

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION

Docket No.: _____

In re HowardCenter Zoning
Permit #ZP-12-292

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NOTICE OF APPEAL

Pursuant to Rule 5 of the Vermont Rules for Environmental Court Proceedings, notice is hereby given that the SOUTH BURLINGTON SCHOOL DISTRICT, by and through its attorneys, Lynn, Lynn & Blackman, P.C., appeals to the Environment Division of the Superior Court from the City of South Burlington Development Review Board's decision to affirm the approval of zoning permit #ZP-12-292. See attached. Pursuant to 24 V.S.A. §§ 4471-4472, neighboring property owner the SOUTH BURLINGTON SCHOOL DISTRICT is an interested person as defined in 24 V.S.A. § 4465(b).

The property with which this appeal concerns is 364 Dorset Street, Suite 101, South Burlington, VT. The applicant is the HowardCenter, Inc. All interested persons must enter an appearance in writing with the Court within 20 days of receiving this notice if they wish to participate in this appeal. V.R.E.C.P 5(b)(3).

DATED in Burlington, Vermont this 29th day of January, 2013.

SOUTH BURLINGTON SCHOOL DISTRICT

BY:  _____
Pietro J. Lynn, Esq.
Sean M. Toohy, Esq.
Lynn, Lynn & Blackman, P.C.
76 St. Paul Street, Suite 400
Burlington, VT 05401

NOTICE OF DECISION

Appeal #AO-12-02 of South Burlington School District appealing the decision of the Administrative Officer to issue Zoning Permit #ZP-12-292 to the Howard Center Inc., as the applicant, and Dorset Street Real Estate Holdings, LLC, as the property owner, for "interior renovations to Suite 101" for existing medical office use at 364 Dorset Street.

FINDINGS OF FACT

1. This appeal, and the involved application for a zoning permit, are subject to the requirements of the City of South Burlington Land Development Regulations (SBLDRs), adopted May 12, 2003, with amendments effective May 7, 2012.
2. 364 Dorset Street is located in the City's Central District 2 (CD2) Zoning District.
3. The building at 364 Dorset Street is part of an existing, 3-building planning unit development (PUD) (involving 364, 366 and 368 Dorset Street) authorized by the South Burlington Development Review Board "for a multiple number of commercial uses for a multiple number of tenants" by Findings of Fact and Decision, dated August 1, 2000, on permits #SD-00-32 and #DR-00-07.
4. The August 1, 2000 DRB decision, which was not appealed, contains 21 "stipulations" (i.e., conditions).
5. Stipulation #4 of the August 1, 2000 DRB decision states, in pertinent part: "[t]his approval for 364 [Dorset Street]... includes the following uses which are currently permitted in the CD2 District ... 3) Medical office"
6. Stipulation #5 of the August 1, 2000 DRB decision states: "This approval is conditioned on a maximum of 165 parking spaces, 5,415 gpd of sewer allocation, and 117 vehicle trip ends ("VTES") during the P.M. peak hour for the entire planning unit development."
7. Stipulation #6 of the August 1, 2000 DRB decision states: "The applicant shall obtain approval from the Director of Planning & Zoning prior to the change of any tenant in any of the buildings. The Director shall approve the proposed new tenant only if the proposed combination of uses fits within the limitations established in stipulation #5 above. In making his determination, the Director shall utilize the parking standards contained in Table 1 of the Zoning Regulations, and trip generation rates contained in the ITE Trip Generation

Manual. If a use is proposed which does not fit clearly within any of these standards or if a shared parking concept is proposed in order to meet the parking limit, the applicant shall obtain approval from the Development Review Board for the proposed use."

