calls for retention and denial.

A.Hart – are there other objections besides flooring materials.

B.Rabinowitz – questions on pressure treated materials.

S.Gustin - permit was denied for it's entirely.

G.Day - I bought the house in 2001 when it was not in pristine condition and spent the last 15 years doing work. The porch was beyond repair and was not holding paint. I researched a lot of different material over the course of a year. Applicant passed samples of the materials to the Board for their review. Explained how the material look and sound like wood and holds up better without losing the adhesion of paint. Appreciates the city wanting to maintain the historic aspect keeping a distinctive features, but feels there are better materials that present the same appearance offering good wear.

A.Hart – questions the claim that the material has been approved in 48 states and with national historic places. How do you know this is fact?

G.Day – this claim is through Aeratis Traditions and their manufacturer's website.

A.J.LaRosa - what is the cost difference, (\$18 a board) and long-time maintenance?

A.Hart - is paint warranted by manufacturer.

J.Stevens – questions about types of floor materials, composition and placement and paint retention.

A.Zipparo - some materials won't hold up in cold weather.

A.J.LaRosa - questions about type of wood.

G.Day – very little water absorption with this material.

S.Gustin - distinction of wood is not specified; criteria does not distinguish type of wood.

W.Senville - staff recommends in kind materials; is there any example where the DRB allowed other materials.

S.Gustin - do not recall a case that came before the Board.

W.Senville – question on how many permits are in kind?

G.Day - easier to maintain and painted wood floors with this material.

B.Rabinowitz - wood available today is not the same quality as old growth and not exactly in kind wood. Other consideration is pressure treated wood posts tend to twist.

A.Hart – some accept fiber board for historic appearance is close why wouldn't same rationale apply.

S.Gustin - precedent set for fiber cement. Staff review is limited.

M.O'Neil – building was permitted for trial in 2005. Understood by property owner and permit office to determine how long it will last. Clearly a trial only, since product has failed the test.

G.Day – cannot see why new material for the porch flooring wouldn't be approved.

J.Stevens – accepts applicant intention to paint rails and posts.

Public hearing was closed.

**3. 16-0325CU; 34 Spring Street (RM, Ward 2C) Christopher Valin**

Establish bed and breakfast utilizing back yard cottage and also establish boarding house within existing home. (Project Manager, Scott Gustin) *Applicant has requested deferral to future date.*

A.Hart – applicant has requested deferral for future date. There is no enforcement action. Makes a motion for deferral and to move item to Dec 1<sup>st</sup>.

J.Stevens – asks how the request for deferral was made.

S.Gustin – request made by email for a date certain on Dec 1<sup>st</sup>.

J.Stevens - seconds the motion.

Board Vote: 6-0-0

**4. 16-0151DT; 2-8 Hickok Place (RM, Ward 2C) Diemer Apartments, LLC**

Appeal of an adverse determination relative to grandfathering of five and six bedroom usage of four living units. (Project Manager, Scott Gustin)

A.Hart - asks the city to give presentation first. Swears in applicants and staff.

K.Sturtevant – as assistant city attorney, I am representing staff in addressing the appeal of an administrative decision to the Board. This application request was for a pre-existing, non-confirming use status which questions whether that use was legal prior to the current zoning ordinance and if it can continue in a nonconforming status. The test dates back to 1970 and with the Mentos decision in 2001. Student living quarters was considered group quarters going back to 1970. City records have been reviewed pertaining to this issue. There is not enough evidence to support this request, since records do not go back far enough. The evidence is not there. As strictly construed, the goal of zoning is to phase out non-conforming uses. Court case defines the property as group quarters going back to 1970. The burden of proof is on the owner. Staff reports lay out more specific details.

B.Rabinowitz – review for zoning related issues and maybe data from housing that may carry weight. There should be a zoning trail. Facts are not supportive?

K.Sturtevant - looked at all sources with greater weight is given to zoning files. There's not a lot of evidence for occupancy in the zoning files. Looked at all the City records but since not a lot of evidence from the files does not go back far enough. Needs to be a zoning trail.

A.Hart – understand this is not about how many bedrooms but about who is living in them and their relationship?

K.Sturtevant – this is correct.

W.Senville – are you expecting the applicant to go back 45 years and provide records continuously from 1970?

K.Sturtevant - yes, the burden is to show a legal existing use prior to the change in zoning ordinance if that was discontinued for a year the property would lose its legal status. They submitted an affidavit from the City on a multiple 8 units building.

