CHARLOTTE ZONING BOARD OF ADJUSTMENT

APPLICATION FOR CONTRACTOR'S YARD AS A HOME OCCUPATION III

CHRISTOPHER AND REBECCA FORTIN

2737 LAKE ROAD

MEMORANDUM IN SUPPORT OF APPLICATION

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PLANNING & ZONING

The subject of this application exemplifies the type of business that is strongly supported by the Charlotte Town Plan adopted March 5, 2013. In its initial statement of "A Vision for the Future of Charlotte" the Plan includes an element to: "To balance property owners' rights to reasonable use of their land with overall public health, safety, welfare and the goals of this Plan."[1] As its first stated General Policy, the Plan recognizes a property owners' right to a reasonable use of their land.[2] In its fifth stated General Policy, the Plan encourages Home Occupations.[3] The first specific policy of the Economic Development Chapter is: "Home businesses are encouraged.[4]

The Conditional Use process that governs this application (and the Performance Standards applied in that review) are the means by which the Charlotte Land Use Regulations achieve the balance element mandated by the Plan's vision, in particular the standard regarding the Character of the Area Affected. Importantly, this element describes *public* interests, implying that the conditional use standards must be applied from the perspective of the entire community. The prominence of home businesses and home occupations in the policy statements that flow from that vision indicate that their encouragement serves an important public interest.

There are two sets of private rights that must be balanced against the public interests: those of the Applicants and those of adjoining landowners. This process avoids pitting the rights of the Applicants directly against the rights of adjoining landowners. Instead, the rights of the Applicants are balanced against the public interest enunciated in the Plan, as are the rights of the adjoining landowners. In the latter balancing, the Applicants' pursuit of a home business or home occupation is itself a public interest to be balanced against the adjoining landowners' right to a reasonable use of their properties.

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[1] A Vision for the Future of Charlotte, Section 1.1.: To balance property owners' rights to reasonable use of their land with overall public health, safety, welfare and the goals of this Plan.

[2] 5.1.1. General Policies and Strategies General Policies – Policy 1
Charlotte supports landowners' rights to reasonable use of their property.

[3] *Id.*, - Policy 5
Non-agricultural commercial services will primarily be located within or near the village areas. Locations for light industrial development will be provided in the Commercial/Light Industrial District within the West Charlotte Village. Home occupations are encouraged by the Town. Agriculturally related businesses may be allowed in conjunction with active farms.

[4] 5.3. ECONOMIC DEVELOPMENT 5.3.1. General Policies – Policy 1
Home businesses are encouraged.

The rights of adjoining landowners, like those of the Applicants, must be weighed and given merit based on a standard of reasonableness. The Performance Standards echo the legal tests for nuisance and trespass - which themselves employ a reasonableness standard - and are the mechanism by which this reasonable use balance is achieved. The application of these standards is meant to ensure that an adjoining landowner gets a reasonable use of her or his property, not an absolutely unfettered use. Some impact among properties is inherent in the nature of human communities and is part and parcel of living in a rural environment. These impacts may include: the sounds, odors and general intensity of farming and related activities; the construction of large suburban scale residences on open agricultural land; or the commercial activity generated by a home occupation. The challenge for the ZBA is to consider all of these viewpoints and strike a balance among them.

Standards for Contractor's Yards and Home Occupation III

The Land Use Regulations require the Applicants to address the standards for both a Contractor's Yard and Home Occupation III.

Section 2.5 (F)(4), provides, in pertinent part:

> "Contractor's Yard ...shall only be allowed as a Home Occupation III [see Section 4.11], or as an Adaptive Reuse [see Section 4.3], which allows a business to be owned and operated by a person other than the property owner. For the above uses to be approved as adaptive reuses, if the business owner does not reside on the property, the property owner must reside on the property."

Section 2.5 (F)(4) clarifies that in the Rural Residential District, unlike other districts in which Contractor's Yards are permissible, the owner of the business or the owner of the property *must* reside on the premises, either as the occupant of the residential structure on the lot in the case of a Home Occupation III or as the business owner or property owner of property containing an adaptively reused structure[5]. The point of Section 2.5 (F)(4) is to preserve the residential nature of the district, not to impose more restrictive limitations of a Home Occupation III on a Contractor's Yard.

Contractor's Yard Standards

(1) The Planning Commission or Board of Adjustment may, as a condition of approval, require larger setback and buffer areas, and/or landscaping or screening as deemed necessary to protect neighboring properties, public rights-of-way, and water quality.

[5] "A proposed business may be owned by a person other than the property owner." Section 4.3 (B) Land Use Regulations, page 39.

The Landscape Plan and Business Use Area Detail Plan depict structures and plantings designed to screen the outdoor storage of materials and equipment as required by this standard. The Applicants sought input from the adjoining landowners and neighbor and incorporated that input into the proposed plan. Due to the 60 foot right of way that burdens the southern portion of the Applicants' property, the effective setback from the south boundary line of 110 feet is already over twice what is required by the district regulations.

(2) **An associated accessory structure may include an office, garage, or other enclosed area for the storage of equipment and materials. The maintenance and repair of vehicles and equipment shall be conducted only within an enclosed building or designated yard areas.**
The Business Use Area contains two storage structures: a garage and shop building and a salt and sand storage shed. Maintenance and repair of equipment and vehicles will continue to occur primarily within the garage and shop building, which was constructed in 2007 for that purpose. Lubrication and other minor maintenance on larger equipment will occur in designated storage areas.

(3) **The operation of the contractor's yard shall meet all performance standards under Section 3.12. The Board of Adjustment may, as a condition of approval, limit the hours of operation as appropriate.**
See discussion of Performance Standards, below, and Supplemental Response to Application for proposed hours of operation.

(4) **There shall be no on-site storage of hazardous waste or materials. Fuel storage shall be limited to that needed for space heating and the operation of equipment and vehicles associated with the business, and meet the requirements of Section 3.10.**
No hazardous materials as defined by the Land Use Regulations are proposed to be stored in conjunction with this use. Fuel storage needed for operation of equipment and vehicles associated with the business will be contained in a manner that renders it non-hazardous. See discussion regarding Fuel Storage, below.

Home Occupation III Standards:

(1) **The home business shall be conducted in the principal structure or an accessory structure by residents of the dwelling, and no more than nine (9) nonresident employees on-site at any time.**
The Applicants will conduct their lawn care and snow plowing business primarily within the accessory structures and designated outdoor storage areas, with a small portion of the principal structure utilized for record keeping and billing. The Applicants anticipate having 2 to 3 employees but seek approval for up to five (5) employees during the busiest season.

(2) **The home business shall be carried out primarily within the principal dwelling and/or an accessory structure to the dwelling as provided for in Section 4.18.**

The Applicants received approval for the existing garage and shop building in 2007 for use with their Home Occupation I. At that time, accessory structures customarily incidental to a residence required only a zoning permit. A Home Occupation I required no Town permit. Having established that use and received an approval to construct that accessory structure, no further approval is required for that structure under Section 4.18. The other storage structure does not require conditional use approval as it is less than 2,000 square feet in area.

(3) Outdoor areas for the storage of materials and equipment, and activities associated with the home business, may be approved by the Board of Adjustment provided that such areas are clearly designated and located or adequately screened so that they are not visible from public rights-of-way or neighboring properties. Designated storage areas at minimum shall meet all district setback requirements. The Board of Adjustment may also require increased setbacks and/or additional landscaping and screening to avoid impacts to neighboring properties.

Both the Home Occupation III and Contractor's Yard provisions contemplate outdoor storage of materials as well as activities associated with the business. The Home Occupation III standards include an explicit reference to "activities associated with the home business". The Contractor's Yard provisions allow for "maintenance and repair of vehicles and equipment (in) designated yard areas".

The Landscape Plan and Business Use Area Detail Plan depict structures and plantings designed to screen the outdoor storage of materials and equipment as required by this standard. The Applicants sought input from the adjoining landowners and neighbor and incorporated that input into the proposed plan. Due to the 60 foot right of way that burdens the southern portion of the Applicants' property, the effective setback from the south boundary line of 110 feet is already over twice what is required by the district regulations.

(4) The storage of hazardous materials anywhere on the premises is prohibited, with the exception of materials customary and characteristic of residential uses (in terms of type and quantity).

No hazardous materials as defined by the Land Use Regulations are proposed to be stored in conjunction with this use. See discussion regarding Fuel Storage, below.

(5) The home business shall not generate traffic, including delivery traffic, in excess of volumes characteristic of other uses allowed in the district in which the home business is located.

The proposed operation will not create any measurable traffic in excess of what is characteristic of other uses allowed in the district. See Supplemental Response to Application regarding projected trip ends.

(6) Parking areas shall be located in side or rear yard areas unless otherwise approved by the Board of Adjustment as a condition of approval under Section 5.4. The

Board of Adjustment may also limit the number of commercial vehicles that may be parked on-site.

The Landscape Plan and Business Use Area Detail Plan depict screened parking areas in the side and rear yards of the property, all located within the Business Use Area. With the proposed screening, the number of commercial vehicles on-site will not be discernible and with the designated storage areas, the Town will be able to determine compliance with the approved plan, if necessary.

(7) The home business shall not change the character of the neighborhood.

While the subject property is located in the Rural Residential District, it is adjoined on three sides by land in active agriculture. The only adjacent property in strictly residential use is the Goodman Hotaling property immediately to the south, although that property appears to include what is presumably an allowable Home Occupation. The residential structure on this property is approximately 275 from the nearest point on the proposed Business Use Area.

The Fischer property to the west is farmed by an industrial scale conventional farm and is unimproved. The DeStigter property to the north is farmed by a neighboring hay farm and includes a residential structure located to the east approximately 750 feet from the proposed Business Use Area. The Russell property to the east is farmed in part by the Applicants as well as by an organic dairy farm and includes a residential structure located approximately 1,200 feet from the proposed Business Use Area.

The larger area affected includes several rural residential homesteads (the nearest of which is the Ming Silverman residence approximately 425 feet from the proposed Business Use Area), some of which exhibit unscreened outdoor storage of equipment and materials. In addition to the industrial scale conventional farm, an organic grain farm, several small-scale farmsteads and two similar contractor's yards are within the general vicinity. All of these properties include some outdoor storage of equipment or materials, giving the larger area the character of a working landscape.

As proposed, the Applicants' Business Use Area will be fully screened from adjoining properties and the public right of way and have specific areas designated for outdoor storage of equipment and materials. Substantial screening will be provided incidentally by the Applicants' agricultural building that will be affixed to the existing garage and shop building, as well as the relocation of an existing storage shed as requested by the adjoining landowner to the south. The combination of these structures will provide complete visual screening and a substantial sound barrier for the benefit of the property immediately to the south, which is most impacted by the proposal.

As a whole, and as viewed from Lake Road, the proposed vegetative screening will complement and blend in with the property immediately to the south, which is ringed by conifers of the same or similar species as are proposed by the Applicants. Specific elements of this vegetative screening, as requested by an adjoining landowner to the north and a neighbor on the west side of Lake Road, will be placed to provide effective screening of the outdoor equipment and material storage areas from the properties to the south, west, north and east.

Performance Standards

No use, under normal conditions, shall cause or result in:

(1) noise in excess of 70 decibels, or which otherwise represents a significant increase in noise levels in the vicinity of the use so as to be incompatible with the surrounding area;

The Applicants assert that the line of structures separating the Business Use Area from the Goodman Hotaling property will sufficiently absorb and deflect the sound created by the business use activity to satisfy this standard. In support of this assertion, the Applicants point to the observations of the ZBA members who attended the site visit on December 13, 2014. During that site visit, the Applicants ran one of their tractors at half idle and one of the mini-excavators at idle. The tractor was located north of the existing garage and shop and the excavator was in plain view from the observation point. Under the conditions on that day the sound of these two pieces of equipment was perceptible but did not interfere with normal conversation. The Applicants assert that with construction of the exempt agricultural building, relocation of the storage shed, construction of the fuel storage bunker and planting of the proposed vegetative screening, the level of noise will meet this standard.

