

## Department of Planning and Zoning

149 Church Street  
Burlington, VT 05401  
Telephone: (802) 865-7188  
(802) 865-7195 (FAX)  
(802) 865-7142 (TTY)

David White, AICP, Director  
Meagan Tuttle, AICP, Comprehensive Planner  
Jay Appleton, GIS Manager  
Scott Gustin, AICP, Principal Planner  
Mary O'Neil, AICP, Principal Planner  
Anita Wade, Zoning Clerk  
Elsie Tillotson, Department Secretary



**TO:** Development Review Board  
**FROM:** Scott Gustin  
**DATE:** November 17, 2015  
**RE:** 16-0151DT; 2-8 Hickok Place

=====

**Note: These are staff comments only; decisions on projects are made by the Development Review Board, which may approve, deny, table or modify any project. THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.**

Zone: RM                      Ward: 2C

Owner/Appellant: Diemer Apartments, LLC

**Request:** Appeal of adverse zoning determination relative to grandfathering of five and six bedroom usage of four living units.

### **Overview:**

The appellant is seeking an affirmative determination that units 2B, 4B, 6B, and 8B at 2-8 Hickok Place, with 5 and 6 bedrooms, are legitimately grandfathered. Sec. 4.4.5 (d) 5, C, *Residential Occupancy Limits*, of the Comprehensive Development Ordinance (CDO) limits occupancy of all dwelling units within the residential zones to a family as defined in Article 13. The definition of family has several subsections including (c): "No more than four unrelated adults and their children." This provision of the CDO limits occupancy of dwelling units throughout the city's residential zones to families with kinship, group homes, "functional families," or up to 4 unrelated adults. This same provision was originally adopted in November 2000 (in just the RL and RM zones) and was incorporated into the Zoning Ordinance in effect at that time. Prior to adoption of this provision, the city's zoning regulations prohibited occupancy of dwelling units as "group quarters." Group quarters includes shared student housing (in re: *Mentes*) such as that at 2-8 Hickok Place. The prohibition of group quarter occupancy of dwelling units dates back to December 21, 1970.

The subject dwelling units at 2-8 Hickok Place are student apartments occupied by more than 4 unrelated adults (5-6 occupants), and the appellant wishes to have these apartments grandfathered as legitimately pre-existing nonconformities. The determination request was denied and has been appealed to the Development Review Board. Note that the appeal also requests city recognition of 8 dwelling units at the property. While the research associated with the determination request turned up a discrepancy in the number of permitted dwelling units, unit count was not part of the determination request and cannot be wrapped into the appeal.

**Recommendation:** Uphold zoning denial based on the following findings and conditions:

### **I. Findings:**

On July 30, 2015, the appellant submitted a zoning determination request seeking grandfathered status of units 2B, 4B, 6B, and 8B with 5 + 6 bedroom usage at 2-8 Hickok Place. Much of the supporting information pertained to bedroom counts back to the appellant's date of acquisition in 2003.

On August 26, 2015, the appellant met with zoning staff to review the pending request. The appellant was advised to demonstrate consistent *occupancy* of the subject dwelling units, not just bedroom counts. Following this initial meeting, zoning staff consulted with the City Attorney's Office and worked with the Code Enforcement Office in reviewing rental registration records and other pertinent city records that might establish consistent occupancy of the subject dwelling units.

On September 10, 2015, the appellant again met with zoning staff and provided additional information. At that point, consistent occupancy of the subject dwelling units by 5-6 students back to April 2001 had largely been demonstrated by the rental registration records. Evidence extending further back remained sparse.

Following a final review of the determination request with Code Enforcement Office and the City Attorney's Office, an adverse determination was issued on September 30, 2015:

This determination is in regard to the above-referenced property, specifically your request that the City of Burlington recognize 5 & 6-bedroom usage (5 & 6 person occupancy) of units 2B, 4B, 6B and 8B as grandfathered (legally pre-existing non-conformities). 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
- Code Enforcement zoning compliance memo
- Affidavits of
  - Richard M. Diemer and Jill M. Diemer
  - Vincent A. Paradis
  - John F. Shea, Jr.
- The City's determination regarding onsite parking
- Floor plans of the residence
- State of Vermont wastewater permit records
- *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, 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 & 6-bedroom occupancy 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 and 6 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.

The appeal of the adverse determination was filed October 8, 2015, within 15 days as required.

The appeal is brief and largely points to documentation submitted in support of the determination request. The appeal notes that the building was constructed in 1894 as an apartment house and that the use has not changed. The appeal does not directly contest the reasons for the adverse determination.

The central matter here is "grandfathering." As noted in the adverse determination, 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. This determination request is not a Bianchi or 15-year statute of limitation request; it is a grandfathering request. In order to issue an affirmative grandfathering determination, the appellant in this case would need to demonstrate consistent 5-6 person occupancy of the subject apartments to at least December 20, 1970.

On December 21, 1970, the city adopted an amended zoning ordinance. In part, the amendments included provision to exclude "group quarters" from the definition of "family." Then, as now, dwelling units are to be occupied by families. Family was defined as:

One or more persons occupying a dwelling unit and living as a single nonprofit housekeeping unit, but not including group quarters such as dormitories, sororities, fraternities, convents, and communes.

