

**EXCERPT OF MINUTES FROM THE  
TOWN OF SAN ANSELMO PLANNING COMMISSION MEETING  
NOVEMBER 19, 2012**

**Appeal of an Administrative Decision, Ford Greene, 711 Sir Francis Drake  
Boulevard, 006-083-08:**

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**COMMISSIONERS PRESENT:** Chair Sisich, Co-Chair Brasler, Commissioners House, Krebs, Overberger, Zwick

**COMMISSIONERS ABSENT:** None

**REGULAR AGENDA**

**Appeal of an Administrative Decision, Ford Greene, 711 Sir Francis Drake Boulevard, 006-083-08:** Appeal of an administrative decision by the Interim Planning Director regarding the existence of a residential use in the lowest level of the building at 711 Sir Francis Drake Boulevard (Staff person: Henderson).

Interim Planning Director Diane Henderson presented the staff report.

Commissioner Krebs asked Henderson if she knows whether or not the toilet installed in 2005 was replacing an existing toilet.

Henderson advised that she does not know if the toilet installed in 2005 was replacing an existing toilet or not.

In response to a question from Krebs, Henderson stated that the date to consider is when the lowest level residential unit was created. She further noted that there was an oven on the lowest floor and that as far as the Planning Department knows, the space was used as a residential unit from around 1990 or 1991.

Krebs asked if that means that the residential unit was created in 1990 or 1991.

Henderson has no evidence as to when the unit was created; there is a signed affidavit indicating that it was not a residential use in 1985. She further clarified that the issue is whether or not the lower unit was legally created for residential use and continuously used for residential use. There is no use permit for residential use of the lowest level in the property file. The C-L zoning went into effect in 1991 and that requires a use permit for a residential use. The earlier code also required a use permit for residential use in the commercial district and that would have been in effect in 1985 when the space was used for storage. If a use permit had been approved between 1985 and 1991, and the unit had continuously been used as a residential unit, that would be considered adequate documentation.

Chair Sisich invited the applicant's team to speak.

Attorney Leonard Rifkind clarified that Greene does not object to applying for a conditional use permit; the issue is staff's conclusion that there would be a resulting change in occupancy. A change in occupancy requires compliance with current building codes and it could cost hundreds of thousands of dollars to bring the unit into compliance.

Rifkind suggested that an apartment use has existed since the building was constructed in 1905 and contends that multi-family apartment use has always been a permitted use of the building. The only period in which it was non-conforming was between 1991 and 1995 when a slight change in the zoning ordinance indicated that a residential use was not permitted in the C-L zone; that stipulation was corrected in 1996.

Rifkind contends that Greene first saw the 2001 Residential Resale Report in 2005.

Rifkind stated that the toilet in question was located in the barn—not in the main building—and that it has been subsequently removed.

Rifkind noted that many permits were issued after Building Official Keith Angerman determined that there was an illegal use issue and maintains that said permits indicate efforts on Greene's part to comply with the Town's directives.

Rifkind provided a declaration from Richard Keintz, who worked as a pastry chef in San Anselmo. The declaration states that individuals slept, ate, used the restroom, and cooked in the lowest floor unit.

Rifkind indicated that the many appendices submitted by the applicant are proof that there has been residential use in the lowest floor of the building.

Rifkind stated that staff identified the sole issue as whether or not the residential use is legally created since becoming non-conforming. Rifkind contends that non-conformance has nothing to do with the matter because the unit has always been a conforming use from the beginning.

Rifkind noted that staff says Greene was provided with second unit criteria in order to prove his residential use; however, Greene never received the second unit criteria. Further, second unit criteria only apply in residential zones in San Anselmo.

Rifkind took exception to staff's concerns regarding the amount of staff time that has been invested in this matter, observing that Greene's home of more than 21 years is at risk.

Rifkind further challenges Real Estate Agent Matt Storms' recollection that a Residential Resale Report was actually provided to Greene at the time of Greene's purchase of the building.

Rifkind added that Vicki Harrison's statement that the unit was used for storage between 1979 and 1985 is irrelevant because continuous use is not the issue; this was a continuing, residential, apartment use from the time of the building's creation until the present time.

