

TOWN OF UNDERHILL - ZONING VIOLATION
DISCREPANCIES IN WARNER CREEK EXTENSION SHARED INFRASTRUCTURE
FINDINGS AND DECISION

In re: Courtney and Warren Palmer
Saxon Oaks Co.
122 Skunk Hollow Road
Jericho, VT 05465

Docket No. DRB-17-01

I. INTRODUCTION AND PROCEDURAL HISTORY

This proceeding concerns the notice of zoning violation issued by Andrew Strniste, Planning Director and Zoning Administrator for the Town of Underhill.

- A. On 28 November 2016, after an extensive investigation, a notice of violation was issued by the town of Underhill Zoning Administrator. Said violation detailed the project background, the investigation conducted by the Zoning Administrator, and concluded with numerous violations. Said violations with supporting documentation are listed as follows:
1. VIOLATION 1: The terminus of Warner Creek is not constructed per Site Plan and lacks a turn-around, and therefore, is in violation of the Site Plan, 2002 Road Policy and 2015 Road Ordinance.
 2. VIOLATION 1A: If the corrective action taken is constructing the road to be in conformance with the Site Plan, turnarounds for the driveway shall also be constructed.
 3. VIOLATIONS 2-4: Lot 3 culverts are undersized and in violation of the Site Plan and the 2002 Road Policy.
 4. VIOLATION 5: The existence of a culvert on Lot 4 is not identified on the Site Plan.
 5. VIOLATION 6: Warner Creek Road is not orientated in the center of the right of way on Lots 3 & 4 per the Site Plan.
 6. VIOLATION 7: The sewer pipe for Lot 3 is located outside of Lot 4's septic easement.
 7. VIOLATION 8: The right of way on Lot 3 is misaligned.
 8. VIOLATION 9-11: The Lot 3 drilled well, Lot 4 drilled well and Lot 4 septic tank deviate from the approved and recorded Site Plan.
- B. On 13 December 2016, attorney Gary L. Franklin representing Courtney Palmer, Warren Palmer, and Saxon Oaks appealed the Zoning Administrator's Decision and Findings. Attorney Franklin requested that the violations be overturned in total, or, in the alternative that a variance be granted as appropriate, pursuant to 24 V.S.A. § 4469.
- C. On 13 December 2016, Marty Baslow, owner of Lot 5 of the Warner Creek subdivision and an interested party to this proceeding, appealed the Zoning Administrator's Decision and Findings. Specifically Mr. Baslow requested to appeal the ability for the violations to be cured by variance.

- D. On 17 January 2017, a copy of the notice of violation and appeal hearing was mailed via Certified Mail to the appellants, Warren Palmer (Saxon Oaks Co., 122 Skunk Hollow Road, Jericho, VT 05465) and Marty Baslow (65 Colonel Page Road, Essex, VT 05452) and to the following owners of properties adjoining the property subject to the violation, along with other affected parties:
- a. Thomas & Sally Ann Bosley, 4 Baslow Lane, Underhill, VT 05489
 - b. Russell & Elise Baslow, 13 Baslow Lane, Underhill, VT 05489
 - c. Francis & Evelyn Comstock, 19 Baslow Lane, Underhill, VT 05489
 - d. Steven Coia, PO Box 212, Underhill, VT 05489
 - e. George Smith, 38 Gert's Knob Road, Underhill, VT 05489
 - f. Maple Station LLC, 1 Town Market Place, Essex Jct., VT 05452
 - g. Craig & Morgan Luce, 50 N. Underhill Station Rd., Underhill, VT 05489
 - h. Drew Vandeth & Kristen Juel, 60 N. Underhill Station Road, Underhill, VT 05489
 - i. Robert & Alisson Richards, 295 Poker Hill Road, Underhill, VT 05489
 - j. Gary & Elizabeth Francis, 305 Poker Hill Rd., Underhill, VT 05489
 - k. Douglas & Christine Varney, 329 Poker Hill Road, Underhill, VT 05489
 - l. Eunice Tatro, 1617 VT Route 15, Morrisville, VT 05661
 - m. Shawn & Michelle Pecor, 772 VT Route 15, Underhill, VT 05489
 - n. Gretchen Dehart, 779 VT Route 15, Underhill, VT 05489
 - o. Christopher Greenwood, 780 VT Route 15, Underhill, VT 05489
 - p. Wayne Ralph Russin, PO Box 417, Underhill, VT 05489
 - q. Louis D. Lawton, 13 Warner Creek, Underhill, VT 05489
 - r. Allen Bugbee, PO Box 221, Underhill, VT 05489
 - s. Elizabeth Geran & Brendan Kelly, 17 Warner Creek, Underhill, VT 05489
 - t. Cynthia & David Glenn, 18 Warner Creek, Underhill, VT 05489
 - u. David Sminkey & Anne Marie Nadeau, 769 VT Route 15, Underhill, VT 05489
 - v. Michael J. & Cara T. Cook, 773 VT Route 15, Underhill, VT 05489
 - w. Mark & Daniel Tatro-Lavigne, 799 VT Route 15, Underhill, VT 05489
 - x. Alex & Alexis Karner, 24 Warner Creek, Underhill, VT 05489
 - y. Kyle & Jenah Koenig, 23 Warner Creek, Underhill, VT 05489
 - z. Albert Abdinoor, 22 Warner Creek, Underhill, VT 05489
 - aa. William West & Kathryn Robinson, 21 Warner Creek, Underhill, VT 05489
 - bb. Claude A. & Judith A. Raineault, 28 Gert's Knob Road, Underhill, VT 05489
 - cc. Warner Creek Homeowners Assoc. Co., 24 Warner Creek, Underhill, VT 05489
 - dd. Town of Underhill, Attn: Andrew Strniste, P.O. Box 120, Underhill, VT 05489
 - ee. O'Leary -Burke Civil Associates, Attn: Paul O'Leary, 13 Corporate Dr., Essex Junction, VT 05452
- E. On 17 January 2017, notice of the public hearing for the appeal of the zoning violation was posted at the following places:
1. The Underhill Town Clerk's office;
 2. The Underhill Center Post Office;
 3. The Underhill Flats Post Office

