

VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org



ENVIRONMENTAL DIVISION
Docket No. 140-12-18 Vtec

14 – 16 Peru Street Boundary Adjustment

DECISION ON THE MERITS

PBGC LLC and BPJS Management, LLC, (together Appellants) appeal the City of Burlington Development Review Board’s (DRB) denial of Appellants’ boundary line adjustment application concerning 14 and 16 Peru St., Burlington, Vermont (the Project). The City of Burlington (City) opposes the application.

Appellants are represented by Matthew T. Daly, Esq. The City is represented by Kimberlee J. Sturtevant, Esq.

In their Statement of Questions, Appellants raise two (2) Questions, with the second Question having several subparts:

1. Is Section 5.3.6(c) of the City of Burlington’s Comprehensive Development Ordinance arbitrary, capricious, vague, ambiguous and unclear and as such, unenforceable and/or inapplicable to the Appellants’ Boundary Line Adjustment application?
2. Does Appellants’ Boundary Line Adjustment Application comply with the following Sections of the City of Burlington’s Comprehensive Development Ordinance?
 - a. Section 4.4.5 Residential Districts and Table 4.4.5 - Minimum Lot Size;
 - b. Section 5.2.2 Required Frontage and Access;
 - c. Section 5.2.5 Exceptions to Yard Setbacks;
 - d. Section 5.3.5 Nonconforming Structures;
 - e. Section 5.3.6 Changes to Nonconforming Lots;
 - f. Section 6.1.2 Review Standards;

- g. Article 8 Parking - Table 8.1;
- h. Section 10.1.5 Lot Line Adjustments.

In a pre-trial motion, the City sought judgment as a matter of law on Question 1 offering that Comprehensive Development Ordinance [CDO] § 5.3.6 (c) is not arbitrary, capricious, vague, or unclear as it gives clear notice of when a change is permitted to a nonconforming lot. Appellants countered that § 5.3.6(c) is a “catch-all” provision that does not contain clear standards for when a change is permitted to a nonconforming lot. In a May 18, 2021 decision, we concluded that CDO § 5.3.6 (c) provides sufficient notice of the conditions necessary for changing a nonconforming lot for applicants and decisionmakers and includes clear limitations to prevent arbitrary or discriminatory enforcement. As Appellants failed to overcome the presumption of constitutionality, we granted the City’s motion for summary judgment on Appellants’ Question 1.

After affording the parties considerable time to resolve the remaining dispute, the Court then conducted a one-day remote trial on March 24, 2022 using the WebEx platform. The Court completed a site visit on its own on May 27, 2022. Following trial and prior to the site visit, parties were allowed to file requests for the Court to observe certain aspects of the Project site and surrounding area. The parties did not file any requests for specific observations. The Court observed the two properties and the surrounding area generally.

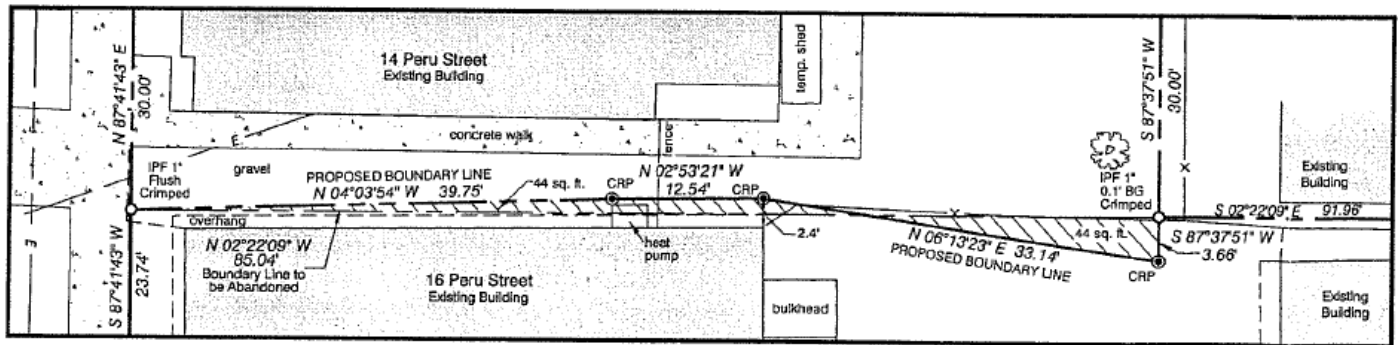
Findings of Fact

1. Mr. William Bissonnette is the principal agent of PBGC, LLC and BPJS Management, LLC. Mr. Bissonnette operates these companies through Bissonnette Properties.
2. BPJS Management, LLC (BPJS) owns 16 Peru Street in Burlington, Vermont (16 Peru St.). 16 Peru St. is located within the Residential Medium Density (RM) District.
3. In 2017, BPJS performed renovation work at 16 Peru St. without obtaining zoning or building permits from the City of Burlington.¹ After these renovations were completed,

