

APPEAL OF BUILDING PERMITS

2019-228104 & 2020-036229 (314 & 316 W 34TH STREET)

Board of Adjustment, February 8, 2021

Presentation by Appellant

Appellants Mary Ingle, Mark Feist, et al.
Represented by Bobby Levinski, Attorney



PROPOSED BUILDINGS

- Subject properties are located within boundaries of [NUNA NCCD](#)
- NCCDs are zoning overlays that modify the use and site development regulations of the Land Development Code
- Two permits (314 & 316 W 34th Street) are mirror images of each other
 - Two-Family Residential Uses
 - Demolition of Front Units for New Primary Residences
 - Maintaining/Remodeling Back Units (each 2 beds; 2 baths)
- **Each** new primary residence will have 4 bedrooms & 7 bathrooms (as well as habitable attic space)
 - Total of 6 bedrooms & 9 bathrooms (per site)
- Four parking spaces provided (per site)

APPLICABLE ZONING PROVISION

“This section applies to a duplex or two-family residential use if there are at least five bathrooms in all buildings in which the use is located. An additional parking space is required for each new full bathroom constructed on the property.”

- NUNA NCCD, Part 6, Sec. 7(j)



PERMIT HISTORY

- Original Permit Application:
Applicant intended to construct 5 full bathrooms and 2 half bathrooms in primary residence
- 10/9/20:
Neighbors pointed out to City staff that the proposed building permits were under-parked, pursuant to NUNA NCCD
- 11/3/20:
After consulting with City legal, City staff agreed that NUNA NCCD should apply and permits were under-parked
- Revised Permit:
Applicant revised permit by deleting (literally crossing out) two showers from plans
“Converting” two of the new full baths into half baths
But, space for showers (and all else) remains on plans



PERMIT HISTORY

- 12/15/20:
Staff approves revised plans but again with only 4 parking spaces, citing Urban Core Parking Reduction
- 12/28/20:
Neighborhood appeals permit based on wrongful application of Urban Core Parking Reduction
- 1/8/21:
Neighborhood meets with staff, including Development Officer Brent Lloyd to discuss appeal
- 1/17/21:
Development Officer writes e-mail agreeing with Neighborhood that Urban Core Parking Reduction wrongfully applied—yet, doesn't repeal building permits
City staff comes up with a new interpretation

CITY STAFF'S 4TH INTERPRETATION

- Staff informed Neighborhood because the building permits were approved—**in error**—the City would attempt to find any possible interpretation of the code that keep the permits valid
- Thus, City staff manufactured the following:
 - “If either of the buildings has less than five bathrooms, then it’s not the case that ‘there are at least five bathrooms in all buildings in which the use is located’”
 - Email from Development Officer Brent Lloyd, 1/19/2021
- **In other words: all ≠ “all”; all = “each”**

1. Apply plain meaning & follow ordinary usage of words.
2. Read provisions holistically.
3. Look to legislative intent.
4. Avoid absurd results.

HOW
SHOULD WE
INTERPRET
THE CODE?

APPLY PLAIN MEANING & ORDINARY USAGE

- The words “all” and “each” have very different meanings:
 - “**ALL**” refers to the entire group as a whole.
 - “**EACH**” refers to the individual members of a group.
- A grammar lesson from [Woodward English](#):
 - I say goodbye to **each** student as they leave the room.
(= Goodbye John, goodbye Mary,... etc. until it has been said to **ALL** of the students individually... Yes, there is a lot of repetition.)
 - I say goodbye to **all** of the students as they leave the room.
(= Goodbye students ... I just say goodbye once)

APPLY PLAIN MEANING & ORDINARY USAGE

- To see how the word “each” would change the meaning of the sentence, consider the following juxtaposition:

Ordinance as Written:

“This section applies . . . if there are at least five bathrooms in all buildings in which the use is located.”; **vs.**

City’s Interpretation:

“This section applies . . . if there are at least five bathrooms in **each** building[] in which the use is located.”

READ THE PROVISIONS HOLISTICALLY

- “Two-Family Residential” use **BY DEFINITION** extends to two buildings.

Two-Family Residential:

“the use of a lot for two dwelling units, each in a separate building other than a mobile home.”

- LDC § 25-2-3(15)

- It would be impossible to count the number of bathrooms within the use, without aggregating across buildings.

