

ONEONTA, NEW YORK – FEBRUARY 25, 2013 - 7:00 P.M.
REGULAR MEETING ZONING AND HOUSING BOARD OF APPEALS PG. 1

PRESENT: Chair Ed May
Commissioner Joseph Ficano
Commissioner Karen Geasey
Commissioner Louis Shields
Commissioner John Rafter
Commissioner Paul Robinson
Council Member Bob Brzozowski
ABSENT: Commissioner Robert Lawson

Chair May called the regular meeting to order and asked the Clerk to call the roll.

CORRESPONDENCE

City Clerk Koury stated there was no correspondence.

APPROVAL OF MINUTES

MOTION, made by Commissioner Robinson and seconded by Commissioner Rafter, that the board approves the Zoning and Housing board of Appeals minutes of the regular meeting held January 28, 2013.

Voting Ayes: Chair May
Commissioner Ficano
Commissioner Geasey
Commissioner Shields
Commissioner Rafter
Commissioner Robinson

Noes: None

Absent: Commissioner Lawson

MOTION CARRIED

Approval of the Zoning and Housing board of Appeals minutes of the regular meeting held January 28, 2013

OLD BUSINESS

10 Irving Place (288.18-1-94), Brody Smith – Required Action: Code Interpretation: The applicant is requesting a code interpretation of the Zoning board of Appeals. The attached garage has been converted into two (2) bedrooms and the 3rd floor attic into one (1) bedroom without first obtaining a building permit from the Code Enforcement Office. In addition, the occupancy of this property is limited to three (3) unrelated individuals but is being occupied by more. (Tabled 10/22/12 to allow applicant to research his information and report back to the board)

PUBLIC HEARING ON REQUESTED VARIANCES

The Notice of Public Hearing appeared in The Daily Star on Thursday, February 17, 2013.

78 East Street: Matt Bechtold wishes to build an addition that will be approximately 370 square feet onto the back of the house where there is an existing porch and deck. The addition will include a bedroom, bathroom, laundry room, and mud room. A new rear deck is proposed to be approximately 300 square feet.

Chair May stated the board would address new business on the agenda dealing with 78 East Street.

NEW BUSINESS

The following Memorandum, dated February 11, 2013, was received from Ordinance Inspector Ferris:

*SUBJECT: PROPERTY ADDRESS: 78 East Street
 TAX MAP #: 288.14-3-19
 APPLICANT: Matt Bechtold
 PROPERTY OWNER: Berenice S Knight
 ZONING DISTRICT: R-2: Moderate Density Residential District
 # OF DWELLING UNITS: 1*

PROPOSAL: The applicant wishes to build an addition that will be approximately 370 square feet onto the back of the house where there is an existing porch and deck. The addition will include a bedroom, bathroom, laundry room, and mud room. A new rear deck is proposed to be approximately 300 square feet.

SKETCH PLAN CONFERENCE:

300-74 E: At the request of the applicant, a sketch plan conference may be held ... to review the basic site design concept and generally determine the information to be required on the site plan.

SHORT ENVIRONMENTAL ASSESSMENT FORM (SEQR):

300-75 F: Compliance with SEQR. ... shall not take final action on any site plan proposal until all SEQR requirements have been addressed in accordance with 6 NYCRR Part 617.

SITE PLAN REVIEW APPLICATION:

300-7 H Maximum allowable impervious surface coverage. Impervious surface coverage of more than ½ acre or of more than 30% of the lot requires site plan review. Impervious coverage includes all impervious surfaces such as structures, parking areas, driveways, and pedestrian walks.

PERMITTED / REQUIRED

30% = 1,500 square feet

EXISTING / PROPOSED

Approximately 2,310 square feet

AREA VARIANCE:

300-88 C (4): Area variance. In cases where relief is sought by area variance, the Zoning board of Appeals may grant such area variance as defined by New York State Law.

CODE SECTION(S)

300-94

PERMITTED / REQUIRED EXISTING/PROPOSED

Minimum Lot Size:

6,000 Square Feet

Approximately 5,000 square feet

Minimum Side Setback:

10 feet

Left = approximately 3 ½ feet

Forty-eight (48) letters were sent out by the Clerk's Office to property owners residing within 200 feet radius of the property in question and no responses were received.

Chair May asked whoever was present to represent the property please state their name, address the board and explain what was being requested.

Berenice Knight introduced herself and said her address was 78 East Street.

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She stated that her family had decided it was time for her to be living on one floor, so they would like to build an addition onto the back of her house that would include a bedroom, bathroom and laundry room. She stated she had spoken to all her neighbors and all of them agreed it would be a good idea.

Chair May said this project required a short form SEQR, an area variance and a setback variance. Chair May then asked board if there were any questions or comments. The board agreed that there were no questions and the project was a good one.

Chair May said hearing no negative comments from the board asked if there was anyone in the audience who wished to speak either for or against this application. Hearing no objection from the audience Chair May stated the board would address the SEQR requirements and asked City Clerk Koury review the short form SEQR.

City Clerk Koury reviewed the short form SEQR and the board stated there was no adverse impact from the project.

Chair May stated there were no objections and suggested the board issue a negative declaration. He asked for a motion.

MOTION, made by Commissioner Robinson and seconded by Commissioner Geasey, that the board makes a negative declaration on the SEQR and approved the issuance of an area variance for the construction of an approximate 370-foot addition on the back of the house, along with an approximate 300 square foot deck.

