



Town of Bolton Development Review Board

Bolton Town Office
3045 Theodore Roosevelt Highway
Waterbury, VT 05676
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**In re: Appeals of Zoning Administrator Determinations
4x4 Off-Road Driving School, Bolton Valley Resort**

Appellants

Automotive Services International, Inc.
(dba 4x4 Center Off-Road Driver Training School)
c/o Thomas Walsh, Esq.
Walsh & Monaghan, LLP
178 Main Street, Suite 301
Burlington, VT 05401

Mountain Operations and Development, LLC
(dba Bolton Valley Resort)
c/o Liam L. Murphy, Esq.
Murphy Sullivan Kronk
275 College Street
Burlington, VT 05406

Appeals

(See Notices of appeal, related materials on file at the Bolton Town Office)

1. On September 3, 2008 the appellants filed a notice of appeal with the Town of Bolton regarding an August 20, 2008 determination, issued by Zoning Administrator, Miron Malboeuf, that conditional use approval and a zoning permit are needed for the expansion and winter use of an off-road vehicle course on existing alpine ski trails at Bolton Valley Resort. As determined by the Zoning Administrator, the proposed use represents a change in use under §§ 3.3 and 3.7 of the Bolton Land Use & Development Regulations, and does not meet the “de minimus” provisions of the regulations under §9.2(A)(4), because it:

- requires use of local roads, ski area parking facilities, and alpine ski trails as separately defined and subject to review under applicable provisions of the regulations currently in effect;
- Involves steep slopes (in excess of 15%) as defined and regulated under Section 3.16;
- requires installation of a significant amount of infrastructure for stormwater management, which falls under the statutory and bylaw definitions of “land development” regulated under the bylaws;
- clearly may result in additional impacts to neighboring properties, the character of the area and, at higher elevations, wildlife habitat (Bicknell’s Thrush) as protected under previous permits and conditions of approval, and
- it required full review and approval from Act 250 under applicable Act 250 criteria.

The Zoning Administrator also, at that time, concurred with the appellant’s attorney that a July 20, 2004 letter, issued by former Zoning Administrator Richard Ward, established the 4 x 4 driving school in existence as of the effective date of the current bylaw (January 26, 2005), as a grandfathered “pre-existing, nonconforming use of an alpine ski facility.”

2. On February 27, 2009 the appellants filed a notice of appeal with the Town of Bolton regarding a separate February 18, 2009 determination, issued by Zoning Administrator Miron Malboeuf, in which he reconsidered his prior determination, referenced above, regarding the nonconforming status of the existing 4 x 4 Center, concluding that, based on information subsequently obtained from the appellants that that the use physically commenced in 2006 – after the town’s current regulations went into effect – conditional use approval and zoning permits were needed for the previously established off-road driving school. The application for expansion of the driving school, as submitted by the appellants on February 6, 2009, was therefore ruled incomplete.¹

The properties that are the subject of these appeals are located at Bolton Valley Resort in the Resort Village, Resort Residential and Forest Districts, accessed from the Bolton Valley Access Road (Parcel ID #s 4-30044250, 7-3003227).

These appeals have been consolidated for consideration by the Bolton Development Review Board, with the consent of the appellants. A procedural summary and listing of submitted materials are attached.

¹ The issue of required permit fees for the notifications of abutters, also referenced in the February 6th notice of appeal, was subsequently resolved to the satisfaction of the both the appellants and the town (see letter of March 7, 2009 from Mr. Malboeuf to the appellants), and was therefore not considered by the Development Review Board.

In their notices of appeal and subsequent filings, the appellants argue that no permits and approvals are needed for either the previously established or for the expanded, off-road vehicle driving course, for reasons summarized as follows:

1. The off-road driving course is not “Development” or “Land Development” under the prior or current Town of Bolton Land Use and Development Regulations; nor does it represent a change of use as defined under the regulations;
2. The use of trails by off-road vehicles, whether in winter or summer, is a “recreational use” for which Bolton Valley has been approved;
3. The use of trails by off-road vehicles is exempt under the de minimus provisions of the Regulations;
4. The existing use was approved by the prior Zoning Administrator, Dick Ward, and cannot now be reconsidered; and
5. The existing use was approved by the current Zoning Administrator, Miron Malboeuf, in a letter dated August 20, 2008 and cannot now be reconsidered.