¹ The renovation work at 16 Peru St. included a raised roof, demolished rear porch, erecting a new 2-story addition, new siding, windows, roofing, lighting, and conversion of a 2-car garage into storage.

Appellants sought a zoning permit to approve the as built renovations (Zoning Permit 18-0495CA).

4. On March 8, 2018, Appellants' zoning permit was denied, citing an encroachment into a westerly side yard setback by the addition at 16 Peru St. This decision was not appealed.
5. In 2018, PBGC, LLC (PBGC) purchased 14 Peru Street, Burlington, Vermont (14 Peru St.). 14 Peru St. is directly adjacent to the west side of 16 Peru St. and is also located in the RM District.
6. After PBGC purchased 14 Peru St., Appellants made dual applications to relocate the common boundary line in an attempt to bring the addition to the 16 Peru St. property into compliance with the westerly side yard setback requirement. Appellants attached as a part of both applications a site plan depicting the boundary line adjustment.
7. On the site plan, the proposed boundary line adjustment is depicted as follows:



8. The proposed new common boundary would have multiple segments. For the first segment, in the area of the structures at 14 and 16 Peru Street, the new proposed common boundary is offset from a line orthogonal to the Peru Street right of way by approximately 1.7 degrees; in the segments towards the rear of the parcels (or to the right in the diagram above) the offset is greater.
9. Appellants' engineer testified that this proposed segmented property line was designed to accomplish the goals of bringing the structure at 16 Peru Street into compliance with the minimum side-yard setbacks while maintaining the present total area of each lot.
10. The width of 14 Peru Street at its frontage on Peru Street is 30 feet.
11. The width of 16 Peru Street at its frontage on Peru Street is 23.74 feet.
12. The distance between the houses at 14 and 16 Peru Street ranges from 8.8 to 9.5 feet.

13. There are 8 houses on Peru Street and all of them have driveways.
14. Mr. Bissonette has personal knowledge beginning during his childhood and continuing through current times of Peru Street generally; and specifically with 14 and 16 Peru Street.
15. During his childhood years, Mr. Bissonette rode his bicycle past the subject properties, and he knew the Charbonneau family that owned both 14 and 16 Peru Street.
16. During the 1960's and 1970s, Mr. Bissonette observed Mr. Charbonneau use the driveway and park a car in the driveway of 14 Peru Street.
17. Aerial photographs from the parties are instantaneous snapshots in time.
18. Mr. Bissonette testified to, and aerial photographs show a curb cut from the street to this driveway between 14 and 16 Peru Street existing historically.
19. The area between 14 and 16 Peru Street has been used as a driveway and parking area since at least the 1960s and likely earlier in time.
20. The existing common property line between 14 and 16 Peru Street runs through the driveway and parking area.
21. This area does not completely comply with the standard 9 foot by 20 foot parking space requirement, as at points the width is slightly narrower than 9 feet.
22. The setback from the common property line on each property for this driveway and parking area has historically been zero feet, as the driveway straddles the boundary. The application to adjust this boundary does not result in a setback that is any more non-complying as the setback remains at zero feet.
23. The proposed boundary line will reduce the east side yard setback to the structure at 14 Peru St. from 8 feet to 6.5 feet.
24. The proposed boundary line will increase the west side yard setback to the structure at 16 Peru St. in the area of the expanded building addition from 1 foot to 2.4 feet. The width of the existing non-complying side yard setback in the remaining portions of the property will be increased.
25. 14 and 16 Peru Street each have a single-family home located on the property.
26. As part of the application before the Court, there is zero lot size change for either of the 14 and 16 Peru Street properties.