Voting Ayes: Chair May
Commissioner Ficano
Commissioner Geasey
Commissioner Shields
Commissioner Rafter
Commissioner Robinson

Noes: None

Absent: Commissioner Lawson

MOTION CARRIED

Chair May told Ms. Knight she would be getting a variance for area and side yard setback for the project. He said the project was still required to go through the Code Enforcement Office and she had to apply for the necessary building permits needed to accomplish the project and meet all City and State Building Codes.

Ms. Knight thanked the board very much.

Chair May said the next item on the agenda was 10 Irving Place.

OLD BUSINESS

10 Irving Place (288.18-1-94), Brody Smith – Required Action: Code Interpretation: The applicant is requesting a code interpretation of the Zoning board of Appeals. The attached garage has been converted into two (2) bedrooms and the 3rd floor attic into one (1) bedroom without first obtaining a building permit from the Code Enforcement Office. In addition, the occupancy of this property is limited to three (3) unrelated individuals but is being occupied by more. (Tabled 10/22/12 to allow applicant to research his information and report back to the board)

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The following Memorandum, dated October 11, 2012, was received from Robert Chiappisi, Code Enforcement Officer

SUBJECT: **PROPERTY ADDRESS:** 10 Irving Place
 PROPERTY OWNER(S): Robert Martella
 TAX MAP #: 288.18-1-94
 APPLICANT(S): Brody Smith
 ZONING DISTRICT: R-2: Moderate Density Residential District
 # OF DWELLING UNITS: 1

PROPOSAL: The applicant is requesting a code interpretation by the Zoning board of Appeals. The attached garage has been converted into two (2) bedrooms and the 3rd floor attic into one (1) bedroom without first obtaining a building permit from the Code Enforcement Office. In addition, the occupancy of this property is limited to three (3) unrelated individuals but is being occupied by more.

300-88 C (1): Interpretation. On direct appeal from a determination of the City Code Enforcement Officer, the Zoning board of Appeals may hear and decide questions where it is alleged there is an error in any order, requirement, decision or determination made by the City Engineer involving the interpretation of the zoning ordinance.

As of this date, no documentation supporting the applicant's claims has been submitted to the Code Enforcement Office for review.

According to the Assessor's Office, this property has three (3) bedrooms and an attached garage. The records also show that there are two (2) stories and the attic is not finished. According to the records in the Code Enforcement Office, this property was never registered as a residential rental property when Saint Mary's Church, therefore any use of the property for rental was not legal no matter how many people lived there. In addition, no building permit applications were submitted or approved to convert the attached garage or the attic into bedrooms.

When Ralph Munoz purchased this property in 2005 a property transfer letter was sent to him requesting that the owner complete the enclosed property use certification form and submit it to the Code Enforcement Office. This form was never submitted and a letter was also sent to him ordering him to discontinue the use of the property as a rental property when the Code Enforcement Office discovered that it being used as such. Therefore, any use of the property for rental was not legal no matter how many people lived there. In addition, no building permit applications were submitted or approved to convert the attached garage or the attic into bedrooms. The real estate listing for the sale of this property by Ralph Munoz shows that there were three (3) bedrooms and there is a picture of the attached garage. The listing also shows that there are two (2) stories and the attic is not finished.

When Robert Martella purchased the property in 2009, he submitted a property use certification form in March. That form indicated that the property was being used as a rental and that the number of stories being occupied as habitable space was two (2). The question on that form asking if the attic was being used as living space was not checked. In question requesting the number of unrelated individuals residing in that dwelling unit was a check mark in the #1 box not a number of people. Another property use certification form was submitted in November 2009. That form indicated that the property was being used as a rental and that the number of stories being occupied as habitable space was three (3). The question on that form asking if the attic was being used as living space was checked. In question requesting the number of unrelated individuals residing in that dwelling unit was a check mark in the #6 box not a number of people. When the property was inspected by the Code Enforcement Office on 11/08/2010, the conversion of the attached garage into two (2) bedrooms without a building permit was cited. That report also ordered the occupancy to be reduced to three (3) unrelated individuals. A building permit application was submitted for the conversion of the attached garage into two (2) bedrooms. The application was denied because not all of the

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documentation required to do a full zoning and building code review was submitted to the Code Enforcement Office. When the property was inspected by the Code Enforcement Office on 08/23/2011 and 04/17/2012, the conversion of the attached garage and over occupancy was cited again. The use of the 3rd floor as a bedroom/habitable space was also cited on the 04/17/2012 inspection report and again on the 06/11/2012 inspection report.

PLEASE NOTE: This property is registered as a residential rental property. At this time, there is not a valid Certificate of Substantial Compliance for this property. A current requirement schedule is attached.

Chair May recognized Attorney Brody Smith.

Attorney Smith thanked Chair May and stated the first order of business was about the discrepancy in the zone classification for the property. Mr. Smith presented some variations of the district from different zoning maps to highlight the differences in the color for the zone in question on the map.

Chair May asked Attorney Smith if his assertion was that that fell at that time under an RD-4 or an RD-5 zone.