Development Review Board’s findings pertaining to each of these points, and associated arguments presented in hearing and in supporting documents, are stated as follows.

Findings

The off-road driving course constitutes “Land Development” subject to regulation under both previous and current zoning bylaws for the Town of Bolton.

1. The definition of “Land Development” under §10.2 of the Bolton Land Use & Development Regulations (effective 1/26/05) is that found in state statute (24 V.S.A. §4303(10):

Land Development: The construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure, or of any mining operation, excavation or landfill, and any change in the use of any building or other structure, land or extension or use of land.

This is also the definition of “Land Development” found under the previous Bolton Zoning Ordinance.²

2. The statutory and bylaw definitions define “development” subject to regulation to include the use, or change in use, of any building, structure or land. The proposed off-road driving school constitutes a use of land.
3. The bylaw definition of “change of use” under §10.2 references the definition of “conversion” which does not specify a change in use of land:

Conversion: Changing the original purpose of a building to a different use, with or without alteration.

4. However, under §3.3 of the current regulations pertaining to conversions and changes of use, it is clearly stated under Subsection (A) that:

“A conversion or change in the use of land, existing buildings, and other structures, is subject to the following requirements: ...”

Under this section, a proposed change in the use of land must meet all the requirements of the regulations pertaining to such use, including the need to obtain applicable permits and approvals.

The use of alpine ski trails by off-road vehicles, whether in winter or summer, is a type of outdoor “recreational use” for which Bolton Valley Resort has not yet been approved by the Town of Bolton.

² Zoning bylaws in effect in 2004 included the “Bolton Zoning Ordinance” as amended through May 1992, and the “Town of Bolton Interim Zoning By-Law” as enacted by the Bolton Select Board on July 22, 2002.

5. Under the Bolton Zoning Ordinance in effect in 2004, “outdoor recreation, skiing facilities, golf courses and associated structures” were jointly listed under Section 2. Village II District (applying to Bolton Valley) as a permitted use subject to site plan review – as required for all uses in the Village II District, except one or two-family dwellings. These uses were not further defined in the regulations. The outdoor driving school course could reasonably be classified as a type of outdoor recreation allowed as a permitted use in this district, in association with skiing facilities and golf courses, subject to site plan review and approval.
6. Under town zoning regulations in effect since July 26, 2005, “Alpine Ski Facility” and “Recreation/Outdoor” are separately listed as allowed conditional uses under applicable zoning districts (Tables 2.2, 2.3 and 2.6) – each subject to conditional use review and approval– and are defined as follows:

Alpine Ski Facility: *An area and facility developed for downhill skiing, with trails and lifts, which may also include associated ticketing, parking, ski equipment sales and rentals, ski instruction, safety, patrol, snowmaking and maintenance facilities, and warming hut facilities to be accessed primarily by ski trails or service roads. Other facilities, such as commercial lodging, indoor recreation, cultural and restaurant facilities, which may support year-round use, may be allowed in association with an alpine ski facility subject to review as a mixed use (see Section 4.14) or a planned unit development (Article VIII).*

Recreation/Outdoor: *A facility for outdoor recreation, including but not limited to a stadium, tennis courts, athletic fields, swimming pools, and trails for hiking, horseback riding, bicycling, snowmobiling, and cross-country skiing; except for such facilities which are accessory to an approved educational facility or a residential use, or are otherwise exempted from these regulations under Section 9.2. Golf courses as separately defined and regulated are specifically excluded from this definition.*

The proposed driving school, while not specifically referenced under either definition, can reasonably be considered a form of “Recreation/Outdoor” as allowed under the current regulations, subject to conditional use review.

