DEVELOPMENT REVIEW BOARD

Town of Underhill, VT

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April 7, 2014

Mr. Grant Allendorf
P.O. Box 214
Underhill, VT 05489

Re: Appeal by Grant Susan & Ryan Allendorf of the Issuance of Certificate of Compliance CC#: 13-01, issued November 25, 2013, by Town Administrator Brian Bigelow

Dear Mr. Allendorf:

The Goplen Subdivision Permit was issued on 19 June 2012. Under the conditions of the permit, a certificate of compliance must be issued pursuant to the criteria outlined in the Town of Underhill, VT Unified Land Use & Development Regulations § 10.4.B.1-3. Our Regulation 10.4.B. requires, in appropriate cases, "a certificate of compliance be obtained to ensure all improvements, including roads and other infrastructure improvements, have been installed in compliance with the conditions of the subdivision approval."

A certificate of compliance requires a review and comparison of the "as built" development to the approved plans. The Town of Underhill issued Certificate of Compliance CC#:13-01 on November 25, 2013. Grant M. Allendorf, Susan S. Allendorf, and Ryan Allendorf appealed this decision on December 9, 2013.

The Decision before the Development Review Board:

Was the storm water utility built in substantial compliance with the DRB permit which adopted by reference the storm water utility plan approved by the State?

The storm water utility might not be built in compliance if it was substantially uncompleted, built in the wrong place, or if substantial changes were made to the utility during construction. We review the certificate of compliance under our authority pursuant to 24 VSA § 4465.(c)(1).

Decisions which cannot be undone because these decisions were made a long time ago and nobody appealed these decisions and are not subject to our review:

Whether the State of Vermont was correct to issue the storm water permit based on this storm water plan.

Whether the DRB was correct to accept the storm water plan when it issued the subdivision permit.

Whether the storm water plan was a good plan.

Whether the subdivision permit should have been issued.

Whether the lots should have been sold.

Whether the "ten year storm" data is correct.

Whether the "ten year storm" data is a correct standard in which to base a design.

Whether the planet's weather has substantially changed.

Decisions that are not currently before us:

Whether the storm water utility is being improperly maintained (i.e. is the silt being cleaned out, are the ditches being maintained, etc.). This would be a matter for the Zoning Administrator to issue a notice of violation if it was determined the utility was being improperly maintained. Any neighbor could request issuance of such a notice of violation, and appeal the failure of such a violation to issue. This is not the issue before us. Should this issue arise in the future, it would be a new violation to be decided at that time.

Whether the storm water utility will fail in the future. Our enforcement system (and most of our legal system) can only regulate things that have already happened. It cannot penalize people for things that might happen in the future.

Decisions which are not within our power to make:

We cannot change an already issued permit or order Mr. Goplen to spend money or make changes. We are limited to determining whether Mr. Goplen has built the development according to the approved plans.

We do not believe the Underhill zoning regulation under section 8.5.4 Stormwater Management & Erosion Control permits us to modify or to force changes on an existing permit or permittee as urged by the appellants. Instead, we read § 8.5.4 as allowing the Board to condition the issuance of a permit on the modification of off-site infra structure should we believe the storm water from a development will overwhelm existing off-site infra structure. For example, if we believe that an applicant is likely to overwhelm an existing town culvert, this provision allows us to condition the permit on the applicant paying for the changes to the existing town culvert. We do not believe § 8.5.4 applies as the permit has already issued.

Background and findings:

This permit was extensively considered by the Development Review Board (DRB) who conducted the following hearings and issued the following decisions:

Sketch Plan-

DRB Hearing-	7-19-2010
Continued	8-30-2010

Preliminary (1)-

DRB Hearing	1-17-2011
Continued	2-21-2011
Continued	2-28-2011
Continued	3-14-2011
Decision	4-4-2011

Preliminary (2)-

DRB Hearing	2-6-2012
Continued	2-16-2012
Continued	2-27-2012
Decision	4-2-2012

Final-

DRB Hearing	6-4-2012
Decision	6-21-2012

There was considerable testimony about the pre-existing drainage problems along Lower English Settlement road from many parties. In sum, the Board heard extensive testimony on this matter which is greatly detailed in the minutes from the applicable hearings. Much of the testimony at the prior hearings focused on storm water issues. Indeed, this application was denied once previously due, in part, because the "Board finds that the proposal includes inadequate provisions for the control of runoff and erosion during and after construction." Goplen Preliminary Decision, 4 April 2011, p. 11.