K.Sturtevant – the question of on how many units was not part of the application. More about the number of occupants in the 4 units. Code enforcement received a request for determination. The statement from Jeanne Francis notes though city records were reviewed not all issues were addressed as was mentioned on the lower portion of her letter.

B.Rabinowitz – is this about searching for any legal proof during that 45 yr. period of time?

K.Sturtevant – if approval was given during that time frame for occupancy, it might not have been a legal nonconforming use. It could be an approved use. Need to start at a date and go forward to determine this.

J.Stevens – if applicant abandoned the use then they would lose right to the nonconforming use.

A.Hart – asks appellant to speak to the Board.

J.Dreimer – appellant hands out a document to the Board.

J.Dreimer - explains that she and husband have been landlords since 1996 and lived there for 11 years restoring another house. Purchased property in 2003. Have been good stewards of their properties. Has been a landlord liaison for UVM for 14 years. Always believed this building was grandfathered and purchased in good faith checking with all authorities and receiving clearance from City departments. Would not have paid this price if something was illegal at property. Shocked to learn it was not grandfathered. Do not feel it is necessary to go back to 1973 since they owned it from 2003.

A.J.LaRosa - questioned the number of units

J.Dreimer – notice of decision dates back to 1965. Records indicated 8 units.

A.Hart – the number of units is not before us. Only reviewing 4 units. Have proof of housing registration forms. Bill and staff tried to research this. In 1996, there were no records for number of occupants. Certified documents are from 1983 to 2003 which does not show violations. Can you provide information back to 1970?

J.Dreimer – the city doesn't have these records or they are incomplete or inaccurate. This was built prior to 1984 and has been apartment house since 1984, when Michael Watson was preservation specialist for Burlington for historic properties. The goal was to bring in single families and send Scott a release. Not pending for building code or having clear title.

A.J.LaRosa - do you have historic floor plans?

J.Dreimer – we have the original floor plans.

A.Hart – this is more about the number of bedrooms. The question is whether or not it has it always been 5 or more unrelated adults.

J.Dreimer – description presents as an 1894 fine example of Queen Anne building as one of the earliest residences for tenants.

J.Stevens - what happened about the alleged violation over a number of years?

A.Hart - asks about a possible violation.

J.Dreimer - putting the building on market and finding out what to do about the right way. I brought up the issue since we had it on the market when a buyer said they learned the property was not grandfathered. Called Bill Ward and decided to get it taken care of. Important point is that for the last 45 years was not in compliance and never told things were done incorrect.

D.O'Rourke – speaks about the letter from Jeanne Francis stating the document was read in the affirmative. Realizes that greater weight is given to the zoning files even though record keeping was not up to same standard as today. City's determination on the Mentes decision shows important distinctions for a single dwelling unit that may trigger the Court's examination.

A.J.LaRosa - questions if relevant since the case examined a single family unit.

D.O'Rourke – Need to separate use of apartment house and the definition of family. Board found property wasn't a group home. Today there's a pre-existing use which needs more than one definition. The best evidence are permits going back to 1985. The Court in Mentes relied on documents and information from 1999 with different definitions and categories from that period of time. What was the City's intent and meaning in interpreting the ordinance and issuing a permit for 5 and 6 bedrooms?

A.Hart – questions whether this is a pre-existing or conforming use and who has this burden of proof?

D.O'Rourke - my clients have the burden of proof

A.L.Rosa – asks for definition of an apartment house

D.O'Rourke – there is no definition of family or apartment house. The permit was approved in 1986.

W.Senville - would it be possible to submit a summary of your oral response?

A.Hart – this may be filed with Scott

A.Hart - there is no enforcement action but this a complicated situation. This should come back again perhaps Dec 19<sup>th</sup>. This might be best we can do.

J.Dreimer - want to get this resolved in the best way with all the necessary information.

J.Stevens – this feels very open ended to close public hearing and have a deliberation session. Need opportunity to discuss to see if all information is available to resolve the issue.

A.Zipparo - would like to hear from the staff attorney.

A.Hart – Board has option of requesting the city to provide council since Kim cannot serve this capacity Let us put this on hold to hear from the City so the Board has the opportunity to ask questions.

B.Ward – the appellant's statements is correct. She thought it was grandfathered but did not find anything. This should come from the zoning administrator. She came back and brought a rental registration document, rental bill and statement about the property with questions about the form. Found this the same as previous years when they reported 5 and 6 unrelated occupants. This number goes back goes back to 2000. Earliest leases in June, 2000 to May, 2001 state 6 and 5 unrelated occupants.

