

STATE OF VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION

Docket No. _____

LAND USE PANEL of the
NATURAL RESOURCES
BOARD,

Petitioner,

v.

SUNRISE PLAZA, INC.,
Respondent.

ADMINISTRATIVE ORDER

Having found that Sunrise Plaza, Inc. (Respondent) committed violations as defined in 10 V.S.A. § 8002(9), the Land Use Panel (Panel) of the Vermont Natural Resources Board (NRB), pursuant to the authority set forth in 10 V.S.A. § 8008 hereby issues the following ADMINISTRATIVE ORDER:

VIOLATIONS

10 V.S.A. Chapter 151; failure to continually maintain a six-foot (6') tall wooden privacy fence between a commercial plaza and a residential subdivision as required by Condition No. 3 of LUP #1R0788-2 and 10 V.S.A. § 6081(a).

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

1. Sunrise Plaza, Inc. (Respondent) owns lands located on Route 4A in Castleton, Vermont, more specifically identified in Book 70, Page 141 in the land records of the Town of Castleton (the Project Tract).
2. On February 21, 1996, the District 1 Environmental Commission (Commission)

issued LUP #1R0788 (the Permit) to Sunrise Plaza, Inc. for the creation of a five-lot subdivision on the Project Tract, which already contained an existing commercial plaza (Sunrise Plaza), along with four residential lots (the Sunrise Plaza Subdivision or Project).

3. Condition No. 1 of the Permit required that the Project be completed in accordance with the exhibits and plans on file with the Commission.
4. Condition No. 6 of the Permit required the installation of a wood privacy fence at the back of Sunrise Plaza between the plaza and the Sunrise Plaza Subdivision prior to the sale or occupancy of the first new home.
5. Condition No. 14 of the Permit requires that each prospective purchaser of any lot in the Sunrise Plaza Subdivision shall be shown a copy of the Permit before any written contract of sale is entered into.
6. The District 1 Assistant Environmental Coordinator issued a Notice of Alleged Violation (the First NOAV) to Respondent dated September 18, 1997 which indicated, *inter alia*, that Respondent had failed to install the wooden privacy fence at the back of the Plaza as required by Condition No. 6 of LUP #1R0788, and directed Respondent to install said fence no later than November 1, 1997. See **Exhibit NRB-A** to the accompanying Affidavit of NRB Permit Compliance Officer (PCO) John Wakefield (NOAV dated September 18, 1997 at 1-2).
7. Thereafter, Respondent installed a post and rail fence rather than a privacy fence at the back of Sunrise Plaza between the plaza and the Sunrise Plaza Subdivision.
8. By letter dated March 26, 1998, the District 1 Assistant Environmental Coordinator advised Respondent that a post and rail fence was not a privacy fence as required by the Permit. See **Exhibit NRB-B** to the accompanying Affidavit of NRB Permit

Compliance Officer John Wakefield (Letter to Respondent dated March 26, 1998).

9. On October 20, 1998, the District Commission issued Land Use Permit Amendment 1R0788-2 to extend the deadline for Respondent to install the wooden privacy fence to December 15, 1998. See **Exhibit NRB-C** to the accompanying Affidavit of NRB Permit Compliance Officer John Wakefield (LUP #1R0788-2, Condition No. 3).
10. On May 6, 2010, PCO Wakefield received a letter from Patricia McCarthy, a resident of the subdivision dated May 5, 2010 (the McCarthy Letter) which requested that the NRB enforce the Permit to require maintenance of the privacy fence between Sunrise Plaza and the Sunrise Plaza Subdivision. See **Exhibit NRB-D** to the accompanying Affidavit of NRB PCO John Wakefield.
11. Roughly ten (10) years ago, Ms. McCarthy purchased a home in the Sunrise Plaza Subdivision, and her use and enjoyment of her property depends, in part, on her reliance on the construction and maintenance of the privacy fence between her home and the commercial operations of Sunrise Plaza. See *id*; see also accompanying Affidavit of Patricia McCarthy at ¶¶ 4-6.
12. Ms. McCarthy reports that, over a year ago, she advised Respondent that the fence was in disrepair, but Respondent advised it would not fix the fence and the fence remained in disrepair. See *id*; see also McCarthy Aff. at ¶ 12.
13. PCO Wakefield investigated the Project on May 24, 2010 and determined that Respondent was in violation of Land Use Permit Amendment 1R0788-2.
14. Respondent failed to maintain the privacy fence as required by Condition 3 Land Use Permit Amendment 1R0788-2, and has refused to fix or replace the privacy fence when asked by a resident of the Sunrise Plaza subdivision over a year ago.