Attorney Smith said High Density Residential according to his assertion in his letter submitted to the board. He stated that the use of property for housing more than three unrelated persons pre-dated the changes to the Zoning Code that use may continue. Mr. Martella owned this property prior to and rented to students prior to the amendments, the most recent amendments to the Zoning Code, changing the Zones and changing this District. Therefore, pursuant to Judge Bernier's decision he stated that it was an allowed use, and should continue. He stated he had also provided in the record, a copy of Judge Bernier's decision, the application and the drawings of the property.

Chair May stated that Attorney Smith had not indicated whether he was applying to receive site plan review and approval for the uses he had asserted and asked if he had any such approval.

Attorney Smith said he did not have any proof of site plan review or approval. As he had mentioned in the letter that the use pre-dated even his client's ownership of the property. The prior owner had also used the house for college students. The prior owner had been the church, which used the property to house unrelated persons employed by the church. Attorney Smith said he was not aware of a "traditional" family occupying the house in recent memory. He said he was sure that at some point, there was, but it had been at least four owners ago. So as long as the use pre-dated the change in the law, the use was allowed to continue. He said he understood there were procedural issues that may or not have been in place twenty years ago.

Chair May said this was not a procedural mistake. If the use of the property was an illegal use, it could not carry forward and now claim a grandfathered use; the problem the board had to address.

Attorney Smith told Chair May he understood. He did not believe the use was illegal. The property had never been cited, there was just no evidence that it was illegal. It was a use that had persisted for many, many years.

Chair May asked if it was Attorney Smith's assertion that because it was an uncited illegal use, that it was now a legal use.

Attorney Smith said no, he just thought that would be evidence of it being legal since the Code Enforcement Office inspected it every year. If it was illegal one would think it would have been cited.

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Chair May said the Code Enforcement Office records did not reflect what he presented and that was the common ground with the maps. The board reprinted maps and got clearer maps, where the colors could be seen. His concern is whether Attorney Smith wanted to make the assertion that it was RD-5 or an RD-4 it would be one of the two and that that use was in fact illegal either with your client or a previous owner of the property that you cannot then claim grandfathering based on illegal use.

Attorney Smith said he agreed.

Chair May that was the point he had reached. He then asked Commissioner Robinson if he had questions.

Commissioner Robinson asked when the changes to the garage and attic into bedrooms had taken place.

Chair May said frankly that was another matter.

Commissioner Rafter asked were there building permits.

Chair May said there were no building permits issued. The only rental registry form filed by the applicant in this case was filed as a single family home for himself.

Commissioner Robinson said it also states in the minutes from the previous meeting that it was unregistered as a residential rental property and no building permits issued, so the rental was not legal. He did not know why the board was even getting it.

Chair May said well that was the case he had just laid out.

Attorney Smith just in his impression the only permit application listed was a student rental it is in that pack of papers.

Chair May said that was the one submitted in 2010.

Attorney Smith said correct

Chair May stated it was denied and unapproved and it was only an application. He thought there was a high bar to get over. There could be an argument about building permits and area setbacks and all the other accoutrements that could inter themselves to this property; but at the end of the day, Attorney Smith's poor assertion was grandfathering. Moreover, he did not know how Attorney Smith could ask the board to grandfather an illegal action. It did not matter whether it was his client or a previous owner, or another previous owner or the nuns that had illegally occupied the property. He meant that was the problem.

Attorney Smith said he agreed with Chair May's summary of the law. He did disagree with facts. He did not believe the use was illegal and there was no evidence in the record that indicated that it was illegal. Attorney Smith stated he and his client were not required; the City knew the use had existed clearly for years prior to the change in the Code making it illegal. They were not required to prove in a sense their innocence. He stated they had not done anything illegal and they were not cited for doing anything illegal until the code had changed.

Chair May said there was a certain point of awareness that had to come into play as well, as to whether it was illegal or not. The Code Enforcement Office did not go into to every building; every day, every week, every month, they went in on application. They went in on rental registries, and then they went in based on an annual inspection program. The City relied on the property owners to properly identify the use of their property and then the City verified. The City was not finding any history of any of this. He said an analogy that he could draw and maybe Attorney Smith could help, he may be a lot smarter about this than Chair May. People sped up

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and down the interstate every day, not everyone got a ticket but some did get a ticket so, did that mean the ones that didn't get a ticket were operating legally or illegally and not being caught.

Attorney Smith said he understood the analogy. He thought that it did not fit the facts in this case, respectfully, because this house when his client purchased it was being used as a student rental for years. It had been used in the exact same way. He just didn't think there would be any reason his client to believe, to go back to the seventies, to dig out, to try to find a site plan approval from decades past. It just seemed like an odd thing to expect someone to do.

Chair May stated the City had tried to do it and could not find it. He meant to say the City had searched the City records and could not find any use. Chair May asked Code Inspector Hester if he had seen anything subsequent to their meeting.

Code Inspector Hester said no.

Chair May said the City found no proof of use for this property; that had been used as a multiple family rental or high density residential.

Commissioner Robinson said it did not matter if it was a rental; it was illegal because it was not registered, as a rental so just because he bought it and it was rented, did not make it legal.

Chair May said he understood that.

Attorney Smith said there was two questions here though, zoning versus failure to obtain a site plan. It was the use, the property was zoned for that use. He said it would be different if the property were used for a rendering or textile mill, because that would have been an illegal use. The use to which it was put was legal. The board could say there should have been site plan approval perhaps, but that did not change the fact that the use was legal, and implemented.

