

Department of Permitting & Inspections

Zoning Division
645 Pine Street
Burlington, VT 05401
Telephone: (802) 865-7188
(802) 865-7195 (FAX)

*William Ward, Director
Scott Gustin, AICP, CFM, Principal Planner
Mary O'Neil, AICP, Principal Planner
Ryan Morrison, Associate Planner
Joseph Cava, Permit Technician
Ted Miles, Code Compliance Officer
Charlene Orton, Permitting & Inspections Administrator*



TO: Development Review Board
FROM: Scott Gustin
DATE: October 18, 2022
RE: ZAP-22-3; 164 North Willard Street

=====
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: RL Ward: 1E

Owner/Appellant: Luke Purvis

Request: Appeal of adverse determination ZP-22-389 as to pre-existing nonconformity.

Overview:

This appeal is the latest in a long series of determinations and related appeals spanning about eight years involving asserted nonconformities and/or unenforceable zoning violations as to use of the property, the so-called northern parking area, the so-called southern parking area, and the area immediately south of the barn. None of the appellant's assertions as to nonconformities and/or unenforceable zoning violations have been affirmed by the Zoning Administrative Officer, the Development Review Board, the Vermont Superior Court Environmental Division, or the Vermont Supreme Court. The latest determination request (ZP-22-389), subject to this current appeal, recycles and re-phrases prior assertions of the appellant as to the southern parking area and the area immediately south of the barn. In addition to appeal of the determination, the appellant improperly seeks to appeal his fence permit (ZP-21-275) issued May 26, 2022 that is well beyond its 15-day appeal period and also seeks to appeal a determination request for the neighboring 158 North Willard Street property that was withdrawn by the owners of that property.

The determination (ZP-21-560) prior to the one now under appeal (ZP-22-389) squarely addressed the question of pre-existing nonconforming status of the southern parking area as well as the area immediately south of the barn. The determination was adverse. It was appealed and then withdrawn by the appellant due to a settlement agreement with the city (dated April 4, 2022) that extended the timeline for keeping the unpermitted triplex use and required removal of the southern parking area and conversion to green space except for a small turn-around.

The most recent litigation in the courts, an appeal of an adverse determination (19-0474DT) seeking recognition as a pre-existing nonconformity or as an unenforceable zoning violation for both parking areas and the triplex use, resulted in permission for a duplex use and a requirement to remove and re-grass the northern unpermitted parking area. The northern parking area has been removed and converted to green space.

Litigation prior to that noted above had found that the southern parking area was not an unenforceable zoning violation per the 15-year statute of limitations. Neither unpermitted parking area (north or south) has been recognized as a pre-existing nonconformity or an unenforceable zoning violation. No litigation remains pending.

Given the repetitive nature of the most recent determination request, the principle of finality is significant in this current appeal.

Recommendation: **Uphold adverse determination** based on the following findings:

I. Findings:

The subject property is located within a residential neighborhood along North Willard Street. The home is historic and most recently recognized as a duplex, although the unpermitted triplex has been allowed to remain until May, 2024 subject to the April 4, 2022 settlement agreement with the city. The unpermitted northern gravel parking area has been removed and converted to green space. The southern gravel parking area remains despite the requirement to remove it as of August 1, 2022.

The current determination, subject to this appeal, was completed July 1, 2022 and reads as follows:

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.

An adverse determination was issued July 29, 2022. Due to a technical problem with the chat feature in the permit system, the determination was reconsidered at the applicant’s request on day 4 of the 15-day appeal period. Following the re-opened application period and submission of additional documentation by the applicant, an adverse determination was issued September 2, 2022, and the appeal period resumed with 11 days left. The determination reads:

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 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. 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.

An appeal of this determination was initiated September 9, 2022 (within the appeal period), but the items for a complete appeal required by Sec. 12.2.2, *Appeals of Administrative Officer Decisions*, were not submitted until September 19, 2022 (after the appeal period). The appellant is very familiar with the zoning appeals process and missed the deadline for filing a complete appeal. The appeal should be dismissed as untimely.

If the Development Review Board accepts the appeal as timely, then the merits are considered.

Much of the current determination request involves items that have either already been decided adversely or are irrelevant to the Comprehensive Development Ordinance. It has already been determined that the southern parking area is neither an unenforceable zoning violation nor a preexisting nonconformity. It has also already been decided that the graveled area immediately south of the barn is not a preexisting nonconformity. Whether these areas are used for parking vehicles or turning around is largely irrelevant. Whether these areas physically encroach into setbacks and contribute to excessive lot coverage is pertinent, and neither area has been found to be legitimate. The appellant seems to be arguing that use of these areas for parking and turning vehicles around might somehow be a preexisting nonconformity, although not necessarily the physical graveled conditions on the ground. The appellant is correct that zoning distinguishes between use of a property and the physical development on it. The primary use of the property is residential – currently a triplex. There is no other primary use of the property – such as a parking lot. The parking in the driveway is accessory to the primary residential use. It is uncontested that this residential property contains accessory features such as a driveway for vehicle access and parking. The encroachment of these physical features into setbacks and excess lot coverage resulting from them is the problem, whether vehicles park on them or not.

Fence permit ZP-21-275 was issued May 26, 2022 in association with the above-noted April 4, 2022 settlement agreement dated April 4, 2022. In addition to the fence, the permit approved some other site items noted in the settlement including the rear patio, removal of the southern parking area, and installation of the related vehicle turn-around. The fence permit contained the standard notice of a 15-day appeal period as was not appealed. It cannot be included in an appeal filed months later in September 2022.

The appellant filed a determination request as to site conditions within an easement on the neighboring 158 North Willard Street property (under separate ownership) on September 2, 2022. The request lacked the property owner's consent required for all applications per Sec. 3.2.2, *Application Types and Submission Requirements*, and the applicant was notified of that. Rather than consent to the application, the owners of 158 North Willard Street submitted a written request

to withdraw the application. As such, the application was withdrawn. There is no zoning determination to appeal.

Sec. 12.2.5, *Finality*, of the Comprehensive Development Ordinance prohibits entertaining redundant determination requests of the same matters, lacking change in circumstance (i.e. such as a change in applicable ordinance standards). There has been no change in applicable zoning standards. Most everything in this latest determination request has already been addressed and made final. Only the belated fence appeal and the improper appeal of the determination request on his neighbors' property are new. Both are deficient. The fence permit is well past the 15-day appeal period, and the owners of the neighboring property withdrew the determination application.

II. Recommended Motion:

Uphold the adverse determination.