

Montpelier Development Review Board
January 20, 2009
City Council Chambers, City Hall

Subject to Review and Approval

Present: Philip Zalinger, Chair; Alan Blakeman, Jack Lindley and Roger Cranse.
Staff: Clancy DeSmet, Planning and Zoning Administrator

Call to Order:

Philip Zalinger, Chair, called the January 20, 2009 Development Review Board to order at 7:00 P.M.

Review of January 5, 2009 Minutes:

Upon motion of the approval of the January 5, 2009 Minutes, seconded by Roger Cranse, the January 5, 2009 Minutes of the DRB were adopted.

Comments from the Chair:

Mr. Zalinger announced he had to recuse himself from sitting in on the site plan and conditional use review for the Foodworks application at 5 Home Way. Kevin O'Connell, Vice Chair, will chair the Board on that hearing. If Kevin is not present at the time they reach that item in the agenda the Board will skip the Foodworks application and proceed directly to the appeal by the North Branch V.A.S.T. matter.

I. 89 Main Street – CB-I/DCD

Applicant: Jeremy Waycott

Owner: City Center Associates

Design Review replacing the Unicel sign with an AT&T sign.

Mr. DeSmet said the current sign at City Center is for Unicel. It is a basic sign change to AT&T, and the dimensions are approximately the same. This application passed unanimously at the Design Review Committee hearing last week.

Mr. Zalinger explained to the applicant that if the Design Review Committee has reviewed and approved the application the DRB doesn't take any further inquiry under normal circumstances.

Mr. Cranse moved approval for the design review application at 89 Main Street. Mr. Blakeman seconded the motion. The motion passed unanimously on a vote of 4 to 0.

II. Appeal – Notice of Violation
North Branch Park V.A.S.T. Trail – REC

Appellant: Vermont Association of Snow Travelers

Bryant Watson, Executive Director, V.A.S.T.

The appeal is from actions taken by the Zoning Administrator, and they are unusual proceedings for the Board. The Board doesn't rely upon any input from the Zoning Administrator like they would with normal proceedings and ask him to step down from sitting with the Board. The DRB essentially hears the merits of the case based upon what the Zoning Administrator did and what the appellant has done. Mr. Zalinger said he would ask everyone to be heard on this matter to raise their rights if they want to testify.

Mr. Zalinger administered oath to Mr. Watson and others interested in presenting testimony to the Board. He asked interested parties to identify themselves for the record.

Alexis Nowalk, VAST Trails Coordinator, speaking on behalf of Bryant Watson, appeared before the Board. Tom Frostic, President, Montpelier Track Makers, also appeared before the board. He said he was a resident of Montpelier and a member of VAST.

Mr. Zalinger said the Board had a variety of materials, including the Zoning Administrator's letter of December 5th and VAST's response dated December 15, 2008.

Mr. Zalinger said they are a 7-member board, and under Vermont law in order for a motion to carry you have to have a majority of the board's votes. That doesn't change if the quorum is a majority. In order to prevail in this appeal they will have to have the affirmative vote of all four members present. The Board probably won't make a decision tonight. The DRB will take the evidence and testimony and then conduct a deliberative session later and issue a decision after that.

Alexis Nowalk, VAST Trails Coordinator, said the reason they were present is they are appealing a zoning violation they received from the City of Montpelier.

Tom Frostic said last year the Parks Department contacted him with regard to the traffic in the North Branch Park. It was because of a trail closure in East Montpelier that they had to re-route off the city tax role through the park and up into the Sparrow Farm. He worked with the Parks Department. To eliminate the major part of the traffic in the North Branch Park and going through the Recreation field and they have been working on this trail for about three years. It uses the existing trail coming up from Pearl Street Motors and Elm Street up to Gould Hill Road across Mr. Syz's property, which he had deeded to the city, and then hook on to the Montpelier Parks Trails system that goes all the way to the Sparrow Farm to the East Montpelier trail system. When he started this he received approvals from property owners, the City Manager, and thought he had every base covered. He worked with the Parks Department. Geoff Beyer was on his shirt tail the majority of the time because they were making observations and moving the trail. If he had known he needed a building permit he would have been here to get one, but nobody said a word.

They took out an existing bridge, which was an old rotten park bridge, and built a new bridge that is 12 feet wide by 32 feet long. It is to accompany the groomer that will come down through there and the snowmobiles that travel it. This links their trail system and pulls it all together for recreation and cross country skiers. Everybody is welcome. They built the new bridge. All of the trail work is not totally finished because of the weather. Some of the articles in the newspaper weren't very nice, but you can't work in mud up to your knee caps and not do more damage than what they had. They mulched and seeded the majority of the important spots.