Rifkind referred to the lease agreement signed by Greene indicating a basement in the building, noting that the landlord of the building would have been aware that there was a bathroom and cooking facilities on the lowest floor. Rifkind also noted that there are no cooking facilities on the floor above.

Rifkind pointed to the directories that show individuals were living in the building for decades and that it is inconceivable that those residents were not using the facilities on the lowest level.

Rifkind displayed appendices to the applicant's submittal, including a chronological chart showing the occupancy of the building and the zoning ordinances in effect throughout the period beginning 1905 (when the building was established) to the present. Rifkind maintains that the building was a mixed use, live/work, multi-family occupancy from the beginning and described each of the parties who lived and worked in the building over time. Rifkind further reviewed planning ordinances in effect throughout the history of the building.

Rifkind concluded by asking the Commission to grant Greene's appeal and allow him to continue living in his home of over 21 years.

Sisich asked what was the most salient evidence that shows that someone was living on the lowest level specifically.

Property owner Ford Greene noted that 1920 Census records show a family of five living there and that an individual was designated as both head of household and baker on the premises through time, from the 1920's through the 1940's. Further, Greene believes that Richard Keintz's declaration puts the matter in perspective by stating that the baker and the baker's assistant slept at the location. Further, the resident family ate on the lowest level.

Commissioner Zwick asked if a list of what would be needed to bring the unit into compliance had been provided to the applicant. Greene indicated letters from both Angerman and Boyle and described some of the necessary measures outlined to him.

Zwick asked if the issue of concern to Greene was the expense of bringing the building to current standards; Greene confirmed that this is the case.

Co-chair Brasler asked staff if there is anything in the Code that allows for hardships with regard to the expense of meeting building code criteria.

Henderson advised that neither the Planning Department nor the Planning Commission has the authority to waive fees. There is an appeal process for building permits and ultimately any matter can be appealed to the Town Council.

Zwick noted that the state historical building code may provide some direction.

Krebs observed that the applicant seems to be making a distinction as to whether this lowest floor unit has been used as a residence vs. the building being used as a residence or live/work space.

Greene explained that the focus is the use of the lowest level as a residence in an apartment building because if it is a residence in an apartment building it is not subject to any of the sunsetting that inheres in a legal, non-conforming label. When there is a legal, non-conforming label, the requirement is that in order not to lose the use, it must be used continuously.

Krebs confirmed that the applicant's argument is that continuous use is not required because the building has been an apartment building from the outset.

Greene concurred.

Brasler asked staff if the Town gives any credence or has any position on this question of continuous use vs. continuous occupancy because if this is an apartment building or a multi-family building then there should not be an issue.

Henderson reiterated that there is no doubt in her mind that this has been a live/work building from day one. At issue is the lowest level and the question is whether or not it was legally created for residential use. There is no evidence that it was legally created for residential use. The ceiling heights are substandard and there is an affidavit that in 1985, the space was storage, not residential use. Consequently, if subsequent to 1985 it was converted to residential use, as for any such property in this Town, building permits should have been obtained. If building permits were sought, the applicant would have been advised that a use permit was required, as it is a residential use in a commercial district.

Brasler stated that if Harrison's affidavit did not exist, the Town's argument that there was no continuous use would be weakened considerably.

Henderson observed that the burden of proof is on the applicant. The Town has no record of a residential use. Among the directories, slides presented with names of residents, etc., no where does it

say individuals lived in the lowest level. The issue remains: when was the lowest level residential unit built and was it built legally.

Henderson pointed to the fact that a commercial lease—not a residential lease—signed by Greene indicates the lease is for a basement, garage, and premises to be used for an office. There is nothing in this 1995 document referring to residential use.

Further, Henderson has indicated that the lowest level has not been used as a residence from the beginning until now. No proof has been offered that the residential unit was legally created.

Commissioner Overberger observed that she thinks of the issue in terms of apartments and space. The real issue is whether this area was an apartment or a bakery where sometimes Mama fed everybody in the building—that is the question she struggles with. If it was the latter, it isn't residential use from the beginning. If it was actually an apartment with a unique family living there, whether or not they were baking, that's a different matter.

Henderson agreed, noting that this is a simplified way of stating the issue at hand.

Zwick asked staff if historical qualifications were considered in the review of the property.

Henderson responded that they were not.

