

only apply for the subdivision review process and not the conditional use review/site plan review process, and therefore, that Section does not apply as part of this review. Staff also notes that density bonuses pertains to the acquisition of extra lots not normally obtained when an applicant is proposing subdivision application, and not extra dwelling units within a multi-family dwelling. Section 3.7.A of the *Underhill Unified Land Use & Development Regulations* (ULUDR) states that a single lot shall only have one principal use or structure – structure being the key word for this particular application. Since the applicant is proposing a multi-family dwelling, that structure would be considered the principal structure. Per Table 2.1, as a conditional use, a multi-family dwelling is allowed up to eight (8) units in the Water Conservation District. Therefore, the applicant is permitted up to eight (8) dwelling units regardless of the energy strategies and techniques he is planning to incorporate as long as the application is approved as a conditional use.

However, the Board could analogize the applicant's proposal to Section 9.6, Density Bonuses, in their evaluation of, or when trying to determine, how many dwelling units should be permitted, as Section 9.6 illustrates the Regulation's intent to reward applicants proposing development utilizing the listed methods of that Section.

Staff also notes that some of the information provided is conceptual or has not been finalized. For example, the applicant has advised that the building footprints could potentially change, but are proposed roughly as he intends them to be. The applicant plans on elaborating on the floor plan during the hearing.

If the Board feels that applicant needs to provide more information, since this proposal is a conditional use application, and conditional use reviewing hearings do not have any subsequent hearings, Staff recommends that the Board should continue the hearing if necessary and allow the applicant to submit more information.

REVIEW OF RELEVANT SECTIONS

ARTICLE II – ZONING DISTRICTS

ARTICLE II, TABLE 2.4 – WATER CONSERVATION DISTRICT (PG. 15)

The purpose of the Water Conservation District is to protect the important gravel aquifer recharge area in Underhill Center.

Staff finds that the obtainment of a Wastewater System and Potable Water Supply Permit would provide sufficient evidence that the gravel aquifer recharge area in Underhill Center would be protected. To meet purpose of this district, Staff recommends that the Board continue their practice of requiring the obtainment of the wastewater/water permit as a condition of approval.

ARTICLE III – GENERAL REGULATIONS

SECTION 3.2 – ACCESS (PG. 27)

The subject property contains one access points. If approved by the Development Review Board, the applicant will be required to obtain an access permit from the Selectboard due to the change of use from a single-family dwelling with an attached accessory dwelling to a multi-family dwelling (four dwelling units). See Section 3.B.iii, which states:

“This ordinance applies to (iii) a change of use of a development road or driveway.

SECTION 3.22 – WATER SUPPLY & WASTEWATER SYSTEMS (PG. 65)

The applicant has been advised by Staff to reach out to the Vermont Department of Conservation and explain the proposed project to them; however, not to begin the permitting process until he has obtained approval from the Development Review Board. If the Board votes to approve the submitted application, the obtainment of a Wastewater System and Potable Water Supply Permit should be a condition of approval, and shall be submitted and recorded prior to receiving a Certificate of Occupancy per Section 10.4.A.2.b of the *Underhill Unified Land Use & Development Regulations*.

ARTICLE IV – SPECIFIC USE STANDARDS

SECTION 4.2 – ACCESSORY DWELLING (PG. 67)

Since the applicant has not delineated the four dwelling units in the floor plans he submitted as part of this application (see Exhibit J & K), if approved, the Board should condition approval on no dwelling units being located in the barn, and all dwellings units being located within the existing dwelling and proposed new silo. As mentioned above in Section 3.7.A, only one principal structure is permitted per lot. Since the Barn is considered detached from the principal structure (as explained above), it is considered an accessory structure. If the Barn were to contain an dwelling units, Staff's interpretation of the Regulations is that both the Barn and the existing dwelling with the proposed new silo would both be considered principal structures, thus in conflict with Section 3.7.A.