27. At trial, Appellant PBGC, LLC proposed to remove 5 inches of concrete at the northerly edge of the concrete walkway/patio on the north side of 14 Peru St. and turn this area into a grassed surface. The dimensions of the impervious area that will be returned to grass are 5 inches by 25.6 feet; or approximately 10 square feet.
28. Existing lot coverage for 14 Peru St. is 61.7%; post lot line adjustment and removal of 5 inches from the concrete walkway/patio the coverage will remain at 61.7%.
29. Existing lot coverage for 16 Peru St. is 89.6%; post lot line adjustment the coverage will be 89.3%.
30. The boundary line adjustment does not change the amount of existing parking on the two lots.
31. The development pattern of the area, including but not limited to Peru Street and Champlain Street, for the most part has lots with lot lines extending from the street perpendicular to the rear of the lot. There are, however, lots with lines that are angled or staggered. Based on the map of existing lot lines submitted into evidence by the City, two such examples are the second lot on the eastern side of Champlain Street to the north of the intersection with Peru Street and a lot on the opposite side of Peru Street from the subject properties and further to the east.
32. On July 20, 2018 Appellants submitted a draft "Parking Easement Deed" to the DRB. This deed granted PBGC parking rights to two full sized parking spaces on BPJS's lot (16 Peru St.) to be used by tenants of 14 Peru St.
33. On December 6, 2018, the Burlington Development Review Board (DRB) denied Appellants' application for a boundary line adjustment concerning 14 and 16 Peru St.
34. Appellants timely appealed to this Court.

Conclusions of Law

a. Question 2 (a–h): Whether Appellants' Application Complies with specific CDO provisions.

Having answered Question 1 before trial, our merits hearing focused on this Question and its subsections concerning whether Appellants' application for a lot line adjustment between 14 and 16 Peru St. conforms with specific CDO provisions. Appellant PBGC, LLC purchased 14 Peru

St. for the purpose of remedying a new minimum westerly side yard setback encroachment on 16 Peru St., which was generated from the construction of an unpermitted rear addition.

The City asserts that the application for proposed lot line adjustment does not comply with the CDO. The Court is tasked with assessing whether the proposed lot line adjustment complies with multiple provisions of the CDO. These provisions include: residential districts and dimensional standards under CDO § 4.4.5; frontage on a public road under § 5.2.2; review standards under § 6.1.2; exceptions to yard setbacks under § 5.2.5; parking under Article 8; Nonconforming structures under § 5.3.5; changes to nonconforming lots under § 5.3.6; and lot line adjustments under § 10.1.5. We address the CDO provisions in the order listed above to provide greater clarity.

I. Question 2(a): Whether Appellants' Application complies with § 4.4.5 and Table 4.4.5 of the CDO.

Appellants' Question 2(a) addresses residential districts and minimum lot frontage, among other applicable dimensional standards contained in Table 4.4.5.² CDO § 4.4.5 states that the RM District is "intended primarily for medium density residential development in the form of single-family detached dwellings and attached multi-family dwellings." Here, Appellants' application depicts single-family residences located respectively at 14 and 16 Peru St. The City does not challenge whether the 14 or 16 Peru St. developments are consistent with the definition of a single-family detached dwelling or attached multi-family apartments. Therefore, as this provision is not at issue, we move on to a discussion of CDO Table 4.4.5.

CDO Table 4.4.5-1 requires that RM Districts have a minimum lot frontage of 30 feet. At present, it is undisputed that 16 Peru St. has a nonconforming lot frontage of 23.74 ft., and 14 Peru St. has a conforming frontage of 30 ft. The City argues that Appellants' application does not provide a mechanism for the dimensionally required lot frontage at 16 Peru St. to become conforming and that the proposed boundary line along the side will cause 14 Peru St. to narrow

² Appellants' Question 2(a) mentions only lot size, while referring to Table 4.4.5 generally; our understanding, however, is that there is no minimum lot size in the RM District, see Table 4.4.5-1. Moreover, the evidence and arguments at trial focused exclusively on lot frontage, lot coverage, and side-yard setbacks.

along the side boundary lines.³ The City, however, provides no measurement indicating to what extent the proposed new boundary diminishes or enhances the 23.74 ft lot frontage of 16 Peru St. or the 30 ft. lot frontage of 14 Peru St.

