

Current Determination Under Appeal Now



City of
Burlington, Vermont
645 Pine Street

Zoning Determination (Reconsideration) – Findings

ZP #: 22-389

Tax ID: 045-1-091-000

Issue Date: September 2, 2022

Decision: Adverse in part / No finding possible in part

Property Address: 164 North Willard Street

Description: Original Request - Determination as to legal pre existing non conformance of the use of vehicles to the south of the barn and on the easement including but not limited to parking.

Amended Request – 1) Determine the use by cars including parking, and turning around on an easement and a small portion of a parcel to the south of the barn constitutes a preexisting nonconforming use that has not continuously ceased for more than 1 year. Further, determine that no portion of the earlier decisions or litigation controls use resumption on the easement or to the south of the barn. As previously communicated to city staff, I would like to now resume legal preexisting uses in those areas. Please see the site plan where the red indicates as built lot coverage in the form of compacted gravel. 2) If request 1 is affirmed, should the Southern Parking Area (SPA), preexisting nonconforming use be considered as its entirety in addition to as its parts? 3) Require that the site plan that I submitted in ZP 21-275 to be included in the conditions of approval to install a fence. Site plans are required for zoning permit approval and the conditions of approval currently does not contain the site plan I submitted.

This determination concerns the above-referenced property at 164 North Willard Street and addresses the forgoing determination request noted above. The City reviewed the following documents/evidence to form its determination:

- The City’s zoning permit records
- The City’s zoning enforcement records
- The City’s zoning codes including
 - 2008 Comprehensive Development Ordinance and as amended
 - 1994 Zoning Ordinance and as amended
 - 1973 Zoning Ordinance and as amended
- Zoning Administrative Interpretation 20-02; Nonconformities
- The orthophotos of 1962, 1978, 1988, 1999, 2000, 2004, and 2019
- Affidavits of
 - Gordon Demag
 - Dale Lavalley
 - Hector Leclair (11/16/13)
 - Jim Hartnett
 - Phillip Bowler, Sr.
 - John Phillips
 - Adam Phillips
 - Dan Phillips
 - Kimberly Rowley
 - Margaret Tamulonis

- Jeff Fellingner
- Susan Wilson
- Luke Purvis
- Christina Lauterbach
- Molly Purvis
- Jorge Valle
- Elaine Brodeur
- Jo Schneiderman
- Email of Robert Hale
- Email of Cara Toolin
- Email from Luke Purvis (Scott Reply x2)
- Luke Purvis race car letter
- Burlington Development Review Board decision in re: Appeal of Code Enforcement Officer's January 29, 2015 "Unsubstantiated Complaint" determination that parking, along the southern boundary of the property, has been expanded.
- Photographs and narrative of the subject area provided by applicant.
- Title timeline for 158 North Willard St.
- Prior litigation documents from *In re Purvis Nonconforming Use*, 2019 VT 60 and *In re Purvis North Willard Street*, No. 88-7-19 Vtec.
- Revised settlement agreement *In re Purvis North Willard Street*, No. 88-7-19.
- Emails of Joseph Cleary
- Determination request document by Luke Purvis submitted September 2, 2022 and attachments 1-15

The original determination request is vague with respect to the "... use of vehicles to the south of the barn..." Multiple requests by city staff to clarify the request have not resulted in clarity provided by the applicant. The determination request does specify "... including but not limited to parking." Parking is clearer. While much of the documentation provided by the applicant focuses on the strip of gravel to the south of the paved driveway, some of it notes gravel accessed by vehicles in the area south of the barn/garage. Various photos of the area over a number of years show grass and other vegetation, some gravel, and storage of various items. No determination is possible as to this vague request. The easement, as noted below, is on a separate property under separate ownership and cannot be included in a determination for this property.