In response to a request from Krebs for clarification of the statute, Henderson clarified that for the unit in question to be a legal, non-conforming use—meaning that it would not need to meet today's building code—it would need to demonstrate a continuous use. Henderson added that this is provision is typical in most municipalities' building codes. If it legally existed prior to the code in effect today, as long as it continues, it is considered legal, non-conforming; however, there is no documentation that the unit was legally created, nor that it continued. Henderson observed that Greene himself stated the space in question has not been continuously used as residential space from the time the building was erected.

Henderson reiterated that the unit must demonstrate continuous use as a residential unit for it to be considered a legal, non-conforming, use; otherwise, the unit becomes legal when the owner secures a building permit and brings it up to current building code standards.

Krebs asked the applicant why he believes the unit does not have to demonstrate continuous use.

Greene explained that when a municipality changes its code such that the way in which a property has been utilized is no longer authorized going forward, the accommodation the law offers between those two interests is to designate the property as legal, non-conforming, and that the owner is allowed to continue the use. However, should the property owner discontinue the use for some period of time, such as six months or longer, than the owner loses the right to that use.

Greene contends that San Anselmo's Code defines an apartment house or a multi-family dwelling, and as it describes what is authorized residentially in a commercial district such as the one in which his property is located, that residential use has always been authorized and is therefore not subject to the sunset provision, as it has never been non-conforming.

Sisich asked if there were further questions from the Commissioners.

Henderson introduced Bonnie Freeman of Senneff, Freeman and Bluestone, LLP, explaining that the Town has found it necessary to hire outside legal counsel. Because Mr. Greene is a member of the Town Council, the Town Attorney potentially has a conflict of interest and cannot represent San Anselmo in this matter.

Sisich opened the public hearing.

Whitney Merchant, Ash Avenue, has spoken on behalf of San Anselmo's proposed housing element in the past and is surprised that the housing element has not been mentioned in the context of the current discussion. Merchant believes that the question going forward is the manner in which San Anselmo's housing problem is to be addressed. She reviewed some of the stated goals of the housing element as they relate to Greene's property and contends that the issue of a conditional use permit should be tabled at this time while the Town fast tracks the overlay zone as it is described in the housing element.

San Rafael resident Jonathan Frieman stated that Ford Greene is a good friend of his and that this is "a ridiculous, outrageous witch hunt; a waste of time and money." Mr. Frieman referred to language in the Town's land use element, quoting the phrase "policies to preserve, maintain and enhance the quality of life in residential neighborhoods." Frieman contends that the phrase "quality of life" is code for "let's not have any black people here," and "let's not have affordable housing," and that is what Ms. Henderson is trying to enforce.

Frieman pointed to Town Council member Jeff Kroot as the main culprit in the current matter, quoting Kroot as having said "this is intolerable for our community." Frieman questions the meaning of Kroot's statement, posing the question of just what harm is done by Greene's residing where he does. Frieman concluded that Henderson and Kroot are the only individuals concerned about Greene's residence.

Frieman believes the current inquiry is outrageous and should be stopped immediately.

Steve Burdo, Ash Avenue, believes the staff and Commissioners have made good use of the time they've put into the current inquiry but also believes they've been used.

It seems the current inquiry has come about as a result of Greene's fellow council member's complaint and that the council member's complaint is politically motivated. Burdo believes this is disrespectful to the Town's staff, residents, and process, and that the current inquiry is not a valuable use of staff's time.

Finally, Burdo reminded all that Greene has served the Town for the past five years and that the current discourse sends a bad message to Marin County about the way in which business is conducted in San Anselmo.

Helen Milowe, San Anselmo resident, noted that the building has been used for living and working in various configurations since it was built. Milowe agreed that one can argue as to whether or not one particular room or space was lived in and asks whether or not this matters. It is not the same as taking an undeveloped basement and deciding to live in it; the record shows that the space was used, whether people ate or slept there—the fact is that it was used in a residential live/work capacity.

Milowe believes the staff acted as they were expected to do but that the law goes beyond that. The Planning Commission has the authority to resolve that the building should be allowed to continue as it was intended and built, without unreasonable requirements that could result in its demolition and the loss of character that belongs to San Anselmo. Bringing the building into compliance would result in the loss of what Milowe believes to be part of historic San Anselmo.

