



**CODE ENFORCEMENT OFFICE**

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**TO:** Development Review Board

**From:** William Ward, Assistant Zoning Administrative Officer,  
Code Compliance and Enforcement

**Date:** February 1, 2019

**RE:** Report on **Appeal #19-0436AP**; Appeal of an Administrative Officer's Zoning Notice of Violation (ZV #345151) issued on October 30, 2018, for "Occupying Unit #1 of structure with more than four unrelated adults in an RL zone" for Premises Located at 15-17 Weston Street, Burlington, Vermont.

**Note:** This is the Administrative Officer's report; decisions are made by the Development Review Board, which may overturn or uphold the Zoning Administrator's Decision. **THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.**

**Location:** 15-17 Weston St, Burlington, Vermont

**Tax Lot #** 045-1-239-000

**Appellant:** Keith S. Aaron, Weston Street Trust, Philip Aaron Trustee

**Representatives:** Philip Aaron

**Applicable Regulations:** CDO Articles 2, 3, 5, 12, 13 and VSA §4451

**Appeal # 19-0436AP filed on November 9, 2018.**

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Pursuant to Sec. 12.2.2, Appeals of Administrative Officer Decisions, the grounds stated for the appeal and the relief requested are stated below; the City's response follows each request/ground stated.

**Relief requested by the appellant:**

- Issuance of a permit to use 15-17 Weston Street by five (5) unrelated individuals acting as a "*Functional Family*".

**Asst. Administrative Officer's Response:**

- A "*Functional Family*" status is a determination considered by the City upon request of the Owner and Group requesting to be considered a "*Functional Family Unit*." To date, such a request has not been submitted (application and fee required). The

definition of a “*Functional Family Unit*” status and criteria for consideration are found under Article 13 *Family* definition of the CDO.

### **Alleged Grounds Why Such Requested Relief is Believed Proper under the Circumstances**

- *The Premise[s] are not in violation as set forth in the notice of violation dated October 30, 2018, hereto.*

#### **Asst. Administrative Officer’s Response:**

- Appellant does not contest that there are more than four (4) unrelated adults currently occupying Unit #1 of the Premises, but contends that the tenants comply with the “*Functional Family*” ordinance (Article 13). Appellant does not have an affirmative determination for “*Functional Family*” status for this group currently residing at Premises (or any previously), due, in part, because the Appellant and/or Group never submitted a “*Functional Family*” status request to the City (application and fee required).
- Appellant also refers to the current use as a “Grandfathered ‘pre-existing legal non-conforming use’”, however, Appellant never submitted a determination request asking for the “pre-existing legal non-conforming use” to be grandfathered.
- Appellant states that what he determines to be a “Grandfathered ‘pre-existing legal non-conforming use’” has occurred for a consecutive period of 15+ years. The premise of grandfathered status per the 15-year statute of limitations is flawed. Grandfathering and the 15-year statute of limitations are two separate things. The appellant’s assertion of the 15-year statute of limitations is an assertion that the violation is unenforceable – not that there is no violation. Grandfathered status is predicated on continuous use of the property as it is presently used back to the time before the city’s zoning code prevented occupancy of dwelling units as group quarters – in this case December 21, 1970.
- Pursuant to Environmental Division case law, exceptions to the Statute of Limitations of 24 V.S.A. §4454(a) (*limitations to a zoning enforcement action after a consecutive 15-year period*) includes, but is not limited to, 24 VSA §4470 (b) which pertains to decisions of the Board as well as use violations. The 15-year statute of limitations does not apply to use violations, as use violations are considered to be “continuing” violations, that is, to recur with each day of violation. Therefore, Statute of Limitations §4454(a) wouldn’t apply in this instance as the over-occupancy at issue is considered a use violation.
- Additionally, there is case law that a group of unrelated adults in a unit may be considered group quarters which are not allowed within the “Family” definition. See *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. The terms “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 person occupancy at 15-17 Weston Street 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 person occupancy of the unit was legal and that 5 person occupancy in that unit continued without stopping (for a year or more) from then until the present. Appellants have not done so. 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.*
- In order to grandfather group quarters in this case, the Zoning Administrator would need to determine that occupancy by a certain number of individuals as group quarters has continuously existed since December 21, 1970. Currently Appellant does not have a “Grandfathered pre-existing legal non-conforming use” determination. An application with sufficient supporting material must be submitted prior to such a determination and that has not occurred at this point.
- More than four (4) unrelated adults may be permissible with a “Functional Family” Status, but that requires application and approval. No such application has been submitted. There is an application process for “Functional Family” status, Appellant had not initiated that process.
- *The Premises, prior to the change in zone (RL District), was and has been in continuous and unbroken use by five (5) unrelated individuals living together as a “Functional Family”; and hence it should be granted “after-the-fact-zoning approval” and granted a permit to continue said use.*

