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CITY OF BURLINGTON, VERMONT
OFFICE OF
THE CITY ATTORNEY
AND
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TO: Development Review Board
FROM: Kimberlee J. Sturtevant, Assistant City Attorney 
DATE: January 11, 2016
RE: 16-0151DT; 2-8 Hickok Place

Appellants have requested “grandfathering” of five and six bedroom usage in four of the living units at 2-8 Hickok Place. After review of the material submitted as well as City ordinances and files, the “grandfathering” request was denied administratively as there was insufficient evidence to demonstrate consistent use from the date when it was legal. Appellants have appealed that determination, which is the subject of the pending matter before the Board. As requested, the following is the City’s legal analysis of the issue.

Grandfathering

The request before the Administrative Officer and the Board on appeal is to recognize as a pre-existing legal non-conforming (“grandfathered”) status, the occupancy of units 2B, 4B, 6B, and 8B at 2-8 Hickok Place by 5-6 unrelated persons, as opposed to the limit of four unrelated persons required by the current CDO. A property can be grandfathered if lots/parcels/structures/uses are non-compliant with a current zoning regulation, but were compliant with prior regulations and have not materially changed. This determination request is not a Bianchi or 15-year statute of limitation request; it is a grandfathering request. To achieve a “grandfathered” status, the burden is upon the applicant to demonstrate that the property was in fact legal prior to the zoning regulation change and that the facts that made the property legal prior to the change have continued without cessation (which is defined as discontinuing for a year or more).¹ The determination of grandfathering therefore requires going back to ordinances in effect prior to the change and analyzing if the property was, at any time in its history, legal. If so, and that status has continued without cessation to the present, the property can be grandfathered. Otherwise, it cannot.

¹ There are circumstances in which the allowed time for discontinuance is more than a year, but those are not the facts in this matter. See CDO Sec. 5.3.4(b).

City Ordinances

Based upon our review, the first Zoning Ordinance in the City of Burlington was approved by Mayor John J. Burns on January 28, 1947. Since then, the zoning regulations have been amended a number of times. The following are excerpts from the definition sections of various regulations that may be pertinent to your review:

- January 28, 1947:
 - 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.

- December 1970:
 - Apartment House: same as 1947

 - 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.

- April 3, 1973:
 - Apartment House: same as 1947 and 1970

 - Family: same as 1970

- April 8, 1994:
 - Apartment: A dwelling unit in a building containing more than two dwelling units or a dwelling unit in a mixed-use building.

 - Apartment house: A structure containing three or more apartments.

 - Dwelling unit: A room or set of rooms fitted with a private bath and kitchen facilities comprising an independent, self-contained dwelling unit occupied by a family and where rooms are not let to individuals.

 - Family: Same as 1970 and 1973

- November 2000 zoning amendment #2000-1:
 - Dwelling unit: A room or set of rooms fitted with a private bath, kitchen, and living facilities comprising an independent, self-contained dwelling space occupied by a family and where rooms are not let to individuals. Bathroom, kitchen and living facilities must be separate and distinct from bedroom facilities. Each bedroom must contain a minimum square footage consistent with the current minimum housing standards. Separate bathroom facilities will be deemed to exist only when it is possible to access such bathroom facilities without passing through a room which is designated as a bedroom. If there is more than one meter for any utility, address to

the property, or kitchen; or if there are separate entrances to rooms which could be used as separate dwelling units; or if there is a lockable, physical separation between rooms in the dwelling unit such that a room or rooms on each side of the separation could be used as a dwelling unit, multiple dwelling units are presumed to exist; but this presumption may be rebutted by evidence that the residents of the dwelling share utilities and keys to all entrances to the property and that they (A) share a single common bathroom as the primary bathroom or (B) share a single common kitchen as the primary kitchen. Each dwelling unit must have a minimum of one hundred eighty (180) square feet of parking space on the premises for every two occupants thereof, such parking area may not be in the front yard.

- 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 below.
 - (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. 4412(5), 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....

In addition to changing the definition of family, the November 2000 zoning amendment, #2000-01, also included modifications to Section 3.1.4, Residential Districts Established, which explicitly stated that occupation of dwelling units in RL, WRL, RM and WRM districts was limited to members of a family as defined in Article 30, Section 30.1.2.

In 2008 the City’s zoning regulations were rewritten and codified in the City’s Comprehensive Development Ordinance. The definitions of Apartment, Dwelling Unit and Family were not significantly changed from the prior versions.

