

CHARLOTTE PLANNING COMMISSION
Charlotte Town Office
PO Box 119
Charlotte, VT 05445
Phone: 802.425.3533

November 15, 2018

Andrew Zins
1654 Prindle Road
Charlotte, VT 05445

Re: Sketch Plan Review – Application Number PC-18-136-SK

Dear Mr. Zins,

The purpose of this letter is to summarize the Sketch Plan Review for a proposed 2-Lot Subdivision of your 96.45 acre property located at 1654 Prindle Road within the Rural District (RUR) in the Town of Charlotte.

It is understood by the Planning Commission (as displayed on the map within your application - <https://is.gd/UkijxE>) that you propose to subdivide your parcels into the following configuration:

1. **Lot #2A:** a 5.0 acre yet undeveloped parcel on the southeastern portion of the property.
2. **Lot #2:** a 91.45 acre parcel comprising the remainder of the property, which includes the existing house and barn.

A public meeting for the project was held at the Planning Commission meeting at 7:00 PM on Thursday September 6, 2018. In attendance were Commissioners Peter Joslin (Chair), Charlie Pughe (Vice Chair), Gerald Bouchard, Marty Illick, David Kenyon, Shawn Coyle, and Richard Eastman; the Applicant Andrew Zins; the Town Planner; et al. The site visit to the property took place prior to the Planning Commission meeting at 6:30 PM, which was attended by the applicant and Planning Commissioners Peter Joslin (Vice-Chair), Gerald Bouchard, and Dick Eastman. The meeting was continued to October 4, 2018 about 7:45 PM.

The continued public meeting for the project was held during the regular Planning Commission meeting around 7:45 PM on Thursday October 4, 2018. Attending Commissioners included: Peter Joslin (Chair), Charlie Pughe (Vice-Chair), Gerald Bouchard, Richard Eastman, Shawn Coyle, and Marty Illick. Other attendees included the applicant Andrew Zins, the Town Planner, et al.

The Planning Commission has classified your project as a “2-Lot Minor Subdivision” in accordance with **Sections 6.1(C)(1)** of the 2016 Charlotte Land Use Regulations (hereafter referred to as “the Regulations”).

The Planning Commission is providing the following observations on your proposed application:

1. The following Areas of High Public Value (AHPV) were identified on the property:
 - a. Agricultural use: The land on the property is in Current Use;
 - b. Primary Agricultural Soils (Primary and Statewide): Prime soils are located parallel along Prindle Road covering between about 230'- 430' distance from the road ROW boundary for both proposed lots. Statewide agricultural soils are on a majority of the remaining non-forested open area of the parcel.
 - c. Steep slopes (>=15%): About 1 acres of 15-25% slope exists along the western portion of Lot #2A. Much of the south-western portion of Lot #2 comprises 15-25% slope with a minimal area greater than 25% slope.
 - d. Surface waters, wetlands and associated setback and 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 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).
 - e. Wildlife Habitat: *Significant Forest Habitat* comprises the majority of the property. About 10.5 acres of *Significant Aquatic Habitat* covers surrounds the two small streams. There are about 4.4 acres of *Significant Linkage Habitat* on the property.
 - f. 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.
 - g. 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.

2. **Section 7.2(E) General Standards – Building Envelopes**

“...The size and shape of each building envelope shall be established in accordance with these regulations, including all applicable standards under this chapter and the district. The Commission also may require the identification of specific building footprints if such information is needed to determine conformance with these regulations. . .”

At the September 6, 2018 public meeting you had proposed developing a 2-acre building envelope for the 5-acre Lot #2A. As the dimensional standards for the Rural District indicate a *Maximum Lot Coverage* of 30%, the proposed envelope could potentially allow for this requirement to be exceeded. Therefore, you should adjust the size of the proposed building envelope to a maximum of 1.5 acres.

1. **Section 7.3(D)(1) Rural, Shoreland, & Conservation Districts - Building Envelopes**

"Within the Rural, Shoreland and Conservation Districts, all subdivisions and associated site development shall be designed and reviewed according to the following standards:

- (1) Building envelopes, to the extent feasible, shall be located, sited and configured so as not to create any undue adverse impacts on Areas of High Public Value. In the event that no other land in the parcel to be subdivided is suitable for development, building envelopes shall be designed to minimize encroachments into these areas and to minimize undue adverse impacts."*

The Planning Commission agrees with your decision to keep the proposed building envelope outside (east) of the forested area.