#### **Asst. Administrative Officer’s Response:**

- To date, a “*pre-existing legal non-conforming use*” determination (Grandfathered group quarters status) has not been affirmatively approved for Unit #1 of Premises, nor has a “*Functional Family*” status determination been affirmatively approved for the group currently occupying unit #1 of premises.

- *Discriminatory enforcement of the Zoning in the RL District in that 15-17 Weston Street has been issued an alleged violation whereas other properties are permitted to continue to be used for five (5) or more unrelated individual.*

**Asst. Administrative Officer's Response:**

- It is unclear as to which "other properties" Appellant is referring to. The Code Office is currently investigating +/- 25 separate "more than 4 unrelated adults" complaints; one of which is 15-17 Weston Street. If Appellant wishes to submit a written complaint and submit such complaint to the Code Enforcement Office as outlined in Article 2 Sec. 2.7.5 of CDO, an investigation relating to the complaints will be initiated.
- *At the time the property was purchased and for some time prior to the zoning change, it was used for occupancy by five (5) unrelated individuals living as a "Functional Family." Enforcement of the violation, and refusal to grant a permit to use 15-17 Weston for five (5) unrelated individuals living as a "Functional Family", constructs a taking of property without due process of law.*

**Asst. Administrative Officer's Response:**

- To date, a "pre-existing legal non-conforming use" determination (Grandfathered group quarters status) has not been affirmatively approved for unit #1 of premises, nor has a "Functional Family" status determination been affirmatively approved for group currently occupying unit #1 of premises. Only the Appellant has asserted the use has "Functional Family" status. Appellant would need to clarify what he means by "taking of property" for this instance.
- *Under Vermont Law, the 15-17 Weston Street, is entitled to have it use[d] for five (5) unrelated individual[s] living as a Functional Family "grandfathered".*

**Asst. Administrative Officer's Response:**

- Appellant does not cite which "Vermont Law" he is referring to in his appeal, however, he has the right to apply for a "Functional Family" use determination or "Pre-Existing Non-Conforming Grandfathered" determination; applications and fees are due for each request (no such request to date). An affirmative "Functional Family" determination would pertain to the tenants applying for "Functional Family" Status only, any change in each tenant status would require a new "Functional Family" determination (ie. one tenant moves out and a new tenant moves in). Criteria for a "Functional Family" Status is outlined in Article 13 Family definition.

### **Background Information:**

- Built circa 1897
- Keith Aaron purchased property on December 12, 1995 and property was transferred to Keith S. Weston Street Trust, Philip Aaron Trustee, on October 30, 2000.
- Property listed in Assessor's Records as a 3 Family structure, 13 rooms (8 bedrooms), on a 7,500 sf lot; finished area 2,244 sf.
- Rental registration: 3 units, 5 bedrooms Unit #1, 1 bedroom Unit #2, 1 bedroom Unit #3.
- RL Zone, Ward 1E
- Neighborhood Parking District
- No records on file in Planning/Zoning files of a "Functional Family" or Pre-Existing Legal Non-Conforming Use determination

### **CDO Article 2. Enforcement**

#### **Sec. 2.7.5 Observation or Complaints of Violations**

*... Upon receipt of a written, signed complaint alleging a violation of this ordinance, the administrative officer shall investigate the complaint, take whatever action is warranted, and, if requested, inform the complainant, in writing, of actions that have been taken.*  
Informative letter mailed to Appellant

