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TO: Burlington Planning Commission
FROM: Scott Gustin, Principal Planner & Zoning Division Manager
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DATE: February 8, 2021
RE: Non-conformities and zoning violations

Some members of the public, STR hosts, and a few Joint Committee members have expressed an interest in enabling existing, but unpermitted STR's to continue, despite the outcome of the Committee's decisions about the policy going forward. While it may appear to be a solution that balances competing policy interests, there are a few layers to this concept that are important to outline for the Committee:

- It conflates zoning violations and legal nonconformities, which are not afforded the same legal benefits, and
- Legal nonconformities are regulated by zoning, not the Minimum Housing Code.

Basics of Nonconformities vs. Violations

As a foundation for this discussion, it is important to revisit the difference between legal nonconformities and violations. Within the **context of zoning**, land uses, structures, or lots are either:

- **conforming** to the requirements and standards of the zoning ordinance currently in effect, sometimes referred to as "legal"; or
- **legally nonconforming**, meeting a previous requirement or standard that has since been changed sometimes referred to as "pre-existing legal nonconformity"; or
- or **in violation** for operating in a way that is consistent with the standards currently in effect but without a valid zoning permit, or operating in a way that is inconsistent with the standards of the zoning ordinance and for which a nonconformity does not apply. This is sometimes referred to as "illegal".

In zoning, a legally nonconforming use, structure, or lot is allowed to continue or be altered (24 VSA 4412 (7)) within limits set forth in the *Comprehensive Development Ordinance (CDO)*. However, it is a central premise of land use law that over time nonconformities should be eliminated such that all uses, structures or lots within a community become conforming to the requirements and standards of the zoning ordinance. Additionally:

- Legally nonconforming status is predicated on a use, structure or lot being legal at the time it first began, and that it has continued uninterrupted since that time.
- VT statute does not enable a community to force a nonconformity to come into compliance within a specified period of time (known as "amortization"), so as a result a nonconformity may continue in perpetuity as long as it continues uninterrupted.

Regulating STRs To-Date

Another important piece of background is how STRs have been regulated in Burlington to-date.

Most Short term rentals (STRs) presently operating in Burlington are doing so without a zoning permit. Some of those STRs are operating in a way that is inconsistent with the present standards and would not be able to get a zoning permit. Therefore, they are **not operating legally, and as a result do not have a basis for being granted legal nonconforming status.**

STRs are currently regulated in the *CDO* as either a "bed and breakfast" (owner-occupied STRs) or a "hotel/motel" (non owner-occupied STRs). Where a use is not specified in Appendix A, the *CDO* provides that the administrative officer apply a "best fit" approach. Such is the case with STR's. While not a perfect reflection of STRs, this has been the practice since we first became aware of STRs operating in Burlington and it has been upheld by the DRB.

- Over the past 5 years, 29 STRs have been cited with notices of zoning violation (NOV) or warning letters, most of which have been resolved via issuance of a zoning permit by the DRB under the bed and breakfast standards.
- At least one non owner-occupied STR was issued an NOV for operating a hotel/motel without a zoning permit. That NOV was appealed to and upheld by the DRB.

Allowing existing, unpermitted short term rentals

Based on this background:

- To allow unpermitted STR's to continue to operate as-is is not a matter of considering them to be a legally "nonconforming use". To do so would instead require amnesty—or the creation of a specific regulation that permits by-right all of the STRs presently operating in Burlington.
- Granting amnesty is inconsistent with fair and equal treatment for STRs citywide. It disregards those STRs that have obtained zoning permits to-date—either as was required or as a result of an enforcement action—and precludes future STRs from being operated in the same way after the amnesty period.
- Granting amnesty creates a precedent for zoning violations to be cured through "forgiveness" rather than compliance with the standards, which is inconsistent with how zoning violations are resolved in all other circumstances.
- If we were to grant amnesty to currently operating unpermitted STRs, how do we justify it? Further, how would we do it, and how would we know specifically which STRs are affected? At what date would amnesty be established, and over what period of time would amnesty be granted?

Additionally, underlying this issue is a key question about what the Committee sees as the policy goal behind enabling illegal STRs to continue.

The interest in enabling existing, unpermitted STRs to continue, regardless of the policy outcome, is inconsistent with the Committee's earlier reservations about the protections afforded to legal nonconformities. Specifically, the Committee was concerned about recommending a more permissive STR policy because the rights afforded to non-conforming uses aren't flexible enough to pare back (or amortize) the number of STRs if the community deems them to be too widespread. This essentially boils down to giving amnesty to zoning violations, while simultaneously precluding a path to legal non-conformities for STRs that may be established legally in the future.

Chapter 18's Minimum Housing Standards vs. CDO's Zoning Standards

Finally, the above noted concern about the inability to amortize zoning permits was a major factor in the staff's recommendation for the Committee to consider using the Minimum Housing Code as the tool for regulating STRs. Staff was instructed at the last meeting to revise the existing STR proposal to move the bulk of the standards into the Minimum Housing Code.

The legally non-conforming provisions afforded to STR's under zoning do not apply to rental registrations issued under the Minimum Housing Code. Therefore, if the Committee remains committed to this approach, there is not a mechanism for enabling either illegal STRs or legal non-conformities under Ch. 18.