

1 **Pine Orchard Association**
2 **Board of Zoning Appeals**
3

4 **IN RE:** Francis Wihbey
5 3 Crescent Bluff Ave,
6 Branford, CT
7 Appeal of Cease and Desist Order of August 16, 2019
8

9 October 22, 2024
10

11 **Supplemental Memorandum of Decision**
12

13 This appeal by Francis Wihbey, owner of 3 Crescent Bluff Ave, Branford Connecticut
14 (“Property”) of a Cease and Desist Order of the Pine Orchard Association’s (POA) Zoning
15 Enforcement Officer (ZEO) dated August 16, 2019 comes before us on remand from the
16 Appellate Court to consider the following question: “... of whether plaintiff established a
17 lawful nonconforming use [under the 1994 Zoning Regulations] on the subject property.”
18 While the order does not specially identify the “non-conforming use” which we are to
19 consider, we are cognizant of the language of Appellate Court in discussing this issue
20 which states:

21
22 “Thus, so long as the tenants of a single-family dwelling are a single "family,"
23 occupying the structure for living purposes to the exclusion of other families, the
24 structure is being used as permitted. The corollary to that proposition, of course, is
25 that rental to multiple families, or any group of individuals that does not meet the
26 definition of "family" set forth in 1994 Pine Orchard Assn. Zoning Regs. § XIII, was
27 not a permitted use under the 1994 regulations.”

1
2 Wihbey v. Zoning Bd. of Appeals of the Pine Orchard Ass'n, 218 Conn. App. 356, 392 (2023).

3 For the reasons set forth below we conclude that Mr. Wihbey failed to establish that his
4 rental of the Property complied with the “Single Family”¹ requirement of the 1994
5 Regulations and therefore the use of the Property between 2005 and 2018 was not in
6 compliance with the 1994 Regulations - - that is there was no lawful non-conforming use
7 established with respect to the rental of the Property.

8 **Brief Factual History of the Case.**

9 On August 16 2018 the ZEO issued a cease-and-desist order to compel Mr. Wihbey
10 to cease using the Property known as 3 Crescent Bluff (“Property) for “short term” rentals.
11 Mr. Wihbey appealed to the ZBA and the case was initially heard before the POA ZBA in the
12 late summer/fall of 2019. The ZBA denied the appeal and Mr. Wihbey appealed to the trial
13 court. The trial court upheld the appeal (10/4/2021) and the POA and Hopkins/Wolff
14 appealed to the Appellate Court. The Appellate Court upheld the decision (3/28/2023) in
15 part and remanded the case to the ZBA for further findings. The POA and Hopkins/Wolff
16 appealed to the Supreme Court which has in turn, in a split decision (4/2) upheld the
17 Appellate court decision (7/29/2024). On August 15, 2024 the trial court issued an order
18 implementing the Appellate Court’s decision. Because neither the Appellate Court nor the
19 Superior Court directed the ZBA to take further evidence on this issue, our decision is

¹ We use the reference of “Single Family” as short hand to refer to the full definition of “family” as set forth in the 1994 Regulations and including the reference to servants and gratuitous guests.

1 limited to a review of the record from the 2019 hearings before the ZBA. The ZBA met on
2 October 1, 2024 and again on October 22, 2024 to discuss and reach this decision.

3 **POA Zoning Regulations.**

4 In reaching our decision we apply the Zoning Ordinance as adopted by the Pine
5 Orchard Association on September 20, 1994. (“1994 Regulations”)² During the 2019
6 hearings Mr. Wihbey testified that he acquired the Property in 2005. He offered no
7 evidence of the use of the Property before 2005; thus, any claimed use of the Property as
8 non-conforming use under the current regulations must have arisen after 2005 and prior to
9 September 18, 2018, the date of adoption of the current regulation. Therefore, the
10 applicable Zoning Regulations were those enacted in 1994. (Sup. ROR 1)