A.Hart - during period of Mentes did you consider this pre-existing property?

B.Ward - this comes from the zoning administrator.

A.Hart - is there disparity during that period of time?

A.J.LaRosa - in 1962 there is no definition of family. In 1970, it was an approved use and then the question was whether it was grandfathered. How does 1962 analysis affect the present situation?

K.Sturveant - haven't demonstrated what that use was. May have to get back to you on this.

W.Senville – Ms. Deimer listed variety of city documents she obtained before purchasing the property. Is there something she missed?

K.Sturveant – the City does not do title searches. The letter from Jeanne Francis mainly refers to parking. We are not aware of any violation on this property. We do not do site visits and title searches, since we don't have the capacity or staff to do that.

K.Sturveant - there are no supporting documents for or against regarding the occupancy issue.

B.Rabinowitz - is there some burden on city to have these documents for properties?

K.Sturveant - not necessarily.

S.Gustin - this is not an enforcement action. Documentation is in response to the grandfathering request. The document trail has to be consistent. There is no intention to file a violation.

K.Sturveant - nonconforming is a legal status stated in the ordinance. It is the intent of state statute and the burden is on the appellant to provide this information.

A.Zipparo – would like to address the Mentes case regarding family dwelling units.

K.Sturveant - will be addressing this and the 1970 memo.

A.Hart - two possible ways to proceed: use Dec 19<sup>th</sup> as a continuation of the public hearing or the deliberative session. Board may have additional questions.

S.Lipman – resident asked when ordinance went into effect to establish this use.

A.Hart - that was discussed previously. Board looks at what the evidence shows and dates.

S.Gustin - Mentes case provides a starting point in 1999 about a functional family and then adjudicated in 2001 and in 2002.

S.Lipman – has anyone brought up the Jean Birdman memo on grandfathering being protected by law? Whether or not it is legal at time is at the discretion of the zoning administrator.

A.J.LaRosa – the memo is a very general statement on grandfathering.

S.Lipman - a lot of people relied on this though.

A.Hart - we understand about this. The question is how the facts fit in this instance.

A.J.LaRosa – motions to continue public hearing for Jan 19<sup>th</sup> receiving attorney's comments to be submitted within 30 days to be able to incorporate into Board's decisions and hearings on Jan 19<sup>th</sup>.

A.Zipparo – seconds the motion.

Discussion among the Board.

S.Bushor – questions the procedure. If the Board receives information and then deliberates, then no one can make comments, which is inconsistent with the process.

A.J.LaRosa – questions if the public hearing is closed whether the Board may still accept materials?

S.Gustin – the practice of accepting new information after the close of the public hearing is not okay.

Board votes to continue public hearing on January 19, 2016.

Board Vote: 4-2-0

## VI. Certificate of Appropriateness

### 1. 16-0375CA; 311-329 North Ave (RM, Ward 7) BC Community Housing LLC

Continued review of five year tree maintenance plan for 311 and 329 North Avenue. (Project Manager, Scott Gustin)

A.Hart - asked if Board they want to reopen public hearing. Swears in applicant.

E.Farrell – applicant said he walked site with Conservation Board who unanimously voted in support of the tree maintenance plan.

A.Hart – asks applicant if he has responded to Board comments?

E.Farrell – answers, yes.

A.Zipparo - don't remember if state shoreline protection law involved with this project.

S.Gustin – the City has reviewed under an existing regulation. The local ordinance is stricter than the State.

Public hearing was closed.

## VII. Other Business

Deliberative session set for Monday December 30<sup>th</sup> at 5:00pm.

Development Review Board approves the 2016 DRB Schedule at the Deliberative Session on Monday November 30, 2015.

## VIII. Adjournment

\_\_\_\_\_  
A.Hart, Chair of Development Review Board

\_\_\_\_\_  
Date

\_\_\_\_\_  
A.Wade, Planning and Zoning Clerk

\_\_\_\_\_  
Date

Plans may be viewed in the Planning and Zoning Office, (City Hall, 149 Church Street, Burlington), between the hours of 8:00 a.m. and 4:30 p.m.

Participation in the DRB proceeding is a prerequisite to the right to take any subsequent appeal. Please note that ANYTHING submitted to the Planning and Zoning office is considered public and cannot be kept confidential.

This may not be the final order in which items will be heard. Please view final Agenda, at [www.burlingtonvt.gov/pz/dr/agendas](http://www.burlingtonvt.gov/pz/dr/agendas) or the office notice board, one week before the hearing for the order in which items will be heard.