



"Providing Sustainable Quality Housing to Southern VT"

August 31, 2022

Castleton Development Review Board
Town of Castleton
263 Rte. 30 North
Bomoseen, VT 05732

**Re: Reconsideration Request of Findings of Fact, Conclusions of Law, and
Decision dated August 4, 2022**

Dear Castleton Development Review Board members,

We represent Dousevicz, Inc. ("Applicant") in relation to the above referenced application and decision. We write on Applicant's behalf to respectfully request that the Board reconsider portions of its August 4, 2022 Findings of Fact, Conclusions of Law, and Decision ("Decision"). Applicant thanks the Board for its clear and objective consideration and approval of the proposed 99-unit project; however, Applicant respectfully requests the Board reconsider Conclusions 14 and 24 as well as Condition 34, 36 A, and 36 B of its Decision for the reasons set out below.

I. Reconsideration is Proper, Efficient, and Authorized by Law.

Vermont law provides the Board with authority to reconsider the Decision. 24 V.S.A. § 4470(a); see also Punderson 2-Lot Subdivision, No. 106-10-18 Vtec, 2019 WL 2568107, at *1-2 (Vt. Super. Mar. 29, 2019) (explaining that Title 24, Section 4470(a) "entitles a municipal body to reconsider its own decision" and reconsideration does not circumvent the normal appeal process because it simply returns the application to the point before the DRB would have voted on the merits).

Reconsideration is also an efficient use of municipal and party resources compared to the more expensive and time-consuming process of appealing to the Environmental Division.

II. Background.

As the Board is aware, Applicant plans to develop a 23,500 sqft senior living facility with varying levels of care as a planned unit development ("PUD") under the Castleton Zoning Ordinance (the "Regulations"). The plan includes three components for senior living which work in conjunction, and cannot be separated: (1) independent living; (2) assisted living; and (3) memory care.

In its decision dated August 4, 2022, Conclusion 14, the Board concluded that the independent living and assisted living elements of the project qualify as allowed "residential" uses under the Regulation. Applicant agrees with this conclusion.

Conclusion 14 goes on to conclude, however, that the memory care unit does not qualify as "residential" because residents of that unit will not be "doing their own cooking in the

building.” The decision therefore concludes the memory care unit is a “nursing home,” which is a non-residential use not allowed in a PUD. In addition, the decision concludes that a nursing home is not allowed as part of the project, because the Regulations have a 30-person limit per lot in relation to nursing homes.

Condition 34 follows up on this by stating that each unit shall be equipped with a kitchen, and that the facility shall not have a memory care unit.

In addition, Conclusion 24 concludes that the “scale of the facility poses a risk of overtaxing the Town water and sewer systems.”

Condition 36 A then requires the Applicant to provide a bond to connect to the municipal water and sewer which is sufficient to cover the costs of the repair or replacement of the town water and sewer system if damages occur within in the first 3 years.

Condition 36 B adds the additional requirement of a “sludge grinder for biosolids processing” to reduce the facility’s impact on the municipal water system.

III. Analysis.

Applicant respectfully asks the Board to reconsider Conclusion 14 and 24, as well as Condition 34, 36 A and 36 B for several reasons. First, the memory care unit is not a nursing home. Instead, it will be a residential care home, which is very different from a nursing home. Second, residential care homes are, for zoning purposes, residential uses. Third, the memory care home, as a residential care home, is consistent with the regulations governing PUDs. Fourth, the memory care unit is an integral part of the proposed project. Finally, the professional judgment of an engineer, rather than scale, would provide better insight on the risk of overtaxing the Town water and sewer systems.

1. The memory-care unit will be licensed as a residential care home, not as a nursing home.

The memory care unit proposed as part of this project will be licensed by the Vermont Department of Aging and Independent Living as a “residential care home.” 33 V.S.A. § 7102(10). This is a specific type of facility which is given special statutory protection, and which is governed by its own set of state regulations. The State also licenses and regulates nursing homes. 33 V.S.A. § 7102(7). There are significant differences between nursing homes and residential care homes, however.

Briefly stated, a residential care home provides a residence—as the name suggests—to persons who are not able to live entirely independently, while a nursing home provides medical, health-related, and rehabilitative care.

This distinction can be found in the Legislature’s definitions of the two types of facilities, set out in 33 V.S.A. § 7102(10) (defining “residential care home”) and (7) (defining “nursing home”). Under § 7102(10), a residential care home provides room, board, and personal care, and

only limited nursing care. Under § 7102(7), by contrast, a nursing home is a facility “primarily engaged” in providing nursing care for medical purposes.