8. On August 6, 2012, the Howard Center, Inc. (applicant) and Dorset Street Real Estate Holdings, LLC (property owner) filed a zoning permit application with the City for a proposed project described as "interior renovations to Suite 101." The application fee was paid.
9. The application listed the existing use as "medical office" and proposed use as "medical use," which the Administrative Officer later confirmed (and identified on the application) as "medical office" use. The estimated cost of the interior improvements was listed as "\$103,200.00".
10. On August 24, 2012, the Administrative Officer issued zoning permit #ZP-12-292 to Howard Center, Inc. (applicant) and Dorset Street Real Estate Holdings, LLC (property owner). In so doing, he concluded that § 17.02 of the SBLDRs requires a person to obtain a zoning permit prior to the commencement of "land development". As defined in Article 2 of the SBLDRs, "land development shall not include any structural alteration or interior remodeling project that does not exceed five thousand dollars (\$5,000) in construction cost." The Administrative Officer concluded that since the proposed interior renovations exceeded \$5,000, a zoning permit was required. He further concluded that since the proposed interior renovation did not involve any new use, change in use or expansion of use, site plan approval was not required under § 14.03(A) of the SBLDRs. The Administrative Officer did not consider traffic impacts in connection with the proposed interior renovations.
11. On September 7, 2012, the South Burlington School District ("SBSD") filed a timely Notice of Appeal (#AO-12-02) challenging the issuance of zoning permit #ZP-12-292.
12. The SBSB operates two public schools, the Frederick H. Tuttle Middle School and the South Burlington High School, at 500 and 550 Dorset Street. The nearest point of the middle school building is located approximately 500 feet from 364 Dorset Street. The primary access to the SBSB property, utilized by school buses, parents, students, faculty and staff, is off of Dorset Street. Traffic through this access is heaviest at the beginning and end of the school day.
13. In its Notice of Appeal, SBSB asks that the DRB deny zoning permit #ZP-12-292. As grounds for the relief sought, SBSB's Notice of Appeal states, in part, that it "is concerned that a proper review of the requested permit did not include an analysis under LDR 10.02 concerning an influx of clinic patients and the

attendant increase in automobile and foot traffic." In addition, SBSB states "due to the proposed location of the Methadone Clinic to the South Burlington High School and Frederick H. Tuttle Middle School campus, Appellant is concerned with the real potential for inappropriate interactions between patients and students, which may put students at risk."

14. Public hearing notice that a hearing on the appeal would take place on October 16, 2012 was published in The Other Paper on September 27, 2012.
15. The Development Review Board held a duly warned public hearing on SBSB's appeal on October 16, November 6 and November 20, 2012. During the hearing, the DRB received evidence and/or heard argument from the zoning administrator, appellant, applicant, landowner, and other persons claiming interested person status on the issues raised in the Notice of Appeal (identified above); both the appellant and applicant were represented by legal counsel throughout the proceedings. In addition to testimony from those persons listed above, the DRB provided members of the general public appearing at the hearing with an opportunity to provide non-evidentiary comment on the appeal and received non-evidentiary letters of input.
16. Although not initially identified in the Notice of Appeal, SBSB's supplemental memorandum raised an issue regarding whether the Howard Center's intended use of the remodeled space at 364 Dorset Street as a treatment facility for opioid addiction qualifies as a medical office use (i.e., it challenged the applicant's contention that no change of use is proposed). Subject to a continuing objection by the applicant, this issue was also raised by DRB member questions and comments (as well as the questions and comments of others) during the public hearing.
17. In response to the issue of use, the applicant's evidence, presented during the reconvened hearing on November 20, 2012, included testimony from John Brooklyn, MD, the medical director of the Howard Center's methadone clinic program. Dr. Brooklyn testified that persons receiving services through the program proposed for 364 Dorset Street will be required to also receive medical treatment for opioid addiction at that location. Only medical personnel (i.e., a doctor or nurse) can administer methadone, and such personnel routinely interact with and examine persons receiving methadone treatment. For example, doctors or nurse-practitioners perform initial evaluations, physical examinations, annual examinations, and dose adjustments, together with other aspects of medical practice. Nurses not only administer methadone, but also examine patients who arrive at the clinic for treatment, and may require further evaluation, refuse to dose, or recommend dose adjustments for patients.

18. The DRB received and reviewed written motions, memoranda and other documentary evidence, including a motion by the applicant to dismiss the appeal that argues SBSB is not an "interested person" within the meaning of 24 V.S.A. § 4465(b). In response, SBSB argued that it qualifies as an interested person under §§ 4464(b)(2), (b)(3) and (b)(5).

BASED ON THE FOREGOING FINDINGS OF FACT AND THE EVIDENCE OF RECORD PRESENTED AT HEARING, THE DRB HEREBY CONCLUDES AS FOLLOWS:

I. Motion to Dismiss Appeal

The motion to dismiss is denied. Although it is a fairly close question, the DRB concludes that SBSB is an interested person within the meaning of § 4465(b)(3). That provision provides that an "interested person" includes:

(3) A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

SBSB owns or occupies property in the immediate neighborhood of 364 Dorset Street. Moreover, SBSB alleges that the issuance of zoning permit #ZP-12-292, if confirmed, will not be in accord with the provisions of the SBLDRs. The issue is whether SBSB "can demonstrate a physical or environmental impact on ... [its] interest under the criteria reviewed." SBSB has articulated its "interests," generally, as involving increases in traffic volumes and student and staff safety. To qualify as an interested person, SBSB must demonstrate a physical or environmental impact on these interests "under the criteria reviewed." The "criteria reviewed" are those criteria in the SBLDRs or other regulatory documents that are applicable to the Zoning Administrator's, and on appeal the DRB's, review of an application. A complicating factor in this analysis is the statute's use of the phrase "can demonstrate," which suggests that a person may qualify for standing under § 4465(b)(3) if he or she has the *potential* to meet the requirements of the statute, even if that showing is not actually made.

