



Town of Bolton Development Review Board

Bolton Town Office
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In re: **2012-17-AP**
Appeal of ZA Application Determination
November 27, 2012

Appellant

Automotive Services International, Inc.
63 Ethan Allen Drive
South Burlington, VT 05403

Annie Dwight, Esq
Monaghan, Safar, Dwight, PLLC
156 Battery Street
Burlington, VT 05401

Appeal

(Notice of appeal and supporting documents are on file at the Bolton Town Office.)

The appellant, Automotive Services International Inc. (d/b/a 4x4 Center Driver Training School) through their attorney, Annie Dwight, Esq., filed a notice of appeal with Development Review Board (DRB) on September 27, 2012 regarding a written determination issued on September 19, 2012 by Bolton Zoning Administrator Miron Malboeuf, as submitted with the notice of appeal.

Mr. Malboeuf, as stated in his letter of September 19th, determined that the "Master Plan for Erosion Prevention and Sediment Control and Stormwater Management" submitted by the applicant under Stipulation of Dismissal and Order (Docket No. 6-1-10 VTec), was incomplete and did not meet the requirements of the approved stipulation agreement. As stated on page 6:

For those areas and uses identified, the Applicant and/or the Landowner shall develop and file for Town review a comprehensive Master Plan for Erosion Prevention, Sediment Control and Stormwater management ("EPSC Master Plan"), prepared by a certified professional in erosion and sediment control and/or stormwater management, that addresses all areas and uses identified on the list, and conforms to the current "Vermont Standards and Specifications for Erosion Prevention and Sediment Control." The master plan for erosion control and stormwater management shall be submitted for review and approval by the Bolton Development Review Board (DRB), which may consult with other EPSC professionals and require modifications to the plan.

Specifically, Mr. Malboeuf determined that "conclusions drawn in the Master Plan are opinions of professionals, but they are not certified as described in the stipulation. The maps submitted with the [Master Plan] prepared by Grover Engineering PC do not indicate certification as to professional qualifications or State of Vermont Licensure." As such, Mr. Malboeuf has not warned the master plan as submitted for hearing by the Development Review Board.

In the Notice of Appeal dated September 26th, 2012 the appellant states that:

The Master Plan was prepared pursuant to Section 6 of the Stipulation of Dismissal and Order in Docket 6-1-10 VTec, dated June 15, 2011 (the Stipulation). The Master Plan specifically addresses erosion prevention and sediment control, and once it is approved, the proposed uses, trails, structures, facilities and features set forth herein will be exempt from compliance with s 3.16(B) of the Bolton Land Use and Development Regulations."

The relief initially requested by the appellant in the notice of appeal included:

1. A determination that the Zoning Administrator's decision was untimely, pursuant to 24 V.S.A. § 4448(d), given that the determination was issued 67 days after the date the application was submitted (July 16, 2012).
2. A determination that the Zoning Administrator is collaterally estopped from finding that the application is incomplete, given that he had previously notified that applicant that it had already been referred to the DRB.
3. A determination that the Zoning Administrator no longer had the authority to **make** issue his determination, given that he had already referred the application to the DRB.
4. A determination that the application includes all of the information required by the Stipulation, and therefore, is complete.

The DRB found that the appeal was filed in a timely manner, within the 15-day period as required under 24 V.S.A. § 4465, and scheduled a public hearing for October 23, 2012, 6:30 PM at the Bolton Town Office, to be warned in accordance with 24 VSA § 4464 and Section 9.8 of the Bolton Land Use and Development Regulations.

Hearing Process

(Warnings, hearing minutes and materials are on file at the Bolton Town Office.)

The appeal hearing was convened on October 23, 2012 with a quorum of the DRB present. No ex parte communications or conflicts of interest were reported. The hearing was also attended by Zoning Administrator Miron Malboeuf, the appellant, Michael Hopwood of Automotive Services International Inc., his attorney Annie Dwight, Esq. of Monhaghan, Safar, Dwight, PLLC, and his engineer, Dean Grover, PE of Grover Engineering PC.

Given that the decision regarding whether or not the application was complete was now before the DRB, and the desire of the appellants to move forward with their projects, it was agreed at hearing to limit requested DRB findings and determinations to #4 above – whether the application includes all of the information required by the Stipulation and is therefore complete. The DRB acknowledges in this, without assigning fault, that the process leading up to the appeal, including previous correspondence from the Zoning Administrator to the appellant, was understandably cause for confusion regarding the status of the application.