(2) clearly apparent vibration which, when transmitted through the ground, is discernable at property lines without the aid of instruments;

The Applicants are aware of no allegations that such vibrations have been observed.

(3) smoke, dust, noxious gases, or other forms of air pollution which constitute a nuisance or threat to neighboring landowners, businesses or residents; which endanger or adversely affect public health, safety or welfare; which cause damage to property or vegetation; or which are offensive and uncharacteristic of the affected area;

The proposed use does not create an unreasonable amount of smoke or dust and no noxious gases. If necessary to prevent dust during topsoil screening the Applicants will apply water to the process in order to control dust.

(4) releases of heat, cold, moisture, mist, fog or condensation which are detrimental to neighboring properties and uses, or the public health, safety, and welfare;

The proposed use does not create any material quantities of these substances.

(5) **electromagnetic disturbances or electronic transmissions or signals which will repeatedly and substantially interfere with the reception of radio, television, or other electronic signals, or which are otherwise detrimental to public health, safety and welfare, except from facilities which are specifically licensed and regulated through the Federal Communications Commission (FCC).**
The proposed use does not create any material quantities of these disturbances or signals.

(6) **glare, lumen, light or reflection which constitutes a nuisance to other property owners or tenants, which impairs the vision of motor vehicle operators, or which is otherwise detrimental to public health safety and welfare;**
The proposal includes appropriate controls, shielding and screening to prevent any unreasonable impact on other property owners.

(7) **liquid or solid waste or refuse which cannot be disposed of by available methods without undue burden to municipal or public disposal facilities, which pollutes surface or ground waters, or which is otherwise detrimental to public health, safety and welfare; or**
All waste and refuse created in conjunction with the business use will be properly disposed of by a qualified waste hauling company.

(8) **undue fire, safety, explosive, radioactive emission or other hazard which endangers the public, public facilities, or neighboring properties, or which results in a significantly increased burden on municipal facilities and services.**
All flammable substances will handled, stored and maintained according to applicable standards, practices and laws. See discussion regarding Fuel Storage, below.

Fuel Storage

Section 4.6 Contractor's Yard, paragraph (4) provides:

> "There shall be no on-site storage of hazardous waste or materials. Fuel storage shall be limited to that needed for space heating and the operation of equipment and vehicles associated with the business, and meet the requirements of Section 3.10."

This paragraph begins by expressly prohibiting hazardous materials and goes on to specify that fuel storage is allowable. If it was one sentence connected with "except" or two sentences that make clear that hazardous materials include fuel, the Land Use Regulations might be read differently. But as written, vehicular fuel cannot be a "hazardous material" in the context of the Land Use Regulations. Regardless of whether in statutory definition, common usage or technical language liquid petroleum fuels are considered hazardous materials, for the purposes of applying the Land Use Regulations, they cannot be.[6]

[6] *Id.*, citing In re Korbet, 2005 VT 7, ¶11, 178 Vt. 459.

This is important because the Home Occupation II & III standards also expressly prohibit the storage of hazardous materials. Section 4.11 Home Occupation, paragraph (B) (3) provides:

> "The storage of hazardous materials anywhere on the premises is prohibited, with the exception of materials customary and characteristic of residential uses (e.g., heating oil)."

Section 4.11 Home Occupation, paragraph (C) (4) provides:

> "The storage of hazardous materials anywhere on the premises is prohibited, with the exception of materials customary and characteristic of residential uses (in terms of type and quantity)."

Both paragraphs create exceptions from what constitutes hazardous materials. In neither case is vehicular fuel identified as an exception, but neither is vehicular fuel expressly identified as a hazardous material. The only specific reference to vehicular fuel – Section 4.6 Contractor's Yard, paragraph (4) - makes it clear that it is <u>not</u> a hazardous material.

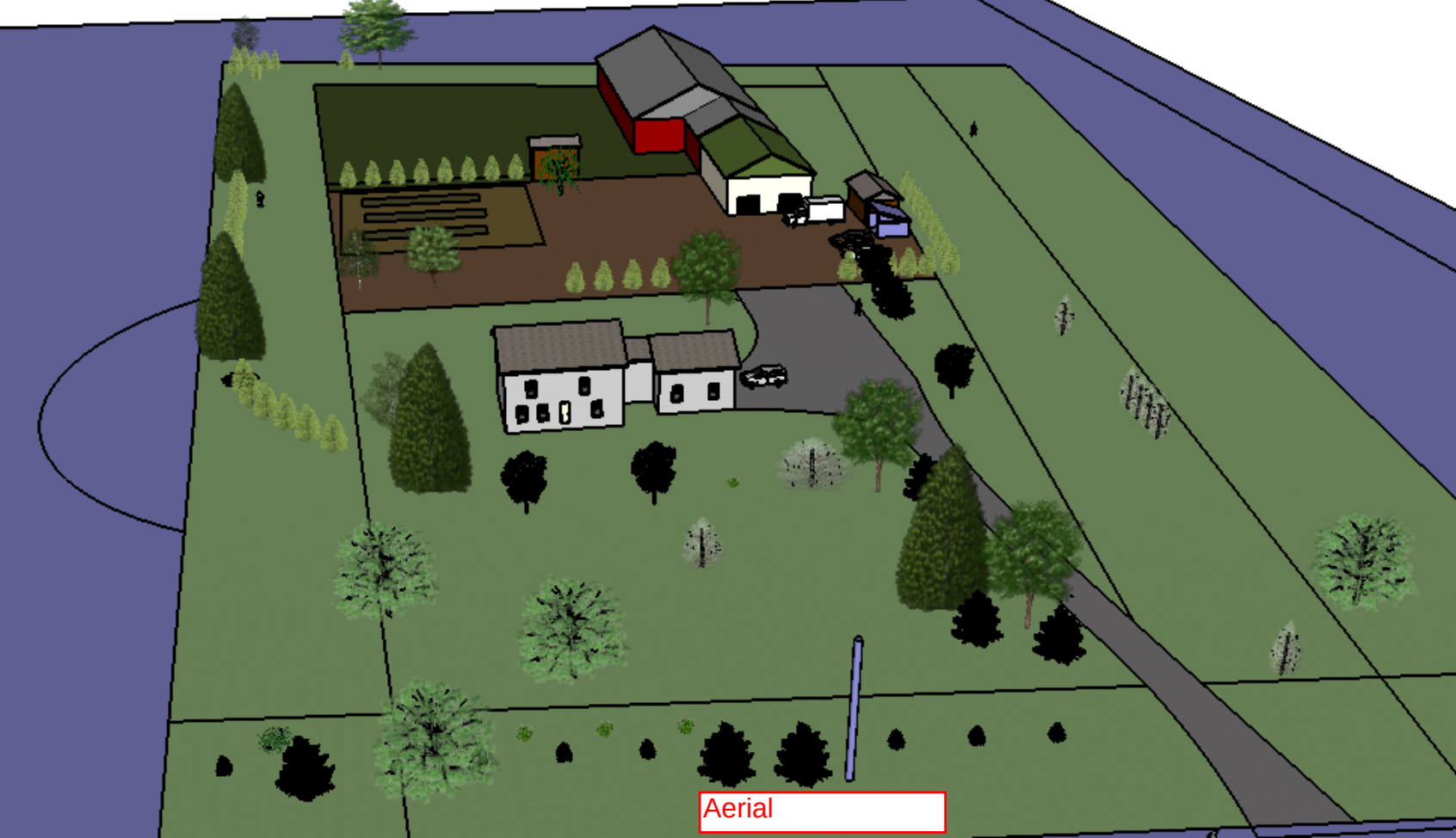
Given these provisions, one cannot say with certainty that vehicular fuel is or is not prohibited in a Home Occupation, or if limited, in what way. If the drafters of the Land Use Regulations intended to limit vehicular fuel storage in the context of a Home Occupation, they could have done so. Clearly they had an intention to prohibit the storage of hazardous materials, but it is not clear whether or not vehicular fuel is included in that prohibition. In the face of such an ambiguity, Vermont law is quite clear what the ZBA must do:

> "We are mindful, however, that zoning ordinances are in derogation of common law property rights and that 'in construing land use regulations any uncertainty must be decided in favor of the property owner.'" In re Weeks, 167 Vt. 551, at 555 (1998).

In weighing these conflicting provisions, the ZBA must conclude in favor of the landowner that vehicular fuel is not a hazardous material in this context.

Under the Home Occupation III standards, since it cannot be hazardous material, vehicular fuel must constitute "materials … associated with the home business" that should be allowed provided it is stored in areas that are "clearly designated and located or adequately screened so that they are not visible from public rights-of-way or neighboring properties."

