

**TOWN OF CHARLOTTE  
Zoning Board of Adjustment  
Appeal**

**In Re: Andras Kirschner  
4717 Spear Street**

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) **ZBA-07-06**  
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**OPINION**

**I. Introduction and Issues Presented**

This matter came before the Board of Adjustment on the appeal by Andras Kirschner of the Administrative Officer's decision to deny a permit application to build a house on the property at 4717 Spear Street.<sup>1</sup> Based on the application, exhibits and testimony at the hearings on July 16 and August 13, 2007, the Board makes the following findings and decision in this matter.

**II. Findings of Fact**

1. Andras Kirschner and Melinda Kirschner are the owners of the property located at 4717 Spear Street.
2. This parcel is located in the Rural Zoning District established by the Charlotte Land Use Regulations adopted March 7, 2006.
3. The Land Use Regulations require a minimum lot area of 5 acres and a minimum density of 5 acres/dwelling unit or use in the Rural Zoning District.
4. The parcel at 4717 Spear Street totals approximately 3 acres. The applicant is representing the parcel consists of two lots. The North Lot is approximately 1-acre and South Lot is approximately 2-acres.
5. In 1997 Andrew and Melinda Marshall acquired the North Lot<sup>2</sup> from Garrow. In 1997 they also acquired South Lot<sup>3</sup> from Stearns. At the time, both lots were developed with mobile homes.

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<sup>1</sup> **Meeting attendance.** The following participated in the hearing: Andras Kirschner, Sheila Burleigh, Karin Lime, Neal Lime, Sonja Ullrich, Bob Ullrich

<sup>2</sup> Charlotte Land Records Vol 95 p 94.

<sup>3</sup> Charlotte Land Records, Vol 94 p 323.

6. George W. Reynolds acquired one lot in September 1998<sup>4</sup> and the second lot in March 2001.<sup>5</sup> Sometime between March 2001 and December 2001, Mr. Reynolds removed all sheds and the 1959 mobile home from the South Lot. Mr. Reynolds did not replace the residence on the South Lot.
7. The December 21, 2001 Charlotte lister's card for 4717 Spear Street indicates the mobile home and sheds had all been removed from the South Lot).
8. In November 2003, Reynolds made application for a building permit for an addition to the one existing trailer; this application represented the parcel as 3.01 acres (the combined acreage for the North and South Lots). Permit #03-108-TM was issued on November 14, 2003 and not appealed.
9. Reynolds applied to the town on February 10, 2005 for a Certificate of Compliance for 4717 Spear Street Ext. On the application Reynolds identified the property as a 3.01 acre parcel (again, the combined acreage for the North and South Lots) with Span identification #138-043-11235 and parcel ID# 0002-4717. The Certificate was issued on February 14, 2005 and was not appealed.
10. Andras Kirschner acquired the parcel(s) in March 2005<sup>6</sup>. At the time Kirschner acquired the parcel, the North Lot was developed with a single family residence (mobile home) and a garage.
11. On July 14, 2005, Kirschner submitted an application to this Board requesting a front yard variance to replace the existing mobile home with a house because the lot (three acres) is small, irregular, with ledge and exceptional topography. The proposed location shown on the application is 120 ft. to the north edge (property line). A different location was later submitted on a site plan prepared by ESPC and dated 9/23/05 which requests the proposed house to be 145 ft. from the north property line and 119.5 ft. from the south property line. This location positioned the house over what was the line that originally separated the North and South Lots.
12. Kirschner indicated that it was a 3 acre parcel (the combined acreage of the North and South lots).
13. In April 2006 after the Land Use Regulations were adopted and required only a fifty foot front yard setback, Kirschner submitted an application for a replacement residence (again indicating it was on a three acre parcel) at 4717 Spear Street. Permit #06-026-TM was issued by the Zoning Administrator on April 25, 2006. This permit was not appealed. At the same time, septic permit #06010-S was

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<sup>4</sup> Charlotte Land Records, Vol 101 p 320.

<sup>5</sup> Charlotte Land Records, Vol 115 p 34.

<sup>6</sup> Charlotte Land Records, Vol 155 p 74.

issued, yet again identifying the parcel as being a three acre lot. This permit was not appealed.