Charlie Clifford, formerly of Berlin Avenue, appreciates staff's work on the matter at hand and believes they have taken it as far as they can. Now it's up to the Planning Commission to provide further direction.

There is no doubt in Clifford's mind that someone did live in the basement with the space as configured. He noted that there was always someone living in the back of Bordenave's Bakery on Fourth Street in San Rafael simply because it took four hours for the ovens to power up. Clifford pointed to a tradition of older, multi-generational families in the area in which the oldest generation often resided in the lower level of the home despite the fact that ceiling heights in the space did not meet code. Clifford asked the Planning Commission to preserve the older buildings in San Anselmo, such as the one under discussion, keeping in mind that complex little worlds exist in such spaces.

Sisich invited the applicant to return to the podium.

Rifkind noted that there was once a staircase between the law office/street level and the lowest unit of the building, indicating that the two floors were connected. Further, there is no evidence that a kitchen ever existed on the law office/street level, the point being that everyone who ever lived/worked in the 711 unit had to go downstairs to eat.

Greene clarified that the toilet referenced by Henderson in her staff report was located in the barn and not in the main building. He also noted that the Residential Resale Report was not presented to him until 2005, at which time he responded immediately to address many of the deficiencies noted therein. He advised that he is willing to take reasonable steps to upgrade the lowest level unit and noted that by the time the building code was established in 1927, 711 Sir Francis Drake had been in existence for over two decades.

Henderson clarified that the point in referencing the complaint from Marin Municipal Water District regarding the installation of a toilet was to identify the beginning of the chain of events that led to the identification of unpermitted construction, specifically the erection of a living unit in the lowest level constructed without permits and without compliance with standards for habitable space.

Krebs noted that the unit was identified as illegal more than seven years ago, indicating that the Town had not suddenly and recently taken action against Greene.

Greene concurred with Krebs' observation, noting that he made considerable follow-up efforts and was stymied when he reached the point of needing the services of an architect, which he could not afford.

Sisich closed the public hearing and asked for comments from the Planning Commission.

Zwick believes that the Planning Commission may not be the correct forum in which to resolve the issue. He has had good experience with the state historic building code and noted that Greene's is clearly one of the oldest buildings in town. Zwick believes the building should qualify for designation as a structure important to the culture of the Town and that it's possible many requirements of the residential building code could be waived with the support of the state historic building code, with the result that Greene may not have the tremendous expense of bringing the building up to today's codes.

Sisich asked Zwick what decision he is supporting.

Zwick clarified that he would ask the applicant to appeal to Building Official Keith Angerman, who could apply the state historic building code to the building, thereby ratcheting down the list of requirements for upgrading. The goal is to reach a reasonable consensus about what it would take to bring the building into compliance. Greene could then withdraw his application for a conditional use permit. Zwick observed that codes can vary based on the discretion of the building official and that this is really a building code issue, as opposed to a planning code issue. Zwick advocates tabling this item.

Sisich asked staff if it was acceptable to continue this appeal process.

Henderson explained that the code does not have time limits with regard to an appeal. The next agenda item, however, which includes the use permit for the residential use and the variance for the fence, must be acted upon by December 10, 2012.

Brasler generally does not believe anyone is being harmed by the fact that someone is living in the lowest unit and that it is acceptable that the unit is occupied as a residence. He would like to support the applicant in remaining in the unit under some reasonable conditions. Brasler delayed voting on the item until he could hear from his peers.

Overberger believes the unit should be allowed as a conditional use and should be a living space. She slightly resents the speakers who stated that it was ridiculous for the Commissioners to try to enforce

codes that are applied to all residents of San Anselmo, noting that the codes protect the social fabric of the Town. As she sees it, the current struggle involves making an attempt to reconcile social need and desire with an individual who has avoided this issue for 20 years. Overberger was planning to vote against the appeal until Zwick proposed a potential path to a more amenable solution and she concluded that a firm date needs to be established for a resolution.

House is interested in Zwick's proposal and asked staff if the state historic building code could be utilized in the current matter.

Henderson explained that the potential role of the state historic building code in this matter would fall under the purview of the Building Department. The Town, however, does not have an historic ordinance.