The amended determination request (1) provides greater detail than the original but continues to focus on the easement and on a "parcel" south of the barn. The subject easement for the benefit of 164 North Willard Street is on the adjoining 158 North Willard Street. As such, any determination about what is, or is not, preexisting nonconforming within the easement area on 158 North Willard Street requires separate application for that property with written consent by the owner of that property. No such application has been included with this determination request. No part of the documentation provided indicates that the land immediately south of the barn is a distinct parcel. Whether or not this area is a separate parcel, the matter of the graveled area south of the barn was raised previously in determination request ZP-21-560. That determination was adverse as to the pre-existing nonconforming status of the gravel south of the barn. That determination was appealed to the Development Review Board. The appeal was subsequently withdrawn per Revised Settlement Agreement: *In re Purvis North Willard Street*, No. 88-7-19 Vtec, Stipulated Order, April 4, 2022. Sec. 12.2.5, *Finality*, of the Comprehensive Development Ordinance precludes raising this matter again. The referenced easement is a private arrangement between the owners of 164 and 158 North Willard Street. It is unknown whether unspecified "earlier decisions or litigation"

affects the provisions of this easement, and zoning standards are distinct from whatever provisions may be made by the noted easement. As noted previously, an application for zoning determination for the property at 158 North Willard Street requires separate application with that property owner's written consent.

The amended determination request (2) seeks recognition as a preexisting nonconforming use of the so-called "southern parking area." This issue was raised in prior litigation, *In re Purvis North Willard Street*, No. 88-7-19 Vtec, in which applicant requested to introduce evidence with regard to the pre-existing nonconforming status of the "Southern Parking Area" through a Motion in Limine prior to trial. The Court denied the Motion in Limine, precluding further evidence on the pre-existing nonconforming status. *In re Purvis North Willard Street*, No. 88-7-19 Vtec, Entry Regarding Motion, December 8, 2020. The Court's decision was incorporated into the Stipulated Order of the parties. *In re Purvis North Willard Street*, No. 88-7-19 Vtec, Stipulated Order, January 4, 2021 at ¶2. That decision was not appealed and is final pursuant to 24 V.S.A. §4472(d) and therefore cannot be contested, either directly or indirectly. This matter is further addressed in revised settlement agreement *In re Purvis North Willard Street*, No. 88-7-19 and requires removal of the "southern parking area" and conversion to green space with limited provision to install a vehicular turn-around.

The amended determination request (3) seeks to change the approved site plan associated with zoning permit 21-275 for a fence and several other site items. That zoning permit was issued May 26, 2022 in accordance with revised settlement agreement *In re Purvis North Willard Street*, No. 88-7-19. It was not appealed, and the zoning permit is final.

Adverse determination as to original and amended requests, except where no findings possible as noted above.

Most Recent Prior Determination - Appeal to DRB Withdrawn



City of
Burlington, Vermont
645 Pine Street

Zoning Determination – Findings - *Reconsideration*

ZP #: 21-560

Tax ID: 045-1-091-000

Issue Date: November 12, 2021

Decision: Adverse in part /
Affirmative in part

Property Address: 164 North Willard Street

Description: Determination as to pre-existing nonconforming status of gravel area on south side of paved driveway.

Added to this determination request October 6, 2021:

Did stock car racing/ car repair activities occur on and did vehicles use the area to south of the driveway and to the south of the barn beginning in the late 1960s? I do not need you to answer if those activities were continuous to current. Just if they existed at that time. You may use all the same evidence to answer this question.

Did gravel exist to the south of the barn in the 1960s? Hector stopped maintaining this gravel but we need to answer if this gravel existed there then.

Did vehicles use the area to the south of the driveway, inside what is now a set back, like a driveway continuously since the 1960s?

