

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

**In Re: Hinsdale/Posey
121 Ethan Allen Highway**

)
)
)
)
)
)

ZBA-13-04

OPINION

I. Introduction and Issues Presented

This matter came before the Zoning Board of Adjustment (ZBA) on the appeal by Clark Hinsdale III (Appellant) of the Administrative Officer's (Zoning Administrator (ZA)) determination that a permit was not necessary for a building at 121 Ethan Allen Highway. The building and lot are owned by William Posey. The relief requested by the Appellant is that the property owner applies to the Zoning Board of Adjustment (ZBA) for a permit. The Appellant believes the requested relief is proper under the circumstances because:

1. Zoning Administrator states that a building that burned over 20 years ago is pre-existing
2. Building not exempt as it is not an accessory structure
3. Property is in the Rural and Route 7 Scenic Overlay Districts

The legal questions presented in this appeal as to whether the building at 121 Ethan Allen Highway is exempt from permitting under the Land Use Regulations¹ fall into two categories: 1) whether the building is allowed to be reconstructed in the footprint of a structure damaged prior to 1993 under Sections 3.1 and 3.8, or 2) whether the building is exempt from permitting under

¹ Note: unless otherwise indicated, all Section references in this document are to the Town of Charlotte Land Use Regulations approved November 2, 2010

Section 9.2 exemptions. There are two corresponding opinions documented by the ZA regarding the structure in question and why it could be built without the need for ZBA approval.

1. A memo dated March 13, 2013 in which the ZA argues that the owner was allowed to reconstruct within the original footprint of a preexisting structure under Sections 3.1 and 3.8 of the Charlotte Land Use Regulations.
2. A letter dated May 3, 2013 to Clark Hinsdale, III in which the ZA argues that the structure is an accessory structure as provided for under Section 9.2(A)(7) and as such is exempt from all review, approvals, or permitting.

Based on the application, exhibits and testimony at the hearings² on June 19 and June 26, 2013 and site visits³ on June 19 and June 26 the Board renders the following Procedural and Substantive Reviews (including a listing of relevant evidence, findings of fact, and determinations of law) and Decision.

II. 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.

² Participants in the hearings: Clark W. Hinsdale III, William Posey

³ Attendance at the site visit: William Posey, Kathleen Posey, Clark W. Hinsdale III, Suzanne Hinsdale, Ben Pualwan, Jonathan Fisher, Frank Tenney, Andrew Swayze, Doug Webster, Gloria Warden

An interested person is defined un 24 VSA § 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.

The Board confirms that the Appellant Clark W. Hinsdale III is the owner of the adjoining property at 121 Ethan Allen Highway and has the right to make this appeal as an *interested person*.

Section 9.6(A) and 24 VSA § 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 Zoning Administrator, in a letter dated May 3, 2013 responding to a letter from Mr. Hinsdale dated April 20, 2013 stated that the work done at 121 Ethan Allen Highway is exempt from all review, approvals or permitting under the Town's Land Use Regulations.

On May 16, 2013, Clark W. Hinsdale III filed an Appeal Application with the Clerk of the Zoning Board of Adjustment.

The Board confirms the appeal filed by Mr. Hinsdale is a timely appeal.

Pursuant to Section 9.6(A)(1) and 24 VSA § 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 [see Section 9.7]; and

(e) the alleged grounds why such relief is believed proper under the circumstances.

The Appellant's notice of Appeal meets these requirements.

III. Substantive Review

Having found that the procedural requirements were met by the Appellant, the Board must determine if the building on this parcel requires permitting under the Land Use Regulations.

A. Evidence presented

1. Regarding the parcel and building site:

- a. Town records and testimony show that...
 - i. William Posey is the current owner and acquired the parcel in June 2010
 - ii. This parcel is located at 121 Ethan Allen Highway, is in the Rural Zoning District (RUR) and the Route 7 Scenic Overly District (R7O) (established by the Charlotte Land Use Regulations adopted November 2, 2010)
 - iii. The dimensions of the lot are approximately 145 feet by 300 feet
 - iv. There are currently no other structures on this property
- b. The owner testified that the land on the property has currently been prepared for the planting of pumpkins and sunflowers, but that it had not been planted.
- c. Testimony, photographs submitted for the record in Exhibits A and F and site visit observations show...
 - i. a large Cottonwood tree and several smaller trees grouped about 18' South from the new structure
 - ii. an unpaved driveway and turn-around on the West side of the structure
 - iii. roughly tilled but unplanted fields between the structure and the property lines to the North, East, and South.