The difference between a nursing home and a residential care home is also evident in the regulations governing the two different types of facilities. The Operating Rules for Nursing Homes promulgated pursuant to 33 V.S.A. § 7117 make clear that nursing homes are focused on “physical, mental, and psychosocial wellbeing.” By contrast, the Regulations for Residential Care Homes state:

Residential care homes provide care to persons unable to live wholly independently but not in need of the level of care and services provided in a nursing home. Toward that end, these regulations are designed to foster personal independence on the part of residents and a home-like environment in the homes.

Because the memory-care unit is a residential care home, it is not a “nursing home” under the state statute.

Under the Castleton Zoning Regulations, “Nursing Home” is defined as:

NURSING OR REST OR CONVALESCENT HOME A place, other than a hospital which maintains and operates facilities, for profit or otherwise, accommodating two or more persons unrelated to the home operator, who are suffering from illness, disease, injury or deformity and require in house nursing care.

This definition is consistent with the state statute definition of “nursing home.” Furthermore, like the statutory definition, this definition describes a different type of facility than a “residential care home.” Just as the memory-care unit is not a “nursing home” under the state statute, it is also not a “nursing home” under the Regulations.

2. Residential Care Homes are “residential” for zoning purposes.

The Vermont Legislature, in 24 V.S.A. § 4412(1)(G), has specifically carved out an exception in zoning which requires certain residential care homes to be treated as single family residences.¹ This statute is consistent with the federal Fair Housing Act’s prohibition on discrimination in housing. The effect of these statutes is to prevent unconventional residential uses, namely residential care homes, from being unfairly excluded by zoning. While the 17-room memory care unit proposed here does not qualify for the specific statutory protection provided in § 4412(1)(G), the principal set forth in that statute does apply here in the sense that the memory

¹ The statute states:

A residential care home or group home to be operated under State licensing or registration, serving not more than eight persons who have a disability as defined in 9 V.S.A. § 4501, shall be considered by right to constitute a permitted single-family residential use of property.

care unit is a residential care home, and a residential care home is, for zoning purposes, a residential use.

3. The Memory care unit is consistent with the regulations governing PUDs

The purpose of the PUD Regulations is “to enable and encourage flexibility and development of land in such a manner as to promote the most efficient and appropriate use of the site while preserving the rural character of the town and avoiding fragmentation of important resources . . .” Regulations, Sec. 417. This is to be done “by allowing creative site design, building placement, street layout, architecture, and provision of streets and utilities, which otherwise may not conform to the Bylaws.” *Id.* Admittedly, the memory care unit proposed here is not a conventional residential use. As such, it does not neatly fit into the conventional types of uses that are expressly provided for in the Regulations. But, it is a use that fits into a PUD, which expressly calls for flexibility in zoning. It also fits into a PUD by clustering housing into a smaller physical space, thereby preserving other parts of the lot.

The Regulations provide that “[a]llowed uses [in a PUD] include single family, two family and multiple-family dwelling units.” (emphasis supplied). For the reasons set out above, a residential care home is a residential use; it is, for all intents and purposes, a multi-family dwelling unit. But, even if it does not neatly fit as a “single family, two family [or] multiple-family dwelling,” the Regulations do not limit allowed uses in a PUD to these three listed residential uses. Instead, the Regulations state that allowed uses “include” these three examples.

Moreover and importantly, Sec. 204(G) of the Regulations provides for flexibility in uses when a specific proposed use is not expressly identified as permitted under the Table III of the Regulations and when that use is “clearly of the same general character as those permitted in the area . . .” Although the memory care unit, as a “residential care home”, does not neatly fit into the Regulations, it nevertheless is a “residence” of sorts, and is of the same general character as those permitted in the area. Residents will not be placed in the unit for medical care, as they would be if this were a nursing home. Instead, they will reside there, with some measure of support. They will eat, sleep, and pass their time there. In other words, they will use the facility as a residence. The impact of the facility will be similar to a normal residential impact. There will be some daytime traffic. In evenings and at night, the facility will be quiet. This is not a bar or nightclub, and it is not an industrial facility. It will not have a detrimental impact on other uses in the area. The memory care unit is not functionally different from the independent living and assisted living spaces, because it will have the same, or perhaps fewer, impacts than the independent living and assisted living spaces, and will not be detrimental to other uses within the same zoning district, the Board has leeway to make this finding and allow this use.

