

CHARLOTTE TOWN CLERK'S OFFICE

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Attest *Cheryl A. [Signature]* Town Clerk

CHARLOTTE PLANNING COMMISSION
SUBDIVISION REVIEW
FINDINGS OF FACT AND DECISION

Andrew Zins and Cydney Spohn
Application for a Minor Subdivision Amendment for 1654 Prindle Road
Application # PC-19-57-SA

Introduction and Procedural History

This proceeding involves the review for a Minor Subdivision Amendment submitted by Andrew Zins for approval under the Town of Charlotte Land Use Regulations (hereafter referred to as "the 2016 Regulations"). The application was received by the Charlotte Planning & Zoning Office on April 17, 2019. A notice of public hearing was published in "The Citizen" newspaper on April 25, 2019. A hardcopy of the notice was mailed to all adjoining landowners on April 30, 2019 and was posted at the following three locations: the Town Office Building, the Old Brick Store (in the West Charlotte Village), and Spear's Corner Store (in the East Charlotte Village) on April 17, 2019. An electronic notice of the hearing was also posted on the Town website meeting calendar.

The application is a request for the Planning Commission to rescind Condition #3 of the Planning Commission decision **PC-00-06**, which required a 50% open space designation for the property that was deferred to any future subdivision of the property. A Sketch Plan Review letter (**PC-18-211-SK**) that addressed this question was issued from the Planning Commission on April 4, 2019 after one public hearing, which took place on February 7, 2019. The original question on the validity of the open space deferral condition was initially prompted during a previous Sketch Plan Review (**PC-18-136-SK**) that proposed a 2-Lot Minor Subdivision. The proceeding took place on September 6 and October 4, 2018; during which the Planning Commission agreed to obtain a legal opinion when the applicant had contested the open space deferral. The Sketch Plan Review letter was issued from the Planning Commission along with the legal opinion rendered by the Town Attorney on November 15, 2018.

The site visit with the Planning Commission took place at the 1654 Prindle Road property on Thursday September 6, 2017 at 6:30 PM as part of the Sketch Plan Review proceeding **PC-18-136-SK**. Commissioners in attendance at the site visit included: Peter Joslin (Chair), Gerald Bouchard, and Dick Eastman. The property owner Andrew Zins was also present during the visit.

The current Minor Subdivision Amendment application (**PC-19-57-SA**) was considered by the Planning Commission at a public hearing held on May 16, 2019 at approximately 7:55 PM. In attendance were the following members of the Planning Commission: Peter Joslin (Chair), Charlie Pughe (Vice Chair), Gerald Bouchard, and Shawn Coyle. Additional participants and attendees included: the Town Planner, the applicants' representative Cydney Spohn, and others.

Exhibits

The following exhibits were submitted for the application:

1. Completed application form signed by Andrew Zins received on April 17, 2019;

2. Letter of authorization for Cydney Spohn to represent landowner Andrew Zins (post-hearing dated May 20, 2019).
3. Sketch Plan Review; Planning Commission Letter (**PC-18-211-SK** Zins), dated April 4, 2019;
4. Sketch Plan Review; Planning Commission Letter (**PC-18-136-SK** Zins), dated November 15, 2018 and proposed subdivision map delineating Lot #2 and Lot #2A;
5. Legal Opinion from Town Attorney, David W. Rugh: "RE: Application of decision conditions v.s. versions of subdivision regs" (received on September 25, 2018). See **Finding 4** below;
6. Planning Commission Decision (**PC-00-06** Cohen-Majors); "Findings of Fact and Decision In Re Application of Marjorie Majors, Landowner; Geraldine Cohen, Applicant; Final Plat Hearing for a 2-Lot Subdivision", approved on April 6, 2000;
7. Map Slide 194, Page 1; Survey - "Andrew David Zins – 1654 Prindle Road, Charlotte, VT" (dated 10 March 22, 2017 / Revised June 21, 2017) by G. E. Bedard, No. 211, Hinesburg, VT;
8. Map Slide 120, Clip 4, Page 23; Survey for "Subdivision of Marjorie M. Major Property – South Farm" (dated December 21, 1999 / Revised 2-28-00, 4-10-00, and 4-22-00) by G.E. Bedard, Inc., Hinesburg, VT.
9. Charlotte Land Records – Volume 222, Pages 470-473 (February 29, 2016); Volume 221, Pages 100-103 (November 18, 2015); Volume 204, Pages 493-495 (December 21, 2012) Warranty deed: Conveyance and covenants from Cohen to Residents Trust; and Volume 111, Pages 7-9 (May 22, 2000) Trustee deed: Conveyance and covenants from Major to Cohen;
10. Charlotte Zoning Bylaws (Approved March 7, 1995 / Amended March 4, 1997);
11. Planning Commission Minutes from meeting held on *May 16, 2019, February 7, 2019, October 4, 2018, and September 6, 2018*; and *April 6, 2000*;

Regulations in Effect

Charlotte Town Plan, 2018

Charlotte Land Use Regulations, 2016

Recommended Standards for Developments and Homes, 1997

Findings

Background

1. Andrew Zins owns a 96.45 acre lot located at 1654 Prindle Road within the Rural (RUR) zoning district.
2. The property is subject to a deferred open space requirement. According to the April 6, 2000 Planning Commission minutes and the resulting decision **PC-00-06** (see **Exhibit 6**), a minimum fifty-percent open space designation (an estimated 48.225 acres) would be required for the proposed subdivision. This is due to the 2000 subdivision being evaluated as a Planned Residential Development (PRD) involving a 177-acre parent parcel (according to *Section 5.15* of the *1997 Regulations* [see **Exhibit 10**], which recommended 50+% open space for subdivided parcels over 100 acres in size).

