STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 20-2-16 Vtec

Diemer Apartments, LLC Denial	DECISION ON MOTION

This is an appeal from a January 29, 2016, City of Burlington ("City") Development Review Board ("DRB") decision, refusing to recognize a grandfathered use of a multi-unit apartment building at 2-8 Hickok Place (the "Property"), with respect to occupancy of several apartments by more than four unrelated adults per apartment. The Property is owned by Diemer Apartments, LLC ("Appellant"), which consists of member R. Michael Diemer and manager Jill Diemer. Appellant and the City have each moved for summary judgment.

Appellant is represented by Daniel P. O'Rouke, Esq. The City is represented by Kimberlee J. Sturtevant, Esq.

Standard of Review

Since both parties have filed pre-trial motions for summary judgment, we begin our analysis with the directive that summary judgement may only be granted to a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). In determining whether there is a dispute of material fact, "we accept as true [all] allegations made in opposition to the motion for summary judgement, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted).

When the Court receives cross-motions for summary judgment, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332 (citation omitted). We begin our analysis with these legal standards in mind.

Factual Background

The following list of material facts has been compiled from the parties' exhibits and affidavits, as made relevant by the legal precedent referenced in the parties' motions, responses

and replies. They are recited here solely to decide the pending cross motions for summary judgment; our recitation here is not intended to announce factual findings. See Fritzeen v. Trudell Consulting Engineers, Inc., 170 Vt. 632, 633 (2000) (mem.) (noting that it "is not the function of the trial court to find facts on a motion for summary judgment . . ." but rather to await trial to render factual findings) (citing Booska v. Hubbard Ins. Agency, Inc., 160 Vt. 305, 309 (1993)).

1. Appellant's Property is located at 2-8 Hickok Place, Burlington, Vermont.

2. In 1986, the City issued various permits relating to maintenance and construction at the Property. Appellant's Exs. 12, 13.

3. From April to September 1986, the City Department of Public Works ("Department") issued eight building permits for work to be completed on the Property: five building permits, two plumbing permits, and one wiring permit. Appellant's Ex. 13.[1,2]

4. On July 23, 1986, the City Zoning Administrator issued a zoning permit to the prior owners "to remove two windows and replace with matching horizontal vinyl siding; one window on [the] Union St. side and one facing Hickock Place. No change in use." Id.

5. This permit notes the existing use of the Property as "eight residential units." Id.

6. None of the permits issued in 1986 (hereinafter, "the 1986 Permits") identify or reference the then-existing occupancy of the Property's individual units.

7. On May 2, 2003, the City Code Enforcement Office ("CEO") issued a letter called "Zoning Compliance Request for 2-4-6-8 Hickok Place, Burlington, VT" (hereinafter, "the 2003 Letter"). Appellant's Ex. 8. Appellant represents that the 2003 Letter was made as it anticipated purchasing the Property.

[1] There are some inconsistencies with respect to dates on the permits provided by Appellant and those included on the list provided in Appellant Exhibit 12. However, the descriptions of the permit activity are consistent. Appellant's Exs. 12, 13.

[2] Appellant appear to contend that an additional permit to construct or add the units at issue in this appeal was granted at this time, but it cannot now be discovered because the City has misplaced it. (Appellant's Motion for Summary Judgment at 6, filed Jun. 9, 2017); (Appellant's Opposition to City of Burlington's Motion for Summary Judgement at 6, filed Aug. 23, 2017). The City disputes this. (City of Burlington Motion for Summary of Judgment at 11, filed Jul. 8, 2017). Regardless of whether a permit was misplaced, the Court cannot rely on a permit not in the record.

8. The 2003 Letter identified grandfathered parking spaces pursuant to photos and an affidavit provided by the prior owners. Id.

9. The 2003 Letter concludes that based on that determination, landscaping concerns, and a review of their records "there are no outstanding claims by the City that a zoning violation exists nor any zoning violations complaints . . . as of [May 2, 2003]." Id.

10. The 2003 Letter includes a disclaimer stating it "only addresses **ZONING** complaints and violations on file" in the CEO zoning records. Id. (emphasis in original).

11. The 2003 Letter includes "Important Note" stating that no research was done to "insure all appropriate Zoning Permits and Zoning Certificates of Occupancy have been issued" for the Property. Id.

12. Appellant thereafter purchased the Property and has continuously rented out the eight residential apartments. Id.

13. On July 30, 2015, Appellant applied for a zoning determination, asking the CEO to acknowledge the grandfathered occupancy of four or more unrelated individuals in each of four identified apartments. In re 2-8 Hickok Place, Findings, at 2 (City of Burlington Dev. Review Bd. Jan. 29, 2017).