Commissioner Robinson said it was illegal if it had not gone through the Code Enforcement Office.

Commissioner Robinson stated even though the zoning provided for it until it went through the Code Enforcement Office and got a certificate of compliance and registered as a rental it was not legal.

Attorney Smith said he understood what the Commissioner was saying and knew what he was saying was true, but the concept of prior system in use was being changed. Yes, it was required to go to the Code Enforcement Office to get a site plan review to have a boarding house. He agreed with him, but the zoning concept, the way the courts looked at a use, the way courts evaluated whether a use was "legal prior system use" thus, the grandfather the Chair was referring to would be one question. Whether the property complied with Site Plan approval, with the Planning board was an entirely separate question, separate from the zoning question. He then said he respectfully submitted that the zoning use meaning, to be used as a boarding house; to be used as multiple family dwelling was a legal prior existing use and that was what it was being used for therefore it should be a prior existing use.

Chair May said he wanted to clarify the use Mr. Smith knew attached to the property. He stated proper site plan review and approval had never occurred so there was no prior use found in the City records back as far as the City has records. That indicated that 10 Irving Place was in accordance with an RD-5 and/or RD-4 under the provisions that stated uses permitted subject to site plan review and approval. Absent of site plan review and approval there was not a permitted use, even though that use might have been permitted in that zone, with site plan review and approval.

Attorney Smith said he understood what Chair May was saying and asked Chair May if he understood what Attorney Smith was stating.

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Chair May stated he did.

Attorney Smith said and reasonable people could disagree. He respectfully disagreed and maybe he would use a different analogy than the speeding analogy. If the use was for residential and it did not have a smoke detector that was illegal therefore, the use was illegal, to rent houses to students if the smoke detector did not work, that would invalidate the use. Though that meant that there were certain procedural steps that were taken to it was doing something being done illegal at the time there wasn't a fire door and there should have been, there wasn't a window, the window was broken, those are illegal according to Code Enforcement so he thought that it was important, he knew the code. He stated he knew the courts would agree with him to separate the idea of code violations and procedural missteps versus uses that pre-existed a zoning change. And the last thing he wanted to say, unless there were questions, was that the context of prior existing use, it would be helpful to understand in New York Zoning started in the early 1900's and initially the State zoned: industrial, commercial, residential and if the property did not fit within one of the zones the people had to stop. There was a flood of court cases because the actions were unconstitutional takings, so the City of New York was going to have to pay people for taking away that person's right to run a garage or service station in the same spot where it had always been able to be before because now it was residential. So what the City did and what municipalities did was took a step back said there was going to be acknowledgement of uses, as the uses existed. Not whether the service station was in compliance or any of those other things. That use existed prior to this change in the law therefore to avoid an unconstitutional taking and municipalities having to pay, compensate those owners for an unconstitutional taking, there was going to acknowledge the uses that were there, once the use stopped; the property had conform with the zoning. The idea being, that those uses were going to be phased out. So that was the concept of a prior existing use, so it was important to separate uses from code violations and what Chair May was saying was true, one of the factors that had to be shown was that the prior existing use was a legal use. Here the question would then be if posed to a Judge was it legal prior to the change in the zoning code, to use this property as a boarding house, as a multifamily residential. He asked if it was legal for that person running that garage or service station to use that garage or service station before the change in the code if there are already land use laws at that point that said you could not have a garage or service station. The court would state there was not going to be a retroactive validation of that. So that was the actual, he thought the best analogy to be used because that was the root of the concept, of prior existing use in New York. He thought that was what the board should apply. He understood that there were different opinions and he respected those and would obviously respect whatever opinion the board thought.

Chair May said all he could try to was to redirect him to the City Code and the first line under Paragraph B. As he had quoted that the use was permitted subject to and the City could not find any subject to anywhere in their records. Now if Attorney Smith had access to records that the City did not have, he asked that he provide them.

Attorney Smith said he did not.

Chair May recognized Commissioner Rafter.

Commissioner Rafter said that summed it up. There was an assertion that this was used in a certain way but there was no evidence to that effect.

Attorney Smith said Mr. Martella was there to provide testimony if there were any questions.

Commissioner Rafter said the board had cases where people were told by a realtor or told by a prior owner that this was fine, and it could be done. Without the buyer doing due diligence and finding out from the City authorities whether it was in fact legal or not for that to do, populate, make drugs, whatever it might be and the buyer believed the seller then it became a self-inflicted hardship because it was not checked as to whether this was used in this way. Whether the board did not see anything as of the investigation and Attorney Smith could not provide anything, that

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continued even having the owner come to the meeting willing to testify; or he did not even know, to testify without any evidence of the numbers, what was going on etc. He said people believed what they want to believe; people said what they wanted other people to believe. This may have been an unfortunate situation but without any proof, he found it difficult to listen to, this was what was done, because it was another version of history that had no substance that could be provided and he would leave it at that.

Attorney Smith said Mr. Martella acquired the property in October 2009. In order for that to be a prior existing use, he had provided that as background for the board. He said from a legal point of view the use just needed to pre-date the change to the law by one day. Mr. Martella had owned the property nearly two years before the zoning changed. Attorney Smith said Mr. Martella was present and asked him what the property had been used for since he had purchased it in October 2009.