This determination concerns the above-referenced property at 164 North Willard Street and addresses the forgoing determination requests noted above. A prior determination was issued; however, Applicant requested reconsideration of that determination. The City reviewed the following documents/evidence to form its determination:

- The City's zoning permit records
- The City's zoning enforcement records
- The City's zoning codes including
 - 2008 Comprehensive Development Ordinance and as amended
 - 1994 Zoning Ordinance and as amended
 - 1973 Zoning Ordinance and as amended
- The orthophotos of 1962, 1978, 1988, 1999, 2000, 2004, and 2019
- Affidavits of
 - Gordon Demag
 - Dale Lavalley
 - Hector Leclair (11/16/13 & 8/25/14)
 - Jim Hartnett
 - Phillip Bowler, Sr.
 - Jo Schneiderman
 - John Phillips
 - Adam Phillips
 - Dan Phillips

- Kimberly Rowley
- Margaret Tamulonis
- Jeff Fellingner
- Susan Wilson
- Luke Purvis
- Christina Lauterbach
- Molly Purvis
- Jorge Valle
- Rebecca Grenier
- Joseph Cleary
- Teresa Cleary
- Elaine Brodeur
- Jo Schneiderman
- Email of Robert Hale
- Email of Cara Toolin
- Email from Luke Purvis
- Letters from Joseph & Teresa Cleary
- Letter from Land Surveyor, Terry Harris
- Burlington Development Review Board decision in re: Appeal of Code Enforcement Officer's January 29, 2015 "Unsubstantiated Complaint" determination that parking, along the southern boundary of the property, has been expanded.
- Photographs and narrative of the subject area provided by applicant.
- John Phillips statement provided 9/28/21.
- Documentary summary provided by Luke Purvis 9/28/21.
- DRB 1 submission by Luke Purvis 10/7/21.
- Fence Permit DRB 1 analysis submission by Luke Purvis 10/7/21.
- CCTV Burlington DRB meeting recording of 4/7/15.
- Title timeline and deed for 158 North Willard St.
- Prior litigation documents from *In re Purvis Nonconforming Use*, 2019 VT 60 and *In re Purvis North Willard Street*, No. 88-7-19 Vtec.

Determination as to pre-existing nonconforming status of gravel area on south side of paved driveway.

In order to recognize the subject gravel area as a legitimate pre-existing nonconformity, evidence must demonstrate that it has been in place continuously since at least April 25, 1973, lacking evidence to the contrary. In this case, evidence provided reaches back to the late 1960's and to the present day. Several sworn affidavits, including those from Lavalley, Demag, Brodeur, and Schneiderman assert presence of the subject gravel area as early as the late 1960's. One sworn affidavit (8/25/14), from then-property owner Hector Leclair, states that gravel and dirt in the subject area was first laid down in 1983.

In this case, there is conflicting evidence in the form of several sworn affidavits. Several assert the presence of the subject gravel area back to the 1970's and even to the 1960's. One asserts the gravel was first laid down in 1983 – the affidavit of Mr. Leclair. This sworn affidavit asserts what he did, when, and where on the property.

While some evidence supports that the subject gravel area has been in place since the 1960's, evidence to the contrary in the form of Mr. Leclair's affidavit prevents clear recognition of the subject parking area as a pre-existing nonconformity.

Upon reconsideration, the request to recognize a pre-existing nonconforming status of the gravel area on the south side of the paved driveway is denied. The affidavits of the prior owner, which indicate establishing the gravel area in 1983 is contrary to it being established prior to 1973. Further, the issue was raised in prior litigation, *In re Purvis North Willard Street*, No. 88-7-19 Vtec, in which applicant requested to introduce evidence with regard to the pre-existing non-conforming status of the “Southern Parking Area” through a Motion in Limine prior to trial. The Court denied the Motion in Limine, precluding further evidence on the pre-existing nonconforming status. *In re Purvis North Willard Street*, No. 88-7-19 Vtec, Entry Regarding Motion, December 8, 2020. The Court’s decision was incorporated into the Stipulated Order of the parties. *In re Purvis North Willard Street*, No. 88-7-19 Vtec, Stipulated Order, January 4, 2021 at ¶2. That decision was not appealed and is final pursuant to 24 V.S.A. §4472(d) and therefore cannot be contested, either directly or indirectly.