The Applicants propose to make the storage of vehicular fuel on-site non-hazardous, proposing to install a covered concrete bunker that both protects the fuel tanks from damage by vehicles and equipment and provides spill protection.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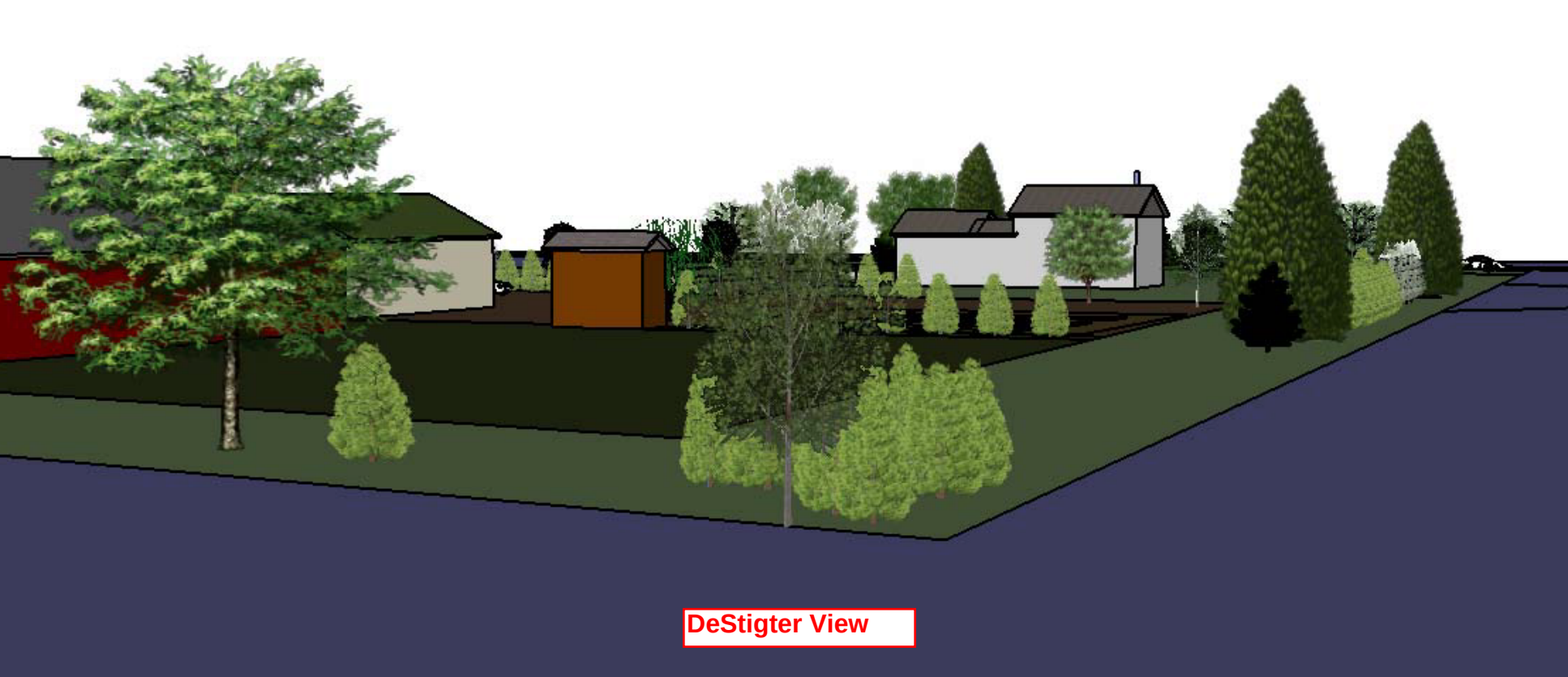
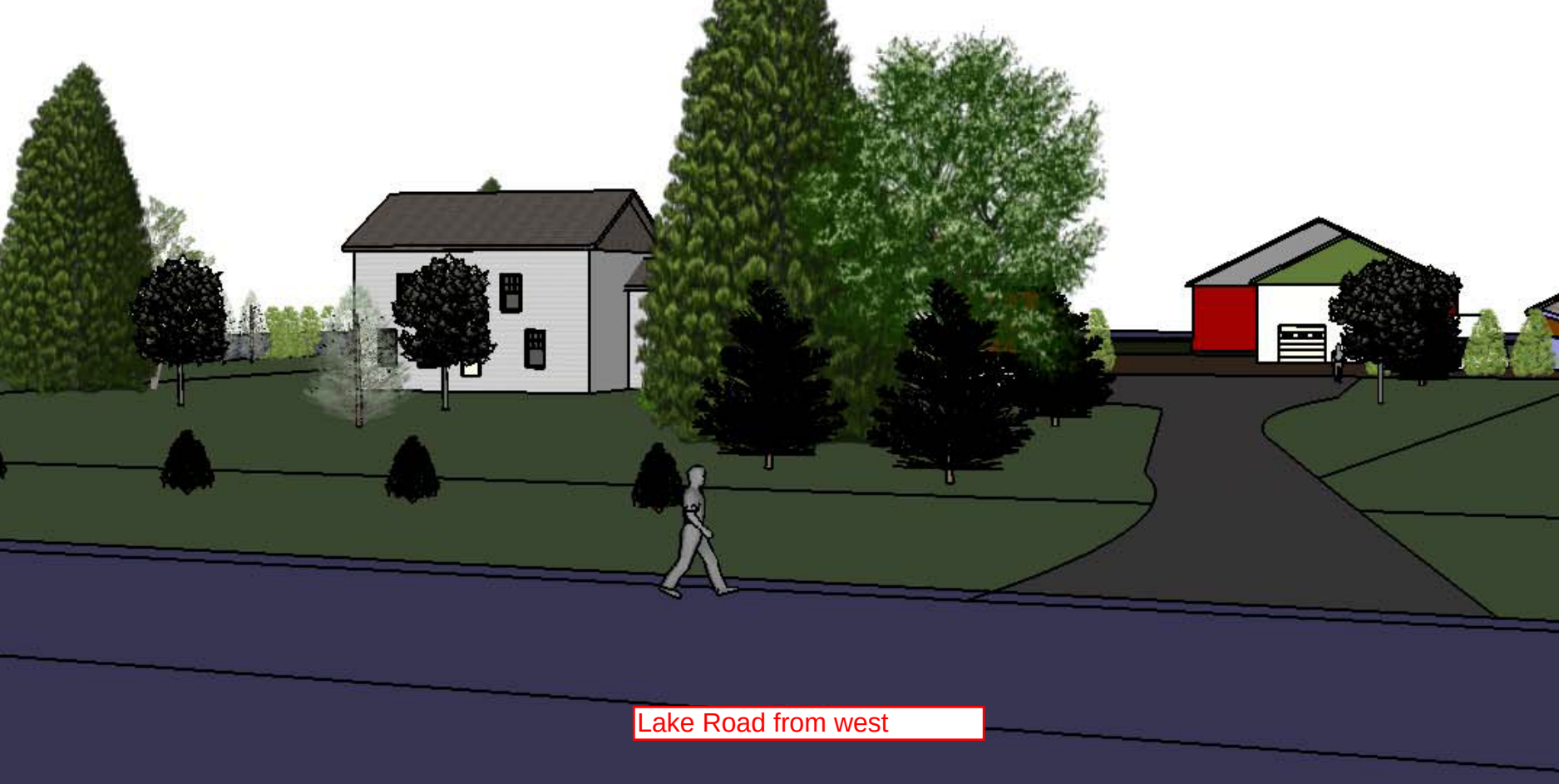

DeStigter View

Goodman Hotaling view

Lake Road from north


Lake Road from west

Ex D

24 VSA 4470. Successive appeals; requests for reconsideration to an appropriate municipal panel

(a) An appropriate municipal panel may reject an appeal or request for reconsideration without hearing and render a decision, which shall include findings of fact, within 10 days of the date of filing of the notice of appeal, if the appropriate municipal panel considers the issues raised by the appellant in the appeal have been decided in an earlier appeal or involve substantially or materially the same facts by or on behalf of that appellant. The decision shall be rendered, on notice given, as in the case of a decision under subdivision 4464(b)(3) of this title, and shall constitute a decision of the appropriate municipal panel for the purpose of section 4471 of this title.

24 V.S.A. §**4470**(a) and the so-called successive application doctrine was addressed in , In re Armitage, 2006 VT 113:

Collateral estoppel, or issue preclusion, "[does] not purport to prohibit litigation of matters that never have been argued or decided." 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4416, at 386 (2002). Rather, **issue preclusion generally bars relitigation of an issue that was already litigated and decided.** *Trickett v. Ochs*, 2003 VT 91, ¶ 10, 176 Vt. 89, 838 A.2d 66. Issue preclusion applies when: (1) it is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits in the prior action; (4) there was a full and fair opportunity to litigate the issue; and (5) its application is fair. *Id.* **The doctrine generally applies to zoning so that "a zoning board or planning commission may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions ha[s] occured."** *In re Carrier*, 155 Vt. 152, 158, 582 A.2d 110, 113 (1990) (quotations omitted). **Applicants bear the burden of showing changed circumstances. *Id.* at 158, 582 A.2d at 114. The changed-circumstances requirement is satisfied when a revised proposal addresses all concerns that prevented approval of the prior application.** *Id.* at 159, 582 A.2d at 114. Despite the general rule limiting successive applications, applicants contend that the successive-application doctrine [1] does not preclude consideration of their second application because the Environmental Court's decision was not a final judgment, the issues were not the same, applying collateral estoppel would be unfair, and there were substantial changes in the second application. **Ordinarily, denial of a zoning application requires that the applicant file a new application that substantially revises its proposal to "address[] all concerns that prevented approval of the prior application."** *Armitage,* 2006 VT 113, ¶ 4.

Ex. E

60 A.3d 686 (Vt. 2012)
2012 VT 87
IN RE WOODSTOCK COMMUNITY TRUST AND HOUSING VERMONT PRD (Appeal of Roy et al., Appellant)
In re Woodstock Community Trust and Housing Vermont Act 250 Application (Appeal of Roy et al., Appellant).
No. 11-398.
Supreme Court of Vermont.
October 26, 2012

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Kaveh S. Shahi of Cleary Shahi & Aicher, P.C., Rutland, for Appellants.

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C. Daniel Hershenson of Hershenson, Carter, Scott & McGee, P.C., Norwich, for Appellees.

Present: REIBER, C.J., DOOLEY, SKOGLUND, BURGESS and ROBINSON, JJ.

DOOLEY, J.

¶ 1. Neighbors of a proposed affordable housing development appeal an Environmental Division decision affirming a decision of the Town of Woodstock Development Review Board (DRB) granting appellee-applicants Woodstock Community Trust and Housing Vermont (hereinafter collectively referred to as WCT) a zoning permit and a decision of the District 3 Environmental Commission, granting an Act 250 land use permit. The Environmental Division had reversed an earlier decision of the DRB granting a permit,[1] but upon WCT's reapplication, and another favorable decision from the DRB, the Environmental Division affirmed, finding that the deficiencies of the first application had been corrected. Following the second DRB decision, WCT went to the Environmental Commission and obtained an Act 250 permit; the Environmental Division also affirmed the grant of this permit. Neighbors argue that: (1) the successive-application doctrine should have barred the submission of the second zoning permit application; (2) the second application failed to correct the problems of the first application; (3) certain of the Environmental Division's findings with respect to the Act 250 permit were clearly erroneous; (4) the court erred by denying a motion to stay this proceeding; and (5) the Environmental Division erred by conditioning approval on a water easement's location being drawn on the plan. We affirm.

¶ 2. WCT presented its proposed development to the Woodstock DRB in June 2007, and the board approved this initial application. Neighbors of the project appealed the DRB's decision to the Environmental Division, which held that the proposed project failed to meet a number of

requirements under the Town of Woodstock Zoning Regulations.[2] The court identified the following problems with the first application: a parking lot contained several spaces that were planned to be built on what the court determined to be a protected wet area, the stormwater disposal system was inadequate, the buffer between the development and properties of neighbors was not sufficient, and there was a lack of ownership and maintenance documents providing for a legal mechanism to protect open space. The court went on to note that WCT could make a future application that addressed the deficiencies in the application.

¶ 3. Several months after this decision, WCT did submit a second application to the DRB, along with an Act 250 permit application to the District 3 Environmental Commission, both of which were subsequently approved. The neighbors appealed both these decisions to the Environmental Division, and the appeals were consolidated. During this second appeal, neighbors moved to stay the

proceedings pending the outcome of related property rights litigation in the Civil Division of the Superior Court regarding neighbors' water easements on the development property.[3] The Environmental Division denied the motion to stay, and, in a ruling on cross-motions for summary judgment, concluded that the application was not an impermissible successive application. In its decision after trial, the court went on to conclude that the application sufficiently addressed the court's concerns with the first application, and it granted the permits on the condition that the location of a neighbor's water easement be drawn on the existing conditions plan. This appeal followed.

I

¶ 4. Neighbors first argue that the second application should have been barred by the successive-application doctrine. The successive-application doctrine represents an implementation of issue preclusion, as adapted to the specific context of multiple zoning applications. *In re Armitage,* 2006 VT 113, ¶ 4, 181 Vt. 241, 917 A.2d 437. Issue preclusion serves to prevent the relitigation of issues that have already been settled in a previous action. See *State v. Pollander,* 167 Vt. 301, 304 n. 2, 706 A.2d 1359, 1360 n. 2 (1997). The successive-application doctrine reflects the necessarily iterative zoning and planning process in that it enforces a more relaxed standard of issue preclusion than is applicable in other contexts.

¶ 5. The basic description of the doctrine is found in *In re Carrier:* " a zoning board ... ‘ may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merits' of the request have intervened between the first and second application." 155 Vt. 152, 158, 582 A.2d 110, 113 (1990) (quoting *Silsby v. Allen's Blueberry Freezer, Inc.,* 501 A.2d 1290, 1295 (Me.1985)). We went on to say in *Carrier* that a second application can be granted " when the application has been substantially changed so as to respond to objections raised in the original application or when the applicant is willing to comply with conditions the commission or court is empowered to impose." *Id.*

¶ 6. Neighbors contend that more recent decisions add an additional element to the successive-application doctrine. See *In re McGrew,* 2009 VT 44, 186 Vt. 37, 974 A.2d 619;

Armitage, 2006 VT 113, 181 Vt. 241, 917 A.2d 437. They argue based on these cases that a second application is not allowed if the applicant could have, and should have, included the corrective elements in the first application. We disagree. Indeed, the absence of this additional element is what distinguishes the successive-application doctrine from the more inclusive standard of issue preclusion.

¶ 7. *Armitage* and *McGrew* are examples of cases where there was no change of conditions. In *Armitage,* the first application was denied, in part, because of a traffic deficiency—left turns from the project onto Route 7 would increase traffic volume on that route. 2006 VT 113, ¶ 10, 181 Vt. 241, 917 A.2d 437. With respect to that deficiency, the revised application had no changes to the development proposal but instead the applicant submitted additional evidence to show that the earlier decision was wrong on this point. In denying the second application, we noted that

there was no indication that the additional evidence was unavailable at the time of the first trial. *Id. McGrew* is similar. See 2009 VT 44, ¶ ¶ 12-13, 186 Vt. 37, 974 A.2d 619. The point of these decisions is *not* that the second application can be denied where there is a substantial change in the project to meet the first decision any time that the change could have been made before the first decision. Instead, these decisions suggest that even without substantial change in the project there could be a successive application if it is based on new evidence unavailable at the time of the first application.