Mr. Malboeuf stated his reasons for issuing his determination – including the fact that Scott Moreau of Greenleaf Forestry, who prepared much of the master plan, is not a certified erosion control or stormwater management specialist.

Additional information in support of the appeal was presented on behalf of the appellant by Annie Dwight, Esq., as set forth in a letter to the DRB dated October 23, 2012 and related testimony. This letter includes a statement that the mandate in the stipulation agreement “is unclear at best. It does not specify what certification is required, nor does it define what makes someone a professional in erosion control and/or stormwater management.” It is noted that Mr. Moreau is specifically referenced under other sections of the agreement pertaining to erosion prevention and sediment control. It further notes that others involved in master plan preparation are independently certified as either a certified professional in erosion and sediment control, or as a state-licensed professional engineer.

Following receipt of testimony and additional information, the DRB adjourned the public hearing and went into deliberative session to review filings, the specific language under the stipulation agreement, and to confer with the Bolton Town Attorney regarding the town's intent in signing the agreement.

Findings

1. The “Stipulation of Dismissal and Order” (Docket 6-1-10 VTec, dated June 15, 2011) or stipulation agreement, as signed by all parties and Environmental Judge Thomas Durkin, includes two separate sets of conditions:
 - “Conditions Regarding Use, Monitoring & Maintenance of the Chute and Southern Dip Trails” in which use of these trails, as previously denied by the DRB under Section 3.16 of the Bolton Land Use & Development Regulations (prohibiting development on slopes in excess of 25%), was granted by the court, subject to stated conditions (1–5). Under Condition #3 erosion control measures are required to comply with the Vermont Department of Forest Parks and Recreation’s “Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont (AMPs), as installed and inspected by an “EPSC or AMP professional.” Scott Moreau of Greenleaf Consulting [Forestry] is specifically identified as being qualified for this purpose (p.2).
 - “Conditions Regarding Master Planning” in which the applicant is required within one year to file with the town “a list of all areas on the Bolton Valley Resort Property which the Applicant reasonably expects that it may develop for the 4x4 Center’s ‘Off-Road Driver Training Program’ within the next three years,” a list of associated uses, trails, structures, facilities and features, and a “comprehensive Master Plan for Erosion Prevention, Sediment Control and Stormwater Management (“EPSC Master Plan”), prepared by a *certified professional in erosion and sediment control and/or a [sic] stormwater management* [DRB italics], that addresses all areas or uses identified on the list and conforms to the current Vermont Standards and Specifications for Erosion Prevention and Sediment Control” (Condition 6).
2. Under Condition 6 (p.7) the information to be included in the Master Plan is further specified as:
 - A location map and site plan that identifies the type, location and extent of planned outdoor recreational facilities and uses in relation to steep (=>15%) and very steep (>25%) slopes, mapped surface waters and wetlands, existing facilities, public roads and adjoining properties. The map and plan must be of sufficient scale to allow reasonable analyses of slopes and drainage in relation to existing features.
 - A description of the level, intensity and frequency of proposed uses.
 - Descriptions and schematics of the Best Management Practices (BMPs) to be employed in connection with a particular use or activity to ensure that erosion, sedimentation and stormwater impacts are minimized to the greatest extent possible. The BMPs shall comply with generally accepted state standards and specifications *as certified by an EPSC professional* [DRB italics].
3. Under the stipulation agreement, the Master Plan is to be submitted for review and approval by the Bolton Development Review Board, which may consult with other EPSC professionals and require modifications to the plan (p. 6). Furthermore, any revisions, supplementations, additions or modifications to the filed master plan, as requested by the Town, must be supported by written recommendations and reasonable justification supplied by an independent EPSC Professional (p.8).