In addition, if the applicant were to contend that any proposed dwelling in the barn should be considered an accessory dwelling, the Regulations do not support this argument, as Section 4.2.A states that accessory dwellings can only be permitted to a principal single-family dwelling, or within an existing accessory structure to the principal dwelling [*specifically noting that the word "dwelling" is singular*].

ARTICLE V – DEVELOPMENT REVIEW

SECTION 5.1 – APPLICABILITY (PG. 105)

Staff finds that conditional use review is required per Article II.

SECTION 5.3 – SITE PLAN REVIEW (PG. 108)

Section 5.3.A – Purpose (pg. 108): When reviewing a conditional use review application, site plan review is also required per Section 5.4.C.

Section 5.3.B – Standards (pg. 108): The Board may wish to consider and impose appropriate safeguards, modifications and conditions relating to any of the following standards:

Section 5.3.B.1 – Existing Site Features (pg. 108): A part of the proposing building is existing; however, the existing building as well as the proposed addition will likely cause minimal undue adverse impacts to significant natural, historic and scenic resources identified in the Underhill Town Plan, maps and related inventories. Moreover, Staff does not anticipate the proposed project will impact the criteria listed under section 5.3.B.1.a. If the Board finds that the proposed project will impact one of the criteria listed under Section 5.3.B.1.a, then they can take one of the measures listed under 5.3.B.1.b to avoid or mitigate

Area" as:

"For purposes of these regulations, the 'character of the area' *or character of a neighborhood* is the planned type, density and pattern of development for a particular area of neighborhood, as defined by the zoning district purpose statements and clearly-stated goals, policies and objectives of the Underhill Town Plan that are specific to that area and/or the physical circumstances of developments." *[Emphasis Added]*

As shown, the definition of "character of the area" seems to infer that the two terms ("character of the area" and "character of the neighborhood") are synonymous with one another; but nevertheless, the term that is more applicable for the subject application is "character of the area" since "character of the area" is the specific term used under the conditional use review evaluation criteria.

As follow-up to the December 4, 2017 hearing, Staff consulted with the Vermont League of Cities and Towns, as well as conducted research on the definition of "character of the area." A lot of the research has yielded that the Board should consider the "character of the area" in relation to other areas within the relevant zoning district (as alluded to in the definition directly above). As stated under Table 2.1, the purpose statement of the Water Conservation District is "to protect the important gravel aquifer recharge area in Underhill Center." Therefore, the obtainment of a Wastewater System and Potable Water Supply Permit indicates the applicant would satisfy the purpose statement of the Water Conservation District. The district's purpose statement appears to predominantly deal with geologic issues and is silent when providing a vision of the type of development that is anticipated for the district.

While the obtainment of a Wastewater System and Potable Water Supply Permit likely demonstrates that the proposed development ostensibly meets the district's purpose statement, this subsection indicates the Board shall perform an analysis regarding the proposed project's location, scale, type, density, and intensity relative to other development in the Water Conservation District, and as "defined by zoning district purpose statements and *specifically stated and relevant policies and standards of the Underhill Town Plan.*" *[Emphasis Added]* Therefore, the Board seemingly needs to determine which policies and standards of the Underhill Town Plan to evaluate the application under.

Similar to the Underhill Unified Land Use & Development Regulation, the 2015 Town Plan also states that the purpose of the Water Conservation District is "to protect the important gravel aquifer recharge area in Underhill" (see Section 3.5 of the Town Plan). In addition, this section of the Town Plan specifically states that multi-family dwelling are allowed in the district as a conditional use.

In Staff's opinion, of the stated context, goals, and policies mentioned in the Town Plan, the following provide support for the approval of this conditional use application:

- (Section 3.5 – Page 24) Goal
 - "Land uses allowed within a zoning district should conform to the purpose of the zoning district and be approved by the community."
 - Assuming the applicant obtains a Wastewater System & Potable Water Supply Permit, the proposed development will satisfy the purpose statement of the district.