¶ 8. We turn now to the application of the successive-application doctrine in this case. The Environmental Division denied the initial application because the development proposal did not comply with the local zoning ordinance in four ways.[4] First, the proposal failed to properly buffer the development from adjacent homes as required by Woodstock zoning ordinance § 313(B)(2)(a). Second, the proposal failed to satisfy § 313(A)(9)'s requirement for the preservation of wet areas. Third, the proposal violated § 313(A)(8) because it failed to specify how the management and maintenance responsibilities would be divided among the organizations and what legal mechanism would be used to protect the land reserved as private open space. Finally, the stormwater drainage system did not meet the requirements of § 313(A)(5), (C)(3)(h), (C)(3)(i), and § 709(B)(5) because a drainage swale was improperly designed and the developer did not meet its burden of showing that the system would adequately control stormwater and account for its discharge into a nearby brook. Neighbors argue that the successive-application doctrine should have barred the second application because it failed to address these problems and was merely a resubmission of the first application with additional evidence as prohibited by *Armitage.*

¶ 9. The second application had an assortment of changes enumerated in the project narrative submitted to the DRB. The DRB was satisfied with the changes, explicitly rejected the assertion that the second application was impermissible as a successive application, and approved the new plan with a vote of 6-0. Ruling on cross-motions for summary judgment, the Environmental Division, too, found that the changes were substantial enough to overcome the bar of the successive-application doctrine and approved the decision of the review board. We affirm the decision of the Environmental Division.

¶ 10. The applicant bears the burden of showing changed circumstances. See *Carrier,* 155 Vt. at 158, 582 A.2d at 114. The second application contained various changes that were directed at rectifying the deficiencies identified in the first application by the Environmental Division. In order to rectify the open space buffer between the project and neighboring landowners, the central loop road was tightened, moving the development away from the neighbors and expanding the buffer zone. The central trash and recycling center was also removed as part of the effort to create an adequate buffer. Additionally, the revised application eliminated seven parking spaces to prevent the disturbance of what the Environmental Division determined to be a protected wet

area. It also included a draft community declaration which outlined the planned ownership and management structure of the development.

¶ 11. Neighbors particularly focus on the stormwater disposal system, arguing that with respect to this aspect of the plan, WCT submitted only new evidence for an unchanged proposal. WCT changed the stormwater drainage system in the first application just before trial, and many of the elements of the system were incomplete. The Environmental Division rejected the system in the first application for two reasons. First, with respect to stormwater from the surrounding undeveloped hillsides, the project plan proposed to divert this stormwater around the developed area with the use of a steep and wide drainage swale that would require the cutting down of many trees. The court rejected this swale design. With respect to the runoff from the developed area, the application was sketchy and incomplete. The court ruled that " [i]t is not enough at this final approval stage to explain that the drainage proposal has only recently been redesigned and that any problems can be adjusted during construction." In the second application, WCT redesigned the swale to respond to the objections of the court. It also provided a complete and detailed description of all of the elements of the system, along with permits from the Agency of Natural Resources for the redesigned system.

¶ 12. We agree with both the review board and the Environmental Division that these changes were adequate to constitute a substantial change of conditions. They are in line with what we and other courts have often recognized as sufficient to overcome the principle of the successive-application doctrine. See *Carrier,* 155 Vt. at 159, 582 A.2d at 114 (holding that redesigned interior road network, reconfigured lots, and updated landscaping were substantial changes); *Malmstrom v. Zoning Bd. of Appeals,* 152 Conn. 385, 207 A.2d 375, 377-78 (1965) (holding that change of location for building and parking area, along with parking area's reduced size were change of conditions); *Russell v. Bd. of Adjustment,* 31 N.J. 58, 155 A.2d 83, 88 (1959) (holding that five-foot increase in front setback and decrease in lot coverage from eighteen to twelve percent constituted sufficient change); *Peterson v. City Council,* 32 Or.App. 181, 574 P.2d 326, 331 (1978) (holding that smaller building and modified setbacks were change of conditions).

¶ 13. In their brief, neighbors put a great deal of emphasis on the statements of the project architect who characterized the changes to the project as " subtle." Neighbors argue that WCT is bound by this admission, and the court could not find the changes substantial in light of the admission. In fact, the architect's statement, even if it somehow binds WCT, is not inconsistent with WCT's position. Under the successive-application doctrine, the applicant can change the

project to respond to the deficiencies that caused the denial of the permit application however small the changes are in the context of the overall project. Here, the question is not the overall impact of the changes on the project, but instead whether they substantially change individual elements to respond to the deficiencies.

¶ 14. The architect's statements may have some probative value in the evaluation of the changes, but they are far from determinative. They do not preclude WCT's argument and should be given the same weight as any other piece of evidence.

¶ 15. We do acknowledge that part of WCT's presentation on the stormwater

system involves a context for the successive-application doctrine that we have not clearly addressed in the past. The redesign of the drainage swale was a substantial change in the stormwater system that responded specifically to a deficiency the court found in the first application. The presentation of the rest of the system, however, specifically the drainage for the run-off of the developed part of the project land, is a full and complete description of what WCT proposed in the first application, now supported by ANR permits. The distinction between this situation and those present in *Armitage* and *McGrew* is that here the first application was denied because it was incomplete, whereas the applications in those cases were complete, and denied on the merits. We conclude that in keeping with the flexibility of successive-application doctrine a second complete application is not precluded by the denial of a prior incomplete application. We recognize in drawing this line that it is somewhat fine and must be carefully applied not to allow a second application because it is better prepared than the former application.

II

¶ 16. We next address the question of whether the changes in the second application corrected the deficiencies of the first application. We review the Environmental Division's " interpretation of zoning ordinances and findings of fact for clear error." *Armitage,* 2006 VT 113, ¶ 3, 181 Vt. 241, 917 A.2d 437. We uphold legal conclusions by the Environmental Division that are reasonably supported by the findings. See *In re Eastview at Middlebury, Inc.,* 2009 VT 98, ¶ 10, 187 Vt. 208, 992 A.2d 1014. Neighbors claim that the court's *conclusions* were clearly erroneous with regard to required parking, the ownership and maintenance documents, and the stormwater disposal system.

¶ 17. In the second application, WCT eliminated seven parking spaces that encroached on what the court determined to be a wet area in its first decision. In order to make up for the lost spaces, applicants created a number of tandem driveways, only wide enough for a single car, but long enough for two cars to park one behind the other. The nature of the tandem driveway requires the back car to move before the front car may exit, but the two spaces in a driveway are both assigned to a single unit. Neighbors claim that the Environmental Division determination that the application satisfied § 520 of the town zoning regulations was clearly erroneous because the tandem driveways could not be counted as two parking spaces.

¶ 18. Neighbors argue that because the driveways are intended to contain two cars, they should properly be characterized as parking lots, which are required by § 520(A)(2) to have at least 250 square feet per car so that the spaces are accessible. Section 520(A)(1) defines a

parking space as 9' x 18'. The tandem driveways are designed to be 10' x 36'-40', the size of two parking spaces. This driveway is not large enough to fit the definition of parking lot, but it is not required to. Nothing in the Woodstock zoning ordinance requires a driveway to satisfy the definition of parking lot or otherwise limits it from being counted as several parking spaces for the purposes of site plan review. Because it is not clearly erroneous, we defer to the Environmental Division's interpretation of the ordinance. *In re Wesco, Inc.,* 2006 VT 52, ¶ 7, 180 Vt. 520, 904 A.2d 1145 (mem.) (" We defer to the Environmental Court's interpretation of a zoning ordinance ‘ unless it is clearly erroneous, arbitrary, or capricious.’ ") (quoting *In re Cowan,* 2005 VT 126, ¶ 7, 179 Vt. 560, 892 A.2d 207 (mem.)). There

is no reason a tandem driveway must be considered a parking lot, rather than two parking spaces arranged in a column. Nor can we conclude that the ordinance prohibits this method of configuring parking so as to meet the number-of-spaces requirement.

¶ 19. Next, neighbors argue that the ownership and maintenance documents do not comply with § 313(A)(8) of the town regulations or Title 27A of the Vermont statutes. Section 313(A)(8) provides in full:

The project land may be owned, leased or controlled either by a single person or corporation or by a group of individuals or corporations. The approved project plan shall be binding on the project land and on present and successive owners. To assure adequate property management and compliance with conditions of project approval:a. If owned by a group of individuals or corporations, an association shall be formed to assure that all properties and common areas are properly maintained.b. The filing of a Declaration of Covenants, Conditions, and Restrictions (or its equivalent) may be required.

Town of Woodstock Zoning Regulations § 313(A)(8).

¶ 20. Neighbors contend that this section prohibits ownership of separate portions of the project land by separate owners and that the Environmental Division's decision to the contrary was clear error. Neighbors read the introductory sentence of the section as limiting who may own project lands, arguing that the entire land must be owned by one individual or corporation. This interpretation appears to be inconsistent with the language authorizing ownership by a group of individuals or corporations. Moreover, we cannot see any reason for the limitation neighbors urge that the ordinance requires. It would, for example, prohibit a development with single-family housing because the purchaser of a house would own the land. Indeed, this reading would prohibit all condominiums, which are defined as " a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions." 27A V.S.A. § 1-103(8). The real substance of § 313(A)(8) lies in the requirement for an association " to assure that all properties and common areas are properly maintained." The opening sentence is broadly descriptive of the kind of circumstances in which an association is required. WCT has met that requirement here. Neighbors further contend that the declaration does not satisfy § 313(A)(8)(a)'s requirement that " an association shall be formed to assure that all properties and common areas are properly maintained" because it does not provide a mechanism through which the units

themselves will be maintained. Town of Woodstock Zoning Regulations § 313(A)(8)(a). Section 8.1 of the Grange Common Interest Community Declaration provides that the " Association shall at its expense maintain all of the Common Elements ... in a good state of repair." While maintenance of the units is not provided for, the units are not to be commonly owned. Again, we conclude that neighbors are urging an overly-restrictive construction of the ordinance. The requirement is to form an association, not to regulate how the association functions in detail. We conclude that the requirement is aimed at property owned or controlled by the association.[5]

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The Environmental Division's interpretation of § 313(A)(8) was not clear error.

¶ 21. Neighbors additionally argue that the declaration violates Title 27A, the Vermont Common Interest Ownership Act, for a number of reasons. Appellants' Statement of Questions submitted to the Environmental Division did not raise this issue, and it was raised for the first time in their Proposed Findings of Facts and Conclusions of Law. This is insufficient to preserve the issue, so we consider it waived. See *Mann v. Levin,* 2004 VT 100, ¶ 26, 177 Vt. 261, 861 A.2d 1138 (holding that when a defendant did not raise the affirmative defense of laches during the factual proceeding and raised it for the first time in proposed findings of fact, the issue was waived for appeal).

¶ 22. Even if the issues were preserved, we fail to see how neighbors can raise compliance with the Common Interest Ownership Act in a zoning proceeding. Nothing in the zoning ordinance requires a landowner to show compliance with the Act in order to obtain a zoning permit. Moreover, we doubt that a municipality could adopt such a requirement. See 24 V.S.A. § 4411 (Zoning bylaws may permit, prohibit, restrict, regulate, and determine land development.). The Vermont Common Interest Ownership Act has its own private remedies, and there is no suggestion that public, regulatory remedies were intended.[6]

¶ 23. Next we turn to neighbors' argument that the second application did not sufficiently correct the stormwater disposal system problems which the Environmental Division identified in the first application. As we stated above, WCT both changed the stormwater plan and fully documented its original elements. It was changed sufficiently to meet the deficiencies identified in the first decision.