Ms. Nowalk said this section of the trail serves as a vital link to the statewide snowmobile trail system. Currently, they maintain 4,700 miles of corridor trails connecting all of the Vermont communities across the state. This serves as a crucial link because that is their only east/west corridor linking Montpelier to Waterbury. The next east/west corridor is in Northfield or up in Morrisville. This basically funnels all of the traffic anywhere from Plainfield, Marshfield, Groton, and the Northeast Kingdom over to the western part of the state. They had been working on upgrading this section of trail for many years now because it is a safety issue and it was also a grooming issue. The club had applied for a trails construction grant to improve the trail, and it went through all of the permitting process. They actually obtained a permit through the Department of Environmental Conservation. They obtained other landowner permissions. They have a signed landowner permission form, which is required as part of their construction process. It was the City Manager, William Fraser, who signed the landowner permission form. It says permission is subject to the additional terms and conditions listed below. If none, enter none. It was just circled none.

As far as the club was concerned they didn't think there were any other additional coordinating processes they had to go through. When they received the letter saying they were in violation they were confused because they thought they had gone through all of the motions.

Mr. Zalinger said they mentioned earlier that if they had known they needed a permit to construct the bridge they certainly would have applied for one.

Ms. Nowalk and Mr. Frostic both agreed they would have.

Mr. Frostic said the piece of property they are on with the bridge is city property, but there is an easement through that property to Tim and Ann Carver's property which goes back to before Mr. Syz deeded it to the city.

Mr. Zalinger said there are jurisdictional issues that arise with the Zoning Board. The DRB generally doesn't have any jurisdictional issues over private property rights, and who has an easement and whether it is enforceable. The beginning and end of the DRB's jurisdiction is in the zoning ordinance. They don't have jurisdiction over enforcement, either. If there is a violation, the DRB isn't in charge and have nothing to do with the enforcement. They just have jurisdiction over hearing applications and determining whether a permit is issued. It certainly sounds to him, and the record indicates and the testimony supports it, that this was an innocent mistake.

Mr. Frostic said he spent three years chasing people, tax maps, etc.

Mr. Zalinger said the innocent mistake arose from receiving the land owner's approval and then interpreting that as the City Manager waiving their obligation to conform to the zoning ordinance. You can also see that you wouldn't want a City Manager telling private property owners not to bother with a zoning permit. That isn't the way it works here.

He suggested that the simplest, most expedient solution to this is to apply for a permit for the bridge. The DRB's hands are tied by the appeal. Was the construction of the bridge that would require a permit?

Ms. Nowalk said the grey area for them was that it was really an upgrade of the structure and it wasn't considered new construction. It was just an upgrade of the current structure.

Mr. Frostic said there was an existing bridge there and they upgraded it to make it work properly and safely.

Mr. Zalinger inquired what the size of the original bridge was.

Mr. Frostic said approximately 8 feet wide by 35 or 36 feet long.

Ms. Nowalk said the new structure is 4 feet wider and 32 feet long, and it was upgraded to accommodate grooming equipment.

Mr. Zalinger asked if there was a railing on it before.

Ms. Nowalk replied yes.

Mr. Zalinger inquired if it was the same kind of railing constructed of the same materials and the same height.

Mr. Frostic replied yes. There are railings on both sides of the bridge now. The original bridge had a railing on only one side.

Geoff Beyer, Director of the Parks Department, appeared before the DRB to testify. Mr. Zalinger administered the oath to Mr. Beyer.

Mr. Beyer added that the bridge is a little bit larger, but there is a different use which is of significance. The part which was hard for himself and the Park Commissioners was not knowing ahead of time about when it was going to happen. They had asked a couple of times for them to be informed so they could be sure it was done according to their verbal agreement. The neighbors were not notified. There were several upset neighbors and he thought through the permit process neighbors would be informed.

Mr. Zalinger asked the Zoning Administrator to address the issue.

Mr. DeSmet said he told the Track Makers when they came in that light construction doesn't necessarily require a permit, but it specifically says in the "no zoning permits" section that outdoor trails, if they require structures, need a permit. The analysis was quite simple. He thought they needed a permit.

Ms. Nowalk asked what the turn around time was for a permit because they are already a month into their season.