Ultimately, the applicant submitted a storm water plan which the Board and the State of Vermont approved. Although the DRB conducts its own inquiry into the adequacy of the storm water plan, the DRB is influenced by the State approval due to the extensive technical expertise of the State officials who issue the storm water permit. Further, the DRB sought input from the Road Foreman on whether he felt the development would impact existing problems on Lower English Settlement Road. Rod Fuller, Road Foreman for the town of Underhill, testified on April 2, 2012 that "based on his review of the plans, he would not anticipate additional runoff from the development." Goplen Preliminary Subdivision Decision, 2 April 2012, p. 6.

The DRB issued the permit. The concerns about storm water were incorporated into specific conditions of the final permit. A final permit relied upon extensive "testimony that was received regarding pre-existing, long standing, and problematic run off and drainage problems affecting areas along Lower English Settlement Drive and Romar Drive adjacent to the applicant's parcel." P. 9. The Board's decision states "Storm water calculations and a letter from the applicants' consultant Gunner McCain stating that the post-development storm water rates would not exceed pre-development rates were received. The Board relies on these submissions and this testimony and finds the plan would not result in a net increase in storm water rate of runoff, offsite; nor would the proposed subdivision exacerbate existing and long-standing water conditions in the area." P. 9. The state storm water permit was required and incorporated into the decision.

The Board is mindful that "infrastructure improvements" on a subdivision of this scale includes many details which are either included on the approved plans or are implicit in "best practice" during construction. Exact compliance on-site with details drawn on an engineer's computer is not realistic nor expected; unanticipated weather during construction or unforeseen site conditions, for example, can permit some minor variations to the plan. However, there comes a point where changes are significant enough that the executed design is no longer the approved design. Such substantial changes require a permit modification and cannot be approved merely through the certificate of compliance.

The majority of the testimony about the changes from the approved plan was undisputed. The appellant's engineer and the developer's engineer both agreed that there were the following changes to the plans, which we adopt as our findings:

1) The armored ditch; along the south side of the road - and by inference, the grading along the south side of the road;
2) The rip rap wall on the Allendorf property; and
3) Earthen berms on the Allendorf property to divert water.

There was a dispute in the testimony about whether the road ditches were too full of rock and were therefore out of compliance with the plans. Though he stated "best practice" in Civil design was to include sizeable head space in ditches, the Appellant's engineer conceded that the approved plans were unclear about the exact dimensions. Developer's engineer testified that the dimensions show on the plans were maximums and minimums and did not call for any specific the head space. As we do not believe the plans were clear enough to make a determination whether the plans were followed and because it appears that the resulting ditches do not materially affect the current functioning of the

existing storm water utility, the Board finds this issue to be irrelevant and not controlling so we make no specific finding on the issue of the as built ditches.

The only question before the Board is whether the rip rap wall, the armored ditch and/or the earthen berms constitute a substantive change in the plans such that a certificate of compliance may not issue.

Zoning Administrators, and this Board, cannot and do not inspect the last stone and every blade of grass shown on a plan. It would be unreasonable to do so. Likewise, Zoning Administrators and this Board cannot, and do not, predict the future. The fact that a plan might fail is not reason itself to deny a Certificate of Compliance. Zoning Administrators and this Board must limit their review to a comparison of the "as built" conditions to the approved plans.

The Board is deeply disappointed that the storm water infrastructure has failed so quickly and so catastrophically. Storm water concerns were preeminent in the minds of the Board members and most of the participants in the many hearings and we required much information about the proposed storm water plan. We reviewed and considered the state storm water permit. Ultimately, we were convinced that the storm water plans were reasonable which led to the permit being granted. This matter was before the Board many times and the storm water plans were extensively discussed and debated.

The Board also acknowledges and finds that the rain events of 2013 were unexpected and poorly timed as they occurred during times in which construction had rendered the land especially vulnerable to rain events. The Board accepts that the aggressive and prompt response by the developer were necessary to control the unexpected floods. Further, the Board acknowledges the engineer's conviction that the function of rip rap wall and the earthen berms is only necessary until vegetation has established itself in the future.

The issue before the Board is not whether the emergency measures taken to control the flooding were necessary and appropriately designed or whether they will cease to be necessary in the future. Emergency remedial measures are not a substitute for compliance with the plan. The issue is whether the storm water utility has now so changed from the approved plan that the certificate of compliance should not issue.

Additionally, the Board points out that a storm water utility perfectly constructed per plan might still fail and that would not invalidate the certificate of compliance. As admitted by the appellant's engineer during testimony, the developer could bring his plan into compliance by ripping out the armored ditch and removing the earthen berms. However, the Board is mindful that all parties seemed convinced that returning to the original plan would increase the problems and not solve the problem. No party, and neither does the board, wishes to see a return to the original storm water utility plan.