¶ 24. Neighbors argue, however, that the regulations prohibit any increase in discharge into nearby Vondell Brook, and the stormwater system for the developed area will increase the discharge. Section 709(B)(5) of the town zoning regulations requires site plan review to consider " [t]he adequacy of surface drainage facilities." In conducting this review, the Environmental

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Division noted that state regulations " require that the post-development runoff will be no greater than the pre-development runoff from a project property, but [they] do not limit whether that runoff can be directed to a different location than in the pre-development condition." Neighbors rely on this statement to claim that it means that the amount of stormwater flowing into Vondell Brook cannot increase as a result of the development.

¶ 25. Neighbors' argument is misdirected. State regulations may contain a requirement of runoff neutrality, but the zoning ordinance does not. Moreover, as stated by the court, the

requirement is overall net neutrality, not neutrality at every discharge point. Prior to the project, most of the runoff from the property drained through different properties and reached the main river through a different brook or by overland flow from Route 4. The court conducted a thorough review of the discharge into Vondell Brook and concluded it would adequately handle the surface runoff, even in flooding conditions. Neighbors do not challenge this analysis, and we find no error in it.

¶ 26. We note that, prior to submitting the new permit application, WCT obtained a stormwater discharge permit from the Vermont Agency of Natural Resources, specifically authorizing the discharge into Vondell Brook. WCT also obtained a stormwater construction permit for the period when the project is under construction. Under Act 250 Rule 19, the permits create a rebuttable presumption that the project meets relevant Act 250 criteria. See 10 V.S.A. §§ 6086(d), 8504(i). Relying upon the presumption, the Environmental Division concluded that the project met the relevant Act 250 criteria with respect to stormwater. In doing so, the court noted that neighbors failed to provide expert evidence to rebut the presumption created by the permits.

¶ 27. Neighbors finally contend that the project's density violates the town zoning regulations. The regulations require that " [t]he proposed development must be designed to create a stable and desirable environment that is in harmony with the density and type of adjacent land uses." Town of Woodstock Zoning Regulations § 313(A)(1). The parcel to be developed is zoned as Residential Medium Density, a zone that the Environmental Division pointed out, " not only allows but promotes a density of development consistent with the design of this project." The court found:

The neighborhood or visual context of the project is the hamlet or settlement of West Woodstock.... Most of the settlement is located close to and focused towards the valley floor and Route 4, surrounded by predominantly wooded hillsides and open fields, with views from the valley floor of the wooded hillsides and more distant wooded hills. A large middle and high school complex with a community indoor arena, and a cluster housing development of 33 units, are located southwesterly of the project property on either side of Route 4....In the area of the proposed project, the hamlet of West Woodstock contains a relatively dense group of residential and residential-style buildings on small lots, 11/2 to 21/2 stories in size, diverse but traditional in design with characteristic gabled roofs, porches, additions, and dormers. The proposed designs for the project buildings are compatible in size and style with the existing properties in the area. Although they are by definition all new, they have been designed with a diversity of building types, roof forms, and architectural details, to reflect and be compatible with the diverse

elements of the neighboring vernacular architecture.The project has been designed to cluster the new residential buildings on the flatter portion of the site, and to preserve the upland fields and forested areas as open space.... The new residential buildings surround a small common area and face an inner loop road, giving the project the appearance and functionality of a small neighborhood, consistent with the neighborhood along Route 4. The project has been redesigned so that the back yards of the new houses, and an area of community gardens, adjoin the back yards of [neighbors'] ... existing houses along Route 4, reinforcing the neighborhood design....The

density of project buildings is consistent with the density of buildings in the existing neighborhood....

¶ 28. Even if the Environmental Division accepted neighbors' assertion that the project could add as many as 140 new residents to West Woodstock, it was not reversible error to find the project harmonious with adjacent land uses. The court's findings are fully supported by the evidence and the conclusions are supported by the findings. The density of the buildings is consistent with the zoning ordinance and " in harmony with the density and type of adjacent land uses" as required by § 313(A)(1).

¶ 29. In conclusion, the second application substantially dealt with all of the identified problems of the first application, and we will not overturn the Environmental Division when there is no clear error.

III

¶ 30. Having determined that the court did not err in determining that the second application successfully corrected the insufficiencies of the first, we turn to neighbors' argument that the Environmental Division's factual findings with respect to the Act 250 permit constituted error. " [W]e will overturn these findings only where the appellant shows ‘ that there is no credible evidence to support them.’ " *In re Entergy Nuclear Vt. Yankee Discharge Permit 3-1199,* 2009 VT 124, ¶ 15, 187 Vt. 142, 989 A.2d 563 (quoting *In re Miller Subdivision Final Plan,* 2008 VT 74, ¶ 13, 184 Vt. 188, 955 A.2d 1200). Neighbors first argue that the court's findings with regard to aesthetics and harmony with adjacent land uses were clearly erroneous.

¶ 31. The only issue neighbors have raised on appeal relative to the Act 250 permit is their contention that the project violates Criterion 8 of Act 250. The criterion requires a court to find that a project will not result in " undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas," before upholding the Act 250 permit. 10 V.S.A. § 6086(a)(8). In *In re Times & Seasons, LLC,* we described a two-pronged test the court should use when determining if this element of Act 250 is satisfied: " [I]t determines if the proposed project will have an adverse aesthetic impact, and if so, it considers whether the adverse impact would be undue." 2008 VT 7, ¶ 8, 183 Vt. 336, 950 A.2d 1189. The Environmental Division used this so-called " Quechee Test" and determined that the project did not fail under either of the prongs of the test. First, the court found that the project would not result in an adverse impact because the project was designed with buildings that matched local architecture [7] and

preserved upland fields and forested hillsides visible to passing travelers. Neighbors have not directly challenged this conclusion, and it is alone sufficient to uphold the project against the Criterion 8 challenge.

¶ 32. Second, the court concluded that if there were an adverse impact, it was not undue. It relied upon the standard from *Times & Seasons:*

An adverse impact is considered undue if *any one* of the three following questions is answered in the affirmative: (1) does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; (2) does the project offend the sensibilities of the average person; and (3) has the applicant failed to take generally available

mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.
Id. Neighbors respond that the planned development violates a clear, written community standard, relying on the 2007 Woodstock Town Plan, which provides, " Of prime importance to the quality of life and character of Woodstock are its open spaces, which include not only open fields and meadows, but also wooded hillsides, forests, stream corridors and other natural vistas." Woodstock, Vt., Town Plan 76 (2007).

¶ 33. We will address this argument, although we find no indication that it was raised below. In doing so, we accept that the open space language is intended, in part, to protect the aesthetics of the Town. We do not, however, take the quoted plan language as a clear, written community standard that no currently open space can be developed anywhere in Woodstock. Under such a standard, virtually no housing could be built on land that is undeveloped.[8] Yet, the zoning regulations that regulate development have no prohibition on development of currently open land in this zone. See *Eastview at Middlebury,* 2009 VT 98, ¶ 21, 187 Vt. 208, 992 A.2d 1014 (project meets Criterion 8, in part, because it is allowed by the zoning ordinance); 10 V.S.A. § 6086(a)(10) (where town plan is vague, commission can consider bylaws for interpretation). Nor do we think the plan language clearly protects from development a ball field that is behind a row of houses on a state highway and barely visible to the public. As the court noted, the project protects the important part of the landscape in the area— the hillsides and forested land— and is designed to be consistent with the surrounding residential development.

¶ 34. The Environmental Division decision that there was no undue adverse aesthetic impact was not clearly erroneous.

IV

¶ 35. We now address neighbors' claim that the Environmental Division erred in its denial of their motion to stay the proceedings. Neighbors made the motion in March 2010, shortly before WCT filed its motion for summary judgment on the successive-application issue. Neighbors sought a stay of this proceeding until a

related action in the superior court regarding water easements on the project property reached an end. Neighbors argued that the superior court action, which they filed against WCT, could have as a result a blocking of the proposed project and they should not have to incur the expense of a trial in this action as long as that possibility was present. They acknowledged that the separate litigation was likely to take years to reach its end point. The court denied the motion with respect to summary judgment proceedings to determine whether the successive-application doctrine prohibited going forward with consideration of the project. The court added: " As the pretrial work in these cases progresses, and depending on the decision on summary judgment in the superior court case, the court will entertain specific future motions to coordinate the scheduling and resolution of these cases with that of the [s]uperior court case as efficiently as possible, including any requests to postpone the trial dates that will be scheduled for these cases." There is no indication in the docket entries that neighbors made any motions to coordinate scheduling the cases or to delay the trial in this case.

¶ 36. A stay in this context is a " suspension of proceedings" until a specified event occurs in another case. See *Stone v. Briggs,* 112 Vt. 410, 412-13, 26 A.2d 828, 830 (1942). It is in the nature of a continuance. We have held that a ruling on a motion to continue involves trial court discretion and will be overturned only if the discretion is " exercised upon grounds clearly untenable, or to an extent clearly unreasonable." *Kokoletsos v. Frank Babcock & Son, Inc.,* 149 Vt. 33, 35, 538 A.2d 178, 179 (1987) (quotations omitted). As the United States Supreme Court held in the leading case of *Landis v. North American Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936), every court has the power " to control the disposition of the causes on its docket." But, how this best can be done " calls for the exercise of judgment" and the party seeking a stay " must make out a clear case of hardship or inequity in being required to go forward" if there is a possibility that a stay will damage someone else. *Id.* at 254-55, 57 S.Ct. 163. " Courts disapprove stays ... when a lesser measure is adequate to protect the moving party's interests." *In re Application for Water Rights,* 101 P.3d 1072, 1082 (Colo.2004).

¶ 37. In this case, the ground for the stay asserted by neighbors related to the expenses of a trial, particularly the employment of expert witnesses. Thus, the court properly concluded that it would allow, and would decide, a motion for summary judgment with respect to the application of the successive-application doctrine. The issue to be decided was one of law, and the record before it was generally sufficient to make that decision. We see no abuse of discretion in allowing the summary judgment process on this issue to go forward.

¶ 38. Beyond resolution of that preliminary issue, the court recognized the circumstances neighbors were in and offered methods to ameliorate any difficulty neighbors would face in trying both cases. At the same time it recognized that neighbors had filed both cases and WCT had a right to efficient consideration of its permit application. Neighbors did nothing to take advantage of the court's offer. In these circumstances, we see no decision to review. Even if there were an adverse decision, we hold that the court acted within its discretion.

¶ 39. We have answered neighbors' argument as it was presented to the trial court. As is common in this appeal, however, neighbors have reframed the issue

for the first time in this Court. Neighbors note that the case went to trial in the superior court with a jury verdict in July 2010 that the project unreasonably interfered with the water rights of one of the neighbors. Based on that event, the neighbors argue that the Environmental Division committed error by not staying the proceeding as of that time. There is, however, no indication that neighbors renewed their motion in the trial court. Moreover, there was a clear dispute over the significance of the jury verdict since the superior court still had to consider injunctive relief, that is, whether WCT could move the water line, and the two trials became separated by a number of months. It is sufficient to hold that neighbors have waived this argument by raising it for the first time on appeal and by failing to obtain an adverse ruling from the trial court.

V

¶ 40. Finally, we turn to neighbors' contention that the Environmental Division acted outside its jurisdiction when it required WCT " to add the location of the Smith spring rights to the appropriate existing conditions plan, together with any necessary note regarding the pendency of

litigation over the Smith spring rights or easement." The parties agree that the Environmental Division does not have jurisdiction to determine private property rights. See *Nordlund v. Van Nostrand,* 2011 VT 79, ¶ 17, 190 Vt. 188, 27 A.3d 340. The aforementioned condition, however, does not affect private property rights; rather, it merely requires WCT to map already existing rights pursuant to the Woodstock zoning regulations. Town of Woodstock Zoning Regulations § 313(C)(3).