Like Overberger, House is interested in seeing the unit made residential. She is also interested in making sure it is a safe place for habitation and noted that the Commission cannot turn a blind eye to codes which apply to all residents. She is not sure it is possible to secure conclusive proof in support of either argument as to the historical use of the space, although there is proof that for at least ten years or so in the 1980's no one lived there. In light of the time limitation on the next agenda item, House does not see how there is enough time to research the applicability of the state historic building code at this time.

Henderson suggested denying the appeal, upholding her action, then approving the use permit on the second agenda item with the condition that the Building Department look into a possible process for readdressing specific improvement requirements based on the state historic building code.

Henderson alternatively suggested the option of holding action on the appeal in abeyance, continuing it indefinitely. Then, Commissioners could take the second item. Based on what is heard at the public hearing, the Commissioners could take action on the second item. If the Commission chooses to approve the second item, a condition of approval could be included stating that the Building Department is to look into the use of the state historic building code and that statute's potential use to lessen the applicant's burden as it relates to required improvements.

Because of the Commission's uncertainty with regard to Greene's appeal, discussion ensued addressing the possibility of continuing the appeal to a date certain and pursuing an investigation by the Building Department of the state historic building code's possible applicability.

Henderson reminded the Commissioners that while there is a state-mandated deadline on the second agenda item—which includes consideration of a conditional use permit—there is no deadline on the appeal currently under discussion.

In response to a question from Sisich, Henderson confirmed that if a use permit with modified conditions can be granted to Mr. Greene, the disposition of the appeal becomes moot.

Krebs agrees with most of the comments put forth in the Commissioners' discussion; clearly, everyone wants the unit to be habitable and the goal is to seek a solution to that end. He also understands and respects the need for affordable housing in San Anselmo specifically and in Marin County. Krebs further believes it is critical for individuals to understand the importance of going through the current process which seeks to treat Mr. Greene, who is a Town Council member, as any applicant would be treated.

Krebs is offended by the expressions of outrage voiced by some speakers regarding the attempts of staff and the Commission to respect what is a necessary process; he is equally offended by allusions to vendettas and statements that the actions of staff and the Commission send a poor message to Marin County.

Krebs further believes it is improper for speakers to imply that staff members may have been motivated by forces other than the necessity of carrying out their professional responsibilities. While he is not ignoring the fact that there may be related political issues at play involving other members of the Town Council and previous projects, Krebs maintains that staff has done a very good job and he has the

impression that the Town has tried to work with Mr. Greene for many years. Also true is the fact that this is a difficult issue for Greene from an economic standpoint and that he has tried to comply with many of the building codes.

In conclusion, while recognizing that certain deadlines exist, Krebs supports continuing the appeal, taking the second item under consideration, and making a decision. Hopefully some of the requirements of the building code can be resolved reasonably.

Overberger agrees with Krebs and appreciates his addressing the politics at play in the Council Chambers. It is also important to remember that while all of the Commissioners have said they would like to see the unit developed, they would like to see it developed legally.

Mr. Greene does have choices: he can inhabit one of the legal units above the one under discussion. Actions taken by the Commission would not put Mr. Greene out of his house, as has been the implication by some of the speakers.

Brasler supports continuing the appeal to a date certain and allowing the applicant to seek other avenues. He is opposed to denying the appeal with a contingency.

Sisich noted that the comments put forth by some speakers were insulting and inappropriate. Staff has put forth considerable effort in this matter. As the director of housing development at a non-profit organization dedicated to increasing the stock of affordable housing, Sisich completely understands the expressed concerns around affordable housing; nonetheless, standards specific to the building code need to be met.

Sisich observed that because the evidence to support the applicant's position has not been found, he supports staff in denying the appeal and intends to look favorably on the use permit application in the second agenda item.

Zwick would prefer to continue the appeal and move on to the next item.

M/s, Zwick/Overberger, that the Planning Commission continue the appeal of the Planning Director's decision to a date certain and that the Commissioners go on to the next item.

Discussion ensued and it was decided that the date certain would be February 4, 2013.

AYES: Brasler, House, Krebs, Overberger Zwick

NOES: Sisich

## **ADJOURN TO THE MEETING OF DECEMBER 17, 2012.**

Sisich adjourned the meeting at 9:55 p.m.

Respectfully submitted,  
Nancy Harris