7. An off-road driving school is not a use that is customary or incidental to or an alpine ski facility as defined above³, but it may be considered in association with an alpine ski facility as a type of “mixed use” as allowed in the Resort Village and Resort Residential districts, subject to conditional use review and §4.14 (Mixed Use) of the regulations:

Mixed Use: *A building or parcel containing two (2) or more principal uses which are otherwise allowed as permitted or conditional uses in the district in which the building or parcel is located (see Section 4.14). Also see Planned Unit Development.*

8. The July 20, 2004 letter from former Zoning Administrator Richard Ward to Bob Fries of Bolton Valley Resort, submitted as evidence by the appellants of local approval, was issued specifically with regard to the initial Act 250 permit application for the driving school, and states only that the proposed driving school “conforms to local planning desires.” It does not reference the issuance of – nor the need for – local permits and approvals.⁴
9. No other evidence was submitted, or found in the land records of the town, documenting that necessary permits and approvals were issued for the existing driving school under previous or current regulations. There also is no record of any notices of violation issued under previous regulations for failure to obtain necessary permits.

The use of alpine ski trails by off-road vehicles is not exempt from regulation under the de minimus provisions (§9.2) of the Regulations.

10. The exemptions under Section 9.2 of the regulations apply to listed uses and structures that have been determined to impose no impact or a de minimus impact on the surrounding area and the overall pattern of development in the town, as specified in statute (24 V.S.A. §4446).

³ Even if considered as such it would be subject to conditional use review and approval as accessory to a conditional use (see district tables).

⁴ This letter, as submitted by the appellants, was not found in the land or permit records of the town.

11. The exemptions under this provision include the following, (A)(6):

Outdoor recreational facilities which do no involve or require the development, construction or use of structures or parking areas (e.g., walking, hiking, cross country-skiing and/or snowmobile trails).

Within this context, such facilities or uses that have been determined to have little or no impact do not require a permit. If they involve the construction or use of structures or parking areas, then the use falls under the definition of Recreation/Outdoor and permits are required.

12. The existing driving school, and proposed expansion, includes use of and improvements to existing parking areas at the resort that are subject to prior conditions of approval⁵, and also necessary improvements to alpine ski trails to allow for their year-round use, including the installation of water bars and check dams that direct flow off of trail surfaces and could therefore impact adjoining properties and uses.
13. The existing driving school course and proposed expansion also occur on steep slopes, as defined and regulated under § 3.16 of the bylaws, and at high elevations in areas subject to previous conditions of DRB approval.⁶
14. All development except for hiking, rock climbing and ski trails, as defined in the regulations, is prohibited on slopes in excess of 25%. Development within this context also specifically includes road and utility corridors (see § 3.16). Ski trails, while allowed on slopes in excess of 25%, are subject to conditional use review under § 3.16 (B), which includes requirements for the submission of erosion control plans and the use of best management practices for stormwater management and erosion control to prevent erosion, runoff and down slope movement, and to minimize associated risks to surface and ground waters (e.g., Joiner Brook and its tributaries), public facilities and roads and neighboring properties.

The existing use was never approved, denied or noticed in violation by the town under Bolton's previous or current zoning regulations. As such, it is open for consideration.

15. The July 20, 2004 letter from former Zoning Administrator Richard Ward to Bob Fries of Bolton Valley Resort, submitted as evidence by the appellants of local approval, was issued specifically in regard to the initial Act 250 permit application for the driving school, and states only that the driving school as proposed "conforms to local planning desires." It does not reference the issuance of – nor the need for – local permits and approvals.
16. No other evidence has been submitted, or located in the land records of the town, documenting that necessary permits and approvals were issued for the existing driving school, under previous or current regulations.
17. There also is no evidence that any notice of violation was issued under previous regulations for failure to obtain a permit for a use known by the Zoning Administrator.

The grandfathered status of the existing use, as established prior to the date the current regulations went into effect (July 26, 2005) was agreed to by Zoning Administrator, Miron Malboeuf in the letter dated August 20, 2008 – as appealed. It was subsequently documented, during the appeals process, that the use was physically established in February 2006 – well after the current regulations went into effect – and as such is open for reconsideration.

18. The August 20th letter from Miron Malboeuf indicates that, at that time, he concurred with the opinion of the appellant's attorney that, based on the February 2004 letter from Richard Ward, the use as established prior to the effective date of the current regulations (January 26, 2005) represented a pre-existing nonconforming use under the current regulations. This letter is the subject of the appellants' first appeal, as generally referenced in the notice of appeal as filed.

⁵ As issued on October 19, 2005 for the Ponds Events Facility which uses the Timberline parking area for events parking.