- F. During the week of 17 January 2017, the notice of the public hearing was published in *The Burlington Free Press*.
- G. The appeal hearing convened at 6:40 PM on 6 February 2017 at the Underhill Town Hall.
- H. Present at the final hearing were the following voting members of the Development Review Board: Charles Van Winkle, Chairman; Will Towle, Vice Chairman; Penny Miller, Clerk; Mark Green; Matt Chapek; and Karen McKnight.
- I. At the outset of the hearing, Chairperson Charles Van Winkle explained the criteria under 24 V.S.A. § 4465 (b) for being considered an “interested party.” Those who spoke at the hearing were:
 - 1. Andrew Strniste, Planning Director and Zoning Administrator
 - 2. Bradford Holden, L.S., consultant for the Town of Underhill
 - 3. Gary Franklin, Esq. representing Saxon Oaks Co.
 - 4. Marty Baslow, current owner of Lot #5 Warner Creek
 - 5. Jason F. Ruwet, Esq., representing Marty Baslow
 - 6. Rick Hamelin, P.E., consultant for Marty Baslow
 - 7. Alex Karner, current owner of Lot #4 Warner Creek
 - 8. Albert Abdinoor, current owner of Lot #3 Warner Creek
 - 9. George McCain, P.E., consultant for Saxon Oaks Co.
- J. In support of the Zoning Violation and appeal the following exhibits were submitted to the Development Review Board:
 - 1. Exhibit A – A copy of the appeal letter from Marty Baslow (dated & rec'd 12/13/2016)
 - 2. Exhibit B – A copy of the appeal letter from Gary L. Franklin, Primmer, representing C. & W. Palmer and Saxon Oaks (dated & rec'd 12/13/2016)
 - 3. Exhibit C – A copy of the zoning violation of the Warner Creek Subdivision - with attachments (dated 11/28/2016)
 - 4. Exhibit C1 – Warner Creek Zoning Violation Timeline, prepared by Andrew Strniste (to accompany Exhibit C, zoning violation)
 - 5. Exhibit C2 – Excerpts from the Underhill Unified Zoning & Subdivision Regulations regarding Development Roads (to accompany Exhibit C, zoning violation)
 - 6. Exhibit D – A copy of the response letter from Gary L. Franklin, Primmer, representing C. & W. Palmer and Saxon Oaks to Katelyn E. Ellerman, Esq, Murphy Sullivan Kronk (Underhill Town attorney) - with attachments (dated 1/11/2017)
 - 7. Exhibit E – Certificate of Service
 - 8. Exhibit F – Palmer Appeal Exhibits
 - 9. Exhibit F2 – Palmer Appeal Brief (to accompany Exhibit F-Palmer Appeal Exhibits)
 - 10. Exhibit G – Selection from the As-Built Site Plan, McCain Consulting
 - 11. Exhibit H – Photos submitted by Marty Baslow

All exhibits are available for public review in the Warner Creek subdivision file (DRB- 17-01) at the Underhill Zoning & Planning Office and are posted on the Town of Underhill website.