4. Under Condition #6 of the stipulation agreement, "Once the EPSC Master Plan is approved by the DRB for proposed new outdoor recreational uses on the list, such uses shall be exempt from compliance with §3.16(B) of the Land Use and Development Regulations, provided that they are developed in full compliance with the EPSC Master Plan's requirements, including the EPSC measures and BMPs identified therein ..." (p.6).
5. Section 3.16(B) of the Bolton Land Use and Development Regulations requires that: "All development is specifically prohibited on very steep slopes in excess of 25% except for the following, which may be allowed by the Development Review Board subject to conditional use review and the requirements of Subsection (A): (1) Ski lifts and ski trails associated with an approved alpine or Nordic ski facility, and (2) hiking and rock climbing trails..."
6. The 4x4 Center's "Master Plan for Erosion Prevention, Sediment Control (EPSC) and Stormwater Management " dated June 2012, as submitted by the applicants/appellants under the stipulation agreement, was developed by Scott Moreau and Addison Kasmarek of Greenleaf Consulting Inc., and under Section III (Development of the Master Plan) references that it was developed adopting "recognized practices such as *Acceptable Management [P]ractices for Maintaining Water Quality on Logging Jobs in Vermont*, Vermont Department of Forests, Parks and Management, 1987, and in consultation with an Erosion Prevention and Sediment Control (EPSC) professional and a licensed professional engineer.
7. The Master Plan as submitted includes short narratives under the following headings: Introduction and Overview (permit history, customer base), Objectives (streamlined, less rigid permitting under a standard protocol), Master Plan Development (considerations), Areas of Expected Expansion (South Parcel), Environmental Protection & Erosion Control (pervious and impervious surface protocols), and Uses, Trails, Structures, Facilities and Features (6.15 miles of additional trails, Winter Exercise Lane, Traction Circle, hospitality trailer and pad, small storage/repair facility, and "unspecified development" for which streamlined DRB approval is envisioned), Dates of Operation and Seasonal Boundaries (requesting that the DRB allow for year-round operation anywhere on the permitted trail system), and Application for Master Plan Approval (requesting streamlined administrative approvals under the approved Master Plan).
8. The Master plan as submitted also includes the following appendices: A. Master Plan Maps (5 8.5"x11" figures at varying scales up to 1"=1500', including area, percent slope and natural resource maps), B: Master Plan Drawings (8.5'x11" drawings for impervious improvements, prepared by Grover Engineering), C: Master Plan Schematics (general schematics for waterbars/dips, check dams with silt ponds, conveyor belt water bars, stream fords, silt fences, and culverts, prepared by Greenleaf Forestry), D: Supplementary Comments from Professionals/ANR (Grover Engineering, Arrowwood Environmental, ANR-Wetlands, ANR-Rivers).

Discussion

In determining whether the application is complete, the DRB must determine if the Master Plan, as submitted for review, meets the terms of Condition #6 of the stipulation agreement, as noted above, including whether it:

1. Has been prepared by certified professional in erosion and sediment control and/or stormwater management.
2. Includes the information specified under Condition #6.

These are each discussed in turn as follows:

Certification Requirement

The Zoning Administrator has determined that the application is not complete, based on the fact that it was not developed by a certified professional in erosion prevention and sediment control or stormwater management as specified under the terms of the stipulation agreement. The appellant has argued that the agreement is unclear in this area, including what “certification” means in this context and, given that Scott Moreau of Greenleaf Consulting is specifically identified as qualified under the agreement’s first set of conditions (pertaining to the installation and monitoring erosion control measures for the Chute and Southern Dip Trails), he should also be considered qualified under the second set of conditions (Condition #6) pertaining to master plan Requirements.

While specific certification requirements are not identified in the stipulation agreement, it is clear that the Master Plan is to be prepared by someone trained and certified in the application and use of the Vermont Department of Environmental Conservation’s *Vermont Standards and Specifications for Erosion Prevention and Sediment Control*, as referenced in the agreement. These standards are more extensive and detailed in their application than the Vermont Department of Forest Parks and Recreation’s “Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont” (AMPs), as referenced in association with the Chute and Southern Dip Trails. Given the intent of the Master Plan requirement – to exempt 4x4 uses, including trail development, from Section 3.16(B) of the Bolton Land Use and Development Regulations, and thereby allow 4x4 Center development on very steep slopes in excess of 25% – the stipulation agreement calls for a higher standard of erosion prevention and sediment control in conformance with an approved Master Plan.

The stipulation agreement clearly states that both the applicant in developing the master plan, and the DRB in its review of the plan, are to employ the services of a professional certified in erosion prevention, sediment control and/or stormwater management. Under Section 3.16 of Bolton’s regulations, an application for development on steep ($\geq 15\%$) and very steep ($>25\%$) slopes must include a stormwater management and erosion control plan that is prepared by a professional engineer licensed by the state. In the absence of any specific provision under the stipulation agreement, this requirement should apply. We are aware, however – as is the applicant, as stated in the submitted master plan – that there are also professionals in erosion and sediment control in Vermont who have been independently certified through CPESC, who may not be licensed engineers but are qualified to develop erosion prevention and sediment control plans according to state standards. Unfortunately, Greenleaf Consulting does not meet licensing or certification requirements. In the past, the DRB has accepted Greenleaf’s work for the 4x4 Center as reviewed and certified by a professional engineer licensed by the state. Those portions of the Master Plan prepared by Arrowwood Environmental (CPESC-certified) and Grover Engineering (licensed by the state) clearly meet certification requirements under the terms of the stipulation agreement.