Appellants offer testimony from their engineer, David Marshall, that the boundary line adjustment does not make either lot more nonconforming as the application retains the 30 ft frontage of 14 Peru St. and 23.74 ft frontage of 16 Peru St. Indeed, both the 14 and 16 Peru St. applications include an attached site plan that does not depict a change in the lot frontage for either property. Pursuant to CDO § 5.3.5 (a)(1) a change to a nonconforming structure is only permitted if the changes “shall not *increase* the nonconformity.” CDO § 5.3.5 (a)(1) (emphasis added) (noting that a change “may reduce the degree of nonconformity”). Under this provision, we see no legal basis mandating that Appellants “provide a mechanism for the dimensionally required lot frontage at 16 Peru to become conforming” as the City suggests. The application therefore meets the requirements for frontage.

The existing lot coverage on both lots exceeds the maximum of 40% for the RM District. The site plan included with the application for lot line adjustment initially noted that the adjustment would increase lot coverage on 14 Peru St. from 61.7% to 62.2%. To remedy this slight increase in lot coverage, Appellants have offered to remove a section of the rear concrete walk/patio at 14 Peru St. and return it to grassy space. With the condition proposed by Appellants, the lot-line adjustment does not make either lot more nonconforming as to lot-coverage.

It was undisputed at trial that the lot-line adjustment also does not make either 14 or 16 Peru Street more nonconforming as to maximum residential density, maximum building height,

³ The DRB below found that 16 Peru St. “will be further constricted by the proposed new westerly boundary line on the proposed northerly terminus. For both lots, the lot width will diminish below the standard of this table, and in the case of 16 Peru Street, increase the level of non-conformity of the lot.” In re 14-16 Peru Boundary Adjustment ZP18-0894LL and ZP18-0895LL, Findings of Fact & Decision, at 2 (City of Burlington Dev. Rev. Bd. Dec. 4, 2018). The DRB, however, does not provide dimensions of the proposed change in lot frontage to 16 Peru St. In addition, the DRB does not identify any basis that the application proposes to alter the lot frontage of either 14 or 16 Peru St. Here, the only means of increasing the degree of nonconformity of 16 Peru St. is to increase the width of lot frontage for 14 Peru St. Such an action would not render 14 Peru St. noncompliant with the CDO as the property would have more than 30 ft lot frontage. Thus, the DRB’s representation that “For *both* lots, the lot width will diminish below [30 ft]” does not hold water. Id. at 2 (emphasis added).

or front or rear-yard setbacks, which are other applicable dimensional standards in Table 4.4.5. The parties dispute whether the application results in a greater nonconformity as to side-yard setbacks, which is addressed below under Questions 2(c).

We conclude that the application complies with § 4.4.5 and Table 4.4.5 of the CDO.

II. Question 2(b): Whether Appellants' Application complies with § 5.2.2 of the CDO.

CDO § 5.2.2 requires frontage on a public road. While the City again alleges that Appellants' Application does not provide a mechanism to bring 16 Peru St.'s 23.74 ft frontage into compliance with the required 30 ft. frontage, the City does not dispute that both 14 and 16 Peru St. have frontage on a public road in conformance with CDO § 5.2.2. Indeed, Appellants have provided testimony from their engineer asserting both properties have frontage on a public road and a site plan that clearly depicts frontage for both properties on Peru St.

We therefore conclude that 14 and 16 Peru St. have frontage on a public road and that the Application complies with § 5.2.2 of the CDO.

III. Question 2 (f): Whether Appellants' Application complies with § 6.1.2 of the CDO.

CDO § 6.1.2 states that the "size and arrangement of new lots shall reflect and perpetuate the existing development pattern of the surrounding neighborhood" and "[i]nterior lot lines extending from a street *should* be perpendicular or radial to the street right of way line [ROW line] *to the greatest extent feasible.*" CDO § 6.1.2 (c) (emphasis added). The City argues that Appellants' proposed boundary line is not perpendicular to the ROW line as it "arcs" and "veers" to the east and west, resulting in a staggered line inconsistent with existing development patterns. Appellants point to the permissive language of § 6.1.2 as indicating flexibility and notes that this offset of orthogonal extension from the ROW line is less than 1.7 degrees in the segment leading from the Peru Street right of way, while acknowledging that further north it is slightly greater than this.

