
**BEFORE THE VIRGIN TOWN COUNCIL
VIRGIN TOWN, STATE OF UTAH**

In Re:

APPEAL OF CONDITIONAL USE PERMITS
(x2) ISSUED TO VIRGIN COMMERCIAL, LLC
DATED MARCH 16, 2022

MEMORANDUM DECISION
(Findings of Fact & Conclusions of Law)

Appellant: John Ely
Permittee: Virgin Commercial, LLC
Hearing Date: September 13, 2022

INTRODUCTION

This matter came before the Virgin Town Council on John Ely's ("Appellant") appeal of two conditional use permits issued to Virgin Commercial, LLC, a Nevada limited liability company ("Permittee") on March 16, 2022, relating to 3.88 acres and 2.05 acres of real property located at approximately 1355 State Route 9, in Virgin Utah and described more fully in *Exhibit "A"* attached hereto and incorporated herein ("Subject Properties").

In February of 2021, Permittee filed an application for a conditional use permit to construct and operate an Automobile Service Station ("Service Station Use"). See *Exhibit "B"* attached hereto and incorporated herein ("CUP Application"). Permittee, in addition to the Service Station Use, sought to conduct the following uses on the Subject Properties: approximately a 5,000 sq ft restaurant, approximately 3,400 sq. ft. retail store, and 24 small Dwellings which would be operated as short-term rentals ("Lodging Use"). Pursuant to the site plan contained in the CUP Application, on the 3.88 acre parcel ("Service Station Parcel"), Permittee sought to construct and operate an Automobile Service Station ("Service Station Use"), which was the use the Planning and Zoning Commission considered.

Upon receipt and initial review of the CUP Application, the Town's Zoning Administrator determined that the proposed Service Station Uses and determined that the application warrant a level 2 review before the Planning and Zoning Commission. Subsequent to the hearings, the Town's Zoning Administrator determined the Lodging Uses were not a permitted use and should be reviewed under a "Level 1 CUP".¹ Pursuant to VULU 16.04(E) the Town's Zoning

¹ VULU Section 16.04(E) states:

E. ZONING ADMINISTRATOR LEVEL DETERMINATION. Initially, upon receipt of the CUP application, the Zoning Administrator shall review the same and make a determination as to the level of said application. The Zoning Administrator shall designate all CUP applications as either a "Level 1 CUP" or a "Level 2 CUP". If the use applied for in a CUP application is designated as a Level 1 CUP it shall be reviewed, and if approved, a CUP issued by the Zoning Administrator. If the use applied for in a CUP application is designated as a Level 2 CUP the CUP application shall be forwarded to the Planning and Zoning Commission for review, and if approved, a CUP issued by the Town Planning and Zoning Commission.

1. The determination of Conditional Use level is vested solely in the Zoning Administrator who shall look at factors such as: a) the type of proposed use, b) the scope or size of the proposed use, c) possible adverse effects of the proposed use upon the Town, its infrastructure and individuals residing nearby, d) whether the construction of new structures and buildings are involved, e) possible conflicts with the Town's General Plan, and f) the benefits and enhancements to the Town that may occur as a result of said proposed use.

Administrator forwarded the Automobile Service Station portion of the CUP Application to the Virgin Town Planning & Zoning Commission ("Virgin P&Z") for review and final determination. The Town Zoning Administrator processed the CUP Application as it related to the proposed Lodging Use.

On March 29, 2021 after conducting a properly noticed public hearing and considering likely and demonstratable adverse effects of the proposed Service Station Use over two meetings the Virgin P&Z determined and voted to approve Permittee's application for a conditional use permit to construct and operate an Automobile Service Station on the 3.88 acre portion of the Subject Properties in compliance with site plan contained in the CUP Application and 16 articulated conditions ("Service Station CUP"). As customary, the Virgin P&Z instructed the Permittee that a written version of the Service Station CUP would be prepared at a later date at which time Permittee would need to sign by and thru an authorized representative and countersigned by the Town Zoning Administrator.

On or around March 16, 2022, after several discussions and modifications to its site plan, the Town, by and through the Town Zoning Administrator, made its determination and issued a conditional use permit to Permittee for the construction of the Dwellings and the conducting of Lodging Uses on the 2.05 acre parcel identified in the CUP ("Lodging CUP"). Accordingly, a written version of the Lodging CUP was prepared, signed by Permittee (thru an authorized representative) and countersigned by the Town. At the same time the written Lodging CUP was executed and countersigned (March 16, 2022), the Town prepared, and the Permittee executed, the Service Station CUP.