Master Plan Content

The DRB has reviewed the content of the Master Plan only as necessary to determine if it meets filing and content requirements as specified under Condition #6 of the stipulation agreement as noted under finding #2 above.

While the Master Plan as submitted includes a number of 8.5” x 11” orthophoto-based area maps specific to 4x4 center operations (Appendix A), it does not include a location map that shows the

property in relation to adjoining properties and features, except as generally depicted on the underlying orthophoto. Because of the coloration, proposed features shown on the slope map (Map 5) are illegible and provide no indication of the location of proposed soil erosion control measures in relation to mapped features and slope. "Master Plan Drawings" (Appendix B) for impervious surface features appear to be developed in more detail, but are presented at a scale that is also difficult to read and interpret. In summary, based on a cursory review of the maps and plans as submitted, it appears that they are not of sufficient scale and/or detail to allow reasonable analyses of slopes and drainage in relation to existing features, as required under the stipulation agreement.

The Master plan as submitted includes a general description of current 4x4 Center activities, including its customer base (I. Introduction and Overview), but no indication of existing or proposed levels, intensities or frequency of use. It does include a request that the DRB eliminate dates of operation and delineated seasonal operational boundaries as required under previous conditions of approval, in order to provide a less rigid, streamlined permitting process.

The Master Plan as submitted does include descriptions and schematics of best management practices as recommended by Greenleaf Consulting, and a general indication of the conditions under which each should be used (Appendix C). As referenced in the Master Plan, these appear to be based on the AMPs for logging jobs rather than Vermont Standards for Erosion Prevention and Sediment Control. BMP compliance with accepted state standards and specifications has not been certified by an EPSC professional, as specified under the stipulation agreement. BMPs also are not tied to particular activities or locations. As such the DRB cannot determine whether the BMPs as proposed will ensure that erosion, sedimentation and stormwater impacts are minimized to the greatest extent possible, as required under the agreement.

Conclusion

We hereby determine and affirm that:

1. **The 4x4 Center's "Master Plan for Erosion Prevention, Sediment Control (EPSC) and Stormwater Management" dated June 2012, as submitted, is administratively incomplete.** The majority of the Master Plan was not prepared by someone trained and certified in the application and use of the Vermont Department of Environmental Conservation's Vermont "Standards and Specifications for Erosion Prevention and Sediment Control" as referenced under the stipulation agreement. For purposes of the agreement, this may include a professional engineer licensed by the state, or a CPESC-certified professional in erosion and sediment control or stormwater management.

Given the delay in the application process as documented by the applicants, and our mutual desire to move the review process along, the DRB is willing to accept the Master Plan in its current form as administratively complete for hearing – if resubmitted as reviewed and certified by either a professional engineer licensed by the state or a certified professional in erosion and sediment control, consistent with the terms of the stipulation agreement and past practice.

2. **The DRB is not qualified on its own in this case to determine whether the Master Plan is substantially complete – that it includes appropriate best management practices that conform to Vermont "Standards for Erosion Prevention and Sediment Control."** As such the DRB, with Select Board approval, will retain a qualified consultant to conduct an independent technical review and evaluation of the resubmitted Master Plan as called for under the stipulation agreement. The consultant will be asked to determine whether the Master Plan is substantially complete, and

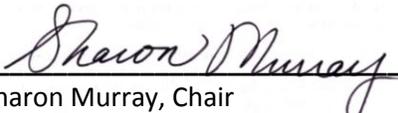
whether proposed management practices are the most appropriate, conform to state standards, and will minimize erosion, sedimentation and stormwater impacts to the greatest extent possible.

Issued by the Bolton Development Review Board (5-0):

Sharon Murray – Yea
Margot Pender – Yea
Michael Rainville – Yea

Susan Vita – Yea
Jennifer Andrews (Alternate) – Yea

Dated at Bolton, Vermont this 27th day of November, 2012.



Sharon Murray, Chair
Bolton Development Review Board

NOTICE: This decision may be appealed to the Environmental Division of the Vermont Superior Court by an interested person who participated in the proceeding before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A. § 4471 and Rule 5(b) of the Vermont Rules for Environmental Division Proceedings.