14. On September 30, 2015, the CEO issued an adverse determination. Id.

15. Appellant filed a timely appeal to the DRB, which affirmed the adverse determination on January 29, 2016. Id.

16. The units at issue are currently occupied by four or more unrelated adults. (Affidavit in Support of Appellant's Motion for Summary Judgement at ¶ 2, filed Aug. 23, 2017).

Burlington Comprehensive Development Ordinance

17. In January 1947, the City adopted its first zoning ordinance which defined "apartment house" as "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." City's Ex. H.

18. "Family" was not defined in these regulations. Id.

19. On December 21, 1970, the City adopted "An Ordinance in Relation to Zoning and Planning – Municipal Zoning." (hereinafter, "the December 1970 Ordinance"). City's Ex. G.

20. The December 1970 Ordinance amended the zoning ordinance to define "family" 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.

21. On October 16, 2000, the definition of "family" was amended, in relevant part, limiting the term to "no more than four unrelated adults and their minor children." City's Ex. D.

22. This definition of "family" currently remains in effect. See Appellant's Ex. 16.

Discussion

Both parties have moved for summary judgment on all 9 questions in Appellant's Statement of Questions.

Appellant argues the use of the Property complies with the City of Burlington Comprehensive Development Ordinance ("CDO"), particularly since the City issued various permits in 1986 and the Property's occupancy pursuant to those permits grandfathers the Property as a pre-existing nonconforming use. Appellant further contends that the City had knowledge of the use and is therefore estopped from enforcing the CDO against Appellant pursuant to 24 V.S.A. § 4454 and may not contest the current occupancy. The City disagrees, arguing Appellant has failed to demonstrate that the occupancy was ever legal, and therefore grandfathered, and that the estoppel and preclusion issues raised by Appellant is not properly before the Court.

For the reasons set forth below, the Court denies in part and grants in part the pending motions.

I. Whether the City's 1986 Permits Included the Right to Use the Bedrooms at Issue as an Apartment to be Occupied by More Than Four Unrelated Individuals

Question 3 asks whether the City's "issuance of zoning permits . . . in 1986 to add or construct the 3 five-bedroom apartments and 1 six-bedroom apartment include the right to use and occupy the bedrooms?" [3]

[3] We feel obligated to note that the phrasing used in this Question is somewhat misleading. The City does not argue in this appeal that Appellant should be prohibited from using or renting the 3 five-bedroom and 1 six-bedroom apartments. Rather, it appears clear that the City only asserts that Appellant's use of these apartments

In construing permit terms, the Court relies on the normal rules of statutory construction. Agency of Nat. Res. v. Weston, 2003 VT 58, ¶ 16, 175 Vt. 573. The Court seeks to implement the intent of the drafters, which we ordinarily determine by accepting the plain meaning of the words used. Id. The conditions a zoning board imposes "must be expressed with sufficient clarity to give notice of the limitations on the use of the land, and cannot incorporate by reference statements made by an applicant at a hearing." Appeal of Farrell & Desautels, Inc., 135 Vt. 614, 617 (1978).

The current use of the Property is residential. Appellant argues that the 1986 Permits allow the current residential use of the Property. Appellant contends that the current residential use of some of the apartments by more than four unrelated individuals is permitted because in 1986 the City had received building plans, including floor plans, from the prior owners when it issued the permits.

The City argues that the 1986 Permits do not have the effect of authorizing the current residential use because the permit applications supplied by Appellant did not identify the nature of the occupancy of any unit within the Property. For the reasons discussed below, we agree with the City's assertion.

A property's residential occupancy is limited by the CDO's definition of a "family" or a "functional family unit." CDO § 13.1.2. Determining the occupancy of a property under the CDO is based on the resident's status and relationship, not on the physical lay-out of the rental unit.

Further, to the extent that the City knew of the number of bedrooms within each of the Property's units, which is disputed, the Court cannot find that the 1986 Permits indicate by their plain language an authority to occupy any of the new units by more than four unrelated individuals. In fact, but for the then owner's absence of any reference to who would occupy the new units, it appears more likely that the units would be occupied in conformance with the CDO: for units with more than four bedrooms, the unit could lawfully be occupied by more than four family members as defined by the CDO.

---

must conform with the CDO: that when they are to be occupied by more than four individuals, those individuals must conform to the definition of "family" or "family unit."