3. According to the September 6, 2018 Planning Commission minutes (for the **PC-18-136-SK** proceedings [see **Exhibit 4**]), the applicant Zins had argued that the proposed subdivision would not be subject to the 2000 deferred open space requirement because it was codified under the 1997 regulations. Resultantly, the Planning Commission agreed to seek a legal opinion to ascertain the status of the deferment.
4. On September 25, 2018, a legal opinion was obtained from the Town Attorney (see **Exhibit 5**), forwarded to the Planning Commission, and distributed to the applicant Zins at the October 4, 2018 public meeting. The import of the opinion was that the 2000 decision conditions remain in effect:

*"The earlier condition of subdivision approval requiring the designation of open space and review under the Planned Residential Development provisions of the Land Use Regulations is binding and enforceable since it was an explicit condition of the 2000 subdivision approval and is explicitly denoted on the subdivision plat. See, e.g., **In re Hinesburg Hannaford, 2017 VT 106, 17-22** (citations omitted) (recorded plats necessarily become subdivision permit conditions and explicit, specific restrictions on the plat are enforceable).*

Notwithstanding the foregoing, nothing prevents the applicant from seeking to amend the earlier condition of subdivision approval pursuant to the so-called "Stowe Club Highlands" or "Hildebrand" tests. This test may be summarized as follows.

*Although an applicant may file an application seeking to amend a condition of approval in a prior Planning Commission decision, unappealed Planning Commission decisions containing permit conditions are considered final and cannot be challenged, directly or indirectly, in subsequent proceedings pursuant to **24 V.S.A. § 4472(d)**. The rule of finality of unappealed Planning Commission decisions is tempered by flexibility built into the system because unappealed permit conditions may be amended in appropriate circumstances. If a permit condition was not critical to the original approval, the Planning Commission may consider the application to amend the condition on its merits. If, however, the Planning Commission conducts an examination of the Findings of Fact or Conclusions of Law of the original decision and determines that it imposed the condition to mitigate the impact of the development or address various concerns regarding the original proposal, such as the requirement of that open space be designated as part of a subsequent subdivision approval to mitigate potential environmental and viewshed impacts, then a different standard applies.*

In those instances, the Vermont Supreme Court has developed a three-part test, known as the "Stowe Club Highlands" or "Hildebrand" test, to guide the Planning Commission in determining whether circumstances warrant amending an important condition of approval. Prior to considering the merits of a request to amend a permit condition, an applicant seeking to amend a permit condition is required to demonstrate that there have been either: (a) changes in factual or regulatory circumstances beyond the control of the applicant; (b) changes in the construction or operation of the project, not reasonably foreseeable at the time the original permit was

issued; or (c) changes in technology. See ***In re Hildebrand, 2007 VT 5, 7, 181 Vt. 568, 917 A.2d 478*** (citations omitted).

Even if such changes in circumstances are present, it may not be appropriate to amend the permit condition if the change was reasonably foreseeable at the time of the original permit application. *Id.* In ***In re Stowe Club Highlands***, the Vermont Supreme Court included a discussion of "foreseeability" to assist the Planning Commission in determining whether a change in circumstance was foreseeable at the time of the original application for a project:

[F]oreseeability is related to the degree of change; while small or moderate changes are expected and even common, extreme changes will likely come as a surprise to all involved. Permit applicants should consider foreseeable changes in the project during the permitting process, and not suggest conditions that they would consider unacceptable should the project change slightly.

In re Stowe Club Highlands, 166 Vt. 33, 39, 687 A.2d 102, 106 (1996).

*Here, the Planning Commission should first look to the original decision to determine whether the condition of approval was imposed to mitigate the impact of the development or address various concerns regarding the original proposal, which is likely. If so, it should then apply the Stowe Club Highlands test to determine whether there has been a change in circumstances since the time of the original application. Here, it's clear that there has been a change in circumstances since the applicable regulations have changed to exempt large subdivisions from mandatory PRD review. Nonetheless, even though a change in circumstances has occurred, if the Planning Commission finds that the change in circumstances was reasonably foreseeable at the time the original application for the subdivision, it can deny the applicant's request to amend the condition requiring the designation of open space or PRD review. See ***In re Hildebrand, 2007 VT 5, 14.****

Furthermore, while there is some concern regarding the precedential effect of allowing a modification to a subdivision permit condition that is intended to mitigate the impact of the subdivision by designating a specific area of the property as open space, if the applicant can meet the Stowe Club Highlands/Hildebrand test, then this concern is somewhat mitigated. Generally this test should be applied strictly such that it's difficult to amend critical permit conditions. Assuming the test is satisfied, then there shouldn't be too much concern about precedential effect of amending the subdivision permit condition since the test is so strict to begin with."