Given the clear language of the ordinance in providing a nonmandatory standard by using the term "should" coupled with the phrase "to the greatest extent feasible," it is difficult to comprehend how the City contends that the offset in this case is irreconcilable with § 6.1.2 (c). Town of Calais v. Cnty. Road Comm'rs, 173 Vt. 620, 621 (2002) (mem.) ("The plain, ordinary

meaning of . . . “may” indicates that a statute is permissive, not mandatory.”); Marsigli Estate v. Granite City Auto Sales, Inc., 124 Vt. 467, 470 (1965) (stating Legislature’s use of “may” in statute indicates decision is discretionary); *see also* State v. Rafuse, 168 Vt. 631, 632 (1998) (mem.) (noting that the use of the term “shall” indicates the legislature’s intent for the provision to be mandatory). Moreover, the surrounding language of § 6.1.2 (c) reinforces the conclusion that this particular provision grants flexibility due to the clear differential use of “should” and “shall.” *See* CDO § 6.1.2 (c) (“The size and arrangement of new lots *shall* reflect . . . existing development patterns . . . Lots *shall* be created in such a way as to enable their development . . .”). Indeed, the use of the term “should” and “shall” in such close proximity “conveys a conscious design to impart to the words their ordinary and distinct meanings.” Town of Calais, 173 Vt. 620, 621 (2002) (assessing the use of “shall” and “may” in proximity). In addition, while the CDO does not comment on the use of “should,” § 13.1.1 expressly states that “shall” is “mandatory and not merely directory.”

The City’s position seems to indicate that any offset, however negligible, must be incongruous with the standard set out in § 6.1.2 (c). We will not adopt such an interpretation, which ignores the permissive language of the regulation and the interest in avoiding inflexible results. Town of Westford v. Kilburn, 131 Vt. 120, 125 (1973); Rogers v. Watson, 156 Vt. 483, 491 (1991) (recognizing that zoning is an “area where some imprecision and generality is necessary and inevitable”).

We note the City’s further argument that Appellant BPJS Management essentially created its own hardship by constructing an addition without approval that encroached into a side-yard setback, thereby necessitating this boundary line adjustment. The City’s expert witness argues that this should be considered as a factor under § 6.1.2 by virtue of the “greatest extent feasible” language and should disqualify the lot-line adjustment. The language of “to the greatest extent feasible” leaves the decision-maker, however, with discretion to allow small deviations from a perpendicular lot line even in such cases.

We conclude that the Application complies with § 6.1.2 of the CDO.

IV. Question 2(c): Whether Appellants' Application complies with § 5.2.5 of the CDO.

CDO § 5.2.5 concerns side yard setbacks and exceptions to yard setback requirements for parking areas. Generally, CDO § 5.2.5 (a)(2) requires that side setbacks in the RM District are 10% of the lot width, as measured at the frontage on a public road, or the average of side yard setbacks of 2 adjacent lots on both sides.⁴ CDO Table 4.4.5-3 (listing residential district dimensional standards); CDO § 5.2.5 (a)(2). The CDO also provides specific exceptions to yard setbacks, pursuant to CDO § 5.2.5 (b)(5), which allows parking areas and driveways to project into a required side setback, "provided they are no less than five (5) feet from a side or rear property line where such a setback is required."

The width of 14 Peru Street is 30 feet at its frontage on Peru Street. Utilizing the 10% of lot width method of calculation, the required setback is 3 feet. The proposed boundary line will reduce the east side yard setback of the structure at 14 Peru St. from 8 ft to 6.5 ft. Thus the reduction in the east side yard setback does not render the structure on 14 Peru St. noncomplying. The width of 16 Peru Street is 23.74 feet and so using the 10% method the required setback is 2.4 feet. The lot-line adjustment will expand the existing 1 ft nonconforming side yard setback to a complying 2.4 ft. along the portion of the unpermitted rear addition. Furthermore, in other areas of this west side yard setback, the setback distance to the structure will be increased beyond the existing 1 foot and therefore does not result in a greater nonconformity.

The City argues that the existing driveway/parking area is within 1 ft. of the shared property line, which triggers the application of CDO § 5.2.5 (b)(5) governing exceptions to side yard setbacks. The City asserts that the proposed boundary line modification will reduce the existing nonconforming setback from the property line on 14 Peru St. further below the required

⁴ Appellants interpreted this provision as allowing the smaller of the two calculated measurements to be the required side setback and the City did not dispute that interpretation at trial.

5 ft., pursuant to CDO § 5.2.5 (b)(5). This, the City argues, would increase the level of nonconformity of the site relative to a required setback from the driveway/parking area.⁵

Appellants' engineer testifies that the width between 14 and 16 Peru St. ranges from 8.8 to 9.5 ft. Per the CDO, a standard parking space is 9 ft. x 20 ft. Therefore, the existing mixed gravel and paved parking surface straddles the existing common property line of the two buildings, resulting in an existing setback of zero feet. The proposed boundary line adjustment does not make the existing parking setback any more nonconforming, he argues, because following the adjustment the setback will remain zero feet.