This Court has refrained from finding implied conditions in zoning permits. "The Vermont Supreme Court has directed the lower courts to refrain from finding implied conditions in a formal written zoning order that contains express conditions." In re Byrne Trusts NOV, No. 150-7-08 Vtec, slip op. at 14 (Vt. Envtl. Ct. Jul. 15, 2009) (Durkin, J.) (citing Farrell & Desautels, 135 Vt. at 616). In the context of zoning permit requirements, the Supreme Court has held that "[c]onditions that are not stated on the permit may not be imposed on the permittee." In re Kostenblatt, 161 Vt. 292, 299 (1994) (holding that representations made by a landowner and findings of fact by a zoning board that were not expressed as explicit conditions in the zoning permit issued by the board may not be imposed). Therefore, we will refrain from finding an implied affirmative grant of a use within a series of building, plumbing, wiring, and zoning permits. In the present action, the implied grant would be based on the mere alleged knowledge of the building's design in various permits that contain a clear, plain meaning.

Appellants' motion for summary judgement in their favor for Question 3 is therefore **DENIED** and Appellee's motion is **GRANTED**.

II. Whether the Use of the Property is Grandfathered or in Compliance with the CDO

Questions 1, 2, 5, and 6 address the Property's compliance with the CDO and its grandfathered status.

Question 1 asks if "Diemer's use of [the Property] which includes 3 five-bedroom apartments and 1 six-bedroom apartment in use since 1986, compl[ies] with [the CDO]." Question 2 asks if the use at issue at the Property is permitted or grandfathered under the CDO. Question 5 asks whether the 1970 Ordinance applies to the current use of the Property. Question 6 asks "[i]f the City . . . had knowledge of the use of [the Property] since 1986, are they barred from denying a request that the use be grandfathered?"

Appellant argues that the Property's use is grandfathered as a nonconforming use under the CDO.

The term "grandfathered" refers to legally pre-existing uses that do not conform with present bylaws, but complied with all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws. 24 V.S.A. § 4303(15). Determining if a use is grandfathered is

based on proving that its use was legal when it began. See Purvis Nonconforming Use, No. 45-5-15 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jan. 27, 2016) (Durkin, J.).

Appellant argues that the relevant date for determining if the use is grandfathered is October 2000 when the "family" definition was amended. Appellant asserts the Property's use legally pre-dated October 2000 because the City issued permits on the Property in 1986. In contrast, the City argues that December 21, 1970 is the relevant date for grandfathering analysis, as the Property did not comply with the City's definition of "family" or "functional family unit" prior to December 21, 1970. We agree with the City's assessment of the operative date.

The definition of "family" and "group quarters" as it existed in the December 1970 Ordinance was applicable to the dwelling at issue in an appeal decided in 2002 by this Court. See In re John Mentes. No. 132-6-00 Vtec (Vt. Envtl. Ct. May 10, 2002) (Wright, J.), *available at* https://www.vermontjudiciary.org/sites/default/files/documents/ecrt132600docmsj.pdf.[4] At that time, the term "group quarters" was undefined. City's Ex. G. The Mentes Court concluded that a dwelling unit occupied by seven unrelated adult students more likely constituted "group quarters" and, that being the case, their occupancy in a dwelling unit was in violation of the CDO. Mentes, No. 136-6-00 Vtec at 3 (May 10, 2002). In reaching this conclusion, the Court compared shared housing to those examples provided as prohibited group quarters such as dormitories, sororities, and fraternities. Id. at 2. The act of living as a group, sharing common spaces and household responsibilities make shared student housing like the statutorily prohibited examples of "group quarters." Id. Mentes clarified that a group of seven unrelated students sharing household chores and responsibilities was prohibited pursuant to the definition of "group quarters" prior to October 2000.

Based upon the Court's analysis in Mentes**,** and our determination that the 1986 Permits do not authorize the occupancy at issue in this appeal, we conclude that Appellant's Property was not legally occupied prior to 2000. Appellant, therefore, must demonstrate that the current

[4] Appellant argues that Mentes does not apply to the present action as the type of dwelling at issue is different. However, at issue in both this action and Mentes is the definition of "family" and "group quarters" as it relates to rental units since December 1970. We therefore conclude that Mentes is applicable.

use has been continuous since before the December 1970 Ordinance became effective. In reaching this conclusion, the Court can answer Question 5 as a matter of law affirmatively.

Appellant also raises the argument that the Property's use is a preexisting nonconformity. The analysis of a property's preexisting use is highly factual. In general, landowners have the burden of proving that their use is preexisting and was lawful under the zoning provisions before the applicable amendment. Town of Sandgate v. Colehamer, 156 Vt. 77, 87 (1990) (citation omitted). Appellant has failed to provide the necessary facts to show that the Property qualifies as a preexisting nonconforming use since before December 1970. Therefore, the Court cannot determine if the use is grandfathered and Appellant are not presently entitled to judgment as a matter of law.