See id.

15. As of May 24, 2010, the privacy fence was in a state of significant disrepair, weather-beaten and rotted, and some sections were completely missing. See **Exhibit NRB-E**, photographs to the accompanying Affidavit of PCO John Wakefield.
16. Respondent's acts or omissions constitute a Class III (minor) violation of Condition 3 Land Use Permit Amendment 1R0788-2 which has persisted and been continuous for at least one year. See Wakefield Aff. at ¶ 14; see also *McCarthy* Aff. at ¶¶ 11-12.
17. Respondent's violation 3 of Condition 3 Land Use Permit Amendment 1R0788-2 has resulted in minor impacts to the public welfare and the environment.
18. Respondent's obligations were clearly set forth in Condition 3 Land Use Permit Amendment 1R0788-2, and Respondent was clearly aware that such violation existed.
19. The Land Use Panel lacks any knowledge or information at this time that Respondent has committed any previous violations of the statutes specified in 10 V.S.A. Section 8003 or related rules, permits, orders, or assurances of discontinuance.
20. As is set forth more fully in Paragraph 16 above, the violation existed for a long duration.
21. On June 18, 2010 PCO Wakefield issued Respondent a Notice of Alleged Violation regarding Respondent's violation of Condition 3 Land Use Permit Amendment 1R0788-2 (the Second NOAV). The Second NOAV included a

compliance directive requiring Respondent to repair or replace the fence as required by Condition 3 Land Use Permit Amendment 1R0788-2.

22. On June 30, 2010, PCO Wakefield conducted a follow-up investigation and determined that Respondent had repaired the fence and that the fence, as repaired, provided the privacy required by Condition 3 Land Use Permit Amendment 1R0788-2.
23. Based upon facts and circumstances described in ¶¶ 6-22, *supra*, the Land Use Panel has determined for purposes of this Order at issuance that the penalty amount for Respondent's violation should be **Three Thousand Two Hundred Forty-Four and 19/100 Dollars (\$3,244.19)**, which includes the Panel's enforcement costs to date which total two hundred forty-four and 19/100 dollars (\$244.19).
24. The above penalty includes a twenty-five percent (25%) reduction of one thousand dollars (\$1,000.00) from the initial penalty for mitigating circumstances. Such circumstances include the fact that while entire sections of the fence were missing, some portions of the fence still stood as of May 24, 2010.
25. The above penalty amount includes only the total costs **to date** incurred by the Panel for the enforcement of the above described violation, and does not include the entire amount of economic benefit gained by the Respondent from the violation, each of which the Land Use Panel reserves the right to augment through evidence obtained via discovery and presented at hearing.
26. In accordance with 10 V.S.A. § 8010, the penalties may be increased by the costs incurred by the Panel for the enforcement of the described violation, the need for deterrence, and any and all other penalty factors enumerated in 10 V.S.A. § 8010(b), each according to proof at the hearing, including, without limitation, the

imposition of daily penalties for the continuing violation as may be demonstrated by evidence obtained via discovery and presented at hearing.