Did stock car racing/ car repair activities occur on, and did vehicles use the area to south of the driveway and to the south of the barn beginning in the late 1960s?

Several sworn affidavits attest that work on cars, including race cars, took place on the property. Some of these affidavits specify that the work took place south of the driveway and south of the barn. A zoning permit was approved 8/7/68 for “working on cars & junk cars.” There is no evidence conclusively supporting that this previously permitted activity has continued uninterrupted to the present day.

Did gravel exist to the south of the barn in the 1960s?

Several sworn affidavits attest to the presence of gravel to the south of the barn. There is no evidence conclusively supporting that this gravel area has been maintained continuously and that it remains in place to the present day.

Did vehicles use the area to the south of the driveway, inside what is now a setback, like a driveway continuously since the 1960s?

Whether and how the area south of the driveway was used is not germane to the status, or lack thereof, of the gravel strip along the south side of the driveway.

Prior Determination Appeal - Appealed to VSCED. Stipulation Agreement.

Burlington Development Review Board

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Burlington Development Review Board

Findings of Fact Deliberative Hearing: Tuesday, June 18, 2019

In RE: 19-0474DT; 164 North Willard Street (Ward 1E, RL) (Tax Lot No. 045-1-091-000)

Owner/Appellant: Luke Purvis / Hans G. Huessy, Esq.

Request: Appeal adverse determination relative to triplex status, southern, and northern parking areas.

Members Present:

Brad Rabinowitz
Austin Hart
Springer Harris
Geoff Hand

Evidence Presented:

The Board examined the materials submitted in support of this request.

I. FINDINGS

The appellant is seeking a multifaceted determination relative to the subject property. Pre-existing nonconforming (i.e. grandfathered) status is sought for the triplex use, the northern parking area, and the southern parking area. Alternatively, status as an unenforceable zoning violation (i.e. per the 15-year statute of limitations) is sought for the same three items. Finally, recognition as a duplex use is sought if a triplex use cannot be recognized.

The appellant implies that the property has been used as a triplex since at least 1962. The appellant asserts that the northern parking area has been in place since the 1950s (or late 1960s/early 1970s according to other documentation) and that the southern parking area has been in place since 1968.

The subject property is located in the residential low density zone and is ~8,052 sf. The minimum lot size in this zone is 6,000 sf for detached single family dwellings and 10,000 sf for duplexes. Within this zone, single family homes are permitted, duplexes are a conditional use, and triplexes are prohibited. Use as a triplex is nonconforming within this zone. Maximum permissible lot coverage in this zone is 35% (with an additional 10% allowed for open structures like decks, patios, and walkways). Present lot coverage is ~ 66.9% and is nonconforming. A

minimum side yard setback of 5' applies to driveways and related parking areas. The southern parking area encroaches into this minimum setback and is nonconforming.

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. Discontinuance of more than 1 year forfeits grandfathered status.

Status of an unenforceable zoning violation is predicated on continuous presence for at least 15 years with the knowledge of the city. It pertains to physical things (such as a parking area accessory to a principal residence) but not to use (such as the triplex use). Note that a case challenging the use exemption from the 15-year statute is presently before the Vermont Supreme Court. Discontinuance for more than sixty (60) days forfeits the unenforceable violation status.

The Development Review Board opened the public hearing for this appeal on May 21, 2019. The hearing was continued to June 18, 2019 to allow parties to submit additional information for consideration by the Board. New information has been provided and placed online and on file.

City records indicate that the home was originally constructed in 1885. The record is unclear as to the original use of property; however, it was likely a residence. The earliest solid evidence as to use of the property is a letter from Ann Gill Baron who lived there from 1947 until 1966. The residence was a duplex for the duration of the time she lived there. The property was sold to Hector LeClair in 1966. Sometime thereafter, a 3rd dwelling unit was added without a zoning permit.