Given the proximity of SBSB's property to 364 Dorset Street and its use of Dorset Street as a primary access, the DRB concludes that SBSB qualifies as an interested person because it has a heightened interest in ensuring that traffic volumes at 364 Dorset Street do not exceed the limits on vehicle trip ends imposed by the DRB's August 1, 2000 PUD approval. Those VTE limits are among the "criteria" that the Administrative Officer should review prior to issuance of a zoning permit. Although not articulated precisely in this manner by the SBSB, the DRB believes that the SBSB "can demonstrate" (*i.e.*, has the potential to demonstrate) an environmental impact on its

interest under this criterion. Therefore, the DRB grants SBSB's request for interested person status under § 4465(b)(3).

The DRB concludes that SBSB does not qualify for interested person status under either 24 V.S.A. §§ 4465(b)(2) or (b)(5). Its arguments to the contrary notwithstanding, SBSB is neither a "municipality" as that term is used in § 4465(b)(2) (*see* 24 V.S.A. § 4303(12)), nor a "department" or "administrative subdivision of this state" as used in §4465(b)(5). Therefore, it does not meet the requirements for standing under those provisions.

II. Appeal of Permit Issuance

Upon receipt of an application for a zoning permit for a particular use, the Administrative Officer must answer a series of questions prior to issuing a permit. These questions include:

1. Is the application complete?
2. Have fees been paid?
3. Does the proposed activity meet the definition of "land development" set forth in Article 2 of the SBLDRs, or is it exempt from that definition?
4. Was the prior use conforming and approved?
5. What is the proposed use?
6. Does the proposed use violate the conditions of any prior permits?
7. In what zoning district will the proposed use be located?
8. Is the proposed use a permitted or conditional use in the district?
9. Does the proposed use meet the definition for the use set forth in Article 2 of the SBLDRs, or is a change of use proposed?
10. Are any other reviews or approvals required prior to permit issuance?

In an appeal from a decision of the Administrative Officer to issue a zoning permit, the DRB must review these same issues.

In this case, as the Administrative Officer correctly determined, the permit application submitted by the Howard Center for interior renovations is complete and the required fee has been paid. The proposed interior renovations are not exempt from the definition of "land development" because the construction cost exceeds \$5,000. *See* SBLDRs, Art. 2. Therefore, a zoning permit is required for the proposed renovations under § 17.02 of the SBLDRs.

The application indicates that the interior space proposed to be renovated was previously used for medical office purposes, consistent with the August 1, 2000 DRB approval. The use of the space is not proposed to change. Medical office use continues to be a permitted use in the CD2 District and for the site in question.

SBSD argues that the proposed methadone clinic represents a change of use from medical office. The DRB disagrees. Article 2 of the SBLDRs defines "office, medical" in pertinent part, as follows: "Any establishment where human patients are examined and treated by doctors, dentists or other medical professionals but not hospitalized overnight." In conjunction with its application, the Howard Center submitted a written facility description, signed by John Brooklyn, M.D., that states, in part, that the leased space at 364 Dorset Street "will be used for the exclusive purpose of providing medical treatment to persons who are dependent on opioids. Under the direct supervision of medical doctors and nurses, treatment will include medication maintenance therapy, medically supervised withdrawals, medical (including psychiatric) evaluation and referral as needed, and incidental ancillary services, including disease-specific education, HIV and hepatitis education and testing, and urinalysis screening." This information primarily addresses the treatment component of the proposed use. However, the DRB finds credible the sworn testimony presented by Dr. Brooklyn at the November 20, 2012 hearing, referenced in Finding #17 above, which confirms that the proposed use will involve both the *examination and treatment* of patients and, therefore, will continue to meet the SBLDR's definition of "office, medical." Accordingly, no change of use will occur.

The DRB also agrees with the Zoning Administrator that no other reviews or approvals are required prior to permit issuance. As noted above, medical office use is a permitted use in the CD2 District. The application at issue does not propose a "new use, change in use, or expansion of use in any district," and only interior renovations are proposed. Therefore, site plan approval is not required under SBLDR §§ 14.03(A) and (B) in connection with this application.