Mr. Martella replied it had been a student rental.

Attorney Smith asked how many people had lived in that student rental.

Mr. Martella replied last year there had been five.

Attorney Smith asked him how many, the year before that.

Mr. Martella replied five, Code Inspector Hester had been there; was a copy of when the house was inspected because he had a copy at home. Code Inspector Hester had come to the house and he did inspect the house and there were some violations on the house that had to be rectified and they had been rectified so Code Enforcement would have a copy of that, probably for 2010.

Chair May said the board had that, but an inspection was not a codification of use. It was simply an inspection of the property, as it existed that day; it did not imply any proof of use.

Attorney Smith stated it was evidence of habitation. He said Mr. Martella was cited by the Code Enforcement Office for having more than three unrelated individuals there. That was stipulated to on the record in court under oath and then they were here. Therefore, it was certainly beyond question to him from an evidentiary point of view. Everyone seemed to agree the city and Mr. Martella agreed that it was indeed occupied by more than three unrelated people prior to the change in the law. The stipulation from the court and Mr. Martella's testimony was good enough for the court. He did not know what else to provide to show the board that more than three unrelated people occupied the premises prior to the law change.

Chair May said the determination was not made by the judge. He had read the judge's decision that the use was subject to grandfathering.

Attorney Smith said not saying that. He was saying that it was indeed used; if there was a factual question about whether more than three unrelated people in fact lived there before the zoning change, there should not be. That was true.

Chair May said that was not a question in his mind.

Commissioner Robinson stated this just perpetuated an illegal use because it never had the paperwork for it to be a rental property. So no matter how many times it was said and no matter how many ways it was said to him it was an illegal use. The board could not grandfather an illegal use. He did not think he was going to budge as an ex code enforcement.

Chair May thanked Commissioner Robinson and asked Commissioner Shields if he had any questions. Hearing none Chair May then asked Commissioner Geasey if she had questions.

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Commissioner Geasey said she was looking at two property use certification forms. Mr. Martella took over the property in October of 2009. The one that was filled out in March of 2010 and there was a question on part three that stated “is there any residential use of this property” and it was answered yes and another question “was this property a rental property” and it was answered no.

Chair May asked Commissioner Geasey was she quoting now from the rental registry form filled out by Mr. Martella.

Commissioner Geasey said yes. The first one said no, it was not a rental property. The second one said yes it was a year later. She was just curious.

Attorney Smith said he did not have the paper in front of him so he could not comment on that.

Commissioner Geasey said she could show him the forms.

Attorney Smith said he believed her but he could not comment on it. He was not aware of it.

Commissioner Geasey said she was looking at what had been filed with the City on two separate years.

Chair May said it was the rental registry form and asked her to hand it to Attorney Smith. He then said please show it to your client and see if he remembers doing it and signing it.

Commissioner Geasey said they were eight months apart.

Attorney Smith said he could not find it on the paper handed him.

Code Inspector Hester stated it is on the back of the form.

Attorney Smith looked at the form and stated he understood what she was saying.

Commissioner Geasey said she just wanted to know what was going on.

Attorney Smith said well this was the first time he had ever seen this piece of paper so he could not really comment on it but he agreed with the way she had read it.

Commissioner Geasey said she just did not know what had changed.

Attorney Smith said he did not know either.

Chair May said that paper would be given to City Clerk Koury to be added to the record. Therefore, the same conundrum still existed. He thought it was difficult, that it was a high bridge to grandfather an illegal use. There was conflicting information, even conflicting information provided by Mr. Martella as to the use of the property. If it was used as a single-family house to borrow Attorney Smith’s analogy for even just one day.

Attorney Smith said prior to the passage of the change to the law.

Chair May said it was a single-family house. Attorney Smith was free to review that information.

Attorney Smith said no he understood the form and knew what the form was saying. He also had a stipulation from a judge. He was saying the actual use; there could be no question, the actual use was as a student rental prior to the changing of the zoning law.

Chair May said well he was appending that it was an illegal actual use.

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Attorney Smith said he understood that.

Chair May therefore, it would not qualify for grandfathering under the application Attorney Smith was making. Chair May asked Commissioner Ficano if he had any questions for Attorney Smith.

Commissioner Ficano said no a question for the board, the difference between student rental and single family home was not a hardship. It could be zoned single family; the owner of that single family home could rent to three unrelated college students or whatever.

Chair May said three unrelated individuals was what the code stated.

Commissioner Ficano said that seemed to be the way it may have been used prior to 2011. But if that was so, it did not change the fact that it was more than unrelated three unrelated individuals inhabiting it illegally.

Chair May said that was correct and that had been admitted to in open court and was no longer a question.

Commissioner Ficano said Mr. Smith was often saying it was a student rental or was used as a student rental at one time. Being a student rental did not equate to having more than three unrelated individuals in the home.

Attorney Smith said to be more precise this was from the stipulation that was signed by the Judge “whereas the people further alledge, the people here refers to the City, the people further alledge the property is over occupied”. Then to skip down to the therefore clauses, Mr. Martella agrees and changes his plea to guilty. Everyone agreed that it was over occupied prior to the change in the zoning code. So student rental, nonstudent rental, whatever so he hoped that clarified the facts as they sit here.

Chair May said obfuscation is a wonderful thing, but he kept trying to focus back on simple things.