However, the Court must also give Appellant's all reasonable doubts and inferences when considering the City's cross motion on this same Question. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5. The City has also failed to conclusively disprove a lawful preexisting use. Therefore, as the record has not been fully developed on this issue, both the Appellant's and the City's motions for summary judgment on Question 2 must be **DENIED**. We look forward to the parties' respective factual presentations on this legal issue at trial.

As the Court cannot conclude the Property is grandfathered, and the units at issue are currently occupied by more than four unrelated adults, the Court must conclude that the use of the Property is not currently in compliance with the CDO. Therefore, summary judgement with respect to Question 1 in favor of the Appellants is **DENIED** and the City's motion is **GRANTED** on that same Question.

Finally, Appellant does not cite, and the Court is not aware of, any authority supporting their assertation that knowledge by a municipality of the Property's nonconforming use is relevant when determining if a use is a preexisting nonconforming use. As such, the Court can answer Question 6 in the negative as a matter of law.

III. Whether the Court has Jurisdiction to Hear Issues Related to Enforcement

Question 7 asks if the City is "estopped from commencing an enforcement action for use of the 3 five-bedroom apartments and 1 six-bedroom apartment?" Question 8 asks if "24 V.S.A. § 4454 appl[ies] to Diemer's use of the property?"

In addition to arguing that the City is estopped from enforcing occupancy violations at the Property by the issuance of permits in 1986 and correspondence in 2003, Appellant argues the City's knowledge of the Property also precludes any enforcement action. The City, in their motion, argues that both Questions address actions outside the scope of the present appeal. We agree.

This Court has a limited scope of jurisdiction in this specific appeal. We do not have authority to consider issues on which the municipal panel did not conduct a hearing or render a substantive decision. Simendinger v. City of Barre, 171 Vt. 648, 652 (2001). The Court only has jurisdiction to address the issues that the DRB had the authority to address when considering the application before it. See In re Torres, 154 Vt. 233, 235-36 (1990); V.R.E.C.P. 5(g).

The present appeal is based on determining the grandfathered status of the Property; it is not an enforcement action. Because the DRB only considered whether the Property is grandfathered, this Court is without authority to consider enforcement issues.[5] Therefore, Appellant's motion for summary judgement with respect to Questions 7 and 8 is **DENIED** and the City's motion as to those same Questions is **GRANTED**.

IV. Whether the City is Estopped from Refusing to Approve the Use of the Bedrooms

Question 4 asks if the City should be "estopped from refusing to acknowledge, allow or grandfather the use of the 3 five-bedroom apartments and 1 six-bedroom apartment after the City issued permits to add or construct the 3 five-bedroom apartments and 1 six-bedroom apartment in 1986?"

A party seeking equitable estoppel must satisfy four elements:

> (1) The party to be estopped must know the true facts; (2) the party to be estopped must intend that his conduct shall be acted upon by the party seeking estoppel; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely to his detriment on the estopped party's representations.

[5] The Court notes Appellant's argument that the City's failure to approve the grandfathered status of the has the effect of an enforcement action. While the failure to obtain approval for the Property's status may hinder the sale of the Property, the Court cannot find the effect of non-approval to be enforcement for jurisdictional purposes.

In re Langloi/Novicki Variance Denial, 2017 VT 76, ¶ 13 (citations omitted). When a party seeks to use the doctrine against the government, the party must also demonstrate "the injustice that would result from denying the estoppel outweighs the negative impact on public policy that would result from applying estoppel." In re Griffin, 2006 VT 75, ¶ 18, 180 Vt. 589.

Appellant has failed to present sufficient undisputed facts for the Court to determine if they are entitled to relief under the doctrine. For example, there is a dispute as to whether the City knew of the intended occupancy of the units at issue by more than four unrelated individuals when it issued the 1986 Permits. Further, the record has not been developed as to the issue of the City's intent that the 1986 Permits would be relied on by the prior record owners to permit the occupancy by unrelated individuals or the prior record owner's knowledge that such a use was potentially in violation of the CDO, and reliance on them by the prior owner to permit the occupancy. Therefore, both Appellants' and the City's motions for summary judgment for Question 4 are **DENIED**.