Zoning was originally adopted in Burlington in 1947. The zoning code was comprehensively updated in 1962. Of significant import is the fact that the 1962 zoning code distinguished among residential uses (single family home, duplex, multi-family) whereas the 1947 code did not. The residence was a duplex until at least 1966 (4 years after the 1962 rewrite of the zoning code). Conversion to a triplex from 1962 onward would have required a "special exception" issued by the Zoning Board of Adjustment (Sec. 6509 of the '62 code). No such permit is evident on file or in the permit log in effect at the time. ZBA decisions going back to the original adoption of zoning in Burlington are available in the city's zoning permit files.

Affidavits from Hector LeClair, owner from 1966 until 2013, assert the presence of 3 units, including one personal office unit. Reference to "multi-family" is made; however details are lacking as to when it was established. As noted above, the record shows a duplex use at the time of sale to Mr. LeClair in 1966. Additional documentation shows exclusive use of one unit as office space (without zoning approval) since 1983 until sale of the property in 2013.

All of the rental billing records since 2004 refer to 2 rental units. Significantly, the rental registration records from 2010 – 2013 indicate vacancy of 2 rental units. The records for 2012 and 2013 further note unit 1 as "office" (and units 2 and 3 not rented). These records clearly suggest discontinuance of triplex use for well over a year.

There is scant zoning permit history for the subject property. A singular notation of a zoning permit for “working on cars and junk cars” dated 8/7/68 is evident in the permit log in use at the time. The actual zoning permit is not on file.

The assessor’s records note “R3” (3 units) from 1984 to the present. Earlier records do not indicate the number of units.

Beyond the foregoing evidence, the determination request includes multiple affidavits and other written statements from other individuals asserting or assuming multi-family use of the property. None of it is as directly relevant as the affidavits from the prior owners noted above.

Affidavits from Hector LeClair and others as well as additional written statements attest to the presence of parking areas along the southern and northern sides of the driveway. The Development Review Board has already issued a decision as to the southern parking area (found to be an enforceable zoning violation) that remains in litigation and is not properly before the DRB in this appeal. An affidavit of Hector LeClair asserts that the northern parking area was established in the late 1960s/early 1970s and periodically maintained throughout his ownership. No site plan is on file for this property. Multiple orthophotos (1978, 2000, 2004, & 2016) show continuous lawn where the northern parking area was seemingly established by Mr. LeClair. Only the 2013 and 2018 orthophoto shows what appears to be a gravel expanse that could be used for parking. No vehicles are evident on the north side in any of the orthophotos. The evidence supports the assertion that there was a gravel area on the north side of the driveway; however, the evidence also shows discontinuance.

The determination request subject to this appeal was submitted November 30, 2018. Following review of the evidence, correspondence with the applicants, and a couple of time extensions to allow for additional evidence, an adverse determination was issued February 4, 2019 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 triplex along with the parking areas on the northern and southern sides of the driveway. Recognition is sought as either grandfathered nonconformities or as unenforceable zoning violations in place for more than 15 years. 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 and rental billing records
- The Sanborn maps of 1961 and 1978 & orthophotos of 1978, 2000, 2004, and 2013
- 2008 Comprehensive Development Ordinance and as amended
- Zoning Ordinances of 1994, 1973, 1962, and 1947
- Cover memos from Hans G. Huessy, Esq. dated November 20, 2018
- Affidavits of Hector Leclair dated July 17, 2013, November 16, 2013, August 4 & 25, 2014,

