

This 23<sup>rd</sup> day of September A.D. 2019  
at 10 o'clock 00 minutes A in and  
recorded in vol. 239 on page 248-256  
Attest Mary A Mead Town Clerk

**CHARLOTTE PLANNING COMMISSION  
SUBDIVISION REVIEW  
FINDINGS OF FACT AND DECISION**

**Andrew Zins and Cydney Spohn  
Application for a 2-Lot Minor Subdivision for 1654 Prindle Road  
Application # PC-19-107-SD**

**Introduction and Procedural History**

This proceeding involves the review for a 2-Lot Minor Subdivision submitted by Cydney Spohn on behalf of Andrew Zins for approval under the Town of Charlotte Land Use Regulations (hereafter referred to as "the Regulations"). The application was received by the Charlotte Planning & Zoning Office on July 2, 2019. A notice of public hearing was published in "The Citizen" newspaper on July 11, 2019. A hardcopy of the notice was mailed to all adjoining landowners on the week of July 18, 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 July 11, 2019. An electronic notice of the hearing was also posted on the Town website meeting calendar.

This application proposes to subdivide a 96.45 acre lot into two lots while declining to designate a required open space area, as per a deferred condition from a 2000 subdivision approval (i.e. **PC-00-06**). On November 15, 2018, a Sketch Plan Review letter (**PC-18-136-SK**) was issued to the applicant advising that a minimum fifty-percent open space designation (an estimated 48.225 acres) would be required for the proposed subdivision to be approved, in accordance with the 2000 Planning Commission decision.

A site visit with the Planning Commission took place at the property located at 1654 Prindle Road on Thursday September 6, 2018 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 site visit.

The current application (**PC-19-107-SD**) was considered by the Planning Commission at two public hearings held on:

- August 1, 2019 at approximately 7:05 PM. In attendance were the following members of the Planning Commission: Peter Joslin (Chair), Charlie Pughe (Vice Chair), Marty Illick, and Jim Faulkner. Additional participants and attendees included the Town Planner and the applicant's representative Cydney Spohn.
- August 15, 2019 at approximately 7:30 PM. In attendance were the following members of the Planning Commission: Peter Joslin (Chair), Charlie Pughe (Vice Chair), Marty Illick, Jim Faulkner, Gerald Bouchard, and Shawn Coyle. Additional participants and attendees included the Town Planner and the applicant's representative Cydney Spohn.

**Exhibits**

The following exhibits were submitted for the application:

1. Completed application form signed by Andrew Zins received on July 2, 2019;
2. Letter of authorization for Cydney Spohn to represent landowner Andrew Zins (dated August 1, 2019) for the proceedings;
3. Planning Commission Decision (**PC-19-57-SA** Zins - Recorded in the Charlotte Land Records, *Volume 238, Pages 23-28*); "Findings of Fact and Decision – Andrew Zins and Cydney Spohn Application of a Minor Subdivision Amendment for 1654 Prindle Road", approved on June 20, 2019;
4. Sketch Plan Review; Planning Commission Letter (**PC-18-211-SK** Zins), dated April 4, 2019;
5. 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;
6. 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 8** below;
7. 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;
8. 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;
9. 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.
10. Letter from the State of Vermont – Chittenden County Forester, J. Ethan Tapper to Andrew Zins (dated March 10, 2017) affirming conformance to the Use Value Appraisal ("UVA" or "Current Use") Program;
11. Forest Management Plan – Zins Family – Charlotte, VT - Effective April 1<sup>st</sup> 2012 – April 1<sup>st</sup> 2022, prepared March 2016 by Allan Thompson, Certified Wildlife Biologist, Licensed Forester (NH446), Certified Pesticide Applicator (VT 1405-4497), Technical Service Provider 11-7345, Northern Stewards LC, Waterbury, VT
12. DRAFT wastewater plan for proposed Lot #2 (file date: June 27, 2019 / rec'd by the Planning & Zoning Office: August 12, 2019);
13. DRAFT Survey - "Proposed 2019 Subdivision of Andrew David Zins – 1654 Prindle Road, Charlotte, VT" (dated 10 March 22, 2017 / Revised June 21, 2017 / **Added Lot #2A – 5.02 Acres +/- without a revision date** / rec'd by the Charlotte Planning & Zoning office on August 12, 2019) by G. E. Bedard, No. 211, Hinesburg, VT;
14. 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;