At that point, the city prohibited occupancy of dwelling units as group quarters. The present occupancy of the dwelling units at 2-8 Hickok Place by unrelated students amounts to group quarters.

The Mentas case from 2001 and 2002 is fundamentally important to the subject appeal. This case, decided by the Vermont Environmental Court, stemmed from an appeal by John Mentas against the Zoning Administrator's decision not to take enforcement action against the owners of a 7-bedroom home at 36 North Willard Street occupied by seven unrelated students. "Family" and "group quarters" were central to that case. The 1999 zoning regulations in effect at the time contained the same definition of "family" as adopted December 21, 1970. The Court found that "...to fall within the zoning use category of a single detached dwelling, the occupants of the house must satisfy *both* prongs of the definition of family. ...The shared student housing at issue... met the first prong of this test, in that the students were living as a single, nonprofit housekeeping unit,

but found that material facts were disputed as to whether or not they also fell outside of the category of ‘group quarters.’” The Court decided that occupancy by unrelated adult students amounted to group quarters and was, therefore, prohibited under the zoning ordinance.

While the Mentis case was pending, the city amended its zoning ordinance November 22, 2000 to address residential occupancy limits (see attached City Council resolution “Appendix A, Zoning #2000-01). The present language, Sec. 4.4.5 {d} 5, C, *Residential Occupancy Limits*, is below.

### **Residential Occupancy Limits.**

In all residential districts, the occupancy of any dwelling unit is limited to members of a family as defined in Article 13. Notwithstanding the following, the minimum square footage requirements shall be reduced by ten (10%) percent in situations where the residential premises are owner occupied.

Subject to Conditional Use approval by the DRB, a dwelling unit may be occupied by more than four (4) unrelated adults if it contains at least twenty-five hundred (2,500) square feet excluding its attic and basement pursuant to the following:

- (i) If in a RL district, the dwelling unit also contains at least an additional two hundred fifty (250) square feet and one (1) additional parking space per adult occupant in excess of four (4); or,
- (ii) If in a RM district, the dwelling unit also contains at least an additional two hundred (200) square feet and one (1) additional parking space per adult occupant in excess of four (4).
- (iii) If in a RH district, the dwelling unit also contains at least an additional 150 square feet and 1 additional parking space per adult occupant in excess of four (4).

**Family:** One or more persons occupying a dwelling unit and living as a single nonprofit housekeeping unit, but not including group quarters such as dormitories, sororities, fraternities, convents, and communes. Occupancy by any of the following shall be deemed to constitute a family:

- (a) Members of a single family, all of whom are related within the second degree of kinship (by blood, adoption, marriage or civil union).
- (b) A “functional family unit” as defined in Article 30, Sec. 30.1.2(1).
- (c) Persons with disabilities as so defined in Title VII of the Civil Rights Act of 1968, as amended by the “Fair Housing Amendments Act of 1988”.
- (d) A state registered or licensed day care facility serving six or fewer children as required by 24 V.S.A. 4409(2), as the same may be amended from time to time.
- (e) No more than four unrelated adults and their minor children.

Provided that a dwelling unit in which the various occupants are treated as separate roomers cannot be deemed to be occupied by a family.

For purposes of this definition of family, a group of adults living together in a single dwelling unit and functioning as a family with respect to those characteristics that are consistent with the purposes of zoning restrictions in residential neighborhoods shall be regarded as a “functional family unit” and shall also qualify as a family hereunder...

While commonly thought of as a restrictive provision, the amendment is actually permissive in light of the *Mentes* case. *Mentes* found that occupancy by unrelated adults constituted group quarters and was, therefore, prohibited. The *residential occupancy limits* amendment added provision for up to 4 unrelated adults within the definition of “family” and established criteria for occupancy exceeding 4 unrelated adults. This amendment enabled occupancy of dwelling units by up to 4 unrelated adults, and under certain criteria, occupancy by more than 4 unrelated adults. The residential occupancy limits amendment originally pertained only to the residential medium density and residential low density zones. It was later expanded to include the residential high density zone. The subject property is within the residential medium density zone.

This appeal for an affirmative grandfathering determination cannot be upheld.

- The subject apartments are presently occupied by more than 4 unrelated adults without any zoning permit to do so.
- Under the case law established by *Mentes*, this occupancy amounts to group quarters.
- Group quarters are specifically excluded from the definition of family.
- Dwelling units must be occupied by a family; occupancy of the apartments as group quarters is not allowed.
- Occupancy of dwelling units as group quarters became prohibited December 21, 1970.
- Consistent use of the subject dwelling units as group quarters with 5-6 unrelated adult occupants would need to be demonstrated back to at least December 20, 1970.
- Neither city records nor documentation provided by the appellant demonstrate consistent use of the subject apartments as group quarters with 5-6 unrelated adult occupants back to at least December 20, 1970.

The property at 2-8 Hickok Place appears to have been used as an apartment building since its construction in 1894. While it may be possible that some of the apartments have been used as group quarters since at least December 20, 1970, there is simply no documentation to support consistent occupancy as such. As a result, no affirmative grandfathering determination can be issued.

## **II. Recommended Motion:**

Uphold the denial of determination request 16-0151DT.