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December 7, 2015

Jane Woodruff, Chair
Greensboro Development Review Board
Town of Greensboro
P.O. Box 119
Greensboro, VT 05841

Re: *Mirror Theater/2583 Hardwick Street*

Dear Jane:

On behalf of Applicant Greensboro Performing Arts Center Trust, Ltd. (GPACT), thank you for the opportunity to summarize GPACT's position and respond to Attorney James Dumont's November 30 correspondence.

The members of the Development Review Board are no doubt aware of the high level of interest that has accompanied GPACT's applications for minor revisions to the previously granted site plan and conditional use approvals for this theater project. The Board has received several letters and heard oral comments from many groups and individuals, both in favor of and in opposition to the applications. Some of the written and oral comments raised issues that are relevant to the conditional use and site plan criteria that the Board must consider in this matter; the content of many other submissions had no such relevance. GPACT does not wish to waste the Board's time with a point by point response, either in support or in opposition to the written or oral comments. However, given that this is a quasi-judicial proceeding, GPACT is compelled to request that the Board disregard any written or oral comments submitted by any individuals who signed the petition referenced in Attorney Dumont's letter. Each of the signatories to the petition have designated Ms. Christine Armstrong as their representative for purposes of these proceedings, and Ms. Armstrong has submitted written and oral comments on behalf of petitioners, pursuant to 24 V.S.A. § 4465. These comments, to the extent that they are relevant to the zoning criteria, may be considered as the statements and evidence from any individuals who signed the petition. All other written and oral comments submitted by these individuals should be disregarded.

We also request that, in fairness to all parties, the DRB should not consider or make part of the record any factual exhibits or letters received at any time following the close of the evidence at the end of the November 30 evidentiary hearing.

In response to the petitioners' argument that the DRB cannot consider the modifications requested by GPACT, we assert that once an applicant receives conditional use and site plan approval for a project, it may obtain approval for minor revisions to the project so long as those revisions do not create an undue adverse effect on the specific criteria set forth in the zoning regulations.

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Applicant remains entitled to the benefit of two decisions which granted permits for the Mirror Theater project. These include the DRB's September, 2014 permits granting site plan and conditional use approval for the project, and the DRB's March, 2015 approval of an amended application which authorized a change in location for the project access and project driveway. Taken together, these permits are binding on all parties, and we proceed from the initial conclusions of the DRB that the development of a performing arts facility at this location will not have any undue adverse impacts on the capacity of existing or planned community facilities; the character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the Town Plan; traffic on roads and highways in the vicinity; bylaws and ordinances then in effect; and utilization of renewable energy resources. The sole task of the DRB in this proceeding is to determine whether or not any of GPACKT's proposed modifications comply with site plan requirements and, in and of themselves, create any undue adverse effects on the items to be reviewed under conditional use criteria.

The proposed minor revisions which require consideration are limited to the following:

1. The addition of a one story accessory structure for production and prop storage;
2. A proposal to install the identical, previously approved lighting fixtures on twenty foot poles, rather than on shorter "bollards," within the parking lot area, to allow for safe access to the parking areas by theater patrons;
3. The addition of a proposed design element to the original structure's theater cylinder, variously referred to as a "cupola," "skirt" or "collar" in these proceedings;
4. A reconfiguration of the site's parking area, with no corresponding increase in the number of parking spaces.

Applicant disagrees with the petitioners' assertion that any other "changes" are properly before the DRB. In that regard, we agree with the Chair's observation during the November 30 hearing that Greensboro's zoning regulations do not contain any provisions authorizing the DRB to enlarge a conditional use or site plan proceeding into one that engages in design review. In his November 30 letter, Attorney Dumont disputes this notion, asserting that it creates a situation in which "once a conditional use permit is granted the applicant can construct any...project that it desires, so long as setbacks are respected." Applicant believes that a more accurate characterization of the Chair's observation is that there are inherent limitations in the authority of the Development Review Board when considering a proposed project, and that the DRB's authority is limited to review of those matters that are regulated under the specific criteria of the zoning regulations. The DRB may impose restrictions and conditions on approval, or deny an application, only where there are specific regulations or criteria in the zoning regulations that provide authority for such action.

Here, while there have been many objections raised to the proposed design changes involving the building alignment and the "footprint" of the first floor of the structure, those changes can only be considered if there are specific site plan or conditional use criteria which regulate the proposed modifications, or if there are prior restrictions or conditions of an existing permit which impact those modifications. There are no prior permit restrictions, or any specific zoning regulations/criteria, which

specifically restrict the size or orientation of any structures on site. This is not to say that *substantial* increases in the size or capacity of structures for a previously permitted project can *never* be subject to regulation. At some point, such increases could be of such magnitude that they would violate specific setback or other dimensional standards and regulations. It is also arguable that substantial increases in the size of a structure may increase the scope/extent of use of the structure, with concurrent potential impacts on criteria set forth in the specific conditional use regulations. However, there is no evidence that any of the changes to the footprint of the first floor, or the realignment of the building, violate any dimensional standards applicable to the Rural Lands District, or otherwise increase the scope or extent of the previously permitted use. Nor is there any evidence that these proposed building changes have any potential additional impacts on conditional use criteria, including traffic, noise, or character of the area, particularly where the proposed modifications increase the overall size of the structure by only 293 square feet, with no corresponding increase in scope or extent of use.