- **Apartment:** A single dwelling unit located in a building containing more than two dwelling units or a single dwelling unit located in a mixed-use building. (See Dwelling Unit and Mixed Use Building)
- **Dwelling Unit (or Housing Unit):** A room or set of rooms fitted with a private bath, kitchen, and living facilities comprising an independent, self-contained dwelling space occupied by a family and where rooms are not let to individuals. Kitchen, living and shared bathroom facilities must be separate and distinct from bedroom facilities. Each bedroom must contain a minimum square footage consistent with the current minimum housing standards. Separate bathroom facilities will be deemed to exist only when it is possible to access such bathroom facilities without passing through a room which is designated as a bedroom. If there is more than one meter for any utility, address to the property, or kitchen; or if there are separate entrances to rooms which could be used as separate dwelling units: or if there is a lockable, physical separation between rooms in the dwelling unit such that a room or rooms on each side of the separation could be used as a dwelling unit, multiple dwelling units are presumed to exist; but this presumption may be rebutted by evidence that the residents of the dwelling share utilities and keys to all entrances to the property and that they (A) share a single common bathroom as the primary bathroom or (B) share a single common kitchen as the primary kitchen. (See also definition of Family and Rooming Unit)
- **Family:** same as 2000 amendment

The January 30, 2008 CDO continued the residential occupancy limits in Section 4.4.5 (d) 5, C. In that Section, the occupancy limits of all dwelling units within the residential zones are limited to a family as defined in Article 13 (as provided above).

Analysis

Based upon the ordinance review identified above, the relevant timeframes and requirements are as follows:

- November 2000 until present
- December 1970 through November 2000
- January 1947 through December 1970
- Prior to January 1947

There has been no assertion that the current 5-6 person occupancy is in compliance with the current regulations. To the contrary, the application for grandfathering starts with the basic understanding that it is not. The question then becomes was it ever legal, if so when, and then, whether the applicant can demonstrate the continuous (no period of discontinuance of a year or more) use of the property from the point in time it was legal until today.

Prior to January 1947, zoning permits were not required in Burlington. As such, the use of the 2-8 Hickok as an apartment building in whatever form of occupancy was legal. If Appellant could demonstrate the units and their occupancy levels were present in 1946 and have continued since then, it would be appropriate to acknowledge the property as a pre-existing non-conformity (grandfathered) with respect to that occupancy. However, that evidence has not been presented.

Between January 1947 and December 1970, there was no definition of family, so one would need to look at the common definition of family to establish the requirement. See *Franks v. Town of Essex*, 2013 VT 84, ¶ 8, 194 Vt. 595, 87 A.3d 418 (“Words that are not defined within a statute are given their plain and ordinary meaning, which may be obtained by resorting to dictionary definitions.”).

The meaning of word “family” necessarily depends on field of law in which word is used, purpose intended to be accomplished by its use, and facts and circumstances of each case. Most commonly refers to group of persons consisting of parents and children; father, mother and their children; immediate kindred, constituting fundamental social unit in civilized society. A collective body of persons who live in one house and under one head or management. A group of blood-relatives; all the relations who descend from a common ancestor, or who spring from a common root. A group of kindred persons. Husband and wife and their children, wherever they may reside, and whether they dwell together or not.

The word conveys the notion of some relationship, blood or otherwise. In restricted sense, the word “family” may be used interchangeably with household.....

BLACK’S LAW DICTIONARY 604 (6th ed. 1990)(internal citations omitted). While there does not appear to be evidence regarding the occupancy during this timeframe, ultimately it is immaterial as the evidence in the record would contradict a claim that an occupancy consistent with this definition of “family” has occurred consistently even within the last decade.

This brings us to the 1970 definition of family which continued through until November 2000 when the current definition was adopted. That definition of family was analyzed during an appeal before the Vermont Environmental Court, *In re: Appeal of John Mentés*, Docket No. 132-6-00 Vtec (Vt. Env’tl. Div. October 22, 2001 and May 10, 2002). The *Mentés* case stemmed from an appeal by John Mentés of 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. Pursuant to the Court’s interpretation, the 5-6 person occupancy at 2-8 Hickok would not have been legal under the 1970-2000 definition of family either.

Ultimately, the burden is upon the applicant to demonstrate that at one point in time, the 5-6 person occupancy of the units was legal and that 5-6 person occupancy in those units continued without stopping (for a year or more) from then until the present. Appellants have not done so. During the initial hearing, Appellants argued that since the property was an apartment prior to 1970, it should be grandfathered. As laid out above, establishing that the building has been an apartment house since pre-1970 does not make the occupancy of the units grandfathered. To demonstrate that the 5-6 person occupancy is grandfathered, Appellants need to demonstrate what the occupancy was, that it was legal, and that it continued to remain consistently. Appellants have not done that. While it may appear to be a heavy burden, one must keep in mind that one of the primary goals of zoning is to gradually phase out non-conforming uses. See *In re Lashins*, 174 Vt. 467 (2002). Zoning provisions allowing nonconforming uses should be strictly construed. *Id.*