We conclude that the existing east side yard setback from the driveway/parking area for 14 Peru Street is zero feet. Likewise, we conclude that the existing west side yard setback from the driveway/parking area for 16 Peru Street is zero feet. The boundary line adjustment does not alter these setbacks from the driveway/parking area. Thus, the project does not result in greater nonconformities with respect to § 5.2.5.

At trial, the City offered several aerial photos of the two properties and the area between the properties asserting that the driveway/parking area either did not exist at times or was not continually used as a driveway/parking area. Aerial photographs can be helpful aids to understanding historic land uses, however, they are snapshots in time and have limited evidentiary value in this regard. Furthermore, some of the historic photos offered by the City are not clear and it is difficult to perceive the area between the properties in any detail. This evidence is contradicted by Mr. Bissonnette's personal knowledge of land use activities over time at the two sites. For the purposes of considering the proposed boundary line adjustment before the Court, we accept the credible testimony of Mr. Bissonnette and conclude that the

⁵ We are aware that there is relief as to side and rear-yard setbacks available for parking areas, as long as they maintain a five-foot buffer from the property line. CDO § 5.2.5 (b)(5). Further, a common or shared driveway that straddles the property line is explicitly allowed under the CDO to have a setback of 0 feet. CDO § 5.2.5 (b)(7). We have evidence that this parking area straddles the property line; we do not, however, have evidence that the driveway is common or shared in the sense that residents of both properties use it to park cars. It is therefore the fact that an existing nonconformity is not made more nonconforming that we rely on to find this provision is met.

driveway/parking area between the two properties exists prior to the proposed boundary line adjustment and will remain in its present form following the adjustment.⁶

V. *Question 2 (g): Whether Appellants' Application complies with Article 8 and Table 8.1 of the CDO.*

CDO Article 8 address minimum off-street parking requirements and minimum parking dimensions for single family residences in Neighborhood Districts. CDO Table 8.1.1-1 requires a minimum of 2 parking units per dwelling unit and Table 8.1.11-1 establishes that 90° angle parking requires a width of 9 ft. It is undisputed that there is sufficient parking on 16 Peru St. The City asserts, however, that existing conditions only allow for a parking area with a width of 5 ft. located on 14 Peru St., which would be further reduced to between 3.5 and 4 ft. by the proposed boundary line adjustment, thereby eliminating a second parking space.

Mr. Bissonnette testified that the "southeast portion of the 14 Peru St. lot has historically been used for parking" and a concrete walk on the east side of 14 Peru St. is connected to the gravel parking surface. Some of the City's photographic exhibits support these features. As expressed above, Appellants' engineer testified that the narrow width between 14 and 16 Peru St. ranges from 8.8. to 9.5 ft., which forces the standard 9 ft. x 20 ft. parking space to straddle the property line. Appellants also present a draft parking easement deed, which seeks to address the CDO Table 8.1.11-1 requirement for 2 parking spaces. The easement provides PBGC, LLC, the owner of 14 Peru St., a permanent easement for parking located at 16 Peru St.⁷

The area between the two subject properties has historically supported a driveway and parking of vehicles. We conclude that the boundary line adjustment does not alter the driveway/parking area to a degree that the area can no longer be used as a driveway or parking area. Thus, the project does not result in greater nonconformities with respect to § 5.2.5. While Table 8.1.11-1 requires a width of 9 ft. for parking, the existing conditions approximate this width and if the area does not strictly comply, the proposed boundary line adjust does not result in any

⁶ For this application, we consider existing conditions and proposed conditions. Whether or not the existing conditions are illegal is not before the Court.

⁷ The City notes that no parking waivers have been granted to either 14 or 16 Peru St.

greater nonconformities with Table 8.1.11-1. Whether through this existing driveway and parking area or by virtue of the easement granted from 16 to 14 Peru Street, the minimum parking requirements of Article 8 are met as to 14 Peru Street, as well as to 16 Peru Street.