The same analysis applies to alleged “increases” in the seating capacity of the theater area. Petitioners focus abundant attention on contrasting seating capacities set forth in numerous permitting applications and documents, but none of this evidence establishes that any of Applicant’s proposed changes result in any real increased seating capacity. A comparison of the architectural plans submitted for the initial applications with those submitted for this proceeding reveal no increases in any aspect of the cylindrical theater portion of the building. Initial application narratives, testimony and findings reference a 200 seat capacity, while the findings from the Act 250 proceeding project a 277 seat capacity. At the November 30 hearing, the project’s architect, Daria Pizzetta, clarified that the theater’s seating plan is flexible in nature, with 179 “fixed” seats and a potential full capacity of 258. Petitioners have seized on this apparent “increase,” and have also referenced a worst case scenario, in which there are simultaneous outdoor/indoor performances for which the wastewater system should be designed to accommodate 329 occupants. But the truth is that GFACT has proposed no changes to the previously permitted project that would create any increase in seating capacity. To the extent any additional “proof” of this proposition is required, we note that the proposed modifications to the parking area result in *fewer* parking spaces than those originally proposed. One would expect that a proposed change for increased use of a project would carry with it a corresponding increase in the amount of patron parking for the facility.

Simply put, there is no evidence that any of the proposed modifications—the addition of the “collar/skirt/cupola” design element, the reconfiguration of the parking area, the change from bollards to poles for the parking lot lighting fixtures, and the addition of a one story accessory shed—will create any increase in the scope or extent of use of the facility, or otherwise create any additional adverse impacts sought to be protected by site plan and conditional use criteria.

The bulk of Attorney Dumont’s November 30 letter represents an effort to fit the current applications for revised site plan and conditional use approval within the parameters of the Vermont Supreme Court’s decision in *In re Lathrop Limited Partnership I*. GFACT agrees that the *Lathrop* decision provides guidance for a DRB when considering revisions to a previously approved project. But GFACT disputes the petitioners’ use of misrepresentations of fact and exaggerated statements of imagined harmful consequences in their failed effort to analogize GFACT’s proposed minor project revisions to the substantial increases in traffic, extraction activities, noise and other impacts illustrated by the gravel pit changes in the *Lathrop* case. A review of GFACT’s requested modifications, based on the evidence, and in recognition that none of the modifications will create an undue adverse effect on the

relevant criteria or run afoul of prior permit conditions, establishes that the DRB has the authority to consider and approve the applications.

We agree that the starting point on this issue is consideration of the proposed modifications in light of the DRB's September 19, 2014 decision. This is the approach employed in the *Lathrop* decision, in which the Court set out to reconcile the competing considerations of the finality and binding nature of unappealed prior DRB decisions, on the one hand, with the reality that permitted projects will often undergo changes as the design process moves forward towards construction and completion, often within differing regulatory environments. The Court in *Lathrop* discussed the considerations that a DRB or court must consider regarding proposed modifications to an existing permit. Initially, the court/DRB must determine if any of the modifications implicate any of the restrictions or conditions of the original judgment or permit (the Court refers to this as whether, with respect to the proposed changes, there is a "judgment with preclusive effect.") **Only** if the requested modifications run afoul of the prior restrictions or conditions of the existing permit or judgment, the DRB must then determine if the modifications are "substantial." If so, any substantial changes must be considered as if no prior permit had issued. Attorney Dumont further argues that even if permit changes are not considered to be "substantial," they must be evaluated in light of criteria for such changes established by the Court's decision in *In re Appeal of Hildebrand*, 181 Vt. 568 (2007), which applied the so-called *Stowe Highlands* application modification criteria to zoning cases. Even if GPACT agreed with Attorney Dumont's analysis regarding these final steps, the Court's ruling in *Lathrop* poses no obstacle to the DRB's authority to review and approve GPACT's proposed modifications.

The *Lathrop* decision summarizes the review process as follows:

Where there is a preexisting permit, it should not matter to applicable regulatory standards whether the applicant submits a new application or requests an amendment to an existing permit. **The first step is to determine whether there is a judgment with preclusive effect.** If so, [and] the board or court concludes that **there is a substantial change from the permitted project**, review should proceed as if there is no prior permit. In the relaxed environment of zoning permits, **it is not determinative that the applicant could have or should have made the new proposal at the time of the original permit review.** The third step is that conducted for permit amendments. **To the extent the applicant seeks to change or avoid permit restrictions or conditions**, the applicant must meet the standards for permit amendments as set forth in *Hildebrand*...

Lathrop at p. 66 (emphasis added).