11 The 1994 Regulation is permissive in nature, meaning that uses that are not
12 specifically permitted are prohibited. Specifically Section IV of the 1994 Regulation
13 provides: “In these AA-I, A-1, A-2, A-3 and A-4 districts no building or land shall be used and
14 no building shall be erected or altered which is arranged, intended or designed to be used
15 respectively for other than one or more of the following uses:” Section IV then provides 8
16 specific permitted uses permitted by the 1994 Regulation. We find that Mr. Wihbey offered
17 no evidence which established any colorable claim relative to any permitted use set forth
18 in Sections 4.2 through 4.8 nor did he make any claim of such uses before the ZBA during
19 the 2019 hearings. The sole and only use of the Property claimed by Mr. Wihbey was that

²² On September 19, 2018 the POA enacted certain provisions addressing “short term rentals”. We are cognizant of the holdings of the superior Court, Appellate Court and Supreme Court in this matter and therefore do not apply the 2018 standards here but rather the Regulations enacted September 19, 1994 (Sup ROR 1).

1 his rental of property complied with the permitted use of “A Single-Family Dwelling” as
2 permitted under Section 4.1 of the 1994 Regulation.

3 Section 4.1 of the 1994 Regulation permits the use of property as follows: “A single-
4 family dwelling. Travel trailers and mobile homes, however, may not be used for dwelling
5 purposes.” The 1994 Regulations define a “Single Family Dwelling” as: “A building designed
6 for and occupied exclusively as a home or residence for not more than one family.” See
7 Section XIII, Definitions. (Emphasis added.) The 1994 Regulations go on to define “Family”
8 as follows: “FAMILY: One or more persons related by blood, marriage or adoption, and in
9 addition, any domestic servants or gratuitous guests. A roomer, boarder or lodger, shall not
10 be considered a member of a family.” Id.

11 Thus, to establish a non-conforming use Mr. Wihbey must establish facts supporting
12 each of the following elements:

13 1. That the Property was improved with a building designed for not more than
14 one Family.

15 2. That the Property was not occupied as a home or residence by more than one
16 Family.

17 3. When considering the term “Family” in each of the elements above, the
18 persons must be related by blood marriage or adoption and would include any servants or
19 gratuitous guests.

1 **Findings:**

2 The Cease and Desist which is the subject of this appeal does not concern the
3 construction of any improvements on the Property; therefore, we find that the first element
4 above is not at issue here; and therefore we need not address it.

5 We next turn to the second element which requires that the Property be occupied as
6 a home or residence by not more than one “Family.”

7 Mr. Wihbey failed to establish that he knew 1994 Regulations limited occupancy of
8 the Property to a single family and in fact he believed he could rent the Property without
9 limitation. (ROR 5, TR 10/28/2019 p 38, l 12; TR 11/25/2019 p. 7, ll 12- 14). We find this
10 significant, because one who was aware of the requirements would be more likely to
11 contemporaneously document their compliance with the Zoning Requirements and Mr.
12 Wihbey did not do so. The only evidence developed contemporaneously with the rental of
13 the Property and produced at the hearing before the ZBA were several examples of a
14 sample “standard” lease agreement (Sup ROR 5; Ex G) each with the name of the Tenant
15 redacted. (RoR 5; TR 10/28/2019, P. 21) The form lease does not list the name of each
16 occupant, nor does it specifically restrict the occupancy of the Property to a single Family
17 as defended by the 1994 Regulations. (Sup ROR 5; Ex G). There is no language within the
18 lease nor was any disclosure provided to the prospective tenants that the occupancy of the
19 Property was limited to “Family” as set forth in the 1994 Regulations.