- Affidavits of Phillip M. Bowler, Sr. dated July 3, 2016 and January 22, 2019
- Affidavit of Jeff Fellingner dated June 7, 2017
- Affidavit of Jorge E. Valle dated May 24, 2017
- Affidavit of Margaret M. Tamulonis dated May 4, 2017
- Affidavit of Gordon Demag dated January 28, 2019
- Affidavit of Jim Hartnett dated January 13, 2019
- Affidavit of John Phillips dated January 28, 2019
- Affidavit of Joseph Cleary dated January 30, 2019
- Affidavit of Teresa Cleary dated January 30, 2019
- Letter from Joseph and Teresa Cleary dated January 30, 2019
- Motion to Quash Subpoena, VT Superior Court Environmental Division dated 9/6/16
- Unsigned, un-notarized statement from Ann Gill Baron
- Undated letter from Dale Lavalley to Luke (assumed Luke Purvis)
- Email from Cara Toolin to Luke Purvis dated March 1, 2017
- Email from Robert Hale to Luke Purvis dated July 27, 2016
- Undated written statement from Elizabeth Mariani
- Zoning appeal file 15-0797AP and related documentation
- Vermont Secretary of State business info

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 triplex, either as grandfathered or as an unenforceable zoning violation per the 15-year statute of limitations. The Planning and Zoning Department further determines that neither the southern nor the northern parking area can be recognized as grandfathered or as unenforceable zoning violations per the 15-year statute of limitations.

The present use for 3 dwelling units is nonconforming. The use is not allowed, nor is the 8,052 sf property large enough for the 3 dwelling unit density (7 units/acre allowed in RL zone). The evidence suggests that the property contained two dwelling units until at least 1966 when Hector Leclair purchased the property. Sometime thereafter, a 3rd unit was created without a zoning permit¹. The benchmark date for grandfathering is 1962, when the city's zoning standards first distinguished among single family homes, duplexes, and multi-family residences. The 1962 zoning ordinance required Zoning Board of Adjustment approval for multi-family residences within the Residential District, wherein the subject property is located. Evidence as to the use of the property since 1966 is inconsistent. Affidavits from neighbors, tenants, and acquaintances indicates that all 3 units may have been used as dwelling units. Affidavits from Hector Leclair, owner of the property from 1966 until 2013, indicates that one of the units was used as office space since 1983 (and home office before that). The same affidavits note that full occupancy of the three

¹ While not germane to this request, the question as to use of the residence as a single detached dwelling remains.

units was inconsistent. The evidence fails to demonstrate consistent, uninterrupted use of the property as a triplex back to 1962. Grandfathered status as a triplex cannot be recognized. The evidence shows that one of the units was used consistently as office space from 1983 until 2013 when the property was sold to the present owner. Uses are not subject to the 15-year statute of limitations. Even if they were, the evidence shows use of one unit as office space as recently as 2013, well within 15 years of the present.

Both parking areas are nonconforming insofar as they have not received zoning approval and they contribute to lot coverage in excess of the 35% limit (~ 70% existing lot coverage) in this residential low density zone. At least the southern parking area encroaches into the minimum required 5' side yard setback. The two parking areas are nonconforming. The benchmark date for grandfathering is April 26, 1973 when the city's zoning standards first articulated lot coverage limits and minimum setbacks for accessory site features in addition to primary structures in the residential zones.

The northern parking area clearly shows as green space on the 2000, 2004, and 2009 orthophotos of the City of Burlington. All three orthophotos depict green space, and no vehicles are shown parked there. Despite evidence suggesting that the area had served as parking in the past, it has clearly not been maintained as parking space continuously and without interruption since 1973, nor has it been in place continuously and without interruption over the past 15 years. Grandfathered status cannot be recognized, nor can the northern parking area be deemed an unenforceable zoning violation per the 15-year statute of limitations.

Evidence has not been provided to demonstrate the continuous and uninterrupted presence of the southern parking area since 1973. It cannot be recognized as grandfathered. The Development Review Board has already determined that the southern parking area was discontinued for more than 60 days within the past 15 years and cannot be recognized as an unenforceable zoning violation (see zoning appeal 15-0797AP dated April 21, 2015). This determination has stood on appeal to the Vermont Superior Court Environmental Division and cannot be discounted in this determination.

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. As noted above, the records show that one of the units was consistently used as an office from 1983 until 2013. This change in use far exceeds the 1 year limitation of this provision. The nonconforming triplex use is not legitimate and cannot be retained.