⁶ As issued on July 25, 2005 for the installation of the Vista Quad and associated ski trails.

19. Following issuance of this letter, Larry Williams of Bolton Valley Resort submitted information on December 10, 2008 that the driving school physically commenced operation in June of 2006 – as such it was not established until well after the effective date of the current regulations, calling into question its grandfathered status.
20. Unless renewed, any permit or approval issued in 2004 would have expired by the date the school was established, under the two-year permit expiration date specified under Article V §1(D) of the previous regulations. There is no evidence of any permits or approvals issued by the town for the existing use.

Discussion

The off-road driving school, as a use of land, clearly falls under the definitions of “land development” subject to regulation under both previous and current municipal bylaws, which are also consistent with the statutory definition of land development under 24 V.S.A. §4303, as cited in the current regulations.

The driving school can be considered a type of “outdoor recreation,” listed under previous regulations as a permitted use, subject to site plan review, and as an allowed “Recreation/Outdoor” use, subject to conditional use review, under the current regulations. Under either set of regulations, approval from the Development Review Board and zoning permits are required for this type of use.

The driving school makes use of existing ski trails and parking areas at the resort. Alpine ski trails and associated facilities are separately listed, defined and regulated under the current bylaw, also as conditional uses. The driving school course cannot reasonably be considered customary or incidental to an alpine ski facility as currently defined, but could be allowed in association with an alpine ski facility as a separate principal use of the facility – i.e., as a “mixed use” as defined and allowed under the regulations, subject to conditional use review and §4.14 of the regulations. As such it also represents a change in the use of land – from one conditional use (alpine ski facility) to another (outdoor recreation/mixed use) – subject to conditional use review under §3.3.

Because the driving school occurs on steep slopes (equal to or greater than 15%), it is also subject to conditional use review under the steep slope provisions (§3.16) of the regulations. Development, in this context, includes roads, utility corridors and alpine ski trails, as specified in §3.16. Ski trails are allowed on slopes in excess of 25%, subject to conditional use review.

Given that the driving school course uses and requires extensive improvements to existing parking areas and ski facilities that are subject to prior conditions of DRB approval, that it involves steep slopes and upland elevations and as such potentially could affect adjoining properties, facilities and surface waters, and critical high elevation habitat, it cannot be considered to have little or no impact and thereby qualify for exemption from permit requirements under §9.1 of the regulations.

There is no evidence, apart from the July 2004 letter issued by former Zoning Administrator in regard to the initial Act 250 application, that the existing driving school was legally established and in existence under the previous regulations, and is therefore grandfathered under the current regulations. Evidence was submitted by the appellants that the driving school physically commenced in 2006 – well after the current regulations went into effect, which calls its grandfathered status into question.

That being said, it is clear that the town, acting through its former Zoning Administrator, was well aware of the proposed 4 x 4 Center use, as evidenced by the July 2004 letter, and there is no documentation anywhere on file that the former Zoning Administrator, notwithstanding this knowledge, required permits or approvals or issued any notices of violation. Turnover in the Zoning Administrator’s position during this period, and poor record keeping also did no service to applicants or the town. It is clear that the appellants made significant investments in and substantial improvements to the 4 x 4 Center in reasonable, detrimental reliance on the inaction/non-enforcement of the former Zoning Administrator, who knew or should have known what the regulations required. The DRB believes that it would be unfair to place the status of those investments/improvements in doubt by requiring the appellants to now obtain permits and approvals for the existing 4 x 4 Center.

Accordingly, the DRB is swayed by the appellants' argument that the driving school in existence prior to the proposed expansion represents a significant investment on the part of the driving school and the resort, based on assurances from the former Zoning Administrator that the use was allowed under the regulations then in effect. Based on principles of fairness and estoppel, no further permits and approvals for the existing 4 x 4 Center are required.

Decision

Based on the above findings and discussion, the DRB has determined that:

- 1) The Town is estopped from requiring permits and approvals for the off-road driving school as established prior to the proposed expansion, given the former Zoning Administrator's prior suggestion that the use was allowed under the previous regulations, his failure to enforce the zoning regulations, and the applicant's investment-backed expectations and reasonable, detrimental reliance in establishing the existing driving school.