Mr. DeSmet said it doesn't take very long if they follow the process. When the Track Makers originally came in they said they were going to apply for a permit. They came in with a check for \$75 which appealed the process. They could have simultaneously applied for a permit and they would be on their way to having a permit. There needs to be two weeks' notice for the newspaper and abutting landowners.

Mr. Zalinger said this is why the Board's jurisdiction is important. It is not unusual for the Board to have to hear permit applications for projects that are already completed. They don't have jurisdiction over enforcement so they try to ignore the fact that the project may be "as built." People put decks on the back of their houses and don't realize they are in the setback and need a variance. Folks would be much better off by not putting prosecuting the appeal, but by simply applying for a permit as the ordinance requires for the bridge "as built." It is a cleaner, more direct solution because appealing to the DRB means they have to make a decision one way or the other. If the zoning administrator is correct, and the Board finds he is correct, then they will need to apply for a permit in any event or take the bridge down. If the Board determines that they didn't need to apply for a permit and they are entitled to the bridge, then it is all done. But, in either event, they are entitled to use the bridge while it is there. Has anybody told them they couldn't use the bridge?

Ms. Nowalk said they have been told that.

Mr. Frostic replied they have a 12-week season.

Mr. Zalinger replied in the summer they hear that the building season is too short and now in the winter they are hearing the snowmobile season is too short.

Mr. Zalinger asked Mr. DeSmet when does he have injunctive authority.

Mr. DeSmet said people told him they were still using it and he was going to appeal it to court if they continued. He received authority from the City Manager

Mr. Zalinger said if someone builds a deck on the back of their house and the Board determines they need a variance, and they are still using it for barbecues and sunbathing on the back of their house you don't tell them they can't use the deck until the variance is issued. In this instance, why would we bar the snowmobile club from using the bridge while the appeal is pending?

Mr. DeSmet said he didn't have a good answer for that. He thought it was inappropriate to keep using it without a permit.

Ms. Nowalk replied the bridge is being used by everybody but snowmobilers at this point.

Mr. Beyer said he might seem that the Park Commissioners and he might be against this, which is not the case. They actually met with Tom Frostic and gave approval for the bridge and support the concept. They want to make sure it is done in a way that impacts the community in a positive way. For him and the parks he thinks there is a reason for the bridge to be used in the meantime, which is to give the neighbors a chance to see what it would really be like. There are some fears by a few of the neighbors.

Mr. Zalinger asked Mr. DeSmet if the snowmobile club applied for a permit, would they be entitled to a permit as a matter of right or would it come before the DRB?

Mr. DeSmet said it would be a site plan review because it is not a single or two-family home. It's another use, so it is actually site plan review.

Mr. Zalinger added the DRB has jurisdiction over site plans which involves considering a whole variety of criteria. It allows the Board to impose conditions upon it and to hear what neighbors have to say. The folks who make decisions on the DRB do so on the basis of the evidence and testimony. They are not generally swayed by popular opinion. They are objective and independent. Neighbors can appear and be very supportive of the application and that doesn't necessarily sway the Board if they don't think it complies with the ordinance.

Neighbors can appear and oppose the application, and that may not necessarily sway the Board if they think the project does comply with the ordinance. He said they will take a brief recess and persuade the applicant to talk among themselves. By proceeding with the appeal they are flipping the coin so the only way they can win is if the Board says they agree with them and don't think they need a permit for the larger bridge. If the Board disagrees and say they think it is appropriate for them to apply for a permit, it will take the Board some time to make that decision and issue the written decision. Then, they will have to begin the application process at that time. There is a notice requirement. He is not certain as one member of the DRB whether he agrees with the Zoning Administrator's decision suggesting to them that other members of the public who have occasion to use the bridge may do so but VAST cannot. He isn't sure what the reason for the differentiation is, or whether in fact that prohibition might be cured if there was an application pending for the zoning permit.

He asked the Zoning Administrator if he would reach the same conclusion about the club using the bridge for snowmobile activities if there were an application pending.

Mr. DeSmet said he wouldn't have a problem because they would be in the process of compliance.

Mr. Frostic said he could get the application in to the Planning Office tomorrow. He has been three years trying to get the bridge open and anything he can do to make it simple and make it work he will do.

Mr. Zalinger said if they were in agreement to withdraw the appeal and the Zoning Administrator changed his position to suggest that the use of the bridge was not prohibited, and there were an application for site plan review submitted it sounds like they would have a favorable resolution across the board.