5. Furthermore, the Planning Commission Chair had expressed that, notwithstanding the previous deferred condition, the Planning Commission has the authority to classify the project as a PRD because of the large forest blocks and the associated *Significant Forest Habitat* (an Area of High Public Value), in accordance with **Section 8.2(B)(3)** and **Section 8.4(C)(1)** of the 2016 Regulations (see **Finding 7.2(5)** below).

6. The applicant Zins submitted subsequently a Sketch Plan Review application (**PC-18-211-SK** – see **Exhibit 3**) requesting that Condition #3 of decision **PC-00-06** be rescinded. There was no new information presented nor discussed during proceedings and the Planning Commission remained in agreement with the legal opinion provided by the Town attorney and declined to rescind the condition.

7.2 General Standards - Areas of High Public Value

The following Areas of High Public Value (AHPV) were identified on the property:

1. Land in active agricultural use: The property is enrolled in the Vermont Agency of Natural Resources (ANR), Use Value Appraisal (UVA) Program.
2. Primary Agricultural Soils (Prime and Statewide - PAS): Prime soils are located parallel along Prindle Road covering between about 230' - 430' distance from the road ROW boundary for both proposed lots (as identified in the applicant's proposed subdivision map for **PC-18-136-SK**). Statewide agricultural soils are on a majority of the remaining non-forested open area of the parcel (according to the *USDA Natural Resources Conservation Service (NRCS) GIS* database).
3. Steep slopes (>=15%): About 1 acres of 15-25% slope exists along the western portion of Lot #2A (as identified in the proposed subdivision map for **PC-18-136-SK**). Much of the southwestern portion of Lot #2 (as identified in the proposed subdivision map for **PC-18-136-SK**) comprises 15-25% slope with a minimal area greater than 25% slope.
4. Surface Waters, Wetlands, and associated buffer areas: The property is traversed by at least 2 small streams, derived from the Vermont Agency of Natural Resources, *Vermont Hydrography Dataset (VHD)*. These small streams enter to an area on the property abutting to the south that is flagged as possible wetland (according to the Vermont Department of Environmental Conservation's *Vermont Significant Wetlands Inventory (VSWI) "Wetlands Class Inventory Layer"*). A look at the aerial imagery would seem to indicate that there may be wetlands along the small streams on the Zins property (especially on Lot #2A).
5. Wildlife Habitat: Approximately 75 acres of *Significant Forest Habitat* comprises the majority of the eastern portion of the property. About 10.5 acres of *Significant Aquatic Habitat* covers surrounds the two small streams. There are about 4.5 acres of *Significant Linkage Habitat* on the southeastern corner, and about 0.4 acres on the northwestern corner of the property.
6. Scenic Views and Vistas: Prindle Road, to the east, is the nearest Town Highway and is classified as a "*Most Scenic Road*" according to the Charlotte Town Plan.
7. Conserved land on adjacent parcels: An abutting 124-acre parcel to the west is owned by the Nature Conservancy. An existing 198-acre area is in an Open Space Agreement (OSA) along the southern abutting property.

Decision

Based on the foregoing Findings of Fact and Conclusions, the Planning Commission denies the application for the Minor Subdivision Amendment.

This decision may be appealed to the Environmental Division of the Vermont Superior Court by the applicant or an interested person who participated in the proceeding. Such appeal must be taken within 30 days of the latest date of signature below, pursuant to 24 V.S.A. Section 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.

Members Present at the Public Hearing on May 16, 2019: Peter Joslin (Chair), Charlie Pughe (Vice Chair), Gerald Bouchard, and Shawn Coyle.

Vote of Members after Deliberations: The following is the vote for or against the application, with conditions as stated in this Decision:

- | | | | | |
|------------|----------------------------------|--|--------------|------------------|
| 1. Signed: | <u><i>[Signature]</i></u> | <input checked="" type="radio"/> For / <input type="radio"/> Against | Date Signed: | <u>6/20/2019</u> |
| 2. Signed: | <u><i>Gerald A. Bouchard</i></u> | <input checked="" type="radio"/> For / <input type="radio"/> Against | Date Signed: | <u>6/20/19</u> |
| 3. Signed: | <u><i>Maggie E. Doherty</i></u> | <input checked="" type="radio"/> For / <input type="radio"/> Against | Date Signed: | <u>6/20/19</u> |
| 4. Signed: | <u><i>[Signature]</i></u> | <input checked="" type="radio"/> For / <input type="radio"/> Against | Date Signed: | <u>6/20/19</u> |
| 5. Signed: | <u><i>Charlie Pughe</i></u> | <input checked="" type="radio"/> For / <input type="radio"/> Against | Date Signed: | <u>6/20/19</u> |
| 6. Signed: | _____ | For / Against | Date Signed: | _____ |
| 7. Signed: | _____ | For / Against | Date Signed: | _____ |