Regarding the 2014 decision, it is important to consider what the DRB decided, what was *not* decided, and whether any of Applicant's proposed modifications run afoul of any of the original provisions of the permit or any restrictive conditions imposed, as this is necessary in order to determine if an applicant is bound by the "preclusive effect" of any prior permit or judgment. There is a "preclusive effect" from the original permit only if any of the proposed modifications run afoul of the restrictive conditions of the 2014 decision. The focus on the restrictions and conditions of the 2014 permit are crucial, as these conditions, together with the requirements and standards of the zoning regulations, are the only aspects of a prior decision that can be binding (essentially, of "preclusive effect") on an applicant:

We recently addressed the issue of whether representations by a landowner, and findings of fact of a zoning board, represent implied permit conditions even though **not expressed as explicit conditions of the zoning permit** issued by the board. Deciding that enforcement of implied conditions would "impose a difficult if not impossible burden on interested parties to determine applicable regulatory standards," we held that "[c]onditions that are not stated on the permit **may not be imposed on the permittee.**" *In re Kostenblatt*, 161 Vt. 292, 299, 640 A.2d 39, 44 (1994). *Kostenblatt* distinguished between discretionary permit conditions and minimum requirements for specific land uses within the district involved. **The former must be stated explicitly**, but the latter are legal requirements with which the landowner must comply.

In re Stowe Club Highlands, 164 Vt. 262, 276 (1996)(emphasis added).

The September, 2014 permit decision contains eleven distinct restrictive ("cannot do") and mandatory ("must do") conditions. With the exception of Exception 10 (discussed below), it cannot be argued that any of the restrictive conditions has any bearing on the minor modifications GPACT has proposed in this proceeding. There are no restrictions imposed on the precise location of parking areas; there is no condition prohibiting exterior light poles, or restricting their height. Nor are there any restrictive conditions barring Applicant's right to apply for the construction of an accessory structure at some future date. Applicant seeks relief from none of the conditions, and our ability to comply with all conditions, whether mandatory or restrictive, remains unchanged. In short, GPACT is not seeking, and it is not necessary, to obtain relief from any of the conditions in order to proceed with the requested modifications. As such, the existing permit and its conditions do not create any binding or "preclusive effect" on the current applications, and the DRB's only task is to evaluate the modifications in light of site plan criteria and for any undue adverse effects the changes may create. GPACT submits that none of these minor modifications create any such adverse effects.

As respects Condition 10, which provides that "the building will be no higher than 35 feet," GPACT submits that the same analysis applies: the DRB's sole task is to determine whether the skirt/collar design element complies with conditional use criteria, which includes the requirement that all aspects of a project must comply with dimensional and height regulations. In this regard, GPACT points to the undisputed evidence that this design element, the highest point of which would rise 42 feet, 2 inches, is not a supporting structure and is not intended for human occupancy. Indisputably, its sole purpose is aesthetic in nature, and was proposed in response to concerns raised by the District 7 Environmental Commission during subsequent Act 250 proceedings. This design element does not run afoul of Condition 10, which requires that "**the building**" be no higher than 35 feet, and also complies with § 3.12 of the Greensboro Zoning Regulations:

The height limitations of these Regulations, shall not apply to barns and silos, private home antennae, spires, belfries, steeples, cupolas, water tanks, ventilators, chimneys, solar equipment, windmills, transmission towers, flag poles, or other appurtenances not used for human occupancy up to a maximum of 50 feet. Windmills over 35 feet in height shall require a conditional use review. There shall be no exception of height limitations for the above items within the Shoreland Protection District.

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The evidence at hearing established that the cupola/skirt/collar, an “appurtenance” under §3.12, is under 50 feet in height. Additionally, as relates to “character of the area” considerations, the evidence established that the highest point of this design element remains several feet shorter than the height of the Fire Department’s building next door.

Even if the DRB concludes that this proposed design element would violate the maximum height restriction imposed by Condition 10, relief from this condition would be authorized under the *Lathrop* and *Stowe Club Highlands* criteria, even as those doctrines are interpreted by Attorney Dumont. Under these criteria, a modification that would otherwise be subject to “preclusive effect” from a prior permit restriction may be allowed if the modification results from “a change in factual or regulatory circumstances beyond the control of a permittee.” The design element was never part of Applicant’s initial conditional use, site plan or Act 250 applications, and was added as a supplemental item in Act 250 proceedings only after the District 7 Commission advised applicant that such a change was necessary to comply with the Criterion 8/Aesthetics criterion of Act 250. This modification would not have been proposed but for the need to obtain Act 250 approval, and as such it is the precise type of modification authorized under the *Stowe Club Highlands* criteria.

In summary, the Development Review Board has full authority to review each of GPACKT’s proposed minor modifications to the existing site plan and conditional use permits. All of the proposed modifications comply with the Greensboro zoning regulations and should be approved.

Thank you.

Very truly yours,



Robert Halpert

cc: James A. Dumont, Esq.