VI. Question 2(d): Whether Appellants' Application complies with §5.3.5 of the CDO.

CDO § 5.3.5 (a) requires that “any change or modification to a nonconforming structure, other than to full conformity under this Ordinance, . . . may reduce the degree of nonconformity and shall not increase the nonconformity.” CDO § 5.3.5 (a)(1) further states that existing nonconforming single-family homes in residential districts that project into side or rear yard setbacks may be vertically expanded so long as the expansion does not further encroach into the setback.⁸ CDO § 5.3.5 (a)(1).

Here, the City asserts that the application does not comply with § 5.3.5 because it “increases the level of nonconformity to a required setback on 14 Peru St. relative to the asserted driveway” that is approximately 1 ft. from the existing property line and increases the degree of nonconformity with respect to the minimum parking spaces required at 14 Peru St.

As addressed above, the proposed boundary line adjustment does not result in greater nonconformities. Thus, the proposed boundary line adjustment complies with § 5.3.5.⁹

VII. Question 2(e): Whether Appellants' Application complies with § 5.3.6 of the CDO.

CDO § 5.3.6 governs changes to a nonconforming lot. CDO § 5.3.6 (c) states that no change is permitted that would “increase[] the density at which the property is being used, or increase the structure located upon such lot, if the dimensional requirements and standards, including parking, of the underlying zoning district are not met as a result thereof.” Compliance with this provision requires a showing that the property in question is nonconforming and evidence that a change that increases the structure located on a lot would not in and of itself

⁸ The DRB below notes that unpermitted vertical structural expansion occurred at 16 Peru St. In re 14-16 Peru Boundary Adjustment ZP18-0894LL and ZP18-0895LL, Findings of Fact & Decision, at 4 (City of Burlington Dev. Rev. Bd. Dec. 4, 2018). An after-the-fact permit was later sought and denied due to encroachment into a required setback and this denial was not appealed. Id.

⁹ We also note that this application for a boundary line adjustment does not entail any changes or modifications to structures (though we acknowledge that the application was precipitated by a change to a structure without the proper permits), and thus Section 5.3.5 may not even be applicable.

(meaning the change itself), result in non-conformance with the dimensional requirements and standards, such as lot frontage, setbacks, and parking.

It is undisputed that 16 Peru St. is a nonconforming lot as it does not meet the minimum lot frontage pursuant to CDO Table 4.4.5-1. Furthermore, both lots, as they exist, have other non-conformities; these include the setback from the driveway and parking area between the two properties and lot coverages that exceed the CDO maximum coverage.¹⁰

As expressed throughout this decision, the two properties in their current status are nonconforming, but the boundary line adjustment does not result in greater nonconformity or create new nonconformities as to lot frontage, lot coverage, setbacks, or parking.

We conclude that the boundary line adjustment complies with CDO § 5.3.6.

VIII. Question 2(h): Whether Appellants' Application complies with § 10.1.5 of the CDO.

Lastly, we address whether Appellants' application complies with lot line adjustment requirements under the CDO § 10.1.5. CDO § 10.1.5 (c)(1) states that a boundary line adjustment application may be denied if the "proposed adjustment will result in the creation of a nonconforming parcel or nonconforming buildings or structures or yard areas or any nonconforming dimensional standard."

As expressed throughout this decision, the boundary line adjustment does not result in the creation of a nonconforming parcel or nonconforming buildings or structures or yard areas or any nonconforming dimensional standards.

We conclude that the boundary line adjustment complies with CDO § 10.1.5.

Conclusion

We conclude that the proposed boundary line adjustment complies with multiple provisions of the CDO including residential districts and dimensional standards under CDO § 4.4.5; frontage on a public road under § 5.2.2; review standards under § 6.1.2; exceptions to yard setbacks under § 5.2.5; parking under Article 8; Nonconforming structures under § 5.3.5; changes

¹⁰ Again, for this application we consider existing conditions and proposed conditions. Whether or not existing conditions are 'illegal' is not before the Court.

to nonconforming lots under § 5.3.6; and lot line adjustments under § 10.1.5. At trial the application was modified to include the following which is a necessary condition to reach the above conclusions:

Applicant will remove 5 inches of concrete along the northerly edge of the concrete walkway/patio on the north side of 14 Peru Street and return this area to grass.

A Judgment Order is issued concurrently with this decision. This concludes the matter before the Court.

Electronically Signed: 6/2/2022 9:44 AM pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, flowing style with a large, stylized "W" and a long, sweeping tail.

Thomas G. Walsh, Judge
Superior Court, Environmental Division