As noted above, evidence has not been submitted to demonstrate the presence of the northern and southern parking areas back to 1973. Further, the evidence does show that the northern parking area has not existed continuously as plainly depicted in the 2000, 2004, and 2009 orthophotos. *Sec. 5.3.5 Nonconforming*

Structures (b) Demolition of the CDO states that a nonconforming structure that is removed for longer than 1 year shall not be re-built or relocated in any way other than in full conformance with the provisions of the CDO. The nonconforming parking areas are not legitimate and cannot be retained.

Sec. 5.3.2, *Bianchi controlled uses, structures, and lots*, of the Comprehensive Development Ordinance (i.e. the 15-year statute of limitations) does not pertain to uses, as use violations are determined to be continuing violations per case law established by the Vermont Superior Court Environmental Division. Further, the evidence shows that at least one of the units was used as office space as recently as 2013. The triplex use cannot be deemed an unenforceable zoning violation.

Sec. 5.3.2, *Bianchi controlled uses, structures, and lots*, of the Comprehensive Development Ordinance does pertain to structures and physical elements such as parking areas. However, as noted above the evidence clearly shows a discontinuance of the northern parking area for a number of years between 2000 and 2009. Pursuant to CDO Sec. 5.3.2, if the parking is discontinued for more than sixty (60) days, the illegal parking is no longer unenforceable under Sec. 5.3.2.

Finally, as noted above the Development Review Board has already determined that the southern parking area discontinued for longer than 60 days and is not an unenforceable zoning violation per Sec. 5.3.2.

An appeal of this adverse determination was filed February 15, 2019, within the 15-day appeal period. The appellant requested deferral of the appeal hearing until May 21, 2019.

The appeal makes six assertions as to the requested relief:

- *The determinations do not address the issue of whether the property is a grandfathered duplex, despite the submission of evidence that its use as a duplex predates 1962, the first year a duplex would have required a permit.*

It is uncontested that the residence was a duplex in 1962. Sometime thereafter, a 3rd unit was added without zoning approval. An affidavit of Mr. LeClair attests that he raised his family at the property and had a home office. More recently, rental registration records completed by then-owner Hector LeClair show use of one unit as an office and vacancy of both of the two residential units for the years 2010 – 2013. Testimony and documents submitted show extended vacancies of one or more of the units throughout the period of ownership by Mr. LeClair and the use of one of the units as an office for a long period of time. These records and testimony demonstrate discontinuance of the triplex use. The triplex use is nonconforming and is eliminated by the demonstrated period of discontinuance.

- *The determination fails to allow for the application of the 15 year SOL for non-conforming uses. This issue is currently on appeal to the Vermont Supreme Court with respect to another City of Burlington case.*

The pending litigation is acknowledged in the determination. Also, as noted in the determination, discontinuance of the triplex use within the past 15 years is demonstrated by the evidence.

- *Use of a dwelling unit as an office does not constitute a discontinuance of its use as a dwelling unit. At all times, all three units had their own kitchens, baths, bedrooms and electric meters. In addition, the record shows that the former owner occasionally spent the night in his office. Therefore, use of the unit as a home office does not disrupt the running of the 15 year SOL. In addition, temporary vacancies of units do not terminate the running of the 15 year SOL.*

Conversion of a residential dwelling unit to an office for more than a year changes the use, even if the physical layout remains unchanged. If a nonconforming use is discontinued for more than a year, it cannot be reestablished even if nothing has physically changed. Occasionally sleeping in his office, used exclusively for office space since 1983 until sale of the property to the present owner, did not make the office space Mr. LeClair's residence.

- *The City applied the wrong standard in its prior decision related to the southern parking area. It applied a 60-day period of non-use. The record clearly shows parking occurred to the south of the driveway prior to 1973, which the City has acknowledged was the date when a permit would have first been required. Accordingly, the City needed to find a one-year period of non-use, not a 60 day period.*

This matter is not properly before the DRB in this appeal.