The SBSBD argues that this property is located in the City's Traffic Overlay District ("TOD") and that the Administrative Officer should have required an analysis of traffic impacts prior to issuing a permit. It observes that § 10.02(E)(3) of the SBLDRs states that Traffic Overlay Zone 3 three includes "all lots with access to the balance of ... Dorset Street (north of I-189)." The Administrative Officer contends that 364 Dorset Street is not located in the TOD, as clearly depicted on the City's Overlay Districts Map, effective January 9, 2012, and he testified that other properties on Dorset Street have not been subject to TOD standards. The DRB concludes that 364 Dorset Street is not located in the TOD.

In reaching this conclusion, the DRB is mindful of the well-established rule that ambiguities in zoning regulations should be decided in favor of the property owner. In this case, the Overlay District Map, the Administrative Officer's consistent interpretation and practice, and rules for construing land use regulations also all weigh in favor of this conclusion. Moreover, even if this property were located in the TOD, it is not certain that further analysis is warranted absent a change of use. The Appellant, SBSBD, failed to meet its burden to demonstrate otherwise.

Similarly, SBSB failed to adequately demonstrate that the Administrative Officer was required to generally inquire into the safety of the proposed use. Zoning regulations are adopted pursuant to the police power and are designed to promote health, safety and welfare of the community. Nonetheless, safety concerns are only given effect through the specific provisions of the zoning regulations.

The Administrative Officer is required to administer the regulations literally. In other words, he can only apply the regulations as written. Absent a specific provision of the SBLDRs that authorizes the Administrative Officer to inquire into the safety of a proposed use or to consider safety-related factors, he has no authority to do so.

No such provision exists in this case. Certainly, in determining whether to issue a zoning permit, the Administrative Officer is not required to generally evaluate potential safety concerns "given the proximity" of the proposed use "to a vulnerable population" or to assess "the real potential for inappropriate interactions between patients and students," as SBSB asserts. Therefore, there is no regulatory basis for the DRB to take these safety factors into account in evaluating the application at issue.

Based on the foregoing, the DRB concludes that SBSB's appeal should be denied and Zoning Permit #ZP-12-292 should be granted because the applicant has met all of the applicable requirements under the SBLDRs.

As noted in the Findings of Fact, above, the August 1, 2000 DRB decision was not appealed. The stipulations contained in that decision remain valid and enforceable against the property owner, including those provisions related to traffic and changes in tenancy. The property owner must comply with those stipulations or risk a zoning enforcement action. If the property owner is not able to comply with the applicable conditions for any reason, it must apply to the DRB for relief (i.e., for a variance or an amendment to the PUD). This is not an issue for the applicant/tenant, Howard Center, in the first instance, however, and does not provide a basis to deny the permit that is the subject of this appeal.

Decision

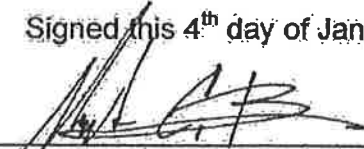
Motion by Mark Behr, seconded by Bill Stuono, to grant appeal #AO-12-02 of South Burlington School District appealing the decision of the Administrative Officer to issue Zoning Permit #ZP-12-292 to the Howard Center Inc.

Tim Barritt-	yea	<u>nay</u>	abstain	not present
Mark Behr -	yea	<u>nay</u>	abstain	not present
Art Klugo -	<u>yea</u>	nay	abstain	not present
Bill Miller -	yea	<u>nay</u>	abstain	not present
Michael Sirotkin	yea	nay	abstain	not present*
Bill Stuono -	<u>yea</u>	nay	abstain	not present
Roger Farley -	yea	<u>nay</u>	abstain	not present

Motion fails by a vote of 2 - 4 - 0

*Board Member Sirotkin recused himself from all participation in these proceedings.

Signed this 4th day of January 2013, by



Mark Behr, Chairman

Please note: An appeal of this decision may be taken by filing, within 30 days of the date of this decision, a notice of appeal and the required fee by certified mail to the Superior Court, Environmental Division. See V.R.E.C.P. 5(b). A copy of the notice of appeal must also be mailed to the City of South Burlington Planning and Zoning Department at 575 Dorset Street, South Burlington, VT 05403. See V.R.E.C.P. 5(b)(4)(A). Please contact the Environmental Division at 802-828-1660 or <http://vermontjudiciary.org/GTC/environmental/default.aspx> for more information on filing requirements, deadlines, fees and mailing address.

The applicant or permittee retains the obligation to identify, apply for, and obtain relevant state permits for this project. Call 802.879.5676 to speak with the regional Permit Specialist.