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March 3, 2021

By Email

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Re: Permit Amendment Application No. 21-0414CA/MA, 75 Cherry Street, BTC Mall Associates, LLC

Dear Board Members:

I write on behalf of BTC Mall Associates, LLC ("BTC") in response to the February 17, 2021 letter submitted by Barbara McGrew, Steven Goodkind, Michael Long, and Lynn Martin (collectively, the "Opponents"). In their letter, the Opponents challenge the permit amendment BTC seeks in this proceeding on several grounds. All of those grounds are meritless.

By way of background, the 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 Street (the "Project") on March 17, 2017. The Opponents appealed that decision to the Vermont Superior Court, Environmental Division, along with other challenges to the redevelopment. The Opponents and BTC subsequently entered into a Settlement Agreement resolving all litigation. In that Settlement Agreement, the parties agreed to a consent judgment in the Environmental Division modifying Permit No. 17-0662CA/MA. That order was entered on July 17, 2017.[1]

In response to changing conditions, BTC reduced the scale and impact of the Project, and now seeks a further amendment to the permit. In the reduced Project, square footage is decreased by approximately 25% and residential units now replace the previous office space component. BTC's application will require a full review under the Comprehensive Development Ordinance's ("CDO" or the "Ordinance") Major Impact Review criteria, and complies with all parking requirements set forth in CDO § 8, as revised on October 21, 2020. Indeed, under the new parking ordinance, the Project is not *required* to provide any parking, but the current design nonetheless includes parking space for 422 vehicles, which is only 25 short of the maximum *allowed* under the Ordinance.

[1] That matter was captioned *Devonwood Investors, LLC 75 Cherry Street*, Docket No. 39-4-17 Vtec. The permit was subsequently modified by the Zoning Administrator on February 23, 2018 (Permit No. 18-0648CA), and by the DRB on April 17, 2018 (Permit No. 18-0768CA).

The Opponents have offered no valid reason why the DRB should not consider BTC's permit amendment application on its merits. Indeed, as the DRB, the Environmental Division, and in fact the Opponents all approved a larger project, the current, reduced-scale Project should certainly conform to all applicable standards.

First, the Opponents' argument that the terms of the Settlement Agreement itself—a private contract between the parties—somehow bars the DRB's consideration of this amendment application is plainly meritless. The DRB has no jurisdiction over the Settlement Agreement. The Board's role here is solely to consider whether the proposed development conforms to the applicable provisions of the CDO. *See* 24 V.S.A. § 4460; CDO § 2.4.4. It may not consider the contractual issues related to the Settlement Agreement.

Moreover, even if the DRB could consider the Settlement Agreement, that agreement on its face does not bar BTC from changing the Project or seeking to amend the original permit.[2] It is revealing that the only citation the Opponents make to the Settlement Agreement—¶ 9—is a routine modification clause that prohibits modifications to the *terms of the Agreement*. BTC's permit amendment application does not seek to modify *any* term of the Agreement. In fact, the Settlement Agreement contains a term prohibiting the Opponents from *opposing* "any other permits or regulatory or legislative approval" necessary to implement the Project. Thus, if anything, the Settlement Agreement actually prohibits the *Opponents* from challenging BTC's application here.[3]

But again, those contractual issues are simply not at issue here, and the DRB should disregard the Opponents' claims based on them.

Second, contrary to the Opponents' claims, the doctrine of *res judicata* does not preclude BTC from seeking a permit amendment. The principles of claim and issue preclusion embodied by the doctrine allow the Board the flexibility in land use cases to consider a subsequent application, especially where, as here, the application involves a substantially reduced project subject to a full review under the CDO and any resulting new conditions that the DRB may deem appropriate. *See*, *e.g.*, *In re Lathrop Limited P'ship I*, 2015 VT 49, ¶ 66 ("If the board . . . concludes that there is a substantial change from the permitted project, review should proceed."). And that is true even where the earlier permit arose as part of a stipulated judgement. *In Re Dunkin Donuts S.P. Approval (Montpelier)*, 2008 VT 139, ¶ 12 (mem.). As discussed above, BTC's current application involves a substantially reduced Project, and the Board is entitled to proceed with its review.

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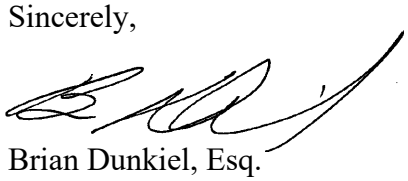
[2] Instead of explaining how the Settlement Agreement bars the DRB's review, the Opponents repeat their argument from that resolved appeal that the Project's parking is not consistent with Burlington's Municipal Development Plan. This argument ignores the fact that the CDO—which implements the aspirational, qualitative goals of the Development Plan—provides the enforceable standard. *See*, *e.g.*, *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979) ("Although the [municipal] plan may recommend many desirable approaches to municipal development, only those provisions incorporated in the bylaws are legally enforceable."); *In re Walsh*, No. 122-6-09 Vtec, 2009 WL 6043898 (Vt. Super. Ct. Envtl. Div. Dec. 9, 2009) (broad objectives in zoning ordinances "are not independently enforceable just as the provisions of a municipal plan are not independently enforceable." (quoting *Appeals of Perrine, et al.*, No. 221-12-03 Vtec & 38-3-04 Vtec, 2004 WL 5232389, slip op. at 6 (Vt. Envtl. Ct. Nov. 30, 2004))).

[3] BTC reserve its rights to assert additional claims for the recurring breach.

Finally, the Opponents argue that the DRB should review the Project under the parking ordinance in effect at the time of the original application, not the current ordinance, which was adopted in October 2020, before the current amendment application was filed. That position is based on an absurd construction of Vermont's vested rights doctrine—which holds simply that the regulations in effect when an *application* is filed govern review of that application. Indeed, Courts have recognized that new applications involving substantial changes are reviewed under current regulations even if the application involves a previously permitted project. *See*, *e.g.*, *In re Taft Corners Assocs., Inc.*, 160 Vt. 583, 593–94 (1993).[4] The Opponents' construction of the vested rights doctrine conflicts with those decisions, and would have the effect of freezing outdated bylaws in place, notwithstanding changing community standards and circumstances. BTC has filed a new application proposing a substantially downsized and lower-impact Project. The bylaws in effect at the time of its application—including the parking standards—plainly govern its application.

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

Sincerely,



Brian Dunkiel, Esq.
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Counsel for BTC Mall Associates, LLC

cc: Don Sinex, BTC Mall Associates, LLC

[4] *See also In re Stonybrook Condominium Owners Association*, DR No. 385, 2001 WL 548428 at *15 (Vt. Envt'l Bd. May 18, 2001) ("[The vested rights doctrine] does not stand for the proposition that the rules or facts in place at the time of an original Act 250 application or permit issuance are those which will control all subsequent events at the project—including events that trigger the need for permit amendment applications."). The cases cited by the Opponents do not establish that a vesting applies the regulations in place during the original permit to a subsequent amendment. *In re Times and Seasons, LLC*, 2011 VT 76, for example, involved an Act 250 applicant's request for reconsideration after a change in law which was only a continuation of the original proceeding and sought to "simultaneously take advantage of the laws in effect at the time of the initial application and those in effect at the time of the reconsideration application." *Id.* at ¶ 11. There is no such two-way street here—BTC's application will be reviewed solely, and in full, under the regulations in place at the time of this most recent filing.