15. Charlotte Zoning Bylaws (Approved March 7, 1995 / Amended March 4, 1997);
16. Planning Commission Minutes from meeting held on August 15, August 1, May 16, and February 7, 2019; October 4 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. This application proposes to subdivide the property into: **Lot #2A**: a 5.0 acre undeveloped parcel on the southeastern portion of the property for a future house site, and **Lot #2**: a 91.45 acre parcel comprising the remainder of the property, which includes the existing house and barn.
3. The property is subject to a deferred open space requirement. According to the Planning Commission decision **PC-00-06** (see **Exhibit 7**), the subdivision application was reviewed as a Planned Residential Development (PRD) involving a 177-acre parent parcel.
4. In accordance with *Section 5.15 of the 1997 Regulations* (see **Exhibit 15**):  
*"The Planning Commission shall consider the following guidelines when establishing open space area requirements: for PRD parcels of 25 to 100 acres in size, open space areas are recommended to be 15% to 50+% of the total area; for PRD parcels over 100 acres in size, open space areas are recommended to be 50+% of the total area."*
5. In accordance with *Condition 3 of the 2000 Planning Commission decision PC-00-06*:  
*"The designation of open space, as required under Section 5.15 of the Zoning Bylaws, will be deferred until any future subdivision of either Lot #1 or Lot #2; this condition shall be added to the survey."*
6. According to the updated 2000 Bedard survey (see **Exhibit 9** above) recorded in Charlotte land records as *Map Slide 120, Clip 4, Page 23*, both **Lot #1** and **Lot #2** (at the time of the subdivision) each have been recorded with a note below their lot label 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"*
7. According to the September 6, 2018 Planning Commission minutes (for the **PC-18-136-SK** Sketch Plan Review proceedings), 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. The Planning Commission hence agreed to seek a legal opinion to ascertain the status of the requirement.

8. On September 25, 2018, a legal opinion was obtained from the Town Attorney (see **Exhibit 6**), forwarded to the Planning Commission, and distributed to the applicant 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."*

9. In the Sketch Plan Review letter (for **PC-18-136-SK**) issued on November 15, 2018, the Planning Commission had advised the applicant that notwithstanding the previous deferred condition, the Planning Commission has the authority to classify the project as a PRD to protect 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 13(5)** below).
10. The applicant subsequently submitted a Sketch Plan Review application (**PC-18-211-SK** – see **Exhibit 4**) requesting that *Condition #3* of decision **PC-00-06** be rescinded. There was no new information presented nor discussed during the proceedings, and the Planning Commission

considered the aforementioned legal opinion provided by the Town Attorney and declined to consider rescinding the condition on April 4, 2019.

11. The applicant subsequently submitted a Minor Subdivision Amendment application (**PC-19-57-SA** – see **Exhibit 3**) requesting that *Condition #3* of decision **PC-00-06** be rescinded. Once again, there was no new information presented nor discussed during the proceedings, and the Planning Commission considered the aforementioned legal opinion provided by the Town Attorney and issued its decision as a denial to rescind the condition on June 20, 2019.
12. As per the *Hildebrand* and *Stowe Club Highlands* tests based on the aforementioned legal opinion discussed in **Finding 8** above, the Planning Commission finds that there has been a change in circumstances since the 2000 Cohen subdivision approval and subsequent recording of the plat (see **Exhibits 7** and **9**, respectively) because the applicable zoning and subdivision regulations have changed substantially. However, not only was this change reasonably foreseeable, but there has also been no change that limits or mitigates the impact of the original subdivision that an open space designation condition was imposed to address. Therefore, there is no basis to amend the condition of approval requiring a designation of open space since the impact of the subdivision, including on Areas of High Public Value, has still not been mitigated in the intervening time period, and since the applicant had record notice of the binding condition prior to acquiring the subject property based on the condition stated on the subdivision plat. Accordingly, the Planning Commission finds that the applicant must designate open space as part of the current subdivision application.
13. The Planning Commission finds the following with respect to Areas of High Public Value (AHPV) on the property in accordance with **Section 7.2** of the Regulations:
  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 acre 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 south-western 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 two 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 seems to indicate that there may be wetlands along the small streams on the Zins property and especially on proposed **Lot #2A** westerly of the proposed building envelope.