According to the Supreme Court, “zoning ordinances are to be strictly construed in view of the fact that they are in derogation of common law property rights . . . and when exemptions appear in favor of the property owner, the exemptions shall be construed in favor of the owner.” Glabach v. Sardelli, 132 Vt. 490, 494 (1974) (emphasis added); accord In re Shearer Variance,

156 Vt. 641 (1990) (mem.); Town of Westford v. Kilburn, 131 Vt. 120, 126 (1973); City of Rutland v. Keiffer, 124 Vt. 357, 360 (1964); see also In re Vitale, 151 Vt. 580, 584 (1989). In light of this standard, zoning regulations and restrictions “may not be extended by implication.” Murphy Motor Sales v. First Nat’l Bank, 122 Vt. 121, 123-24 (1960) (citations omitted). Rather, “[a]ny ambiguity or uncertainty must be decided in favor of the property owner.” Id. at 124 (citations omitted). Therefore, to the extent the memory care unit is not clearly prohibited, the Board should conclude that the Regulations should not be extended by implication to prohibit it.

4. The memory care unit is integral to the project.

The use of this property is restricted by a deeded covenant, which states:

The Sand Hill Property shall be held, developed, used, occupied, leased, sold, and/or conveyed by the Town of Castleton to provide for and/or promote the general public good and welfare by providing one or more buildings and/or building sites, with associated sitework, landscaping, roads, parking, walkways, public and private utilities and other infrastructure for commercial, industrial or educational development that will create employment and/or educational opportunities for residents of other communities in the Castleton-area educational institutions, and residents of other communities in the Castleton area, and economic, educational and/or entrepreneurial opportunity for emerging, growing, or established business industry.

The proposed project can meet these development goals, and in doing so it will promote the general public good and welfare. As such, this is a unique opportunity for the Town to sell this land, achieve the requirements of the deeded covenant, and bring a large amount of Tax Revenue in for many years to come. It is also anticipated that this project will create a partnership with Castleton University’s nursing program, and thus this Residential Care Facility is the perfect educational, entrepreneurial, economical, and Residential fit for the land.

Without the memory care unit, this project will no longer be able to move forward, and the benefit that the project would bring to the Town and the community would be lost.

5. Professional judgment of an engineer on the risk of overtaxing the Town water and sewer systems.

As part of the reconsideration, it is respectfully asked that before requiring a bond and grinder for biosolids processing, that the water/sewer department of the Town is consulted to determine if the facility poses a risk of overtaxing the Town’s water and sewer systems.

During the hearing, comments were made by a representative of the Fire Department that the water system is adequate. The Town Manager also stated that the sewer system on Sand Hill Rd had been recently camera’d and was deemed in adequate condition by a consulting engineer hired by the Town. In addition, this project will require State Wastewater System and Potable Water Supply Permit, Public Water System Construction Permit, and a permit from the Division of Fire Safety for the sprinkler system serving the facility.

The project will pay high allocation and connection fees due at the time of construction. The way the Condition is worded for the bond, there is no certainty of how large of a bond the developer may need to post prior to construction. Reviewing Section 1210(B)(2), this vague Condition with an unspecified bond amount with no ceiling for the Applicant's liability for replacing water/sewer infrastructure in the Town is not an "additional reasonable condition[] and safeguard..." This is especially true if the water/sewer department is not consulted in making this determination.


As it relates to the grinder, Applicant is agreeable to adding a water/grease separator or trap for servicing the cafeteria which will likely be a requirement of the Wastewater System and Potable Water Supply at the State level. However, a sludge grinder is typically seen at much larger facilities, such as airports, large pump stations, wastewater treatment facilities, etc., and should be determined as a requirement after consultation with the sewer department.

Conclusion

Applicant requests the Board reconsider its decision not to approve the memory care unit and require a bond and grinder for biosolids processing without consulting with the water/sewer department of the Town. As set out in detail above, the memory care unit proposed here is not a nursing home, but is instead a residential care home. As such, it is a residential use for zoning purposes, and is consistent with the regulations governing PUDs. In addition, information provided at the hearing would not conclude that this project poses a risk of overtaxing the Town water and sewer systems. For these reasons Applicant respectfully requests the Board to reconsider its Decision, approve the memory care unit as an allowed residential use within the overall approval of this project, and consult with the water/sewer department about the necessity for the bond and grinder.

Respectfully submitted,

DOUSEVICZ, INC., APPLICANT

By: 

Sources

- Deed
 - <https://www.dropbox.com/s/ripaqtlgrrddxaer/3.%20Deed%20and%20Covenant%5B2305843009215871003%5D.pdf?dl=0>
- Castleton Zoning Ordinance
 - https://www.castletonvermont.org/sites/g/files/vyhliif376/f/uploads/zoning_and_fha_adopted_6-28-21.pdf
- **33 V.S.A. § 7102**
 - <https://legislature.vermont.gov/statutes/section/33/071/07102>
- Residential Care Home Licensing Regulations
 - https://dail.vermont.gov/sites/dail/files/documents/Res_Care_Hom_Licensing_Regulations_2000.pdf
- Licenses and Operating Rules for Nursing Homes
 - https://dail.vermont.gov/sites/dail/files/documents/Nursing_Home_Regulations_2018.pdf