2. Regarding the structure previously on the site, as well as relevant dimensions and its use:

- a. Town documents in the Lister's file contain documentation recorded in 1993 that a structure 60' by 30' had previously burned down on this site. On December 23, 1993 the Assessor's card notes "No Structure - Burnt Down".

- b. Testimony by both the owner and appellant agree that the structure had actually burned down closer to 10 years prior to the date it was recorded, putting the date the structure was destroyed closer to 1983.
 - c. Testimony established that the previous structure had been a retail shop for antiques and other odds & ends.
 - d. The earlier of the Lister's cards in Exhibit G, includes a photo (date stamped Apr 74) showing the previous structure standing as well as the grade of the ground by the building.
 - e. Photographs in Exhibits A and F show the remains of the building as well as the grade of the ground by the building and portions of the old cellar foundation that had not been removed since the time the structure was destroyed.
3. Regarding the new structure, its dimensions and intended use.
- a. The owner submitted drawings Exhibits C and D to the ZA prior to construction indicating a building height of 11'10" (not including fill, gravel stone base or foundation), a length of 24', a depth (not including wings) of 10', and a depth (including wings) of approximately 20'. Testimony was also given by the owner at the hearing confirming these dimensions.
 - b. The owner testified that fill had been delivered to the site to fill in the cellar hole from the previous structure and prepare a level spot for the new structure. Photographic exhibits were received in Exhibits A and F which show the site before and after the fill was added.
 - c. The Board conducted an initial site visit on June 19, and a follow-up site visit on June 26 at the approval of the owner. The Board measured the dimensions of the structure, the distance of the structure from a large Cottonwood tree centered on the South of the structure, the approximate height of fill piled up from the natural base of said tree, the approximate height of stone gravel added on top of said fill, and the approximate height of the concrete slab foundation above said stone gravel using measuring tapes. The Board measured a height from the peak of the roof to the top of the foundation at 12.02' (12'1/4"), the height from the top of the foundation to the stone gravel under the foundation to be between .42'-.58' (5"-7"), the approximate height of the stone gravel at 1', for a combined height above finished grade at 13.44'-13.60'. The approximate height of the fill at the tree was measured at 3'. The length of the structure was measured at 24.17' (24'2"), the depth (not including wing walls) was measured at 10', the depth (including wing

walls) was measured at 20°. The wing walls are integrated into the North and South walls of the structure and slope down from the peak of the roof.

- d. Site visit observations revealed that in the area between the wing walls on the East of the structure there are several concrete footings poured into the ground (at the time of the site visits these footings were not supporting anything), and an opening for a door in the rear (East) wall of the structure (at the time of the site visits there was no door installed).
- e. The owner testified that he halted construction once he was aware an appeal had been filed.
- f. The owner testified that prior to building he had considered building a commercial farm stand and may still at some point seek approval for said use from the ZBA, but that he currently intends to use the structure for storage for farming and gardening equipment and plants.
- g. The owner testified that to prepare the site for building, a stand of sumac trees had been removed⁴, loads of cinder block were removed, fill had been added to fill the cellar hole of the previous structure and to level the natural grade of the site (which slopes down from west to east), and gravel stone was trucked in as a bed for the poured concrete slab foundation.
- h. The owner testified that he considers the structure an accessory structure to the primary use of the land which he considers to be (non-commercial) agriculture/gardening. He did not claim that activity on the property qualifies as commercial agriculture as defined by the state.

B. Findings of Fact

1. Regarding the parcel and building site:

- a. This parcel is located in the Rural Zoning District (RUR) and the Route 7 Scenic Overly District (R7O) established by the Charlotte Land Use Regulations adopted November 2, 2010.
- b. At approximately 145 feet by 300 feet, the lot is approximately 43,500 square feet in area, or approximately 1.0 acre (Note: 1 acre is 43,560 square feet).

⁴ Without ZBA approval as required by Section 2.9(E)(2)(e) of the Land Use Regulations