Ms. Nowalk said she was in agreement. She would like to discuss it with the rest of the club members. They had a couple of questions which will be contingent upon whether or not to proceed.

Jim Hill, Vice President of VAST, was administered the oath by Mr. Zalinger. He said the Zoning Administrator is saying the application requires a site plan review. If there is an existing structure that is being upgraded, does that require site plan review?

Mr. Zalinger said if the improvement of the existing bridge is covered by the zoning ordinance, then the only review it would receive is site plan review.

Mr. Hill said replacing something that already exists requires site plan review.

Mr. Zalinger said this isn't just a replacement.

Ms. Nowalk said it is an upgrade.

Mr. Cranse said the words on the application are "reconstruction, conversion, structural alteration, relocation or enlargement." That would seem to cover all that was done.

Mr. Zalinger said the Board is the review board so if they apply for a permit it comes before them. They usually don't make the initial threshold determination about these kinds of matters, but logic tells him that a bigger bridge is an enlargement.

Mr. Hill said if they apply for a site plan permit, they can go ahead and use the bridge. But if they appeal the decision they can't use the bridge. To him that doesn't make any sense whether they are appealing or applying for a permit. He doesn't know why they can't use the bridge during an appeal. Usually, if you appeal something it doesn't mean you can't use it while an appeal is in process. If you lose the appeal, then you have to stop using the bridge.

Mr. Zalinger asked if that was relevant to their decision.

Mr. Hill replied it was. He doesn't understand where somebody can just arbitrarily say if they appeal it they can't use it, but if they fill out an application and pay the permit fee then you can use the bridge while the application is pending.

Mr. Zalinger said he was trying to take the straightest route between two points and find a common ground because the Board doesn't have jurisdiction technically over the Zoning Administrator's determination that they are not to use the bridge. They didn't appeal that decision. They just appealed his decision that they needed a zoning application.

Mr. Frostic said yes, to the best of his knowledge.

Mr. Zalinger said they didn't technically appeal his determination that they shouldn't use the bridge in the meantime.

Ms. Nowalk said they didn't ask any questions.

Mr. Zalinger asked what authority does the Board have right now. One could argue that the Board's authority is limited to the appeal they have taken, so they are pinning the DRB into a box as well. We all live in Montpelier and want to make the zoning ordinance work for the residents of Montpelier.

Mr. Hill replied they were painted into a box also. They are in the same box. He was assuming if they were using the bridge right now, whether it is an appeal or an application, at least they are working and trying to go forward but using the bridge in the meantime.

Mr. Zalinger said he couldn't tell them what to do. He asked the Zoning Administrator some questions and drew an analogy between other situations in which landowners are required to apply for permits for "as built" structures. All he knows about this case is what is in front of them right now.

Mr. Frostic said if they start the permit paperwork tomorrow morning can they start using the bridge.

Mr. DeSmet said every decision he makes is appealable, so if he thinks it is a good idea to keep using the bridge in the process of applying for a permit it is okay.

Mr. Frostic said they have stopped traffic, other than some renegades. If they go through the permit process for site plan review...

Mr. DeSmet said he was on record as saying yes.

Mr. Hill asked if he still feels that because the appeal is pending that they can't use it. Is that correct?

Mr. DeSmet state he simply requested they stop using the bridge. He thought they were still damaging the trail.

Mr. Frostic said they are talking about a bridge and not trail damage.

Mr. Zalinger said this is the appeal to the DRB. The zoning ordinance doesn't address every single factual circumstance that can arise. The Montpelier zoning ordinance does not; the Berlin zoning ordinance does not; no zoning ordinance does. There are always questions that arise such as this. They rely upon logic, good judgment and cooperation among residents to make it work. If it is evenly applied people respect it.

Ms. Nowalk said they have not received a clear answer. They are asking if they continue with the appeal can they use the bridge.

Mr. Zalinger said that is not his decision. It's not the Board's decision.

Mr. Hill said it seems fairly clear they could have been using it all season from what transpired this evening.

Mr. Zalinger said he is Chair of the DRB. He can't advise them what their legal rights are.

