

## Department of Permitting & Inspections

Zoning Division  
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**TO:** Development Review Board  
**FROM:** Scott Gustin  
**DATE:** November 4, 2020  
**RE:** 21-0354AP; 75 Cherry Street

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**Note: These are staff comments only; decisions on projects are made by the Development Review Board, which may approve, deny, table or modify any project. THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.**

Zone: FD6 Ward: 3C

Owner/Appellant: BTC Mall Associates, LLC & Devonwood Investors, LLC/ Brian Dunkiel, Esq

**Request:** Appeal of administrative zoning decision regarding relinquishing zoning permit 17-0662CA/MA.

### **Overview:**

The appellant is appealing an administrative zoning decision that zoning permit 17-0622CA/MA cannot be relinquished. The subject zoning permit was issued for redevelopment of the former Burlington Town Center mall site. The zoning permit was released and acted upon; however, the approved building and site improvements will not be built. The applicant is looking to abandon (relinquish) that zoning permit and apply anew for a different project under separate zoning permit. The subject zoning permit cannot be relinquished because it was acted on in part by demolishing a section of the mall.

**Recommendation:** Uphold administrative decision based on the following findings:

### **I. Findings:**

Zoning permit 17-0622CA/MA was approved by the Development Review Board on March 17, 2017. It was appealed to Superior Court Environmental Division. A stipulation agreement was reached among the parties, and the project was ultimately approved July 17, 2017.

Pre-release conditions associated with the zoning permit were met in full November 16, 2017, and the zoning permit was picked up by the applicant the same day. The zoning permit contains a number of conditions, including standard condition 3 that reads:

3. **Unified Certificate of Occupancy (UCO):** It shall be unlawful to use or occupy (or allow the use or occupancy of) any land or structure or part thereof which has been created, changed, converted, or wholly or partly altered or enlarged in its use or structure without a UCO.

**If the project is partially completed**, meets “prior to issuance of a UCO” conditions of approval, meets all health and safety standards, and all municipal fees for the project are paid, a Temporary Zoning CO may be requested and issued. **Upon completion of the project**, applicant shall request and obtain a Final UCO from the Code Enforcement Office (located at 645 Pine Street). Additional information on how to request and obtain this UCO is available at this office. **Failure to obtain a certificate of occupancy** places the property in violation of the CDO and is subject to enforcement. In addition, **Failure to obtain a UCO within the time limits above is subject to** “after the fact” fees ranging from \$75 - \$1500 (in addition to the UCO fee).

Demolition work ensued December 2017 and continued through August 2018. At that point, activity at the construction site essentially stopped. Work associated with the zoning permit started within a year as required by standard condition 2, which reads in part:

2. **Time Limits.** This zoning permit shall become invalid unless work or action authorized by the permit is commenced by **July 17, 2018**. The owner shall complete the approved project and obtain a UCO (combined Zoning and Building certificates of occupancy, still applicable even if a zoning or building permit was not required) by **July 17, 2020**, or be subject to enforcement actions.

Zoning permit 17-0662CA/MA was issued and acted upon within specified time limits.

On September 4, 2020, the applicant submitted a letter by way of email (followed up with hard copy) seeking to relinquish zoning permit 17-0662CA/MA.

An administrative response to the applicant was emailed September 14, 2020 indicating that the zoning permit cannot be relinquished because it was acted upon in part.

An appeal of that emailed decision was received by the Department of Permitting & Inspections October 1, 2020. This date is 18 days following the September 14 email and is untimely. The appeal letter is dated September 28, 2020 – the last day of a 15-day appeal period on administrative decisions. The appeal should be dismissed as untimely.

It bears noting that the applicant is separately pursuing an amendment to the project phasing for zoning permit 17-0662CA/MA. This application was submitted November 20, 2019 and has been deferred by the applicant for about a year but will be heard by the Development Review Board November 17, 2020. It is incongruous that the applicant seeks to somehow keep zoning permit 17-0662CA/MA alive with this phasing amendment while at the same time trying to abandon it by relinquishment.

As the zoning permit was acted upon, it must now be closed out. Standard condition 3 is based upon Sec. 3.2.11, *Zoning Certificate of Occupancy*, which requires issuance of a certificate of occupancy in order to use or occupy (or allow the use or occupancy of) any land or structure or part thereof which has been created, changed, converted, or wholly or partly altered or enlarged. The subject property has certainly changed as a result of partial action on the zoning permit.

Not all issued zoning permits are acted upon. As a result, the Department of Permitting & Inspections has created an administrative means of closing such permits by way of relinquishment.

Applicants who have not acted on an approved zoning permit in any way and do not intend to do so may request that the zoning permit be relinquished. A form is completed and submitted by the applicant. An inspector follows up to confirm that no work associated with the zoning permit was done and then closes the zoning permit record by relinquishing the permit. The Comprehensive Development Ordinance does not articulate standards to relinquish a zoning permit. Relinquishment is simply an administrative means to close the permit record for projects not acted upon in any way.

Zoning permit 17-0662CA/MA has been acted upon and cannot be relinquished. The applicant could seek to close the zoning permit with a certificate of occupancy; however, given the obvious lack of project completion, it would likely fail inspection and not be issued a certificate of occupancy.

The applicant has recently submitted a new zoning permit application for redevelopment of the subject property. If that zoning application is approved and a zoning permit is issued, that new zoning permit could supersede the original zoning permit 17-0662CA/MA, thereby negating the need for a certificate of occupancy for the original zoning permit. Superseding a prior zoning permit is an administrative way of addressing projects that are approved and then amended with subsequent permit(s) prior to completion of construction. Doing so keeps the permit record clean and closes the zoning permit for the project as ultimately approved and constructed.

Zoning permit 17-0662CA/MA has been acted upon in part. Therefore, it cannot be relinquished. The applicant could seek to close the zoning permit with a certificate of occupancy. Given the likely failure to obtain a certificate of occupancy, the more appropriate route would be to simply supersede zoning permit 17-0662CA/MA with a new zoning permit for redevelopment of the property.

**II. Recommended Motion:**

Dismiss the appeal as untimely or uphold the zoning decision relative to relinquishing zoning permit 17-0662CA/MA.