¶ 41. It is entirely within the jurisdiction of the Environmental Division to impose conditions on permits. See *Entergy,* 2009 VT 124, ¶ 54, 187 Vt. 142, 989 A.2d 563. The location of certain easements was in dispute when the court imposed this condition, but requiring the easements to be drawn on the existing conditions plan does not constitute a property-rights adjudication. Furthermore, the Environmental Division was sensitive to the concurrent litigation when it imposed the condition, requiring that the pending litigation be noted on the plan. The condition was based on the requirements of the Woodstock zoning ordinance, and it was within the court's jurisdiction and discretion to require it.

Affirmed.

Notes:

[1] At the time of the first appeal to this body, it was known as the " Environmental Court," but it is now the Environmental Division of the Superior Court. For the purpose of consistency, this opinion will refer to the " Environmental Division," even when discussing the actions of the Environmental Court.

[2] In this opinion, we refer to the zoning regulations in effect at the time of the applications, which were adopted in 2002. These regulations were repealed by Town of Woodstock Zoning Regulations § 104 (2010) and replaced with new ones.

[3] Neighbors also claimed that they had acquired part of the project land by adverse possession, but they did not prevail on that claim in the superior court.

[4] In its denial of the first application, the Environmental Division noted that its decision did not preclude WCT from making a second application addressing the listed problems. This is not unlike the court's dismissal " without prejudice" discussed in *Armitage.* See 2006 VT 113, ¶ 6, 181 Vt. 241, 917 A.2d 437. The inclusion of this language correctly states the law, but does not affect the successive-application analysis.

[5] We recognize that a declaration could provide that maintenance of individual units not owned by the association is an association responsibility. See 27A V.S.A. § 3-107(a). We believe, however, that the point of the zoning requirement is to ensure that some entity or person is responsible for the maintenance of each part of the property. Consistent with that purpose, the declaration makes the association responsible for maintenance of certain parts of the units— exterior siding, roofs, porches, party walls and driveways— that might not be maintained by individual unit owners. It is consistent with that purpose, and the language of the ordinance, for individual unit owners to be responsible for maintenance of the interior of their units, as provided for by the WCT declaration. Such a reading is consistent with the ordinance as a whole because it does not try, assuming it could, to regulate how housing units outside of common interest

communities are maintained.

[6] The inappropriateness of raising compliance with Act requirements in a zoning proceeding is clearly demonstrated by the issues neighbors raise. First, neighbors raise that the declaration requires unit owners to purchase a license for use of common elements, but the Act requires that access to common elements be free. Second, neighbors argue that the declaration is illegal because it allocates a larger share of the ownership to declarant and its affiliates than is allowed under the Act. Third, neighbors argue that the declaration allows the subdivision of a unit without any restriction on the number of new units as required by the Act. Fourth, neighbors argue that the declaration does not specifically mention the need to relocate the waterline easements of some of the neighbors. The first three claims involve rights between purchasers and the developers. The neighbors have no legitimate interest in these rights. Neighbors cite no Act requirement for their fourth claim; we cannot see one.

[7] In making their argument, neighbors describe the project as a " congested collection of buildings with a Disney like effort to mimic a New England village." We find this characterization greatly exaggerated. It and other similar mischaracterizations do not help neighbors' cause.

[8] As often happens in town plans, the language supports policies that are sometimes in conflict. Thus, the Woodstock plan provides that " Woodstock needs additional affordable housing units for its current residents and employees in order to maintain a broad social-economic base." Woodstock, Vt., Town Plan 59 (2007). That the plan does not attempt to resolve a conflict in objectives, when it occurs, is evidence that it does not set a " clear" community standard.

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917 A.2d 437 (Vt. 2006)
2006 VT 113
In re Appeal of ARMITAGE et al.
No. 04-454.
Supreme Court of Vermont
November 9, 2006

Motion for Reargument and Motion for Clarification Denied Jan. 4, 2007.

On Appeal from Environmental Court, Merideth Wright, J.

Stephanie J. Kaplan, East Calais, for Appellants.

Vincent A. Paradis and Daniel P. O'Rourke of Bergeron, Paradis & Fitzpatrick, LLP, Essex Junction, for Appellees.

Present: REIBER, C.J., DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ.

¶ 1. BURGESS, J.

Interested neighbors ("neighbors") appeal an Environmental Court order granting Pittsford Enterprises, LLP and Joan S. Kelly ("applicants") a conditional use permit and site plan approval to construct a new post office in the Town of Pittsford. The proposed site is located at the intersection of Route 7 and Plains Road. In 2002, neighbors appealed the zoning board of adjustment's (ZBA) grant of a conditional use permit to the Environmental Court. The court reversed the ZBA and denied the application, without prejudice, because of erosion, traffic volume and traffic safety problems. Neither side appealed. In January 2003, applicants submitted a revised application which the ZBA approved. Again, neighbors appealed to the Environmental Court. After trial on the merits, the Environmental Court approved applicants' proposal, finding that the erosion and traffic issues were resolved by the new application and new evidence. The court's approval was given on condition that applicants take additional specific steps to provide for traffic safety. This appeal followed. Neighbors argue that: (1) relitigation of traffic volume and safety issues at the intersection of Route 7 and Plains Road should have been barred by collateral estoppel; (2) the Environmental Court's findings of fact were not supported by the evidence, nor were the conclusions of law supported by the findings; and (3) the conditions imposed by the court were invalid. We reverse.

¶ 2. In neighbors' first appeal to the Environmental Court, the court denied applicants' post office proposal "without prejudice," finding that the application did not meet the requirements of § 2.12.1(b) and (e) of the town's zoning bylaws governing

approval of conditional use permits. The court stated that applicants' proposal did not comply with subsection (b) because it did not adequately address potential erosion problems at the site, and did not comply with subsection (e) because it presented three potentially adverse effects to area traffic: vehicles exiting the project driveway could not safely make a left turn onto Plains Road; the additional traffic brought by the project turning left from Plains Road onto Route 7 during peak

conditions would deteriorate traffic movement to an unacceptable level; and the absence of vegetation or signs to screen the proposed emergency access gate to the property from Route 7 posed a traffic hazard. Neighbors argue that some of the problems with the Route 7 intersection identified in the 2002 decision were not addressed in applicants' subsequent application and that relitigation of the same problems should have been barred by collateral estoppel. Applicants reply that collateral estoppel does not apply for several reasons, including that the Environmental Court's 2002 decision was not a final order because it was made "without prejudice" to their right to resubmit their application. We agree with neighbors. The revised application should not have been considered absent substantial modifications to the plans to address or alleviate the traffic-flow problems identified in the Environmental Court's earlier order.

¶ 3. We review the Environmental Court's interpretation of zoning ordinances and findings of fact for clear error. *In re Gaboriault*, 167 Vt. 583, 585, 704 A.2d 1163, 1166 (1997) (mem.). Conclusions of law are reviewed de novo. *In re Beckstrom*, 2004 VT 32, ¶ 9, 176 Vt. 622, 852 A.2d 561 (mem.).

¶ 4. Collateral estoppel, or issue preclusion, "[does] not purport to prohibit litigation of matters that never have been argued or decided." 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4416, at 386 (2002). Rather, issue preclusion generally bars relitigation of an issue that was already litigated and decided. *Trickett v. Ochs*, 2003 VT 91, ¶ 10, 176 Vt. 89, 838 A.2d 66. Issue preclusion applies when: (1) it is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits in the prior action; (4) there was a full and fair opportunity to litigate the issue; and (5) its application is fair. *Id.* The doctrine generally applies to zoning so that "a zoning board or planning commission may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions ha[s] occured." *In re Carrier*, 155 Vt. 152, 158, 582 A.2d 110, 113 (1990) (quotations omitted). Applicants bear the burden of showing changed circumstances. *Id.* at 158, 582 A.2d at 114. The changed-circumstances requirement is satisfied when a revised proposal addresses all concerns that prevented approval of the prior application. *Id.* at 159, 582 A.2d at 114. Despite the general rule limiting successive applications, applicants contend that the successive-application doctrine [1] does not preclude consideration of their second application because the Environmental Court's decision was not a final judgment, the issues were not the same, applying collateral estoppel would be unfair, and there were substantial changes in the second application.

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¶ 5. As a preliminary matter, we address applicants' argument that neighbors are barred from asserting preclusion because neighbors' statement of questions on appeal to the Environmental Court "raised the very issues they seek to have barred by collateral estoppel." This argument misconstrues the question neighbors presented to the court: "Whether the applicant has made changes 'to the Plains Road/Route7 intersection (and the screening of the emergency access gate) sufficient to address the problems discussed [in the 2002 decision].' " The question goes on to list specific problems identified in the 2002 decision. Applicants maintain that the

problems raised by neighbors in this question gave applicants the right and obligation to respond by presenting evidence on those problems. We conclude, to the contrary, that neighbors' question did not waive preclusion but rather asserted it by asking whether the successive application was substantially changed to address the previously identified problems. As discussed below, the permissible response was for applicants to show that the renewed application did address all of the problems. Applicants were not entitled by this question to relitigate whether the problems, already decided, were present in the first place.

¶ 6. We next address applicants' argument that the successive-application doctrine does not apply because the Environmental Court's 2002 decision was not a final judgment. In support of this argument, applicants point to the court's denial of the conditional use permit "without prejudice to the Applicant's submittal to the ZBA of the same or a revised building design" with changes to address the court's stated concerns. The test for final judgment is whether the judgment "makes a final disposition of the subject matter before the Court." *State v. CNA Ins. Cos.*, 172 Vt. 318, 322, 779 A.2d 662, 666 (2001) (internal quotations omitted). The court's denial "without prejudice" is merely a recitation of the successive application doctrine articulated in *Carrier*-that applicants could reapply with a substantially altered application that addressed the reasons for the previous application's denial. Consideration of the substantially altered successive application presents a new subject matter to the ZBA, and to the Environmental Court on appeal. Thus, the court's denial of an application is a final disposition of that particular application's compliance with applicable laws and regulations. [2]

¶ 7. Put another way, the 2002 decision was a final judgment because it was conclusive, not merely tentative, and was procedurally definite. *Scott v. City of Newport*, 2004 VT 64, ¶ 12, 177 Vt. 491, 857 A.2d 317 (mem.) (citing Restatement (Second) of Judgments § 13, cmt. g (1982)). The decision was conclusive and definite despite the possibility of future applications for the same project. See *id.* (finding grant of a site-plan permit to be a final judgment for purposes of issue preclusion, though permit was never used and eventually expired). The parties were given a full opportunity to litigate the issues, and all matters that "should or could properly

[have been] settled at the time and in the proceeding then before the court" were so settled. *CNA Ins.*, 172 Vt. at 322, 779 A.2d at 666. Consequently, the Environmental Court's "denial without prejudice" was a final judgment of that application for preclusion purposes and conferred no greater right to reapplication than is allowed by our successive-application doctrine.

¶ 8. Applicants argue that barring review of their second application would be unfair because a second application receives de novo review-and thus should not be viewed as relitigation of the same application. As Carrier explains, however, a revised application for the same development is not a per se new issue for purposes of applying the successive application doctrine. Rather, the applicant must show that there has been a substantial change in the application or the circumstances. 155 Vt. at 158-59, 582 A.2d at 113. Nor does this amount to unfair surprise to applicants; *Carrier* has been settled law for fifteen years. The Environmental Court's denial of the first application "without prejudice" to applicants' ability to resubmit their application with revisions that address all identified concerns could not reasonably be interpreted as conveying greater

rights than permitted by our established successive-application doctrine.