LOOK TO LEGISLATIVE INTENT

- Many of the provisions within the NUNA NCCD, including this one, were adopted to address the proliferation of ***stealth dorms***.
- Occupancy limits have proven largely ineffective and unenforceable.
- These provisions are an attempt to regulate building form—rather than use—as recommended by City staff, to address the externalities of stealth dorms.
- By exempting two-family uses with less than five bathrooms, the NUNA NCCD excluded remodels of smaller-scaled two-family uses that are historic to the way the neighborhood originally developed.
- Many of the lots within the neighborhood were originally developed with two separate structures, less than 1,000 sq ft. in size each (incl. one or two bathrooms).

LOOK TO LEGISLATIVE INTENT

- Part 6, Section 7(j) functions as both an occupancy limit and a reasonable tool to address parking, traffic, and safety problems.
- For a two-family use that exceeds the five-bathroom threshold:
1 new full bathroom = 1 additional parking space
- Functional limit on overall scale of the structure
- Addresses the sufficiency of on-site parking to accommodate additional density
- Perfect remedy? No. Enforceable? Yes.
- ***Policy debate surrounding parking should be left to the City Council.***

AVOID ABSURD RESULTS

City's Revised Interpretation	Exist. Full Baths	Unit 1 Full Bath	Unit 2 Full Baths	Total Baths (Agg.)	Parking Required Under City Interp.
Subj. Permit	2	2	3	5	2 spaces
Scenario A	2	2	5	7	2 spaces
Scenario B	2	3	5	8	2 spaces
Scenario C	2	4	5	9	2 spaces
Scenario D	2	5	5	10	10 spaces
Scenario E	2	2	8	10	2 spaces
Scenario F	2	2	20	22	2 spaces

AVOID ABSURD RESULTS

- Under the City's interpretation, Part 6, Section 7(j) would only be triggered if both structures contained five bathrooms, as illustrated under Scenario D.
- Under that scenario, the required parking would leap from 2 parking spaces to 10 parking spaces.
- Under all other scenarios, the parking requirement would be 2 parking spaces, rendering Part 6, Section 7(j) meaningless.
- Absurd results:
 - Scenarios D & E each have 10 bathrooms, but D would require 10 spaces and E would require 2 spaces.
 - Scenario F has 22 bathrooms but would only require 2 spaces.

LOGICAL INTERPRETATION

Neigh. Interpretation	Exist. Full Baths	New Full Baths	Total Baths (Agg.)	Parking Req. under Neigh. Interp.
Subj. Permit	2	3	5	5 spaces
Scenario G	2	2	4	2 spaces
Scenario H	2	3	5	5 spaces
Scenario I	2	4	6	6 spaces
Scenario J	2	5	7	7 spaces
Scenario K	2	6	8	8 spaces
Scenario L	2	7	9	9 spaces

LOGICAL INTERPRETATION

- It is much simpler to understand the 5-bathroom threshold as an aggregate, considering its legislative intent to address stealth dorms.
- For a two-family use that exceeds the five-bathroom threshold:
1 new full bathroom = 1 additional parking space

NOTE:

THIS IS THE WAY THE CITY WAS READING PART 6, SEC. 7(J) UNTIL IT APPROVED THE SUBJECT PERMITS IN ERROR AND DECIDED TO COME UP WITH SOMETHING ELSE TO SAVE THE BUILDING PERMITS.



CITY STAFF
IS NOW
“NEUTRAL”

“We don’t view the other issue I raised (i.e. the ‘all buildings’ language) as an airtight reading of the NCCD and appreciate the issues you pointed out in the tables below.”

“[W]e’re going to remain neutral on the effect of the parking/bathroom provision and will be supportive of whatever decision the Board makes.”

- Email from Development Officer
Brent Lloyd, dated January 28, 2021

- **Reverse the Building Permits.**
- Apply Part 6, Section 7(j) of the NUNA NCCD **as written** for each building permit:
 - There are 9 bathrooms for each two-family residential use, triggering Part 6, Section 7(j).
 - The applicant is building 3 new full bathrooms on each lot, requiring an additional parking space for each new full bath.

Baseline Parking:	2 parking spaces
Additional Parking:	<u>+ 3 parking spaces</u>
Total Parking Required:	5 parking spaces



OUR
REQUEST
FOR BOA
ACTION