V. Whether the May 2, 2003 Letter Permits the Property's Use

Question 9 asks whether the 2003 Letter "confirm[s] or permit[s] the use of the 3 five-bedroom apartments and 1 six-bedroom apartment?"[6]

Appellant argues that the letter is a certification of compliance and, therefore, a municipal land use permit that allowed the use of the bedrooms, by certifying there were no outstanding zoning violations at the time. Therefore, Appellant draws the conclusion that occupancy of these apartments by unrelated individuals was not in violation of the CDO. Further, Appellant argues that the letter was an appealable decision that has become final pursuant to 24 V.S.A. § 4472 and, therefore, the City cannot now enforce any violations that existed on or before May 2, 2003, as it failed to appeal the decision.

The City disagrees, arguing the letter only addresses zoning violations and complaints on file in the zoning records. Further, the City argues the plain language of the letter's note stating that "[t]his memo does not include research of zoning permit files to insure all appropriate Zoning

[6] Appellant characterizes the letter as a Certificate of Occupancy in their Statement of Questions. Appellant acknowledges in its motion for summary judgement this was a mistake and stated the document as a zoning compliance letter.

Permits and Zoning Certificates of Occupancy have been issued for the above property" means the letter could not be regarded as a certification that the occupancy of any apartment at the Property by four or more unrelated individuals (something that the record before us does not reveal was ever disclosed to the City) was somehow lawful. Zoning Compliance Request for 2-4-6-8 Hickok Place, Burlington, VT.

Before determining if § 4472 permits the occupancy, the Court must determine what the letter decides. We first note that, when interpreting permit terms, the Court seeks to implement the intent of the drafters, which we ordinarily determine by accepting the plain meaning of the words. Weston, 2003 VT 58, ¶ 16.[7] The 2003 Letter determines that the identified parking spaces were grandfathered.

Reading the letter in its entirety, including the disclaimer and note about the scope of the City's review when issuing it, the Court concludes the letter does not operate as a certificate of compliance pursuant to § 4303(11) such that the City could not subsequently enforce zoning violations potentially in existence prior to May 2, 2003.

In the 2003 Letter, the CEO makes a determination as to the grandfathered status of parking spaces identified by the Property's prior record owner. While the letter indicates there are no outstanding claims on file with the City, it explicitly states no on-site inspection was conducted and no research into the permit files regarding Certificates of Occupancy or Zoning Permits related to the Property was done. Id. Because the letter expressly limits the scope of review conducted before issuing the letter, the Court cannot conclude that no zoning violation existed at the Property at the time or that the letter permitted the use of the Property at issue in this appeal. The Court can only conclude that, based on the plain language of the letter, that no outstanding complaints or claims were in the City's files. Id.

To the extent Appellants argue the letter is an unappealed decision now final pursuant to 24 V.S.A. § 4772, the Court notes that, while the term "decisions" is not defined statutorily, "the word connotes finality . . . if a 'decision' does not resolve an issue it is not really a decision, but mere commentary or analysis." Saxon Partners LLC BJ's Warehouse Sketch Plan, No. 5-1-16 Vtec,

[7] While this precedent relates to the interpretation of municipal permits, we believe it applicable to our quest to interpret the language of the 2003 Letter.

slip op. at 2 (Vt. Super. Ct. Envtl. Div. Jul. 15, 2016) (Walsh, J.). Commentary, guidance, or other non-binding discussions is not appealable under 24 V.S.A. § 4471(a). Id. (citations omitted).

As discussed above, the letter did not reach a final decision regarding potential zoning violations not on file with the City. To the extent the letter is an unappealed decision, it is final only regarding the specific issues addressed, including the grandfathered status of the identified parking spaces and that, based on limited information, no zoning violations were on file with the City at the time. The letter did not reach a final decision regarding the grandfathered status of the occupancy of some of Appellant's apartments by four or more unrelated individuals. We therefore conclude that the City is not precluded from contesting the use of the Property at issue in this appeal pursuant to 24 V.S.A. § 4472.

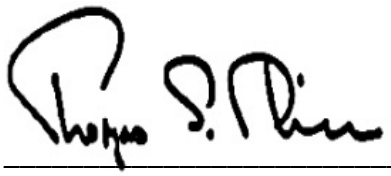
For these reasons, the Court **DENIES** Appellant's motion for summary judgment as to its Question 9 and **GRANTS** the City's motion for summary judgment as to that same Question.

Conclusion

For the reasons set forth above, the Court answers Question 5 in the affirmative and Question 6 in the negative as a matter of law. Further, Appellant's motion for summary judgment on all questions is **DENIED**. The Court **GRANTS** the City's motion for summary judgment on Questions 1, 3, and 7 through 9. The Court **DENIES** the City's motion on Questions 2 and 4. Therefore, Questions 2 and 4 will be resolved at trial.

The Court will schedule a pre-trial conference to discuss final trial preparations with the parties.

Electronically signed on December 29, 2017 at Burlington, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division