Attorney Smith said he was just answering factual questions people kept raising.

Chair May said he was not suggesting Mr. Smith was trying to obfuscate the issue. He was saying was a wonderful and he kept trying to focus on simple basic points. To him not having had the training and expertise Mr. Smith may have had. He thought it was impossible for this board to codify and grandfather an illegal use. The court had not said it was a legal use it. The Court said it was over occupied. Everyone agreed it was over occupied. But there has been no permit or approval for said over occupancy ever. There were other people here who wanted to have a say.

Attorney Smith said of course Mr. Chair he would defer to him in terms of having the last word. He found repetition to be a very ineffective method of persuasion. So he would not repeat what he had said before. He did think that there was a difference between the illegality the board was referring to and the kind of illegality the Code Enforcement Office was referring to in terms of determining if something was illegal prior existing use. Chair May was talking about something different. The way he thought it should be interpreted, the question was the use as a boarding house, multifamily dwelling, whatever was the use a legal use prior to the change in the zoning code. It was. Was it used in that way, yes it was, was there a smoke detector missing, maybe, was there some sort of procedural missteps, maybe, was the site plan from 1972 lost, maybe, he did not know. But what he thought was a judge would seize on was one time.

Chair May said well the judge may seize on that and then the judge may seize on another perspective. Your analogy before was by saying an illegal use had a smoke detector that was out or a fire door that was missing or any number of small violations. Those could be corrected.

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Attorney Smith said conceptually these were two different things.

Chair May said those things could be resolved but in this case the code was quite specific. The current code and the past code said it was a permitted use “subject to.” Therefore, he thought that meant that it was a permitted use after there had been a site plan review and an approval and the board did not have that. Absent that, there was no legal use. Absent a legal use, the violations were immaterial. It was not a permitted use and the board could not grandfather it.

Commissioner Robinson said he thought Attorney Smith kept confusing the word legal and permitted. It was a permitted use but it was never legal because the paperwork had never been done.

Chair May asked the board if there were any questions. He assumed there were audience members that might have something to say. He asked if anyone wanted to speak for or against this application. Chair May recognized the audience asking them to state their name and address before they addressed the board.

Dianne Terry said she lived 11 Irving Place, which was right across the street. She had lived there for thirty-nine years so she had a little history. It was a small street and the neighbors were close so they knew each other. The Molinari family lived at the property 39 years ago. When they left, the Catholic Church bought it. She had spoken to and received a letter from the Church stating that there had been only one nun that lived in that house. When she had left another family lived there.

Chair May thanked her for the history and recognized another petitioner.

Grant Labarr introduced himself and said he lived at 3 Irving Place. He stated he had a number of conversations with the people living in the house and he stated based on his conversations the claim that there was a prior use appeared to be totally fictitious.

Chair May asked if anyone else wanted to address the board.

David Hutchison introduced himself and said he lived at 2 Irving Place stated he wanted to support the stated evidence and that it was time for a vote.

Chair May thanked him and recognized Peter Friedman

Peter Friedman said Mr. Martella’s failure to procure a building permit for the work that he did on the property had made it impossible for the City to intervene and correct his mistaken interpretation of the zoning map.

Chair May asked if there was anyone else who had something to say.

Mr. Labarr said in the event that the request was denied, he would further request that the board have the Code Enforcement Office not issue a certificate of occupancy until the existing bedrooms had been removed.

Chair May thanked him for his comments and asked was there anyone else who would like to address the board.

Marilyn Halterline introduced herself and said she was in support of the request that the extra bedrooms be removed. She lived next door to a house where an extra bedroom was added illegally and now extra people lived there. She thought leaving the bedrooms would just encourage that.

Chair May thanked her for her comments hearing no other comments he closed the public comment section and said they would move to deliberation. He then asked Commissioner Ficano if he had any thoughts, questions, or concerns.

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Commissioner Ficano said no concerns, no thoughts. He stated Mr. Martella not be given permission to go forward.

Chair May then asked Commissioner Geasey for her comments.

Commissioner Geasey stated she could not support the grandfathering.

Chair May said the board was creating a record and he wanted everyone committed and on what basis.

Commissioner Geasey she agreed with the other board members that it was always illegal. Between no building permits, between work going on in there, which did or did not exist which was also apparently up in the air. She said just because it was going on, it could not be said that it was legal. There was no proper paper trail or proper inspections and she did not feel okay about it right now.

Chair May thanked her and asked Commissioner Robinson to speak.

Commissioner Robinson said he thought it was a permitted use under R-5, he did not know about R-4.

Chair May said it was permitted.

Commissioner Robinson said but it was never legal. He stated nothing was done in terms of the inspections, the certificate of occupancy, and the site plan review. It was an illegal use as far as he was concerned and he would not grandfather that.

Chair May then asked Commissioner Rafter to speak.

Commissioner Rafter said he agreed that there was no history of any applications, any seeking of relief for a multifamily, a boarding or rooming house etc. and without that, there was no legal foundation for this being that. There was no grandfathering because this was simply done without seeking approval by the City and that was that.

Chair May recognized Commissioner Shields.

Commissioner Shields stated he could not imagine this board grandfathering an illegal use.

Chair May said there had been a lot of conversation here about the use existed prior to Mr. Martella's ownership.

A petitioner asked what zone the zoning office believed this property was prior to the change in the zoning law.