As such, we reverse the Zoning Administrator's determination that permits and approvals are required under the current regulations for the driving school as established prior to proposed expansion and winter operation.

- 2) Under the current regulations, the physical expansion and winter operation of the off-road driving school using alpine ski facilities at Bolton Valley Resort constitutes:
 - An outdoor recreational use (Recreation/Outdoor) – a conditional use as listed and defined in the regulations – which also may be allowed in association with the ski facility as a mixed use, subject to conditional use review pursuant to §4.14 of the regulations.
 - A change in the use of land from one conditional use to another, requiring conditional use review and approval pursuant to §3.3 of the regulations.
 - Development on steep slopes, subject to conditional use review under §3.16 of the regulations.
 - Development of land, ski and parking facilities subject to previous municipal permits and conditions of approval.


As such, we affirm the Zoning Administrator's determination that conditional use review and approval, and a zoning permit, are needed for the proposed expansion and winter operation of the 4x4 driving school.

As approved by the Development Review Board (5-0):

Jerry Chabot – Yea
Michael Hauser – Yea
Sharon Murray – Yea

Margot Pender – Yea
Michael Rainville – Yea

Dated at Bolton Vermont this 8th day of May, 2009.



Sharon Murray, Chair
Bolton Development Review Board

NOTICE: This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A. § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.

Procedural History

(See documents, meeting minutes on file at the Bolton Town Office.)

On January 19, 2008, Zoning Administrator Miron Malboeuf issued a letter to Bolton Valley Resort advising them that municipal permits and approvals were needed for the off-road driving school.

On February 27, 2008 Bolton Valley Resort filed an application, a site plan (dated 2/5/08), a one page project summary and fees for conditional use review and approval of an expansion of the off-road driving school, and a copy of the Act 250 permit for the original driving school. The application was then referred to the Bolton Development Review Board.

A public hearing on the application was duly warned and held on May 28, 2008 at the Smilie School, the minutes of which are on file at the town office. Bolton Valley Resort was represented at the hearing by Doug Nedde. The Off-Road Driving School was represented by Michael Hopwood. Others in attendance who participated in the hearing included:

- Linda Baker and Rodney Pingree, representing the Bolton Planning Commission
- Warren Kirschbaum, 68 Snowdrift Lane, Bolton Valley, VT 05477
- Walter and Pat Duda, 127 Wentworth Road, Bolton Valley, VT 05477
- Andrew Crowder, 207 Wentworth Road, Bolton Valley, VT 05477
- William and Elaine Miles, 101 Bittersweet Circle, Williston VT 05495
- Peter Fenn, 3421 Lake Road, Charlotte. VT 05445
- Brett Lister, 233 Thacher Road, Bolton Valley, VT 05477
- Anastasia Grechen, 224 Thacher Rd, Bolton Valley, VT 05477
- Ken Wiggin, 1307 Leary Road, Bolton, VT 05477

The hearing was recessed pending receipt of additional information from the applicants. A letter specifying additional information to be submitted was sent by the DRB to Bolton Valley Resort on June 6, 2006. Bolton Valley Resort then requested that the hearing be continued and, in a letter dated July 6, 2008, formally withdrew their application, citing the following:

- A letter from former Zoning Administrator Richard Ward to Robert Fries, former owner of Bolton Valley Resort, dated July 20, 2004 regarding an Act 250 permit application for the driving school, stating that "In the Town's opinion, the Off Road Driving School conforms to local planning desires"
- An opinion from the applicant's attorney Liam L. Murphy, Esq. of Murphy, Sullivan & Kronk, dated May 21, 2008, that no municipal permits or approvals were needed.

On July 30, 2008 the DRB formally discontinued the public hearing, and requested that staff inform all interested parties that the resort had withdrawn their application.

On August 20, 2008 Zoning Administrator Miron Malboeuf issued a written determination to Bolton Valley Resort that municipal permits and approvals were needed for the expanded off-road driving school under the town's current land use and development regulations.

On September 3, 2008, Liam L. Murphy filed a notice of appeal and associated fees on behalf of Bolton Valley Resort with regard to the August 20th determination of the Zoning Administrator that municipal permits and approvals were needed for the expansion of the off-road driving school. The appeal was referred to the Bolton Development Review Board.