STITZEL PAGE & FLETCHER PC

ATTORNEYS AT LAW

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June 26, 2019

VIA ELECTRONIC FILING

Jennifer Teske, COM
Vermont Superior Court, Environmental Division
32 Cherry Street, 2nd Floor, Suite 303
Burlington, VT 05401

Re: *Duval CU Denial*
Docket No. 93-8-18 Vtec

Dear Jennifer:

Enclosed for filing with the Court in the above-referenced matter please find the Town of Underhill's Memorandum in Opposition to Appellant's Motion for Reconsideration, along with a Certificate of Service.

Please contact me with any questions. Thank you for your assistance.

Sincerely,



Eric G. Derry

EGD/tb

Enclosures

cc: *Please see attached Service List*
Andrew Strniste, Underhill Planning Director & Zoning Administrator

UNL19-006 (Duval) EGD to Court- 19-06-26 cor.docx

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
DOCKET NO. 93-8-18 Vtec

IN RE: DUVAL CU DENIAL

CERTIFICATE OF SERVICE

I certify that I have today delivered a copy of the Town of Underhill's Memorandum in Opposition to Appellant's Motion for Reconsideration to all other parties to this case as follows:

By first class mail by depositing it in the U.S. mail;

By personal delivery to _____ or his/her counsel;

Other. Explain:

The names and addresses of the parties/lawyers to whom the mail was addressed or personal delivery was made are as follows:

Please See Attached Service List

DATED at Burlington, Vermont, this 26th day of June 2019.



Signature: _____

Eric G. Derry, Esq.

Counsel for: Town of Underhill

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
DOCKET NO. 93-8-18 Vtec

IN RE: DUVAL CU DENIAL

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STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
DOCKET NO. 93-8-18 Vtec

IN RE: DUVAL CU DENIAL

TOWN OF UNDERHILL'S MEMORANDUM IN OPPOSITION
TO APPELLANT'S MOTION FOR RECONSIDERATION

The Town of Underhill ("Town") opposes the Appellant's motion for reconsideration of this Court's Entry Regarding Motion, dated May 21, 2019, granting the Town's request to remand this matter to the Underhill Development Review Board ("DRB").

Having failed in his efforts to oppose the Town's motion to remand, Appellant now raises the same facts and arguments a second time – based on his same apparent misunderstanding of the Town's zoning authority as it relates to wastewater systems. This Court's Entry Regarding Motion at page 2 squarely addressed that issue, and Appellant's motion fails to identify any manifest errors of law or fact upon which the Court's judgment is based, fails to present newly discovered evidence, fails to identify any intervening change in the controlling law, and fails demonstrate any manifest injustice. See *Lathrop Ltd. P'ship I*, Nos. 122-7-04 Vtec, 210-9-08 Vtec, and 136-8-10 Vtec, slip op. at 10–11. (quoting 11 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2810.1) (discussing the standards for granting motions for reconsideration, subject to the Court's discretion). Indeed, Appellant's present motion merely rehashes the same arguments he advanced in his response to the Town's motion to remand. Because

Appellant offers no valid basis for the Court to reverse its well-reasoned judgment, the motion for reconsideration should be denied.

Finally, Appellant's motion for reconsideration also raises the issue of discovery and whether it was appropriate for the Court to refer to the DRB's decision in granting the Town's motion for remand. This is ironic in that the predominant motivation behind the Town's remand request was that the Town still has not had the opportunity to consider in the first instance a complete set of application materials from Appellant – the same materials it has been requesting since at least February 15, 2018. It is unfair to the Town that it should have to incur the expense of obtaining those materials through discovery that should already have been provided during the DRB review process.

For the foregoing reasons, and those outlined in the Town's prior motion to remand, Appellant's motion for reconsideration should be denied.

DATED at Burlington, Vermont, this 26th day of June 2019.

TOWN OF UNDERHILL
By: Stitzel, Page & Fletcher, P.C.
Its Attorneys



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