

TOWN OF UNDERHILL  
DEVELOPMENT REVIEW BOARD

Conditional use review application by Peter Duval to convert a single-family dwelling with an attached accessory dwelling to a four unit multi-family dwelling.

Docket No. DRB-17-16

MOTION FOR RECONSIDERATION UPON NEW SUBMISSIONS

Applicant Peter Duval respectfully submits this motion for reconsideration of the Board's decision of June 29, 2018, which denied the conditional use permit for conversion of a single family dwelling unit with an attached accessory dwelling to a four unit multi-family dwelling at 25 Pine Ridge Road.

The record contains ample evidence to support conditional use approval with routine conditions, as argued in the Motion for Reconsideration on the Record. In the interest of obtaining the approval rather than being right, I bring this Motion for Reconsideration Upon New Submissions of a Wastewater and Potable Drinking Water Supply Permit when it becomes available, approximately three months from now, along with a more detailed floor plan than the plan shown than already presented, and any other material necessary to address Board concerns, and to amend the decision's incomplete procedural history, address new Board concerns that emerged in the decision, identify areas where the Board steps beyond its jurisdiction, and identify issues improperly used as a basis for denial.

New Submissions

More detailed floor plans will be available at approximately the same time as the Wastewater and Potable Drinking Water Supply Permit. Anticipated obtainment of the permit is November 15, 2018.

## Procedural History

### Filing Time

It is heartening that the Board acknowledges that this application was “submitted” November 2, 2017 (Decision, DRB-17-16, p.1), but disappointing that it still fails to recognize that November 2, 2017 is exactly the date of “filing”. Correct examples are found in these recent decisions:

“On April 24, 2017, Katelin Brewer-Colie, on behalf of her father Ross Brewer (collectively known as the applicants), filed an application for a conditional use...” (Decision, DRB-17-09, p.1)

“On October 5, 2016, Ashley Wishinski (also known as the applicant) filed an application for a conditional use...” (Decision, DRB-16-10, p.1)

“On February 12, 2018, Peter Davis, on behalf of Rade Holdings, LLC [also known as the applicant], filed an application for a conditional use...” (Decision, DRB-18-06, p.1)<sup>1</sup>

This inconsistency in the treatment of this application’s filing time is indicative of the mishandling this conditional use application has received and the lack of fairness that permeates the decision.

### Request for Time

In order to address the 24 VSA 4449(d) kerfuffle caused by the Planning & Zoning Administrator’s March 26, 2018 letter, a request to postpone or continue the May 7, 2018 hearing was made at the April 9, 2018 and more formally at the April 16, 2018 DRB meetings. This request was not granted.

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<sup>1</sup> In the Rade decision, the Planning & Zoning Administrator became aware of 24VSA4449(d) “Between February 12, 2018 and March 6, 2018,” an inconsistency with “Between February 5, 2018 and March 6, 2018” as stated in this decision.

At the May 07, 2018, the Chair of the DRB was unaware that the request for time was made and not acted upon. This caused confusion and contributed to the raucousness of the meeting. It is the responsibility of all members, and especially the Chair to “review the minutes and other official records of DRB meetings and actions”. (Rules of Procedure, p. 2)

The request for continuance was repeated at the May 07, 2018 meeting.

#### Motion to Stay Proceedings

With no agreement over the issue of 24 VSA 4449(d), A motion to stay proceedings was made but not acted on during the May 7, 2018 hearing.

#### Refusal to Take Oral Testimony

At the May 7, 2018 hearing, the Board refused to take testimony from the project’s consulting engineer about the site plan, water, wastewater and stormwater. This being a significant deviation from common practice, it should be noted in the procedural history, just as it is in the meeting minutes:

“The applicant requested at this time for engineer Gunar [sic] McCain to present the site plan and he could answer technical questions concerning waste-water, water and storm water. Chair Van Winkle responded to Mr. Duval that he had plenty of time to prepare for the presentation and that he (Van Winkle) was pretty much done here.”