On December 18, 2017 the Code Enforcement received a written complaint alleging

- *Trash and Recycling tote(s) consistently stored on the greenbelt. Cars parking on the sidewalk. First Floor Unit - Occupying structure with more than four unrelated adults in an RL zone, inconsistent with the Family Definition of the Zoning Ordinance.*

On December 29, 2017 an informative letter was mailed to Appellant and Appellant responded, in writing, on January 9, 2018, to the "Occupying structure with more than four unrelated adults ..." allegation (NOTE: Appellant did not address the totes and parking allegations, however, those issues were addressed in the July 29, 2010 executed Agreement thus making Property in contempt of the Agreement; City will address those matters separately from this appeal).

### **CDO Article 4. Enforcement**

#### **Sec. 4.4.5 (d) 5, C, Residential Occupancy**

*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.*

Conditional Use approval would require a zoning application perfected with the appropriate fee and submitted to the Planning/Zoning office before it could be considered.

December 21, 1970 is the date for demonstrating a pre-existing nonconformity (grandfathered) as to occupancy by more than 4 unrelated adults. As such, if grandfathered status is sought appellant shall provide evidence that occupancy of unit #1 was consistently five (5) unrelated adult persons prior to December 21, 1970. See *Diemer Apartments, LLC Denial*, Docket No. 20-2-16 Vtec (Vt. Env'tl. Div. December 29, 2017)<sup>1</sup>.

## **CDO Article 5 Part 1: Uses and Structures**

### **Sec. 5.1.1 (a) Preexisting Uses:**

*Any use lawfully existing as of the effective date of this ordinance shall be authorized to continue solely on the basis of the provisions of this ordinance.*

### **Sec. 5.1.1. (b) Preexisting Non-conforming Uses:**

*Pre-existing uses that do not conform to the requirements of this ordinance shall be subject to the provisions of Sec. 5.3.4.*

### **Sec. 5.3.3. Continuation**

*Except as otherwise specified in this Article, any nonconformity which lawfully existed at the time of passage of the applicable provisions of this or any prior ordinance or any amendment thereto may be continued subject to the provisions of this Part.*

Appellant asserts that the existing use at unit #1 of premises known as 15-17 Weston Street is a “pre-existing legal non-conforming use”. The City has no known records showing that use of unit #1 of premises has consistently been occupied as group quarters by 5 unrelated adults prior to December 21, 1970.

### **Sec. 5.3.4 Nonconforming Uses**

#### **(b) Discontinuance**

A nonconforming use shall not be re-established if such use has been discontinued for any reason for a period of one (1) year or longer. Provided, however, a period not in excess of two (2) years shall be the applicable standard for the re-establishment of discontinued uses in the Enterprise-Light Manufacturing (E-LM) district.

For the Zoning Administrator to issue an affirmative *legal non-conforming grandfathering determination*, the appellant would need to demonstrate five (5) unrelated adult tenants consistently occupied unit #1 of premises since December 20, 1970. Rental housing records indicate, since the City required landlords to submit Rental Registration forms in 2002 Appellant always indicated five (5) residents resided in unit

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<sup>1</sup> There is a reference in Appellant’s material that the *Diemer* matter is pending before the Vermont Supreme Court. It is not, the Vermont Environmental Division matter is closed, the 2017 Environmental Division decision stands. There is a matter, *In re 204 North Avenue NOV (Pierre Gingue)*, Docket No. 2018-340 that is pending. That case stems from a DRB determination that a violation existed at 204 North Avenue for the change of use from a duplex to a triplex without zoning approval.

#1 with the exception of 2003. On or about April 1, 2003 appellant submitted a registration form indicating the number of residents residing in unit #1 was four (4) and on the 2004 registration form appellant reverted back to five (5) residents occupied unit #1; A nonconforming use shall not be re-established if such use has been discontinued for any reason for a period of one (1) year or longer.

## **CDO Article 12. Appeals, Conditional Uses, Variances**

Appellant filed a complete appeal as outlined under CDO Article 12 Sec. 12.2.2

## **CDO Article 13. Definitions**

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 in residential zones are to be occupied by families as defined in Article 13.