14. On January 22, 2007, Kirschner applied for and was issued permit #07-003-TM to rebuild the existing garage. Again, Kirschner indicated on the application that it was a three acre lot.
15. On May 18, 2007, Kirschner submitted the permit application, which is the subject of this appeal. That application stated the intended use of the land and structures is “to build a house on lot 2 [South Lot] of our property. This building lot meets all zoning setbacks and was in separate and nonaffiliated ownership as of the date when the zoning regs went into effect.”
16. At least five times in over three years (until May 2007), while the property was under common ownership, the owners of this property have represented that this is a 3 acre parcel and in that time have never asserted a separate use for the lots.
17. On June 5, 2007 the Zoning Administrator denied Kirschner’s permit application stating that the South Lot merged with surrounding acreage.

### **III. Discussion**

**Procedural Review.** As an initial matter, the Board must first address the appeal procedure sections under Chapter IX to determine whether this appeal was filed by an appropriate person, met the requirements for a proper appeal, and whether the decision itself met the procedural requirements.

Section 9.6 (A) states in part—

Zoning Administrator Decisions. In accordance with the Act [§4465], an interested person may appeal a decision or act of the Zoning Administrator within 15 days of the date of the decision or act by filing a notice of appeal with the Secretary of the Board of Adjustment, or the Town Clerk if no Secretary has been elected, and by filing a copy of the notice with the Zoning Administrator.

An interested person is defined under 24 V.S.A. § 4465(b)(3) as —

A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person’s interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies,

purposes, or terms of the plan or bylaw of that municipality.

Andras Kirschner is an owner of the parcel of land at 4717 Spear Street and has the right to make this appeal.

Section 9.6(A) and 24 V.S.A. § 4465(a) also govern the time and process in which an appeal may be filed, stating in part that the notice of appeal must be filed within 15 days of the date of the decision or act. The appellant submitted a Zoning Permit Application on May 18, 2007, which was denied by the Zoning Administrator on June 5, 2007. Kirschner filed the appeal on June 14, 2007. Therefore, the Board finds this is a timely appeal.

Pursuant to Section 9.6 (A)(1) and 24 V.S.A. § 4466 a notice of appeal shall be in writing and include the following information:

- (a) the name and address of the appellant;
- (b) a brief description of the property;
- (c) a reference to applicable provisions of these regulations;
- (d) the relief requested by the appellant, including any request for a variance from one or more provisions of these regulations; and
- (e) the alleged grounds why such relief is believed proper under the circumstances.

Appellants' notice met these requirements. The relief requested by the appellant is for the Board to find he has two lots and for the Zoning Administrator to issue the zoning permit and septic permit for which he applied.

**Substantive Review.** Having found that the procedural requirements were met by the Appellant, the Board must determine if the two lots of this parcel merged at any point after the parcel came under common ownership. The Land Use Regulations applicable to this appeal is the first issue that needs to be resolved. Both lots were owned by Reynolds as of March 2001. In 2001 Reynolds removed the mobile home and all sheds from the South Lot. This removal is reflected in the Lister's records dated December 21, 2001. According to the regulations in effect at the time, Reynolds had a period of six months (by May 2002) to reestablish the use on the

South Lot or that right would extinguish. Charlotte Zoning Bylaws, Section 6.6 (B)(3) (March 2002). Since May 2002 is the date this right would extinguish, the Board finds that the March 2002 Charlotte Bylaws apply to the analysis into whether these lots merged and unless otherwise indicated the 2002 Bylaws are the ones cited in this opinion.

Table 2.5 Rural District governs the uses and dimensional standards for this district. Under Table 2.5 (E) Dimensional Standards (unless otherwise specified by use type) the requirement is a Minimum Lot Area of five acres and a Minimum Density of five acres/dwelling unit or use. This means that to build a Single Family dwelling under Table 2.5(C)5 you would need to have a minimum of five acres in the Rural District. The lots do not meet the minimum lot size of five acres for the district. Therefore, they are nonconforming lots.

Existing small lots are governed by Section 5.7(A) Merging Lots, which states—

When an owner owns a lot which fails to meet minimum lot size requirements and such lot is contiguous to another lot owned by the same lot owner, such contiguous lots shall constitute a single lot, except that:

1. Contiguous lots which as of June 20, 1966 were devoted to separate and independent uses shall constitute separate lots so long as such lots continue to be devoted to separate and independent uses; or
2. Contiguous lots which are devoted to uses approved as separate uses under the Charlotte Zoning Regulations shall constitute separate lots provided such uses are conducted in compliance with the terms and conditions of the approvals granted; or
3. Contiguous lots which are shown on a plat approved by the Charlotte Planning Commission pursuant to subdivision regulations shall constitute separate lots provided such approval has not expired.

