

CITY OF BURLINGTON

BURLINGTON DEVELOPMENT REVIEW BOARD

IN RE: 16-1051IDT; 2-8 Hickok Place
Appeal of Adverse Zoning Determination Relative to Grandfathering of Five
and Six Bedroom Usage of Four Living Units

MEMORANDUM OF APPELLANT DIEMER APARTMENTS, LLC

Appellant, Diemer Apartments, LLC, by and through its attorneys, Bergeron, Paradis & Fitzpatrick, LLP, submits this Memorandum in support of its appeal of the adverse zoning determination relative to grandfathering of five and six bedroom usage of four living units.

BACKGROUND

Diemer Apartments LLC (hereinafter "Diemer") owns an apartment building with 8 units located at 2-8 Hickok Place. Three of the units contain five bedrooms. One unit contains six bedrooms. A public hearing on Diemer's appeal was held on November 17, 2015. Diemer presented overwhelming evidence at the hearing as to the use of the property as 3 five bedroom units and 1 six bedroom unit since 1986. Diemer provided evidence of the permits issued by the City in 1986 for the conversion the units to five and six bedrooms. Director of Code Enforcement, Bill Ward, testified there was no dispute of the use of the property as five and six bedroom units since 1986. Jill Diemer testified on the lengths taken by Diemer with multiple City departments to confirm the use of the five and six bedrooms in the property prior to their

purchase in 2003. The evidence presented at the hearing abundantly demonstrates that the Development Review Board should grant the Diemer's appeal.

The City's position is, that despite having issued the permits for the five and six bedroom living units in 1986, its 1970 zoning ordinance controls the use of the Diemer property and the 1970 definition of "family" prohibits occupancy of the Diemer units as "group quarters". The City then relies on a 2002 Environmental Court decision interpreting "group quarters" to include shared student housing. Finally, while at the same time as acknowledging that their records are not complete, the City contends that the City records do not demonstrate consistent use of the apartments as "group quarters" with 5-6 unrelated adult occupants back to December 20, 1970. The City's argument fails on its face.

ARGUMENT

At the outset, Diemer submits that they have provided convincing evidence of the use of the five and six bedrooms not for just fifteen years, but for almost thirty years. The City is attempting to transport us back forty-five years by relying on the December 1970 ordinance. The inquiry, however, starts and stops in 1986. The City's own actions in interpreting its 1970 ordinance and issuing the permits in 1986 for the five and six bedroom units should end the discussion. This is the best evidence of how the City interpreted its ordinance as it applied to an apartment house. The Diemer's appeal should be granted.

Although Diemer's appeal should be successful based upon the above, Diemer contends that the City's reliance upon the 1970 ordinance and the 2002 Environmental Court interpretation of the definition of family do not survive scrutiny. The City relies heavily on the unappealed Environmental Court decision *In re: Appeal of John Mentec*, Docket No. 132-6-00 Vtec. (Vt. Env'tl. Div. October 22, 2001 and May 10, 2002). *Mentec* involved the rental of a

seven bedroom single family residence by seven University of Vermont students. The case turned on the definitions of “single detached dwelling” and “family” as found in the 1999 zoning ordinance. (*Mentes*, October 22, 2001 decision at p. 2). Significantly, the Environmental Court noted that no argument was made that the use of the property was either an apartment or boarding house. *Id.* The 1999 ordinance defined single detached dwelling as a “free standing residential structure containing a single family unit occupied by a single nonprofit housekeeping unit, but not including group quarters; see definition of ‘family’ and where rooms are not let to individuals.” *Id.* 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.” *Id.* The October 22, 2001 decision concluded that as a single detached dwelling, the occupants of the dwelling had to meet the definition of family. The ultimate inquiry was whether the shared housing use by the students fell within the exclusion of “group quarters” in the definition of family. *Id.* at pp. 2-3.

In its May 10, 2002 decision, the Environmental Court addressed the interpretation of group quarters as an exclusion to the definition of family. The Court determined that list of uses following group quarters in the definition of family was not an exclusive list of uses but were examples only of types of group quarters. (*Mentes*, May 10, 2002 decision at p. 1.). The Court then concluded that the use of the property by the seven students was “similar to the five listed ‘group quarter’ uses, especially that of commune...” The Court concluded that the shared student housing use of a single detached dwelling was prohibited under the 1999 ordinance. *Id.* at p. 2.