- *The ortho photos relied on by the City to prove non-use are inconclusive at best. They show the status of parking on a single day. Affidavits from the prior owner describe regularly applying gravel to the parking areas after grass grew in. The photos may have been taken just before additional gravel was added.*

The orthophotos used in the determination were taken at 5 different times in 4 different years.

- 1978
- 2000
- 2004 (black & white, pre leaf-out)
- 2004 (color, leaves on)
- 2013

Presently, 6th and 7th dates are available (2016 & 2018). Google Earth imagery is also available. Only two of these orthophotos (2013 and 2018) show gravel north of the driveway. 2016 imagery is low-resolution but shows green north of the driveway.

Google Earth imagery clearly shows green north of the driveway in 2012. The orthophotos depict the discontinuance of the northern parking area and its return to lawn and then reconversion back to gravel more recently. It is unlikely that every one of the orthophotos showing lawn were taken just before new gravel was added.

- *The City has failed to address the Applicant's claim that the parking areas were permitted pursuant to a 1968 permit issued to the former owner.*

There is nothing in all of the foregoing evidence to substantiate the claim that somehow the 1968 zoning approval included a site plan depicting the parking areas. Perhaps there was one, perhaps there was not. More significantly, the evidence demonstrates that the northern gravel area was discontinued for a period of years prior to its reestablishment without a zoning permit.

Legitimacy of the triplex use as “grandfathered” is predicated on proof of its continuous existence from pre-1962 until the present. As noted above, the residence was a duplex until at least 1966 when it was sold to Hector LeClair. No zoning permit was ever issued to change the use to a triplex. Use violations are not subject to the 15-year statute of limitations. Even if they were, the evidence shows use of one of the units as office space as recently as 2013. Continuous use as a triplex for 15 years has not been demonstrated.

The legitimacy of the southern parking area is not property before the DRB in this appeal. Legitimacy of the northern parking area as “grandfathered” is predicated on existence prior to 1973 and continuous existence since then. An affidavit of Hector LeClair attests that this northern parking area was established by laying down gravel in the late 1960s or early 1970s. It may have predated 1973; however, the affidavit does not clearly establish the time of construction. Even if it was established prior to 1973, the evidence shows that it was discontinued for a number of years. Status as an unenforceable zoning violation is predicated on continuous existence for the past 15 years. Evidence shows discontinuance as recently as 2012 or 2016.

Nonconformities are tightly limited by the CDO (Sec. 5.3.4 & 5.3.5). The zoning code seeks to replace them with conformity, hence the 1-year timeline for abandonment. Unenforceable violations are even more tightly limited, as they are violations (Sec. 5.3.2). The CDO establishes a 60-day clock for abandonment. The evidence in this determination undercuts the appellant's assertions of grandfathered or unenforceable violation status for the triplex use as well as for the northern gravel parking area.

II. MINUTES

The meeting minutes will be distributed separately upon review and approval by the Development Review Board.

III. MOTION

Motion: Austin Hart

I move that the Board uphold the decision of the Zoning Administrator and deny the appeal based on the findings in Section I above. The Board affirmatively acknowledges the duplex use of the property as a pre-existing nonconformity.

Seconded: Geoff Hand

Vote: 4-0-0, motion carried.

Dated at Burlington, Vermont, this ____ day of June, 2019

Respectfully Submitted,

Brad Rabinowitz, Development Review Board Chair

Please note that an interested person may appeal a decision of the Development Review Board to the Vermont Superior Court Environmental Division. (Zoning Ordinance Article 17, Section 17.1.7, Appeals of Development Review Board Decisions: An interested person may appeal a decision of the Development Review Board to the Vermont Superior Court Environmental Division. The appeal shall be taken in such a manner as the supreme court may by rule provide for appeals from state agencies governed by Sections 801 through 816 of Title 3). The Court rules may require that such an appeal be commenced within Thirty (30) days of the Board's decision.