#### Jurisdiction

it seems necessary at this point to remind the Board that Vermont is a Dillon’s Rule state. Towns are creatures of the state. The Board’s authority is limited by state law, state rules, town plan, and land use and development regulations. The Board’s only job is to interpret town development regulations and hear zoning appeals. The DRB is not

the Planning Commission. It is not the Act 250 District Commission. It is not the Department of Environmental Conservation.

The Board goes beyond its authority in several parts of the decision: (1) inventing a planning neighborhood that is not recognized in any town document; (2) using, and misreading, an Act 250 permit as a basis for denial, (3) demanding a complete wastewater system design prior to approving a conditional use.

### Planning Authority

The Board designates a Pine Ridge Road neighborhood in its decision, but simply does not have the authority to create planning neighborhoods. This is the jurisdiction of the Planning Commission as it drafts town plans. The Planning Commission has not recognized any neighborhoods. No Pine Ridge Road neighborhood exist in town documents, indeed there are no neighborhoods anywhere in Underhill. It's simply too rural for neighborhoods to emerge.

### Act 250

At a time when wastewater regulation was in its infancy, the Act 250 permit for the subdivision included a return for amendment provision for development beyond single-family home. That limitation was long ago superseded by a statutory right to an accessory apartment. And even as the Board attempts to ascribe new meaning to this provision and enforce it as if the DRB were the District Commission, the Planning Commission has been busily altering the zoning that applies to this lot and other lots in the subdivision. At one point, half of the lots that front on Pine Ridge Road were to be partially upzoned to a half-acre minimum lot size — with multi-family buildings as a permitted use. The DRB cheered on these zoning proposals. As of 2018, part of the subdivision has been included in the Underhill Center Village Center zoning district. Vermont never adopted statewide zoning, and Act 250 is not a zoning authority. That authority rests solely with the Planning Commission as approved by the town's voters, who voted to allow multi-family housing in all of the Water Conservation District.

## Water/Wastewater an Potable Water Supply Permit

“Chair Van Winkle advised that the Board typically relies on the obtainment of a wastewater permit from the State of Vermont.” (DRB minutes, February 5, 2018). Indeed, since 2007, town control over water and wastewater has been superseded by state review. By statute 10VSA1976(b), The DRB has no role in regulating water and wastewater. In all other recent permits, DRB has made the acquisition of a state permit a condition of the town permit, a perfunctory gesture that is at once redundant yet powerful, and allowed by 24VSA4414(13).

The wording of this condition may overstate the role of the DRB, but since the location of the wastewater system is already known, it would be harmless: “Obtaining a Wastewater System & Potable Water Supply Permit is a requirement to obtain the Certificate of Occupancy Permit per Section 10.4.A.2. If the layout of the wastewater system changes between this approval and the installation of the system, it shall require review and approval by the Planning/Zoning Administrator and shall be referred to the DRB for a new Conditional Use review at the PZA's discretion” (Decision, DRB-17-09, p. 7)

Here is another final-permit-issuance-conditioned-on-issuance conditional use approval: “The applicant shall submit a copy of the Wastewater System and Potable Water Supply permit for recordation prior to obtaining a certificate of occupancy permit in regards to Lots 2 and 3. In addition, prior to the issuance of a Certificate of Occupancy, the applicant or subsequent landowner shall provide a certification letter from a Vermont Licensed Professional Engineer or Licensed designer that the wastewater system and water supply have been constructed according to the approved ANR plan.” (Decision, DRB-17-04, p.13)

At the May 07, 2018 hearing the project's professional engineer, Gunner McCain, was available to answer any questions that the Board had about the site plan, water and wastewater systems. The Board chose not to hear his testimony. If it had, he might have been able to ease the Board's concern about the leach field setback from the east lot line (Decision, that the town's Water Conservation District side lot line setback that applies to leachfields is 20', which is less than the 25' property line isolation distance required by Vermont Environmental Protection Rules, 1-807(a). Gunner might also have explained steep slope mapping. While there are some small isolated, noncontiguous steep areas, they do not meet the minimum area threshold for steep slopes. He could also have explained that the area of soil disturbance was below regulatory thresholds, erosion control procedures would be by-the-book, as described in the project narrative.

