

November 2, 2020

By Email

Scott Gustin, Principal Planner & Asst. Administrative Officer
City of Burlington Development Review Board
Office of City Planning
City Hall, 3rd Floor
149 Church Street
Burlington, VT 05401
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Re: Zoning Permit No. 17-0662CA/MA – Notice of Appeal Pursuant to CDO Section 12.2.2 of September 14, 2020 Zoning Administrator Decision

Dear Board Members:

I write on behalf of BTC Mall Associates, LLC’s (“BTC”) regarding its appeal of the September 14, 2020 Zoning Administrator Decision, noticed for consideration in the Board’s November 4, 2020 meeting. This letter provides a brief factual and legal background underlying BTC’s appeal. I look forward to discussing these issues with you.

This Board issued to BTC Permit No. 17-0662CA/MA which covers the mixed-use redevelopment of the Burlington Town Center Mall located at 75 Cherry St.¹ BTC has since abandoned the project as permitted and is in the process of putting forward a new project at the 75 Cherry St. site for consideration. Planning is already underway on the new project—on October 9, 2020, BTC presented its construction plans before the Ward 2 and 3 Neighborhood Planning Assembly, and on October 15, 2020, BTC submitted an application for 75 Cherry St. to the Zoning Division.

By letter dated September 3, 2020, BTC notified the Board that it had abandoned the permitted project and was relinquishing Permit No. 17-0662CA/MA. *See* Exhibit 2, 9/3/2020 Ltr from Donald Sinex, Manager, BTC Mall Associates, LLC to Burlington DRB. On September 4, 2020, in response to BTC’s notice, the Zoning Administrator wrote to BTC that it could not relinquish Permit No. 17-0662CA/MA “because it was released and acted on, at least in part.” *See* Exhibit 1, Scott Gustin Email of 9/14/20, also appended to BTC’s notice of appeal. Counsel for BTC followed up with the Zoning Administrator, seeking to understand the authority under which the Zoning Administrator purported to act. *See* Exhibit 3, Scott Gustin Email of 9/18/20.

¹ The DRB approved Permit No. 17-0662CA/MA on March 17, 2017, which was subsequently modified by the Environmental Division in a Judgment Order dated July 17, 2017 in the matter captioned *Devonwood Investors, LLC 75 Cherry Street*, Docket No. 39-4-17 Vtec, and amended by the Zoning Administrator on February 23, 2018, and by the DRB on April 17, 2018.

The Zoning Administrator responded that he would “follow up shortly,” but provided no further response. *Id.* This appeal of the Zoning Administrator’s decision follows.²

The Zoning Administrator’s authority is expressly circumscribed by statute and the Burlington Comprehensive Development Ordinance (“CDO”). An administrative officer “shall administer the bylaws literally and shall not have the power to permit any land development that is not in conformance with those bylaws.” 24 V.S.A. § 4448. *See also* Burlington CDO § 2.3.3 (“The administrative officer shall administer the provisions of this ordinance and any amendments thereto and other applicable bylaws literally, and shall have no power to permit any land development that is not in conformance with this ordinance.”). Any authority delegated from the Legislature to the municipality not expressly delegated to the administrative officer is retained by the municipality, and the Zoning Administrator is constrained to the letter of the CDO.

The CDO and the DRB’s own bylaws delegate no authority to the Zoning Administrator to decline relinquishment of a permit. CDO § 3.2.7(a). “Relinquish” or any analogue do not appear in the CDO or the bylaws. This Board should reverse the Zoning Administrator’s decision purporting to deny BTC’s relinquishment of Permit No. 17-0662CA/MA.

Apart from lacking any support in the CDO, the reasoning in the staff report on this issue also would lead to the absurd conclusion that the City can compel a zoning permittee to construct a permitted project so that it can obtain a Certificate of Occupancy. That notion is simply untenable—a zoning permit does not *require* its holder to complete the contemplated project; it *allows* the permittee to construct the project. Indeed, as the Zoning Administrator recognizes, not all zoning permits result in a built project for a variety of reasons. There is no authority to prevent a permittee from abandoning or relinquishing an existing permit. The Zoning Administrator has acted beyond its statutory and regulatory authority in specifying the categories of projects it deems may be relinquished in the absence of any delegated guidance.

Please contact me if you need additional information or have any questions.

Sincerely,



Brian Dunkiel, Esq.
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC
Counsel for BTC Mall Associates, LLC

cc: Don Sinex, BTC Mall Associates, LLC

² BTC, through counsel, hand-delivered the appeal to the City Zoning Office on September 28, 2020, 14 days after the Zoning Administrator’s decision. Apparently as a result of COVID-19 protocols, the person making the delivery was not allowed access to City Hall, but a representative of that office took delivery at the entrance to City Hall. *See* Exhibit 4, Affidavit of Scott Scribi. The Zoning Administrator’s contention that the appeal was not filed until October 1, 2020 is incorrect.