The Decision:

The DRB has limited authority in this area. Many, if not most, of the remedies which were proposed during testimony on this matter are beyond the power of this Board. This does not mean that we are completely powerless. We sit in review of the Zoning Administrator's decision to issue the Certificate of Compliance. We review that decision de novo, which is to say we make up our own mind about the law and the facts of the case.

We find that:

The storm water utility is not built in substantial compliance with the plans and therefore we do not issue a certificate of compliance. We have listened to extensive testimony about the reason the rip rap wall, the armored ditches and the earthen berms were necessary. We accept the testimony about why these changes were required when the rains came and the original plans proved unworkable. However, in this testimony a central fact is clear: it became apparent to the developer that the original plans were unworkable. There was substantial testimony about an evolving strategy which was developed to fix the site when the original plans did not work. The completed work at the site, no matter how necessary or reasonable, is substantially different than the original plans. This is not mere tweaking of an approved plan, it is a significant departure in ways which we believe is substantive as outlined below. Although we approve of the expeditious nature of the work and of the need for emergency work at the site, once the emergency was over, we feel the developer should have sought a permit amendment for the as built plans.

We do not adopt a blanket rule today that all such changes to any storm water plan or to similar plans would constitute a material departure from the plan in all cases. But in this particular permit, concerns about storm water were preeminent and dominated all aspects of the permit process. Drainage and storm water concerns were well known in this area of the town and such issues were raised at every hearing for this subdivision and was one of the primary concerns driving the conditions on the DRB's final subdivision permit.

Repeatedly, during the application process and as part of the approved storm water plan, the applicant and the storm water plan relied on sheet flow as a way of dissipating the accumulated water. The Board, addressing the reasonable concerns expressed by the community about the known drainage issues on Lower English Settlement Road, had sought assurances that the runoff from the development would not be diverted or channeled in ways which would adversely impact the neighborhood.

In response, the approved storm water plan relied upon dissipating the accumulated water in "sheet flow" in several places within the development. According to the approved plans, this sheet flow would disperse the water into the existing soils similar to the historical patterns on this site.

The sheet flow design was central to the Board's decision, which had sought assurances that the storm water utility not concentrate the flow in a way which endangered adjoining properties. The changed "as-built" design channelizes a significant amount of water which had been originally

anticipated to be disbursed as sheet flow over the adjoining lots. The changes to the storm water plan are not a small tweak to a non-essential element. Instead, we view this change as a fundamental alteration of an important criteria which was central to the Board issuing the permit. As such, we deem the conversion of sheet flow run off into channelized run off as a change to a material element of the plan and specifically, an element we would have considered as part of our design review under § 8.5.

Zoning regulation § 8.5 allows for review of a subdivision stormwater design along with its operation. However, there are significant limitations to this review. Per regulation, our review is predominantly on impact to properties outside of the subdivision. We acknowledge that none of the as built changes appear to have affected properties outside of the subdivision. Further, we note our design criteria under 8.5, does not consider the visual or economic impact on affected property owners of the plan within the development.

Zoning regulation § 8.5 allows for review of a subdivision stormwater design along with its eventual function. However, we decline to address the issues which might arise between the developer and the purchasers of lots in the development. This is largely outside our authority. Further, the Board, and the Zoning Regulations, are not guarantors of rights between buyer and seller. Three buyers purchased from the developer prior to the storm water infrastructure being built and prior to the Town issuing any Certificate of Compliance. Buyers who purchase from such a seller who has not received a Certificate of Compliance and who has not entirely built out the project – those buyers are taking a risk that the developer might not be able to develop the rest of the project as designed. The Board and the Zoning Regulations do not protect such buyers from that risk.

We also do not take an opinion on the impact any amended storm water design might have on specific properties within the development. Per our zoning regulations we note that as long as the development can handle its storm water without impacting the neighboring properties, we need not delve into the issues regarding the increased burden on the properties within the development. Any future plan must be worked out between the development property owners and the developer. Our review is predominantly focused on the impact to properties neighboring the development.

Pursuant to 8.5, the Board conditioned the final permit on strict compliance with the approved storm water plan and after carefully considering how the storm water was concentrated and dissipated. Given the great concern and importance of the storm water plan to this application and the Board's decision, we view the rip rap wall, the armored ditches and the earthen berms as all collectively changing the storm water plan from a sheet flow to a channelized flow. Changing the discharge flow from sheet flow to channelized flow is a substantial change from the plan under these circumstances. For these reasons, we side with the appellant and decline to uphold the issued certificate of compliance.

Sincerely,

Charles Van Winkle

Charles Van Winkle
Chairman, Underhill Development Review Board