Diemer is distinguishable from *Mentes*. In *Mentes*, it was the **use** of the single detached dwelling that triggered the examination of the definition of family. Conversely, Diemer owns

an 8 unit **apartment house**, not a single detached dwelling. The Court in *Mentes* noted that no argument was made by the parties that the use of the property was as an apartment or boarding house. Presumably, an argument to that effect would have triggered a different analysis by the Court. The use of the Diemer property as an apartment house since the late 1990s presents a different scenario and analysis. *Mentes* does not apply.

In *Mentes*, the City relied upon its 1999 ordinance. Given the history of the use of the property since 1986, the City cannot rely on that ordinance and instead is going back to its 1970 ordinance. Once again, the City efforts should fail. In its 1962 zoning ordinance, the City provided a definition of apartment house, which the Diemer property met. (Exhibit 1). The 1962 ordinance did not include a definition of family. If the City is seeking a grandfathered determination, it should be based upon the 1962 ordinance, not the 1970 ordinance. In such an analysis, the Diemer's appeal should be granted.

Finally, the Court in *Mentes* was confronted with interpreting the 1999 ordinance which contained different uses and additional definitions than the ordinances that preceded it. In this case, the Board has the benefit of knowing how the City interpreted the ordinance in 1986 as it applied to the five and six bedroom units at the Diemer property. The Board has the benefit of knowing that the City issued permits for conversion to five and six bedroom units at the Diemer property. The City's own actions demonstrate the City's interpretation of the ordinance as it applies to the property. The original permittees and the Diemers have the right to rely on the City's 1986 interpretation.

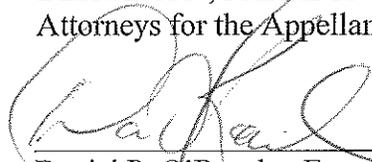
CONCLUSION

Based upon the foregoing, the Appellant, Diemer Apartments, LLC requests that the Board grant its appeal of the adverse zoning determination relative to grandfathering of five and six bedroom usage of four living units at its property at 2-8 Hickok Place.

DATED at Essex Junction, Vermont this 17th day of December, 2015.

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Exhibit I



Revised
Ordinances
of 1962



City of
BURLINGTON
Vermont

§ 6501. Definitions

For the purpose of this chapter:

(1) Singular words shall include the plural, and plural the singular, words in the present tense shall include the future, "used" shall include "designed or intended to be used," and the word "shall" is mandatory and not merely directory.

(2) Apartment house. A building or portion thereof used or designed to be used as a residence for three or more families living as units independently of one another.

(3) Building. Anything constructed or erected, the use of which requires more or less permanent location on the soil, or attached to something having a permanent location on the soil.

(4) Height of building. The vertical distance from the street curb level to the mean level of the slope of the main roof, provided, however, that the average elevation of the finished grade in front of the building may be substituted for the street curb level where the building in question is set back from the street a distance at least equal to the difference in elevation between the curb level and the grade level.

(5) Hotel. A building occupied as the temporary or permanent abiding place of individuals lodged therein with or without meals, in which there are more than fifteen sleeping rooms above the first story for separate occupancy and no provision made for cooking in individual rooms.

(6) Nonconforming use. The use of a building or premises which does not conform with the use regulations of the district where located.

(7) Public garage. A garage other than private, used or designed to be used for the housing or care of more than three self-propelled vehicles, where any such vehicles are for hire, stored, repaired, serviced, or kept for lease or sale.

§ 6502. Administration and enforcement

The building inspector of the city, or in case of his absence from the city, inability to serve, resignation, death or removal, the deputy building inspector, shall be the zoning administrative officer. No building or structure, or part thereof, shall be erected, altered or moved without a permit from the zoning administrative officer, issued upon application, stating that the plans and intended use indicate that the building is to conform in all respects with the provisions of this chapter. He shall have general charge of the administration of this chapter.