Appellant filed his appeal of both the Service Station CUP and the Lodging CUP on July 5, 2022. After noticing the hearing on Appellants appeal for September 13, 2022, the Town received a letter from Stephen Labrie, as manager of Virgin Commercial, LLC dated September 8, 2022, wherein Permittee formally withdrew and surrendered the Lodging CUP and indicated that it would submit another application for a conditional use permit for the 2.05 acre parcel which contained lodging uses at a later date. This request for withdrawal and voluntary surrender/termination of the Lodging CUP was confirmed with Permittee's legal counsel at the September 13, 2022, appeal hearing ("Hearing"). Thereafter the Town Council accepted Permittee's voluntary surrender of the Lodging CUP and: a) deemed the same to be voided and of no force and effect, *in ab initio*, and b) struck agenda Items B and E from the Hearing agenda.

DECISION

On account of the Permittee's voluntary withdrawal and surrender of the Lodging CUP (and the acceptance of the same by the Town Council at the Hearing) the Appellant's appeal as to the Lodging CUP is hereby dismissed on the grounds that the same is moot in that no such permit exists.

Although Appellant has standing to assert his appeal based upon a showing that he and his property interests stand to be adversely affected by the Service Station CUP, the Town Council lacks subject matter jurisdiction to hear an appeal of the Service Station CUP as Appellant's appeal was not filed with the Town timely pursuant to VULU 16.04(G)(7) which requires all appeals of a Level 2 CUP be lodged with the Town within 15 days of the determination of said permit. In this instance the Service Station CUP was approved or "determined" on March 29, 2021, at the

Virgin P&Z Meeting. The nature and scope of the Service Station CUP (as found in the CUP Application) was available for inspection and copying by the public at least 10 days in advance of the March 29, 2021, Virgin P&Z meeting where the Service Station CUP was determined as being approved. At that meeting the public (including Appellant) had constructive, if not actual, notice of the CUP being sought by the Permittee and had the ability to articulate many of the concerns he now sets forth in his appeal. Appellant is deemed to be on constructive, if not actual, notice of the issuance or determination of a conditional use permit when its consideration and possible action is properly noticed pursuant to VULU 16.04(G) (1-3). Accordingly, Appellants appeal of the Service Station CUP is dismissed on the grounds that the appeal is untimely and thus the Town Council lacks subject matter jurisdiction.

FINDINGS OF FACT

1. Permittee is the owner or beneficiary of the Subject Properties.
2. Permittee applied for a conditional use permit (or series of conditional use permits) in February, 2021, to construct and operate an Automobile Service Station
3. Permittee is the recipient of a Level 2 CUP determined and approved by the Virgin P&Z on March 29, 2021, for the construction and operation of a Fuel Station on the 3.88 acre parcel of the Subject Properties ("Service Station CUP").
4. The determination of the Service Station CUP was made by the Virgin P&Z at a public meeting after a public hearing (conducted after being properly noticed 10 days in advance).
5. Permittee is also the recipient of a Level 1 CUP determined and approved by the Virgin Zoning Administrator for the construction and operation of 24 Dwellings (rented on a short-term basis) on the 2.05 acre parcel of the Subject Properties ("Lodging CUP").
6. The determination of the Lodging CUP was made by the Virgin Zoning Administrator on the 16th day of March 2022, however public notice of the issuance of said permit and its scope/conditions of approval were never published or made available.
7. On July 5th, 2022, Appellant filed his appeal of both the Virgin P&Z's determination of the Service Station CUP and the Virgin Zoning Administrator's determination of the Lodging CUP.
8. The Town set the Hearing on Appellant's appeal for September 13, 2022, at 1 pm and gave notice to the public as well as Appellant and the Permittee.
9. On September 8, 2022, Permittee, thru written letter to the Town, withdrew and unconditionally surrendered the Lodging CUP and suggested that the same not be the subject matter of the Hearing on account of the voluntary surrender and termination.
10. A Hearing of over two and half hours was held on September 13, 2022 before the Town Council.

11. Council Member Misti Baird recuse herself as she was the Chairperson of the Planning and Zoning Commission that heard and issued the Service Station CUP.

12. At the Hearing on September 13, 2022, the Town Council confirmed the withdrawal and surrender of the Lodging CUP with Permittee's legal counsel and accepted the same.

13. At the Hearing, Appellant stated he was appealing the two CUP's issued on March 16, 2022 but was not appealing the Planning and Zoning decision on March 29, 2021.

CONCLUSIONS OF LAW

1. The appeal relating to the Lodging CUP is dismissed on account of mootness as said permit was surrendered and accepted as terminated *in ab initio*.

2. VULU 16.04(G)(7) requires all appeals of "Level 2 CUPs" be lodged with the Town within 15 days of the determination of said permit.

3. "Determination" of the Service Station CUP occurred on March 29, 2021, when the Virgin P&Z approved the same with the 16 specific conditions of approval. "Determination" does not occur when the written form of the CUP is signed by the applicant and countersigned by the Town.