20 The failure of Mr. Wihbey to contemporaneously document his compliance with the
21 1994 Regulations, did not prevent or foreclose him from doing so at the hearings before the
22 ZBA. Yet despite Mr. Wihbey’s assertion that he rented the Property from 2005 through the

1 date of hearings, and that he rented the Property for between 8 and 12 weeks a year, (ROR
2 5, TR. 10/28/2019, p. 35-36, ll 21-12), more than 100 times during the 13 years preceding
3 the hearings, Mr. Wihbey failed to produce any evidence or to elicit any testimony of a
4 single instance in which the rental of the property complied with the single Family
5 requirement. Mr. Wihbey had the opportunity to do so not only at the initial hearing, but
6 also at a subsequent hearing date some 4 weeks later. The intervening 4 weeks between
7 the hearings afforded Mr. Wihbey ample opportunity to buttress his claim of compliance
8 with the 1994 Regulation, but his failure to produce such evidence supports our conclusion
9 that he did not and could meet his burden of establishing his use of the property was in
10 conformity with the 1994 Regulations.

11 Even during the course of the hearings Mr. Wihbey disputed the proposition that the
12 rental of the Property was limited to that of a single family as defined in the Regulations.
13 (ROR 5, TR. 10/28/2019, p. 34, ll 1-7) When directly asked if such requirement applied, Mr.
14 Wihbey responded, “No, I won’t agree with that.” (ROR 5, TR. 10/28/2019, p. 3,4 l 4)

15 During the hearing the VBRO listing for the Property and its associated reviews was
16 offered by the ZEO. (ROR 8, Exhibit 3). The VBRO listing provides several reviews, most of
17 which are not relevant to this inquiry as they reference stays after the 2018 Regulation
18 adoption. However, there is a single review referencing a stay in August 2018. The review
19 references the Property accommodating a “large group”. While not determinative of the
20 issue at hand, the review does not refer to the group being a family, yet equally as
21 importantly, it presents as an example of a renter from whom Mr. Wihbey could have
22 obtained a statement supporting his compliance with the 1994 Regulation, but did not.

1 Mr. Wihbey used an application process, but would not collect the names of
2 everyone who would actually be staying on the Property. (ROR 5, TR. 10/28/2019, p. 32, ll
3 18-22) Indeed, Mr. Wihbey did not at the time of rental determine whether the people
4 occupying the Property were related by blood, marriage or adoption. (ROR 5, TR.
5 10/28/2019, p. 33, ll 4-23) Furthermore, at the time of the hearings before the ZBA Mr.
6 Wihbey could not state the people he rented to in the past were related by blood, marriage
7 or adoption. (ROR 5, TR. 10/28/2019, p. 33, ll 18-23) In the words of Mr. Wihbey: "I cannot
8 [state the renters were related by blood, marriage or adoption] and if I said I would be
9 lying..." Indeed Mr. Wihbey continued, acknowledging that not all of the renters were
10 related, stating that "... people are going to have friends there and a lot of times people
11 would come and they had friends....they usually come back and have friends that live in the
12 area and that they meet..." By Mr. Wihbey's own admission, he truly did not know who was
13 occupying the Property: "If you ask if I'm standing there when they come in, who's this and
14 how are they related to you, I do not ... and I don't think that's appropriate." (ROR 5, TR.
15 10/28/2019, p. 33, ll 10-11) Mr. Wihbey's indifference to whom he was renting or who was
16 occupying the Property is consistent with his belief that he could rent the Property
17 "however [he] wished" (ROR 5, TR. 11/25/2019, p. 7, ll 12-14)

18 For these reasons we conclude that Mr. Wihbey failed to establish that his rental of
19 the Property resulted in a single "family," occupying the structure for living purposes to the
20 exclusion of other families and thus failed to establish a lawful use in conformity with the
21 1994 Regulations.

22

1 Upon motion made by Jeanne Hughes and seconded by Maureen Herbert the
2 foregoing decision was adopted by the unanimous vote of the Board with James Killelea,
3 Jeanne Hughes, Maureen Herbert, Eric Rose and Vining Bigelow voting in favor of adoption..
4

5 Pine Orchard Association
6 Zoning Board of Appeals
7

8 By: Maureen Herbert
9 Maureen Herbert, Secretary