II. FINDINGS

Based on the notice of violation, the above exhibits, hearing testimony, and evidence submitted relative to this proceeding, the Development Review Board makes the following findings under the requirements of the Underhill Unified Land Use and Development Regulations (UULUDR) and 24 V.S.A. § 4465:

1. VIOLATION 1: The Board finds the terminus of Warner Creek is not constructed per the approved Site Plan and lacks a turn-around, and therefore, is in violation of the approved Site Plan. The board finds that it has no jurisdictional review or enforcement authority over the 2002 Road Policy or the 2015 Road Ordinance, as both the policy and ordinance is administered by the Selectboard. The Board makes no findings with regards to the violations cited under the 2002 Road Policy or the 2015 Road Ordinance.
2. VIOLATION 1A: The Board finds no corrective action has been taken with regard to physical construction of the roadway or driveway as suggested by the Zoning Administrator in his violation letter of 28 November 2016.
3. VIOLATIONS 2-4: The Board finds that the Lot 3 culverts are undersized and in violation of the approved Site Plan.
4. VIOLATION 5: The Board finds the existence of a culvert on Lot 4 is not identified in the approved Site Plan.
5. VIOLATION 6: The Board finds that Warner Creek Road is not orientated in the center of the right of way on Lots 3 & 4 per the approved Site Plan.
6. VIOLATION 7: The Board finds that the sewer pipe for Lot 3 is located outside of Lot 4's septic easement.
7. VIOLATION 8: The Board finds that the right of way on Lot 3 is misaligned.
8. VIOLATION 9-11: The Board finds that the Lot 3 drilled well, Lot 4 drilled well and Lot 4 septic tank deviate from the recorded Site Plan. The Board's findings in this regard, are somewhat minimalized. In conducting their review of the subdivision, the Board approved common infrastructure improvements for the roadway and drainage system. The Board acknowledges the well and septic locations were shown for reference and in support of a permit application subject to review the VT Agency of Natural Resources. The Board then relied on the ANR permit, as a rebuttable presumption that the development will not contaminate the groundwater. The Board did not issue a "site plan approval" to the lots within the subdivision. The Board finds the location of the well and septic on Lots 3 and 4 are subject to the jurisdiction of the VT Agency of Natural Resources.
9. The Board finds the certification letter(s) issued by Paul O'Leary, P.E., dated 18 November 2014, and 5 May 2015 indicating the shared infrastructure within the Warner Creek subdivision to be inaccurate and misleading. The Board finds these letters issued by a professional engineer licensed in the state of Vermont, dissuaded the Zoning Administrator from further independent investigation relative to the completion of the shared infrastructure improvements.

10. The Board finds that certificate of occupancy for the construction of a single family home on Lot #3 was issued by then Zoning Administrator Rachel Fifield on 3 November 2015.
11. The Board finds that certificate of occupancy for the construction of a single family home on Lot #4 was issued by then Zoning Administrator Rachel Fifield on 23 October 2015.
12. The Board finds, based on the 17 January 2017 submission from attorney Franklin that Saxon Oaks has no interest in the development.
13. The Board finds that a Certificate of Occupancy issued by the Zoning Administrator is required by the UULDR prior to the use or occupancy of land, a principal structure, or part thereof, or for which a zoning permit has been issued. The purpose of this Certificate is to ensure that the use or structure, as established, conforms to the regulations and the conditions of approval. The UULDR states a certificate of occupancy may be appealed within 15 days from the date of issue.
14. The Board finds that no appeals were filed on behalf of either certificate of occupancy issued for Lot 3 or Lot 4.

III. CONCLUSION

The Board concludes that the zoning administrator did not solely rely on the certifications provided by Paul O’Leary, P.E. and in fact conducted her own inspections on the dates referenced in the certificate of occupancy. The Board concludes the zoning administrator did not validate or inspect infrastructure in plain sight even though she conducted a site inspection, prior to issuing the certificates of occupancy.

The Board concludes that Paul O’Leary, P.E. was negligent in his inspection of the common infrastructure improvements and negligent in his certification of said improvements. The Board concludes the actions of Mr. O’Leary betrayed the public trust instilled by his license.

The Board concludes that the developers, buyers, financiers, title insurance agencies, and the overall real estate market rely on the “Certificate of Occupancy” as a foundation for transacting the purchase and sale of land and housing stock. The Board concludes that no appeal of the Certificate of Occupancy was made within the stipulated 15 day appeal window, and to re-evaluate said approval more than a year after issuance would undermine the integrity of the certificate of occupancy process.

IV. DECISION AND CONDITIONS OF APPROVAL

Based upon the findings and conclusions listed above, the Development Review Board overturns in total the notice of violation dated 28 November 2016.

The Board directs the Zoning Administrator to file a complaint with the VT Board of Professional Engineering regarding the negligent actions by Mr. O’Leary and to seek reimbursement for costs incurred by the town to investigate the discrepancies.

Dated at Underhill, Vermont this 20th day of **February, 2017**.

Charles Van Winkle, Chair, Development Review Board

NOTICE: This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceedings before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A. §4471 and Rule 5 (b) of the Vermont Rules for Environmental Court Proceedings. Appeal period ends 22 March 2017.