A duly warned public hearing on the appeal was convened on October 22, 2008 at the Bolton Town Office, the minutes of which are on file at the town office. Bolton Valley Resort was represented by Larry Williams and Attorney Brian Sullivan of Murphy, Sullivan & Kronk. The Off-Road Driving School was represented by Michael Hopwood and Attorney Thomas Walsh of Walsh and Monaghan, LLP. Others in attendance who participated in the hearing included:

- Rodney Pingree, on behalf of the Bolton Planning Commission
- Brett Lister, 233 Thacher Road, Bolton Valley VT 05477
- Lynne DesLauriers, 26 Wentworth Road, Bolton Valley, VT 05477
- Wynne Kirschbaum, 68 Snowdrift Lane, Bolton Valley, VT 05477

The hearing was recessed until December 17, 2008, pending the receipt of additional information from the appellants, including the date the driving school physically commenced.

A letter dated December 10, 2008 was received from Liam L. Murphy, Esq. requesting that the hearing be continued and reconvened as a combined hearing to also consider an application for the expansion, to be filed by Bolton Valley and the driving school operator, Automotive Services International (dba 4x4 Center Off-Road Driving Training School). In the event that the hearing was not continued, the letter also outlined the appellants' reasons for which no permit should be required for the expansion.

Correspondence (e-mail), dated December 10, 2008 was received from Larry Williams of Bolton Valley Resort stating that the driving school was physically established in June 2006.

The public hearing was reconvened on December 17, 2008 to enter the above correspondence received from the appellants into the hearing record, and then recessed indefinitely pending the outcome of an application.

On December 22, 2008 the DRB issued a letter, sent by certified mail to Bolton Valley Resort and the 4x4 Center Off-Road Driving Center, agreeing to continue the appeal hearing pending the outcome of an application to be submitted by the appellants, provided that the appellants agree to waive the 45-day statutory period for rendering a decision (as confirmed by the appellants' attorney in written correspondence dated December 17, 2008); and that a complete application for both the existing school and proposed expansion is filed within 90 days of the date of the letter.

A public hearing on the application was duly warned by the Zoning Administrator for February 25, 2009 in anticipation of receipt of an application. This hearing was subsequently cancelled at applicant request.

On February 6, 2009 an application and fees were submitted by Bolton Valley Resort and the 4x4 Center for conditional use review and approval only for the expansion of the existing 4x4 school and for winter use of certain areas, with a request that the hearing be rewarned.

On February 18, 2009 Zoning Administrator Miron Malboeuf issued a written determination to Thomas Walsh Esq. and Liam L. Murphy, Esq., by certified mail, that the application as filed was incomplete with regard to required fees and, because the 4x4 center commenced physical operations in June 2006, after the current regulations went into effect, permits, approvals and an application were required for the existing 4x4 center as well as the expansion.

On February 27, 2009 Attorneys Thomas Walsh and Liam L. Murphy, on behalf of the appellants, filed a notice of appeal regarding the Zoning Administrator's February 18th determination that the application as filed was incomplete, referencing the February 6th letter filed with the DRB.

On March 7, 2009 Zoning Administrator Miron Malboeuf issued a letter indicating that Bolton Valley could bear the cost and responsibility of notifying adjoining landowners, and as such would not have to pay required notification fees to the town, rendering that portion of the appeal moot.

A duly warned public hearing was held on March 25, 2009 at the Bolton Town Office to hear the consolidated appeals as agreed to by the appellants, the minutes for which are on file at the town office. The 4x4Center was represented by Mike Hopwood and Attorney Thomas Walsh. Bolton Valley Resort was represented by Larry Williams and Attorney Liam L. Murphy. The following were also present and participated in the hearing process:

- Linda Baker, representing the Bolton Planning Commission
- Brett Lister, 233 Thacher Road, Bolton Valley, VT 05477
- Warren Kirschbaum, 68 Snowdrift Lane, Bolton Valley, VT 05477

The public hearing was adjourned that evening.

This decision on the combined appeals was issued by the Bolton Development Review Board on May 8, 2009.