2. **Section 7.6 Water Supply / 7.7 Sewage Disposal**

It is understood that both proposed lots for the 2-lot subdivision are planned to have their own wells and septic systems. Where Lot #2 already has a system in place, a wastewater designer has not yet been consulted for water supply and wastewater for the proposed 5.0 acre Lot #2A.

3. According to the April 6, 2000 Planning Commission minutes and the resulting decision **PC-00-06** (currently posted on the Town of Charlotte website), 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, which recommended 50% open space for parcels over 100 acres in size). According to the September 6, 2018 Planning Commission minutes, you 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 affirm the status of the deferment.

On September 25, 2018, a legal opinion was obtained from the Town Attorney (please see attached) and forwarded to the Planning Commission, and distributed to you at the October 4, 2018 public meeting. The import of the opinion was that the 2000 decision conditions definitely carry forward. 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 Regulations.

4. **Section 8.6(B)(3) Open Space**

The Planning Commission may require a forest management plan as a condition of the subdivision. At the October 4, 2018 public meeting, it was stated that there was already a professionally managed forest management plan in place. The Planning Commission will require that a forest management plan be submitted as part of your subdivision application. It is likely that the Charlotte Conservation Commission may be asked to

weigh-in on the plan. Alternatively, the forested land may be enrolled into the Forestry Use Value Appraisal (UVA) Program.

5. Other issues may be considered during the review of your forthcoming Final Plan application. In accordance with **Section 6.3(D)** of the Regulations, this Sketch Plan Review is valid for six months, but may be extended for up to a year from the date of this letter upon request from the Planning Commission.

Please let me know if I can answer any further questions.

Sincerely,



Peter Joslin, Chair
Charlotte Planning Commission

Town of Charlotte Legal Opinion

From: David W. Rugh [mailto:DRugh@firmspf.com]
Sent: Tuesday, September 25, 2018 11:14 AM
To: Daryl Benoit
Subject: RE: Application of decision conditions v.s. versions of subdivision regs

Hi Darryl,

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

Town of Charlotte Legal Opinion

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.

Please let us know if you or the Planning Commission have further questions regarding this.

Thanks,

Dave

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Town of Charlotte Legal Opinion

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From: Daryl Benoit [mailto:DBenoit@townofcharlotte.com]
Sent: Wednesday, September 19, 2018 3:20 PM
To: David W. Rugh
Subject: Application of decision conditions v.s. versions of subdivision regs

Hi Dave,

The Planning Commission has requested some legal guidance on the Andrew Zins application for the subdivision of his property located at 1654 Prindle Road (if you wish to view the application, it is at this link: <https://is.gd/UkijxE>).

Stemming from a 2-Lot subdivision approval granted in 2000 (see: PC-00-06) there were conditions that included the designation of 50% Open Space, which was deferred until a future subdivision application... The 2000 application was evaluated as a PRD involving a 177-acre parent parcel (according to Section 5.15 of the 1997 Regulations, which recommended 50% open space for parcels over 100 acres in size). This is substantiated by the April 6th, 2000 - Planning Commission minutes, and in the recorded survey plat that has a note stating:

"Any further subdivision of either Lot 1 or Lot 2 shall require the designation of Open Space as required by Section 5.15 of the Zoning Bylaws"...

Mr. Zins (an attorney) argues that the open space condition should not apply to him as the 1997 regulations are superseded by the current 2016 regulations, which would not require a PRD for a 2-Lot subdivision (unless dimensional requirements were to be reduced). I have expressed to the PC that the condition does apply to him, but the PC is still unsure. This deferred open space designation precedent may be found in a number of Planning Commission decisions over time. A recent Subdivision application that did follow this deferment was the Remo & Donna Pizzagalli decision PC-17-170-SD (see Finding #3 here: <https://is.gd/uqQRWa>), which was based on a 2002 decision (<https://is.gd/tiPuaN>).

Thank you,
Daryl

Daryl Benoit, Town Planner
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