ORDER

Having found that Respondent has committed a violation as defined in 10 V.S.A. § 8002(9), **it is hereby ORDERED:**

A) The Respondent shall pay a penalty of **THREE THOUSAND TWO HUNDRED AND FORTY-FOUR AND 19/100 DOLLARS (\$3,244.19)** within thirty (30) calendar days of the receipt of this Order. Payment shall be by **two (2) checks**, (one for three thousand dollars (\$3,000), and a second for two hundred and forty-four and 19/100 dollars (\$244.19)) each made payable to the "Treasurer, State of Vermont" and forwarded to:

Denise Wheeler, Business Manager
Natural Resources Board
National Life Records Center Building
National Life Drive
Montpelier, Vermont 05620-3201

B) Any payment by the Respondent pursuant to this paragraph is made to resolve the violation set forth in this Order and shall not be considered to be a charitable contribution, business expense, or other deductible expense under the federal or state tax codes. Respondent shall not deduct, nor attempt to deduct, any payments, penalties, contributions or other expenditures required by this Order from Respondent's state or federal taxes.

RESPONDENT'S RIGHT TO A HEARING BEFORE THE SUPERIOR COURT ENVIRONMENTAL DIVISION

Pursuant to 10 V.S.A. § 8012, any Respondent has the right to request a hearing before the Superior Court Environmental Division concerning this Administrative Order, if such Respondent files a Notice of Request for Hearing within **fifteen (15) days** of the date the Respondent receives this Administrative Order. The Notice of Request for Hearing must be filed with both the Land Use Panel and the Superior Court Environmental Division at the following addresses:

Natural Resources Board, Land Use Panel
c/o Mark Lucas, Associate General Counsel

Clerk, Superior Court
Environmental Division

National Life Records Center Building
National Life Drive
Montpelier, VT 05620-3201

2418 Airport Road
Barre, VT 05641

EFFECTIVE DATE OF THIS ADMINISTRATIVE ORDER

This Administrative Order shall become effective as to a Respondent on the date it is received by such Respondent unless that Respondent files a Notice of Request for Hearing within **fifteen (15) days** of receipt as provided for in the previous section hereof. The timely filing of a Notice of Request for Hearing by such Respondent shall stay the provisions (including any penalty provisions) of this Administrative Order as to that Respondent pending a hearing by the Superior Court Environmental Division. If a Respondent does not timely file a Notice of Request for a Hearing, this Administrative Order shall become a Judicial Order when filed with and signed by the Superior Court Environmental Division. 10 V.S.A. § 8008(d).

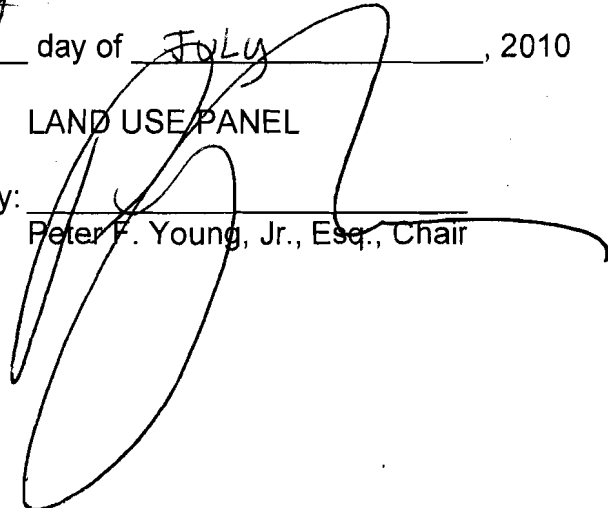
COMPLIANCE WITH A JUDICIAL ORDER

If this Administrative Order becomes a Judicial Order and a Respondent fails or refuses to comply with the conditions of that Judicial Order, the Land Use Panel shall have cause to initiate an enforcement action against such Respondent pursuant to the provisions of 10 V.S.A. Chapters 201 and 211.

Dated at Montpelier, Vermont, this 19th day of JULY, 2010

LAND USE PANEL

By:


Peter F. Young, Jr., Esq., Chair