Chair May asked if it was germane, he meant it was either RD-4 or RD-5.

Peter Friedman stated it is very significant.

Chair May asked Code Inspector Hester what the map indicated.

Code Inspector Hester there were a couple of maps. This was the newest map and a note was placed where 10 Irving Place was located. It could clearly be seen it was in an R-2 on the current zone map. This map was from 2003 actually, it also had date of 1999. He would have fallen under this timeline; the property was clearly located in an RD-4.

Chair May ask Ms. Zimmnewicz if her questioned had been answered as to whether it was RD-4 or RD-5.

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She stated Attorney Smith passed a whole bunch of maps around and she stated she did not hear any response to that.

Chair May said frequently when maps were printed off the internet, the color rendition was not correct.

Attorney Smith said the maps that were submitted were received in person from the Code Enforcement Office.

Chair May said original from them and they have the same problem with what they can print out was not necessarily always correct. He stated he needed to find the larger map and locate the exact street and that is what the board attempted to do. No permit was issued to the property at any point in time. The testimony from the public here, the neighbors that live there have not indicated that they support anything that comes close to the scenario that Mr. Smith outlined.

Attorney Smith stated the board needed to remember the background. He stated what happened years ago wasn't germane to whether or not it was a prior existing use pursuant to New York law because what it was being used for the day before the zoning law was changed in 2011 is what the courts would look to and it doesn't matter what was happening in 1985.

Chair May said he concurred.

Commissioner Robinson said it was still an illegal use.

Chair May said he concurred.

Attorney Smith said he was correcting the record. He thought there was no evidence of that, he was a bit dumbfounded by it, and the Judge had said that it was.

Chair May said no the judge agreed that Mr. Martella over occupied.

Attorney Smith said that was all he was saying.

Chair May said the board concurred with that.

The next issue that he wanted to talk about was the work done in the property without benefit of permit.

Attorney Smith stated he provided inspections showing that that work is up to Code except for one error. It was in the original packet, page 13, John Taylor a licensed property inspector did a full code review and found the room size to be consistent with code. He found the hallway to be consistent with the code, the stairs and rails to be consistent to the code. He did find that one window in each room was too small and before the property could be occupied, that window would need to be modified. Other than those, the additions were up to code. There was an electrical inspection provided on page 15. The electrical inspection was done by a master electrician, licensed in the City. Lake Emmons Electric confirmed that the electrical in the addition was all up to code. He said he would ask that pending resolution of issue of the window that, in the event that the interpretation goes in favor of Mr. Martella; whether or not the occupancy is changed; whether it is three or more than three. He asked that pending a resolution of the issue of the window that the addition be allowed to be granted.

Chair May said even though Attorney Smith had admitted that it was done without benefit of building permit.

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Attorney Smith said that was true, Mr. Martella was cited for it and paid a fine for it and the house was left unoccupied for a year. It was costing his client tens of thousands of dollars. He was not sure how much more the City could punish him for that.

Chair May said there were some small problems with the property. There was a front yard parking issue; by converting the garage to living space there was no longer have any parking. Parking was required in order to occupy so there was another conundrum. He said he was not out hunting for these things they just keep popping up.

Mr. Martella said there was a driveway on the right side and left side of the house. If only three people were allowed in the house, one car on the right side, one car on the left side and one car in the street.

Chair May asked Code Inspector Hester the property was in an R-2 zone now, was that driveway to the right of the house singularly his or was it shared with the property next door.

Code Inspector Hester said it was shared.

Mr. Martella said he did not mean to interrupt bur Robert Chiappisi actually made him put 4x4 steel post in there to safeguard the gas meter. His neighbors had their own driveway, which went back to gates, and they had the two dogs in the back. On the left side if needed the driveway could actually be widen without interfering on his neighbor's property. Two cars could be put there; if there was concern about three cars, there would be nothing on the street.

Chair May asked Commissioner Robinson what he felt about the work done on the house without benefit of permit.

Commissioner Robinson said he could only state that when he was Code Enforcement Officer for the Town of Franklin, he would have required a permit. He would have issued an appearance ticket to town court and the town judge would have told them to put it back the way it was. He thought that was how the board would it was going to stay vacant. He thought it should just go back to the way it was. The Assessor shows three bedrooms and an attached garage and he thought it should be the way it was being assessed.

Chair May then asked Commissioner Rafter and Commissioner Shields for comment.

Both stated no comment at this time.

Chair May said okay Commissioner Ficano any comments

Commissioner Ficano said he did not think the garage should be turned into to a bedroom. He thought that sheet rock did not need to be removed. He thought it could have uses. It could be

used as a study or something else. He thought the board would have to make this a priority. The Code Enforcement Office would make it a priority. The neighbors would help in that regard to ensure that it would not be turned into a dormitory.

Mr. Martella said he was nice person. If he had been approached from the start, it would have been fine. He had rented to five girls for a year and a half and never had a problem. Nobody ever called him. He said he could technically rent out the house to three people on the La Crosse team and that just did not make that much sense to him.

Chair May said he understood what Mr. Martella was saying. The board's challenge here was to enforce the city's zoning law to the best of their ability. To look at the facts that are presented and to collect the evidence and render a reasonable decision that enforces the law. Again polling the board on the work that was done, he thought the space that had been converted could be used

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for other things. He agreed with Commissioner Ficano and would be reticent to order either it removed but with that would come an admonishment that it was three unrelated individuals or a single family. The City would be vigilant regarding that.