Wastewater rules allow for disposal fields on slopes up to 30% for this lot. The slope in the wastewater disposal area is much less than 30%. The source protection plan does not consider septic systems to be a priority concern in Jericho Underhill Water District Source Protection Plan zone 3, the 25-year zone, on the edge of which this project is located. It is concerned with chemical pollution from fertilizers, pesticides, and fuels.

#### Villaneuve Subdivision

Even though the Richard and Ardelle Villaneuve land subdivision involved 23 lots which are accessed by at least 4 different roads, the Board invented the planning neighborhood based on the subdivision, wrongly declaring that the subdivision created a distinct neighborhood of single family homes along Pine Ridge Rd. Single family homes dominate all areas of Underhill.

While there are several deed restrictions of varying wisdom applied to the lots of the subdivision, there are no restrictions on development or the use of permanent

structures. If the Villaneuves had intended for the subdivision contain single-family homes forever, such a restriction would be in the deed.

### Character of the Area

The regulations that the Board is charged with interpreting refer to the “character of the area affected, as defined by zoning district purpose statements and specifically stated and relevant policies and standards of the Underhill Town Plan.” (ULUDR 2014, 5.4.B.2) Aspects of the project which address the purpose statement include minimizing impervious surface area, maintaining wooded landscape, constructing infiltration features, and switching from petroleum to solar and electric energy systems.

The town plan referred to by the regulations is not the 2015 Town Plan. It did not exist when the regulations were written. While the 2015 Town Plan contains some remnant clues about the meaning of the character of the area, it is the Town Plan adopted May 27, 2010 to which the regulations refer. Regulations are written to implement the policies set out in the Town Plan. The regulations are informed by the 2010 Town Plan, not the 2015 Town Plan.

“Generally speaking, in Underhill, there are three categories of land use: traditional village centers, residential lands, and open/agricultural lands.” (Town Plan 2010, p.23) The Town Plan goes on to describe the prevalence of residential structures throughout the town, predominantly single-family and the scattering of commercial uses throughout the town. In short, the character of the area for most of the whole town is residential with scattered other uses. Multi-family housing is a residential use.

### Fair Housing

The Board can’t use the presence of single-family homes to deny the multi-family conditional use because it would have the effect of prohibiting the conditional use everywhere in town.

## Housing

In the context of the skew to single-family homes, the plan asks the question “What can the town do to encourage development of new housing units?” The top solution is to “make zoning regulations accommodate multi-family housing in more districts” (Town Plan 2010, p.62), which is exactly what the Planning Commission and the voters did when they allowed for up to 8-unit multi-family housing in several districts, including the Water Conservation District. It is the intent of the Town to allow multi-family housing in the Water Conservation District.

## Parking

It is improper for the DRB to deny a conditional use permit based on concerns that can be resolved with reasonable conditions.

In its February 17, 2018 letter, the DRB requested a total of 8 parking spaces, including 1 accessible space, not 9 spaces as suggested in the decision. The requested 8 spaces matched the parking capacity proposed with the original site plan, November 02, 2017. It was improper for the DRB to increase its desired minimum parking capacity at the time of its decision.

In its decision, the DRB expressed a concern about the accessible parking space indicated on the site plan conflicting with the driveway. This could be easily addressed with a simple condition: "The width of the driveway shall be flared to 14' where it intersects with the parking area."

Tandem parking was proposed to minimize impervious surface and anticipate reduced parking demand with the deployment of shared vehicles. Nonetheless, the DRB's concern can be addressed with a straightforward condition: "The parking area shall accommodate two cars per unit as the phases are developed, and be arranged to accommodate single depth parking along a single driving aisle, with a minimum driving

aisle width of 24'." The resulting 60'x56' parking area would accommodate the 8 parking spaces, including 1 van-accessible space, flared driveway and turning space. There is plenty of space onsite for additional parking, if necessary. The Brewer decision demonstrates the Board's ability to condition additional parking capacity as needed. (see Decision, DRB-17-09, p. 6)

#### Table of Concerns

Responses to questions and requests, including concerns about erosion control and stormwater, are summarized in Exhibit "Narrative: PR025 201805211600..."

For the above reasons, the Motion should be granted.

Dated: July 27, 2018

Respectfully submitted,

/s/ Peter K Duval