### Family Definition:

*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.*

*... 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 ...*

*Nonconforming Use: An existing use of land or building that does not conform to the current use or density regulations for the district in which such use of land or building exists as set forth in Appendix A - Use Table. Such nonconforming uses are those in legal existence at the time of the adoption of the regulations to which they do not conform, including a use improperly authorized as a result of error by the administrative officer or Development Review Board under the finality provisions of 24 V.S.A. §4472. To the maximum extent possible, no entitlement shall be given to those that provide misinformation to City Officials. Permits issued as a result of such misinformation shall gain no legal entitlement regardless of duration of the permit or inaction.*

Unit #1 located at 15-17 Weston Street does not have ““Functional Family” status approval nor has the City grandfathered a “pre-existing legally non-conforming use.”

## **SUMMARY:**

Property is taxed as a tri-plex with five bedrooms in unit #1, one bedroom in unit #2, and one bedroom in unit #3. Complaints include unit #1 is occupied by five (5) unrelated adults, in conflict with the CDO “*Family*” definition. Appellant does not contest unit #1 is occupied by five (5) unrelated adults, however, he asserts the use is grandfathered or somehow acceptable as a functional family. City rebuts a “Functional Family” status or “pre-existing legally non-conforming use” status. Recognition of such status has not, to date, been requested or granted, therefore, current use is in violation of the CDO.

Appellant has argued the “*pre-existing legally non-conforming use*” defense many times during the investigation period and was informed, numerous times, to request a determination for a “Functional Family” or “pre-existing legally non-conforming use” from the City (application, fee, and supporting materials required). On January 9, 2018 Appellant requested an extension date to address the alleged violation; request granted until March 2018. March 2, 2018 Appellant’s Attorney requested the City to delay enforcement action until April 16, 2018; extension granted. June 25, 2018 Appellant was informed, due to lack of meeting extension deadlines, the City would follow up the complaint with an enforcement action; October 30, 2018 a Notice of Violation was issued to Appellant, which was appealed and is under consideration by the DRB today.

The subject apartment (#1) is presently occupied by 5 unrelated adults without zoning approval (ie. “*Functional Family*” or *conditional use approval or grandfathered determination*).

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 in residential zones must be occupied by a family; occupancy of the apartment as group quarters is not allowed.
- Occupancy of dwelling units in residential zones as group quarters became prohibited December 21, 1970.
- Consistent use of the subject dwelling units as group quarters with 5 unrelated adult occupants would need to be demonstrated back to at least December 20, 1970.
- City records do not demonstrate consistent use of the subject apartment as group quarters with 5 unrelated adult occupants back to at least December 20, 1970.

No determination for a legally pre-existing nonconforming use (grandfathering) has been requested or obtained.

## **CONCLUSION:**

The Assistant Zoning Administrative Officer for Code Compliance/Enforcement hereby requests the Development Review Board uphold ZV #345151 as valid. The following stipulations are recommended:

1. Appellant (Owner) shall submit a copy of the lease for unit #1 to the Zoning Office on or by April 1 of each future calendar year.
2. Within 30 calendar days from date of DRB decision, appellant shall reduce number of unrelated adult residents in unit #1 to four to comply with “Family” definition and comply with July 29, 2010 Executed Agreement; **or**
3. Within 30 calendar days from date of DRB decision, Appellant shall submit a complete zoning application to the Zoning Office, with appropriate fee, requesting Functional Family Status or Conditional Use approval for unit #1 of structure; **or**
4. Within 30 calendar days from date of DRB decision, Appellant shall submit a complete zoning determination request, with fee, to the Zoning Office requesting a “Grandfathered Legal Pre-existing Non-Conforming use” for unit #1 of structure, **or**
5. Within 30 calendar days from date of DRB decision, Appellant shall request an agreement from the Zoning Administrator (to be executed within forty-five [45] calendar days from date of DRB decision) that includes reasonable timelines in which to cure the violations noted in ZV #345151.



**Photo of 15-17 Weston Street**