Mr. Lindley said they should know that the Chairman is trying to get them to go in a direct line to get their problem fixed. He isn't sure they are listening to him very carefully, and he is troubled by that. It's very clear that if they continue with their appeal they will come up with an answer somewhere down

the line, but if in fact if the Zoning Administrator is upheld at some time they will have to face the need for a permit for a structure that is larger than what was there. Let's use a little logic and listen to the Chairman and see if they can't bring some clear direction to solving their problem so their members and the members of the Montpelier public can get this behind them. Somebody didn't look at the appeal process versus the permit process and they would have been much better served if they had gone through the permit process in the first place. That is probably what the Zoning Administrator was trying to get, which was a need for a permit for this particular structure. The Board deals with "as built" situations time and time again. He can't remember anybody having to rip something down. They are asking questions of the Chairman that he can't answer because he isn't in a position of authority.

Mr. Frostic asked if they come in for a permit could they start using the trail.

Mr. DeSmet replied yes.

Mr. Zalinger administered the oath to Anthony Iarrapino, a member of the Montpelier Conservation Commission, who appeared before the DRB to speak as an individual.

Mr. Iarrapino said the discussion that has gone on about appeals and receiving a permit by what may be a violation is frustrating. If you want people to take the zoning ordinance seriously you don't guarantee them that the permitting process is a done deal that just involves paying the permit fee and processing the paper. There are a lot of uses that the zoning ordinance is designed to monitor and control, and it isn't right to say that someone because they have built it they can continue to use it even though it may have been a violation to build it even though the zoning process may have required they take different precautions and build to different dimensions. He just wanted to state his feeling as a citizen for the record and as someone who wants the zoning ordinances to be respected. If there is a good reason to say a use can't continue because that is the consequence of completely disregarding the ordinance, then it shouldn't be whether it is on appeal or whether you are applying for a permit. If you don't have a permit to build the structure, then they shouldn't be able to use it.

Mr. Zalinger said he kept co-mingling two different arguments. One was the statement that he perceives the board is suggesting that all this applicant has to do is submit an application to receive a permit.

Mr. Iarrapino said that seems to be what they are implying to the applicant.

Mr. Zalinger said he must have misinterpreted his language.

Mr. Iarrapino said he apologize if he did, and he appreciates him making it clear for the record.

Mr. Zalinger said if they read the ordinance in detail you'll see that the scope of the Zoning Administrator's authority to give a notice of violation does not carry any injunctive authority. The Zoning Administrator's determination that someone can or can't continue to use the project that was constructed without a permit there is a whole body of case law and a blind spot in most every Vermont zoning ordinance as to what you do with the notice of violation. You can put them on notice, but that doesn't mean that the party has to begin tearing it down or not using it. It is a legitimate open question.

Mr. Frostic said they didn't blatantly disregard the zoning laws on the bridge. With the paperwork they filed they thought everything was okay to proceed, that no more permits were required.

Ms. Nowalk said VAST would like to withdraw the appeal and go through the site review process.

Mr. Lindley moved that the Board grant the applicant's request for the appeal to be withdrawn. Mr. Cranse seconded the motion. The motion passed unanimously on a vote of 4 to 0. The appeal is withdrawn.

**III. Site Plan and Conditional Use Review
5 Home Farm Way – IND/FP**

Applicant: Martin Kemple

Owner: Foodworks at Two Rivers Center

Renovation of the existing facilities and the addition of a cultural center/
Agricultural sales, driveway improvements, and a café.

Mr. Zalinger said he is sorry to have to tell Foodworks that once he recused himself from the Board they no longer have a quorum.

Mr. Lindley moved the Board take the Site Plan and Conditional Use Review for 5 Home Farm Way and table it for the next meeting. Mr. Cranse seconded the motion.

Mr. Zalinger said he can't ever remember the Board having to continue an application because they failed to have a quorum.

Mr. Kemple said they have contractors lined up for some work to be done in the ensuing couple of weeks to do some minor work down in the basement of the building. He isn't sure whether the Zoning Administrator would allow them to do some of the minor work. They were hoping after this hearing to start them working.

Mr. Zalinger suggested he talk to the Zoning Administrator separately outside of the Board situation because even if the DRB had gone forward tonight they probably wouldn't have the kind of decision that would have suggested they have contractors come in because there are appeal periods they would want to take under consideration.

Mr. Lindley said his motion is to continue this agenda item until Monday, February 2nd. Mr. Cranse seconded the motion. The motion was voted unanimously on a vote of 4 to 0. The motion was granted and the applicant is continued until Monday, February 2, 2009.

Adjournment:

Upon motion by Mr. Lindley to adjourn, with Mr. Blakeman seconding the motion. The Development Review Board adjourned.

Respectfully submitted,

Clancy DeSmet
Planning & Zoning Administrator

Transcribed by: Joan Clack