¶ 9. Finally, we consider whether modifications made to applicants' proposal were sufficient to overcome the successive-application doctrine and allow the court to rehear the case. We encourage, but do not require, the trial court to make an explicit finding of changed circumstances before considering a second application, so long as the court's findings implicitly indicate that the revised proposal is sufficiently changed to meet all concerns that prevented prior approval. *Id*. at 158-59, 582 A.2d at 113. The court's 2002 decision identified potential erosion problems at the site and three traffic concerns as bases for denying the application. According to the court's 2004 decision, the revised proposal sufficiently addressed the potential erosion problems and two of the three traffic concerns-the addition of a vegetation screen across the Route 7 emergency access and a redesign of the entrance and exit drives to locate the project's exit onto Plains Road farther from the Route 7 intersection to eliminate a potentially dangerous left turn onto Plains Road.

¶ 10. The revised proposal did not, however, make any modifications to address the court's expressed concern that increased traffic from Plains Road turning left onto Route 7 would adversely affect traffic flow on Route 7. The court's 2002 decision stated:

Without some redesign [of the intersection] to accommodate an increase in the volume of traffic turning left . . . during peak conditions, that turning movement in the intersection will deteriorate to an unacceptable level.... [T]herefore, the proposal can be expected to adversely affect the traffic on roads and highways in the vicinity.

The revised application did not include any changes to the proposal to address this concern. Rather, applicants brought forth additional evidence in the form of testimony from Agency of Transportation officials to demonstrate that traffic flow at the intersection would not be adversely affected. Nothing in the record suggests that the same testimony was not available or the same evidence could not have been known to applicants when the traffic-volume issue was raised at the first hearing. This relitigation of an issue with additional evidence that was previously available is precisely what issue preclusion is intended

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to prevent. See *Berlin Convalescent Ctr. v. Stoneman*, 159 Vt. 53, 60, 615 A.2d 141, 145-46 (1992) (describing issue preclusion as a balance between giving a litigant an adequate day in court and preventing repetitious litigation of what is essentially the same dispute). We do not find any implicit indication in the Environmental Court's decision that the revised proposal met the concern expressed in 2002 regarding increased traffic volume. In the absence of such indication, consideration of the revised application is foreclosed by the successive application doctrine. In reaching this conclusion we do not needlessly place procedure over substance, but rather seek to uphold the important policy of encouraging applicants to be thorough in their initial applications in the interest of finality and judicial economy.

¶ 11. Having concluded that the revised application should not have been considered absent changes that addressed all areas in which the previously denied application did not comply with regulations, as opposed to merely offering different evidence on a matter settled by the earlier decision, we do not review neighbors' challenges to specific findings of fact and conclusions of law. Nor do we take up the matter of the court's imposition of future obligations upon applicants as

a condition of approval.

Reversed.

Notes:

[1] Neighbors assert "issue preclusion" as the basis for denying the application. We use the term "successive-application doctrine" henceforth because of the specific issue-preclusion rules developed for zoning applications.

[2] Applicants' citation of *Zingher v. Department of Aging & Disabilities*, 163 Vt. 566, 664 A.2d 256 (1995), as an example of a similar situation in which a board's decision was not final, and issue preclusion was therefore inapplicable, is unpersuasive. There, an administrative board denied an individual's request for certain equipment and training as part of a rehabilitation plan "at the present time" until the individual could show the necessity of the particular assistance required. *Id.* at 571, 664 A.2d at 258. The continued review of a disabled individual's evolving needs is distinct from a zoning application for a design or use that either does or does not meet established standards.

Fortin Residence

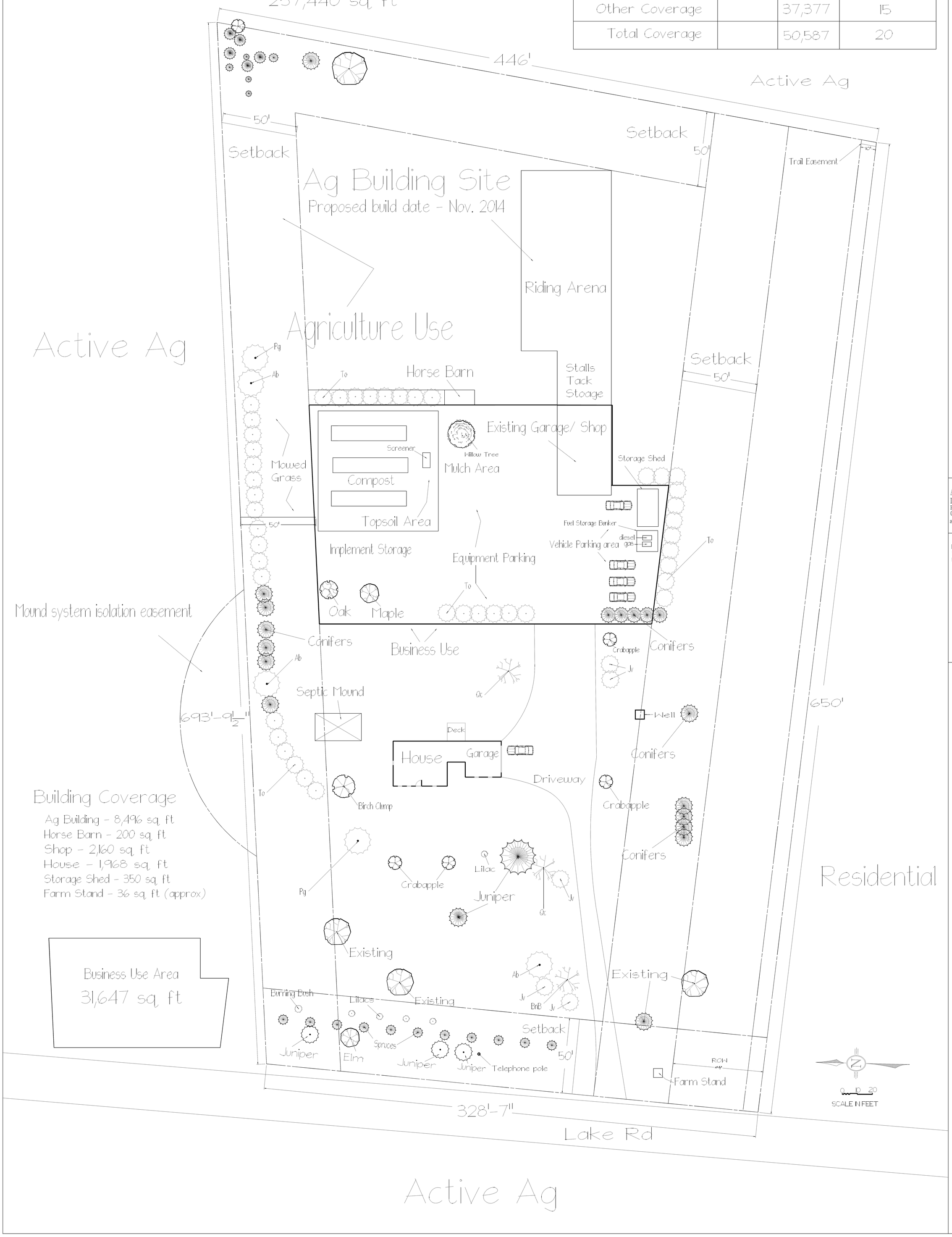
Landscape Plan View

Site Plan

Lot Area = 5.91 Acres

257,440 sq ft

	Acres	Sq Ft	Percentage Total
Lot Area	5.91	257,440	100
Commercial Bldgs		2,546	1
Other Bldgs		10,664	4
Total Bldg Coverage		13,210	5
Other Coverage		37,377	15
Total Coverage		50,587	20



Ashley Robinson
Landcape Designer
PO Box 28
Charlotte, VT 05445
arobinsonlandscapes.com

Notes:
Base Site Plan - 9/12/14
Revised - 9/28/14
Revised - 11/4/14

Fortin Residence
2737 Lake Rd
Charlotte, VT 05445

Scale 1"=20'
Date 9/12/14

CHARLOTTE ZONING BOARD OF ADJUSTMENT

APPLICATION FOR CONTRACTOR'S YARD AS A HOME OCCUPATION III

CHRISTOPHER AND REBECCA FORTIN

2737 LAKE ROAD

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPLICATION

Background

In the hearing on December 16, 2014, the ZBA received advice from an adjoining landowner regarding the doctrine of Successive Application. Although that argument is not documented, that landowner argued orally that the present application should not be considered by the ZBA based on this doctrine. The Applicants responded to that argument after the hearing by providing the ZBA with a recent Vermont Supreme Court case that makes clear that the doctrine of Successive Application does not bar this application. In particular, that case states that:

> The successive-application doctrine reflects the necessarily iterative zoning and planning process in that it enforces a more relaxed standard of issue preclusion than is applicable in other contexts. *In re Woodstock Community Trust and Housing Vermont PRD*, 60 A.3d 686 at 692 (Vt. 2012).

That is, merely because the ZBA deliberated on and denied a previous application from the same applicants for the same approval does not bar a subsequent application, as might be the case in a civil court in which the broader principle of issue preclusion was applied. Clearly the Town of Charlotte recognizes this doctrine, since it encouraged the Applicants to re-apply as the best means to both come into compliance the Land Use Regulations and continue to operate their business in town.

Based on prior precedent, the Court in *In re Woodstock Community Trust and Housing Vermont* recited that:

> [A] second application can be granted "when the application has been substantially changed so as to respond to objections raised in the original application or when the applicant is willing to comply with conditions the commission or court is empowered to impose." *Id.* at 692

The Applicants have substantially changed their application to respond to objections raised in the ZBA's previous decision and is willing to comply with reasonable imposed by the ZBA in a possible future approval.

Furthermore, the Court proceeded to point out that not only changed circumstances, but also the introduction of new evidence not available in the first proceeding could be the basis for an allowable successive application, even in support of a similar or perhaps even identical application:

> The point of these decisions is *not* that the second application can be denied where there is a substantial change in the project to meet the first decision any time that the change could have been made before the first decision. Instead, these decisions suggest that even without substantial change in the project there could be a successive application if it is based on new evidence unavailable at the time of the first application. *Id.* at 692. (Emphasis in the original)

The Applicants contend that there is a substantial change in the project as well as new evidence that was unavailable to the ZBA in the first application proceeding, that the present application can be considered by the ZBA, and that the application should be approved.

General basis for denial of ZBA-13-10

The basis for the ZBA's denial of Application ZBA-13-10 was stated as follows:

> Given the size and layout of the lot, its location in the Rural District in combination with the scale and nature of the business activity in question, the Board finds this business activity is entirely unsuitable for its location.

The Applicants' new application addresses the basis for this denial by:

1. Significantly reducing the scale of the business activity;
2. Clarifying the nature of the proposed business activity; and
3. Following precisely the requirements contained in the Land Use Regulations that they must meet in order to minimize the impact of the business activity on adjoining landowners and the general public.

Specific findings from denial of ZBA-13-10

The new proposal addresses each of the findings made by the ZBA in support of its decision.

ZBA Finding 1:

> "Under 4.11(C}(2}: *That the business shall he carried out primarily within the principal dwelling and/or accessory structure to the dwelling.* Even though the application is for a

Contractor's Yard, in the Rural District, Contractor's Yards must still comply with all the standards required for Home Occupation Ill."

Applicants' response:

This statement is actually a legal conclusion about the meaning of the Land Use Regulations, not a factual finding about the substance of the previous application. As an evidentiary body, the ZBA sets no legal precedent, and is not bound by any legal conclusion that it reaches in a previous matter.

ZBA Finding 2:

Under 4.11(C)(3): *That there are clearly designated storage areas for the array of gear, equipment, vehicles, materials providing an effective or acceptable screen from public rights of way or neighboring properties.* Approximately 30 percent of this nearly 6 acre lot is designated for the business operation. The proposed bulldozed, 6-foot high,100+ feet long earthen berm with trees on top is itself an uncharacteristic feature, nor would it ensure adequate visual (or noise) screening. The proposed use of saplings on their own as a screen on the other three sides of the operation would not be capable of providing significant screening until the saplings matured many years later.