Mr. Martella said he could live with that.

Chair May asked if there were any other comments from the board.

Commissioner Geasey said she was not sure where this comes into what she thought was in front of the board tonight. She was not sure where the decision about what to do with what has been done fits into the interpretation issue. She was not sure why the board was talking about it

Chair May said only that it was brought up by audience members that there was work done on the property. That question was part of the minutes of the record and the board was to answer them.

Commissioner Geasey said but was the board, the people to answer that. She did not know.

Chair May stated yes the board would make this final determination. Mr. Martella would have to come back at some point. There were other requirements and other issues that he would run into when he went to the Code Enforcement Office for his building permit.

Commissioner Geasey asked if the board would not be making decision tonight, because it was not on the agenda.

Chair May said it is not part of a motion nor has a motion been made yet as soon as the board does.

Commissioner Geasey said so it may or it may not.

Chair May agreed it may or it may not.

Commissioner Geasey stated because she was not prepared to deal with that herself.

Chair May said he would look for a motion.

Petitioner asked Chair May well on this other issue, would there be more public comment.

Chair May asked on what other issue Laurie.

Laurie said the issue of the two other bedrooms that were built in the garage that did not meet the zoning requirements for clearance.

Chair May said it stood right now the house could not be occupied. Mr. Martella did not have permission to build those things and would have to go to the Code Enforcement Office and get a building permit. That would start a whole other process. He questioned if the property had the right setbacks for issuance of the permit, and would it have to come before the Zoning board again. He stated it would be his guess that it would not. At that time, the board could address the issues of setbacks, front yard parking all the issues that would fall into play when he required a building permit. He then asked Attorney Smith if he had anything to add.

Attorney Smith said again going back to the Judges stipulation, which stated “the people further allege that the property is over occupied and garage space was illegally converted into two bedrooms open (the occupancy violations).” Later on in therefore cause of the order the judge said that Mr. Martella agreed to submit an application to the zoning board for an

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interpretation with regard to occupancy violations. The people agreed not to issue violations while the board is reviewing it. He thought it was within this Boards' authority according to the judges' stipulation. If the board wished to make a ruling today whether or not and to what extent and to what degree those improvements may remain.

Chair May stated he thought the board probably could as well. However, some board members are not comfortable. He thought it would be just as easy and appropriate for Mr. Martella to make an application to the Code Enforcement Office for a building permit for what he would like to do. Then there is no question about what he can or cannot do. There would not be any of this gray area anymore it would be well defined.

Attorney Smith stated he understood. From his point of view that application was in the record, the building permit application had already been made.

Chair May said yes but it was denied.

Attorney Smith said it was made retroactively.

Chair May stated he could and that was his preference. Chair May just thought it was cleaner to deal with the over occupancy issue this evening. Not to come down, say tear everything out, and start over but to say go back to the Code Enforcement Office and put in an application for what you would like to do to use the property in a manner that is consistent with code and the neighborhood. Then to move forward on that basis that might include a media room where there was once was a garage or a library were there once a garage as long as the required parking along the side of the house could be provided. Mr. Martella believes he can do and then he should not have a big issue. He would have an area variance maybe and he would have a setback requirement maybe he would not know until it before the board.

Attorney Smith said he understood.

Chair May said does that seem fair and reasonable to you

Attorney Smith stated that seemed like one reasonable way to do it Mr. Chair.

Chair May said he would take that as a yes he then asked would a board member like to make a motion.

Motion made by Commissioner Robinson and seconded by Commissioner Ficano that finding of the Zoning and Housing board of Appeals was the property at 10 Irving Place was a single-family home allowing three unrelated individuals. The board would further add to that motion that Mr. Martella agrees to go to the Code Enforcement Office and get a permit for the work done in the building absent a permit.

Chair May said the findings of the court were Mr. Martella was to come to the board for an interpretation of how the property could be utilized and occupied. The board's determination was that it was a single-family house. As a single-family house, it could be occupied by three unrelated individuals. There was work done to the house absent a building permit. The applicant has agreed to go to the Code Enforcement Office and obtain a building permit. There was now extra space and the extra space might be allowed to kept. It did not mean it could be utilized as bedrooms for additional people, now that did not preclude him from renting to a family of five or six or eight.

Chair May said there was a motion on the floor that had been moved and seconded, and asked if were there any additional comments from the board or the Code Enforcement Office. Hearing none Chair May called the motion.

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MOTION, made by Commissioner Robinson and seconded by Commissioner Ficano that finding of the Zoning and Housing board of Appeals was the property at 10 Irving Place was a single-family home allowing three unrelated individuals. The board would further add to that motion that Mr. Martella agrees to go to the Code Enforcement Office and get a permit for the work done in the building absent a permit.

Voting Ayes: Chair May
Commissioner Ficano
Commissioner Geasey
Commissioner Shields
Commissioner Rafter
Commissioner Robinson

Noes: None

Absent: Commissioner Lawson

MOTION CARRIED

Chair May thanked board members for their time.

There being no further business to come before the board, Chair May adjourned the regular meeting at approximately 8:00 p.m.

JAMES R. KOURY, City Clerk

JRK/vpw