Section 5.7(A) 2 is the only subsection applicable to this appeal. Section 6.6(B)(3) of the March 2002 Zoning Bylaws states that any non-conforming use of a structure or parcel of land may be continued indefinitely but

Shall not be reestablished if such use has been discontinued for a period of six months, or has as [sic] been changed to, or replaced by a conforming use. Intent to resume a non-conforming use shall not confer the right to do so.

Therefore, under the bylaws, to maintain the right to continue to use the 1.5± acres as a separate lot, the use had to be re-established within six months.

The two contiguous lots had the same owner as of March 2001. Sometime before December 21, 2001, while owned by George Reynolds the mobile home dwelling unit and all sheds were removed. The Reynolds did not replace or build on the South Lot. Indeed, when Reynolds made application for a building permit in November 2003 the lot size on the application was entered as 3.01 acres. Prior to and after the transfer to Kirschner in March 2005 the South Lot remained undeveloped. The record indicates that no separate structure or separate use has been on the South Lot for almost 6 years. Therefore the Board finds that the separate use ended at least as early as December 2001 (and that it expired six months later). The Board further finds that South Lot ceased to “continue to be devoted to separate and independent uses” for more than six months and that the North and South Lots are merged.<sup>7</sup>

Vermont statutes provide for a lot merger override for contiguous small lots in common ownership. This override requires application of a four part test. 24 VSA § 4406 (2001, 2003) states—

Any lot in individual and separate and non-affiliated ownership from surrounding properties in existence on the effective date of any zoning regulation, including an interim zoning regulation, may be developed for the purposes permitted in the district in which it is located, even though not

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<sup>7</sup> The Land Use Regulations currently in effect were passed in March 2006 and indicate that if a lot merged under prior regulations that new regulations do not revive an argument for separation or non-merger. Chapter X. Definitions define a lot as—

An identifiable and separate parcel of land legally in existence as of the effective date of these regulations which has sufficient area to meet the lot area requirements of these regulations; or (2) a portion of land in an approved subdivision as depicted on an approved plat that is separated from other portions of land by a property line. The merger of any lot prior or subsequent to the effective date of these regulations shall terminate its separate existence for the purpose of these regulations (see also Section 3.8 regarding Nonconforming Lots). See also Contiguous Land; Lot Area; Lot of Record, Nonconforming Lot.

conforming to minimum lot size requirements, if such lot is not less than one-eighth acre in area with a minimum width or depth dimension of forty feet.

- (A) If such lot subsequently comes under common ownership with one or more contiguous lots, the lot shall be deemed merged with the contiguous lot for the purposes of this chapter. However, such lot shall not be deemed merged and may be separately conveyed, if:
- (i) the lots are conveyed in their preexisting, nonconforming configuration; and
  - (ii) on the effective date of any zoning regulations, each lot had been developed with a water supply and wastewater disposal system; and at the time of transfer, each water supply and wastewater system is functioning in an acceptable manner; and
  - (iii) the deeds of conveyance create appropriate easements on both lots for replacement of one or more wastewater systems in case a wastewater system fails, which means the system functions in a manner:

To pass this four-part statutory test, Kirschner would have to prove the South Lot has a well and wastewater system existing in a functioning manner. Evidence received during the hearing indicated that the residence on the North Lot is using the well on the South Lot. No evidence was presented to indicate that the wastewater system functioned or is even still in existence on the South Lot. No evidence was provided and no evidence of easements was submitted to the Board. Therefore, the statutory merger override provided for under 24 VSA § 4406 (2001, 2003) and the substantively identical § 4412 (2007) is not triggered.

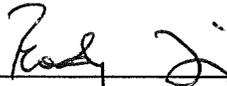
**IV. Decision**

**Motion was duly made and seconded to uphold the decision of the Zoning Administrator and to deny the appeal.**

**Vote 5 in favor 0 opposed**

**DATED AT CHARLOTTE, VERMONT THIS 27<sup>th</sup> DAY OF SEPTEMBER 2007.**

**CHARLOTTE ZONING BOARD OF ADJUSTMENT**



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**BRADY TOENSING, CHAIRMAN**

**THIS DECISION MAY BE APPEALED TO THE VERMONT ENVIRONMENTAL COURT BY THE APPLICANT OR AN INTERESTED PERSON WHO PARTICIPATED IN THE PROCEEDING. SUCH APPEAL MUST BE TAKEN WITHIN 30 DAYS OF THE DATE OF THIS DECISION, PURSUANT TO 24 VSA §4471 AND THE VERMONT RULES FOR ENVIRONMENTAL COURT PROCEEDINGS.**