5. **Wildlife Habitat:** Approximately 75 acres of *Significant Forest Habitat* composes a majority of the western portions of both Lot #2 and Lot #2A. About 10.5 acres of *Significant Aquatic Habitat* surrounds the two small streams—one on Lot #2A and the other on Lot #2. There are about 4.5 acres of *Significant Linkage Habitat* in the southeastern corner of Lot #2, including a portion of proposed Lot #2A, and about 0.4 acres of *Significant Linkage Habitat* in the northwestern corner of Lot #2.
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 subject to an Open Space Agreement (OSA) between the Town and the property owner of the southern property abutting Lot #2 and Lot #2A.

The Planning Commission has prioritized the identified *Significant Forest Habitat* on the property as the most important Area of High Public Value (AHPV) in accordance with **Section 7.2** of the Regulations, and to minimize forest fragmentation as per *Act 171*, as it is addressed in **Chapter 1.4** of the 2018 Charlotte Town Plan.

14. The Planning Commission finds the following with respect to **Section 7.2(E)** of the Regulations:

The Sketch Plan Review proceedings for **PC-18-136-SK** (see **Exhibit 5** above) advised the creation of a maximum 1.5-acre sized building envelope for the 5-acre Lot #2A, because the dimensional standards for the Rural (RUR) zoning district indicate a *Maximum Lot Coverage* of 30%, pursuant to **Table 2.5** in **Section 2.3** of the Regulations. However, the applicant did not include the proposed building envelope in the submitted survey (see **Exhibit 13** above). The aforementioned building envelope shall be added to the survey mylar prior to its submission for recording.

15. The Planning Commission finds the following with respect to **Sections 7.3(D)(1), (2), and (3)** of the Regulations:

The Planning Commission will require that the proposed building envelope to be created on the eastern portion of proposed Lot #2A, to avoid the fragmentation of, to protect, and to prevent any undue adverse impacts from the subdivision upon the *Significant Forest Habitat* located on the western portion of the lot.

16. The Planning Commission finds the following with respect to **Section 7.3(D)(4)** of the Regulations:

As the property exists within the Rural (RUR) district, all subdivisions and associated site development shall be designed and reviewed according to the following standard pertaining to Areas of High Public Value (AHPV), which have been identified in **Finding 13** (above). The Planning Commission finds that the prioritized AHPV of *Significant Forest Habitat* warrants protection and should be included in an open space agreement.

17. The Planning Commission finds the following with respect to **Section 7.3(D)(5)** of the Regulations:

The Planning Commission considered requiring the clustering of lots and find that it is unnecessary given that the proposed building envelope discussed in **Findings 14** and **15** would minimize undue adverse impact on the identified Areas of Public Value.

18. The Planning Commission finds the following with respect to **Section 7.3(D)(6)** of the Regulations:

The Planning Commission finds that the creation of proposed Lot #2A does not impact on the ability of the landowner to continue enrollment of Lot #2 in the current use program, provided that Lot #2A is properly withdrawn from the program.

#### **Conclusions of Law**

Since the applicant has not proposed the dedication of any open space for the subdivision as per the above Findings, the Planning Commission is forced to deny this application for any subdivision. The Planning Commission would otherwise be inclined to grant the proposed 2-Lot subdivision provided that at least 50% of the existing 96.45 acre parcel, including the area of the parcel with *Significant Forest Habitat* is conserved in either an open space agreement with the Town; or through a conservation easement. In addition per **Findings 14** and **15** (above), the Planning Commission also would otherwise require the designation on the plat of a maximum 1.5-acre sized building envelope on the easterly portion of the 5-acre Lot #2A.

#### **Decision**

Based on the foregoing Findings of Fact and Conclusions, the Planning Commission **DENIES** the application for the 2-Lot Minor Subdivision.

**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 August 1, 2019:** Peter Joslin (Chair), Charlie Pughe (Vice Chair), Marty Illick, and Jim Faulkner.

**Members Present at the Public Hearing on August 15, 2019:** Peter Joslin (Chair), Charlie Pughe (Vice Chair), Marty Illick, Jim Faulkner, 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: [Signature]  For /  Against Date Signed: 9/19/2019
- 2. Signed: [Signature]  For /  Against Date Signed: 9/19/2019
- 3. Signed: [Signature]  For /  Against Date Signed: 9/19/2019
- 4. Signed: [Signature]  For /  Against Date Signed: 9/19/2019
- 5. Signed: \_\_\_\_\_ For / Against Date Signed: \_\_\_\_\_
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- 7. Signed: \_\_\_\_\_ For / Against Date Signed: \_\_\_\_\_