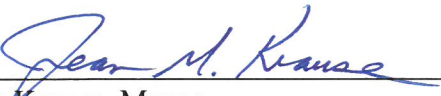
4. Appellants appeal of the Service Station CUP was lodged with the Town on July 5, 2022, 463 days after the Service Station CUP was determined.

5. Appellants appeal of the Service Station CUP is time barred pursuant to VULU 16.04(G)(7) and the Town Council therefore lacks subject matter jurisdiction to hear such an appeal.

6. Accordingly, the appeal relating to the Service Station CUP is dismissed for lack of subject matter jurisdiction.

SO ISSUED this 18th day of October, 2022.

VIRGIN TOWN COUNCIL



Jean/Krause, Mayor

EXHIBIT "A"
To Memorandum Decision

(Legal Descriptions of the Subject Properties)

PARCEL A (Lodging Parcel):

S: 21 T: 41S R: 12W BEG S89*38'48 E 1947.13 FT ALG C/S/L & S0*13'01 E 678.12 FT FM W1/4 COR SEC 21 T41S R12W BEING ON SLY R/W/L STATE HWY 9 TH S0*13'01 E 817.93 FT TO ELY LN DESERT GARDEN ESTATES PH 1; TH ALG ELY BDRY N82*14' W 71.17 FT; TH N07*46' E 210 FT; TH N16*51'41 W 55 FT; TH N07*46' E 200 FT; TH N82*14' W 237.20 FT; TH N0*13'01 W 75.77 FT TO PT OF 500 FT RAD CUR RGT; TH NELY ALG ARC CUR 69.67 FT THRU CTL ANG 07*59'01 TO PT TNGY; TH N07*46; E 180.52 FT TO PT OF 25 FT RAD CUR RGT; TH NELY ALG ARC CUR 39.27 FT THRU CTL ANG 90* TO PT TNGY ALSO BEING ON SLY R/W/L STATE HWY 9; TH ALG R/W/L S82*14' E 208.07 FT TO POB. LESS: POR LYING WITHIN DESERT GARDEN EST PH 2.

MORE OR LESS: 2.05 ACRES. PARCEL NO. V-2-1-21-315

PARCEL B (Service Station Parcel):

S: 21 T: 41S R: 12W BEG S 89*38'48 E 1947.13 FT ALG C/S/L & S 0*13'01 E 678.12 FT FM W1/4 COR SEC 21 T41S R12W BEING ON SLY R/W LN HWY 9 TH ALG R/W LN S 82*14' E 478.93 FT TO PT OF 25 FT RAD CUR RGT BEING ON WLY R/W LN SHEEP BRIDGE RD; TH ALG R/W SELY ALG ARC CUR 38.85 FT THRU CTRL ANG 89*01'44 TO PT OF 400 FT RAD RVSE CUR; TH SELY ALG ARC CUR 170.78 FT THRU CTRL ANG 24*27'44 ; TH S 12*30' W 104.77 FT; TH S 69* E 109.71 FT TO PT ON 400 FT FT RAD CUR LFT(CTR BEARS N 48*53'29 E) BEING ON WLY R/W LN SHEEP BRIDGE RD; TH ALG R/W LN SELY ALG ARC CUR 175.45 FT THRU CTRL ANG 25*07'55 TO PT TNGY; TH S 66*14'25 E 85.12 FT TO PT OF 350 FT RAD CUR RGT; TH SELY ALG ARC CUR 213.64 FT THRU CTRL ANG 34*58'23 ; TH S 05* E 263.27 FT; TH S 38*35' W 587.17 FT TO PT ON NWLY R/W LN SHEEP BRIDGE RD; TH ALG R/W LN S 45*18'01W 3.13 FT TO PT OF 450 FT RAD CUR LFT; TH SWLY ALG ARC CUR 32.87 FT THRU CTRL ANG 04*11'08 TO PT TNGY; TH S 41*06'53 W 218.30 FT TO PT OF 450 FT RAD CUR LFT;TH SWLY ALG ARC CUR 55.97 FT THRU CTRL ANG 07*07'36 TO PT TNGY; TH S 33*59'17W 189.47 FT TO PT OF 350 FT RAD CUR RGT; TH SWLY ALG ARC CUR 66.83 FT THRU CTRL ANG 10*56'22 TO PT TNGY; TH S 44*55'39 W 241.71 FT TO SEC/L SEC 21; TH ALG SEC/L S 89*46'21 W 93.83 FT; TH N 0*13'01 W 2013.61 FT TO POB. LESS: POR LYING WITHIN DESERT GARDEN ESTATES PH 2.

MORE OR LESS: 3.88 ACRES. PARCEL NO. V-2-1-21-315.

EXHIBIT "B"
To Memorandum Decision
(CUP Applicatio