Applicants' response:

The present application proposes 12.3% (31,647 / 257,440) lot coverage for Applicants' business use, a reduction of 59% from the previous application. This is a significant difference from the previous application, and one that reflects the Applicants' willingness to modify their proposal in order to address the concerns expressed in the ZBA's previous decision.

The role of the proposed earthen berm in visually screening the Business Use Area and absorbing sound is replaced with a non-regulated agricultural structure that meets all town and state requirements. This agricultural structure is characteristic of the Rural Residential District in general and other properties within the immediate vicinity on Lake Road. Based on the observations made at the site visit conducted on December 13, 2014, the Applicants' contend that the existing structures may provide adequate sound screening. The Applicants further contend that the additional screening provided by the new agricultural structure will be more than adequate to satisfy the requirements of the Land Use Regulations.

The new proposal calls for planting larger conifers that the Applicants contend will provide adequate screening at the time of planting. In addition, based on input from the neighbors, the Applicants are proposing to relocate an existing accessory structure to provide immediate screening of the property most directly affected by the business operation.

This aspect of the current application represents a significant change from the application previously submitted by the Applicants and denied by the ZBA.

ZBA Finding 3:

> Under 4.11(C)(4):*That the size and scale of the bulk fuel tank use is characteristic of residential uses.* Although such bulk fuel tanks may be typically used for agriculture, industrial, or even other sizable Contractor Yard operations, the standard the Land Use Regulations requires us to consider in the Rural District for Home Occupation Ill is that which is "characteristic of residential uses (in terms of type and quantity)".

Applicants' response:

As noted above, the ZBA's reliance on Section 2.5 (F)(4) in applying the more restrictive provisions of the Home Occupation III standards on a Contractor's Yard is inconsistent with the intent of the Land Use Regulations, but even if the ZBA determines to apply this more restrictive standard, based on the plain language of the Land Use Regulations, the fuel storage as proposed by the Applicants should be approved. Moreover, the Applicants are proposing new health and safety measures constituting a significant change from those in their previous application.

Fuel Storage

Section 4.6 Contractor's Yard, paragraph (4) provides:

> "There shall be no on-site storage of hazardous waste or materials. Fuel storage shall be limited to that needed for space heating and the operation of equipment and vehicles associated with the business, and meet the requirements of Section 3.10."

This paragraph begins by expressly prohibiting hazardous materials and goes on to specify that fuel storage is allowable. If it was one sentence connected with "except" or two sentences that make clear that hazardous materials include fuel, the Land Use Regulations might be read differently. But as written, vehicular fuel cannot be a "hazardous material" in the context of the Land Use Regulations. Regardless of whether in statutory definition, common usage or technical language liquid petroleum fuels are considered hazardous materials, for the purposes of applying the Land Use Regulations, they cannot be.[1]

This is important because the Home Occupation II & III standards also expressly prohibit the storage of hazardous materials. Section 4.11 Home Occupation, paragraph (B) (3) provides:

> "The storage of hazardous materials anywhere on the premises is prohibited, with the exception of materials customary and characteristic of residential uses (e.g., heating oil)."

[1] *Id*., citing In re Korbet, 2005 VT 7, ¶11, 178 Vt. 459.

Section 4.11 Home Occupation, paragraph (C) (4) provides:

> "The storage of hazardous materials anywhere on the premises is prohibited, with the exception of materials customary and characteristic of residential uses (in terms of type and quantity)."

Both paragraphs create exceptions from what constitutes hazardous materials. In neither case is vehicular fuel identified as an exception, but neither is vehicular fuel expressly identified as a hazardous material. The only specific reference to vehicular fuel – Section 4.6 Contractor's Yard, paragraph (4) - makes it clear that it is <u>not</u> a hazardous material.

Given these provisions, one cannot say with certainty that vehicular fuel is or is not prohibited in a Home Occupation, or if limited, in what way. If the drafters of the Land Use Regulations intended to limit vehicular fuel storage in the context of a Home Occupation, they could have done so. Clearly they had an intention to prohibit the storage of hazardous materials, but it is not clear whether or not vehicular fuel is included in that prohibition. In the face of such an ambiguity, Vermont law is quite clear what the ZBA must do:

> "We are mindful, however, that zoning ordinances are in derogation of common law property rights and that 'in construing land use regulations any uncertainty must be decided in favor of the property owner.'" In re Weeks, 167 Vt. 551, at 555 (1998).

In weighing these conflicting provisions, the ZBA must conclude in favor of the landowner that vehicular fuel is not a hazardous material in this context.

Under the Home Occupation III standards, since it cannot be hazardous material, vehicular fuel must constitute "materials … associated with the home business" that should be allowed provided it is stored in areas that are "clearly designated and located or adequately screened so that they are not visible from public rights-of-way or neighboring properties."

The Applicants propose to make the storage of vehicular fuel on-site non-hazardous, proposing to install a covered concrete bunker that both protects the fuel tanks from damage by vehicles and equipment and provides spill protection.

This aspect of the current application represents a significant change from the application previously submitted by the Applicants and denied by the ZBA.

ZBA Finding 4:

> Under 4.11(C)(5): *That the traffic generated by this business is characteristic of volumes characteristic for the district.* With the exception of some larger agricultural operations (which are exempt from these regulations), the daily volume of trucks and trailered

equipment, employee vehicles, and delivery traffic during busy seasons clearly exceeds typical traffic in this district.

Applicants' response:

The ZBA must consider all sources of traffic volume when determining whether the traffic generated by the business is characteristic of the area. Many of the vehicles burdening Charlotte roads are operated by entities that are beyond the use regulation by ZBA through the Land Use Regulations including:

- Private commercial vehicles delivering fuel and packages to and removing solid waste from the residences and businesses located in the district;
- Municipal and governmental vehicles such as school buses; and
- Agricultural vehicles and equipment.

To ignore the effect of these considerable impacts on traffic volumes in the vicinity of the proposed use would be inconsistent with the practice and methods of scientific traffic studies and would create an artificial state of affairs against which to judge an actual proposal. All of the traffic described above is generated by services that make possible the rural lifestyle and viable agriculture that are among the express purposes of the district, and are thus by definition part of the character of the district.[2]

ZBA Finding 5:

Under 4.11(C)(6): *That the number of commercial vehicles parked on-site is acceptable.* The regulations permit the Board to limit the number of commercial vehicles that may be parked on-site. The Board feels that the number of commercial vehicles parked on this site is well in excess of what is appropriate for this residential location.

Applicants' response:

The impact of commercial vehicles on site is almost entirely visual; a commercial vehicle parked in a properly screened parking area has no impact on adjoining properties or the general public, just like equipment stored inside an accessory structure. The language of the finding contains no rational basis for this limitation, and is based on no competent evidence or testimony. The provision in the Land Use Regulations itself may run afoul of the "void for vagueness" ruling of *In re Appeal of JAM Golf, LLC*, 2008 VT 110, as it is not clear what important value is protected by granting the ZBA discretion to impose a condition based on how it feels.

[2] See Section 5.4 (C) (2).

This finding is based on the previous application which may not have contained a precise enough depiction of the proposed screening in order for the ZBA to form a properly considered opinion. The Applicants contend that the present application does provide a sufficient depiction on which the ZBA may judge the effectiveness of the proposed screening, and that the ZBA ought to find the proposed screening adequate. In the alternative, the ZBA could condition an approval on modified or enhanced screening.

This aspect of the current application represents a significant change from the application previously submitted by the Applicants and denied by the ZBA.

ZBA Finding 6:

> Under 4.1l(C)(7) & 5.4(C)(2): *That this business shall not change the character of the neighborhood/area.* The level of activity, visual impact, and noise generated by this business is on a scale that significantly changes and negatively affects the character of the neighborhood, unavoidably creating quality of life challenges for neighboring properties and is not consistent with the Rural District purposes.

Applicants' response:

Viewed in the context of other activity in the neighborhood, including industrial scale agriculture, smaller scale agriculture, and private commercial and municipal services delivered to the residents of the neighborhood, the activity generated by the Applicants' business use does not change the character of the neighborhood. In lieu of an expensive traffic study, the Applicants ask the ZBA to take notice that:

- Town residents working and procuring goods in other towns and cities each generate multiple trip ends each day, seven days a week;
- During the warmer months, Town residents and others seeking to enjoy the lakefront recreational activities travel through town and especially roads near the lake such as Lake Road generate in the aggregate multiple trip ends each day;
- During planting and harvest seasons, the neighborhood is subjected to industrial scale agricultural equipment operating at all hours of the day including tillage, planting and harvesting heavy equipment operating in the fields, feed trucks carrying harvested crops and manure tankers traveling through the fields, private drives and public roads;
- Every weekday the neighborhood receives at least one trip each by the USPS letter carrier, the Fedex delivery truck, and the UPS delivery truck;
- Every weekday during the school year, two school buses travel through the neighborhood twice a day;

- Periodically and with frequency dependent on the weather, landscape contractors and lawn care companies use the public road to reach private homes to maintain lawns and gardens; and
- During snow and ice storms, plow trucks contracted to the town plow snow and sand the public roads and private plowing companies keep driveways and private roads clear, all without regard to hours of operation.

The Applicants contend that the projected trip ends described in the application do not change the character of the neighborhood, but are in keeping with the level and type of traffic impacts that exist in the neighborhood.

The Applicants propose measures to address the visual impact and noise potentially generated by their business use. As proposed, the Applicants' Business Use Area will be fully screened from adjoining properties and the public right of way and have specific areas designated for outdoor storage of equipment and materials. Substantial screening will be provided incidentally by the Applicants' agricultural building that will be affixed to the existing garage and shop building, as well as the relocation of an existing storage shed as requested by the adjoining landowner to the south. The combination of these structures will provide complete visual screening and a substantial sound barrier for the benefit of the property immediately to the south, which is most impacted by the proposal.

As a whole, and as viewed from Lake Road, the proposed vegetative screening will complement and blend in with the property immediately to the south, which is ringed by conifers of the same or similar species as are proposed by the Applicants. Specific elements of this vegetative screening, as requested by an adjoining landowner to the north and a neighbor on the west side of Lake Road, will be placed to provide effective screening of the outdoor equipment and material storage areas from the properties to the south, west, north and east.

This aspect of the current application represents a significant change from the application previously submitted by the Applicants and denied by the ZBA.

ZBA Finding 7:

> Under 5.4(D)(3) and by direct reference in that section,3.12(A)(6): *That "glare, lumen, light or reflection" associated with this use/proposed use does not "constitute a nuisance to other property owners."*

Applicants' response:

The ZBA provides no factual basis for the finding that the previous proposal would create a nuisance based under this performance standard. The Applicants have provided required specifications on the existing outdoor lighting fixtures associated with the business use. The

proposed screening will prevent any light associated with vehicles and equipment from impacting adjoining landowners and the general public. If necessary, the ZBA could condition an approval on a modification of the existing lighting if evidence is presented that this performance standard is not being met, but to date the Applicants are aware of no such evidence having been presented.

ZBA Finding 8:

> Under 5.4(0)(3) and by direct reference in that section,3.12(A)(1): *That this activity does not generate "a significant increase in noise levels in the vicinity of the use so as to be incompatible with the surrounding area".* While Rural District residential areas have their share of lawn care noises, the regularity, range, and hours of equipment noise represents a significant increase from what there would be if this business were not located in this neighborhood.

Applicants' response:

As discussed above, the Applicants contend that the ZBA has observed the effectiveness of existing screening to absorb and reflect sound away from nearby residences and contend further that the agricultural structure being constructed on the property will enhance that screening to a point well within the limits imposed by this performance standard. As further discussed above, the noise levels in the vicinity of the use must take into account all activities that generate noise, including activities accessory to residential uses such as lawn care, exempt or non-regulated activities such as agricultural uses, and private commercial uses that involve delivery vehicles. The Applicants have proposed hours of operation limiting when possible noise generated by their business use could occur.

This aspect of the current application represents a significant change from the application previously submitted by the Applicants and denied by the ZBA.

GASOLINE

GASOLINE