- c. Not including the new structure, there is no structure (principle or accessory) on the property.
 - d. Despite the stated future intention of the owner to conduct (non-commercial) agriculture/gardening, there is no other actual use of the property that is current or clearly evident to the Board.
2. Regarding the structure previously on the site, its relevant dimensions and use:
- a. A structure previously on this site was 60' by 30' in size and burned down circa 1983, and had been used as an antiques retail shop.
 - b. The main level of the previous structure was approximately at grade level facing the road (to the West), and had a cellar below the main level with a walk-out door also approximately at grade level (due to the downward slope of the site) on the South side 6-8' lower than the main level.
3. Regarding the new structure, its dimensions and intended use:
- a. Based on measurements, site visit observations, testimony, and photographs, the base of the stone gravel under the foundation along the front (West) edge of the new structure is estimated to be at the same grade as the front (West) base of the previous structure. For lack of a better reference point this is estimated to be at natural grade.
 - b. The stone gravel under the foundation at the back (East) edge of the new structure is estimated to be on top of 6'-8' of fill. This edge is estimated to be 6'-8' above natural grade.
 - c. The height of the structure above natural grade is between 16.44'-17.60' (16'5" – 17'7") given...
 - i. a measured height from the peak of the roof to the top of the foundation of 12.02'
 - ii. a measured height of the cement foundation of between .42'-.58',
 - iii. a measured height of the stone gravel of 1',
 - iv. an average height of fill above natural grade (estimated from testimony, site visit observations and photographs) to between 3'-4'.

The height (as defined in Section 10.2) of this structure is above the 12' maximum allowed for exempt auxiliary structures, even without the 3-4' portion accounting for natural grade.

- d. The structure is 24'2" long.
- e. The structure has a depth of 20'. This measurement includes the wing walls (which must be included in this measure because they are attached, are higher than 6' and, along with the concrete footings, contribute to the overall dimensions of the structure).
- f. The stated intended use for the new structure is fundamentally different from the use of the previous structure destroyed by fire.

C. Determinations of Law

1. The Land Use Regulations require a minimum lot size of 5 acres in the Rural District. Because this lot is approximately 1 acre, this lot is considered a pre-existing non-conforming lot and may be developed in accordance with Section 3.7 of the Land Use Regulations.
2. Section 9.2(A) provides an exemption for up to 2 qualifying accessory structures up to 250 square feet (combined), not over 12 feet in height. The definition of Accessory Structure in Section 10.2 requires a structure to be "clearly and customarily related to the principle structure or use on that lot." Because there is no principle structure, nor current or clearly evident use that the new structure would be an accessory to, the new structure in question does not qualify as an accessory structure. Furthermore, because the new structure is both 480 square feet, and a height of between 16'5" to 17'7" above the average natural grade, it fails to satisfy either the area or height requirements and therefore does not qualify under any reasonable interpretation of the Regulations as an exempt accessory structure as described in plans (submitted to and reviewed by the ZA), or subsequently as built.

3. Sections 3.1 and 3.8 allow the reconstruction of damaged structures without a permit...
 - a. within “a reasonable amount of time”, Section 3.1(A), and
 - b. with the condition that reconstruction is commenced “within one year of the date of the event that led to the damage, and is substantially completed within two (2) years of the damage or destruction...”, Section 3.8(B)(3).

Because approximately 30 years has passed since the building burned down (which the Board does not consider reasonable, nor is it within one year of the event that led to its destruction), rebuilding is not allowed without conditional use review.

IV. Decision

For the reasons discussed above, the Board concludes that the owner of 121 Ethan Allen Highway must obtain applicable local permits and approvals as required under the Land Use Regulations for the existing structure built on this parcel. The Board rejects both opinions documented by the ZA.

On motion duly made and seconded the Board voted unanimously to uphold this Appeal that the building at 121 Ethan Allen Highway is not exempt under the Land Use Regulations and is required to obtain all necessary approvals and permits.

VOTE: 5 – in favor, 0 – opposed

Dated at Charlotte, Vermont, this 31st day of July, 2013.



Benjamin Pualwan
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.

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL US

Postage	\$ 1.37
Certified Fee	3.10
Return Receipt Fee (Endorsement Required)	2.55
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.97



Sent To
 William E. Posley
 100 Crosswind Dr.
 Charlotte, VT 05445

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 William E. Posley
 100 Crosswind Dr.
 Charlotte, VT 05445

2. Article Number
 (Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature
 [Signature] Agent Address

B. Received by (Printed Name)
 W.E. Posley

C. Date of Delivery
 8-2-13

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

7007 3020 0002 0019 7644

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-154

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL US

Postage	\$ 1.52
Certified Fee	3.10
Return Receipt Fee (Endorsement Required)	2.55
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.97



Sent To
 Clark H. Dinsdale
 1211 Ethan Allen Hwy.
 Charlotte, VT 05445

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 Clark H. Dinsdale #
 1211 Ethan Allen Hwy.
 Charlotte, VT 05445

2. Article Number
 (Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature
 [Signature] Agent Address

B. Received by (Printed Name)
 Clark H. Dinsdale

C. Date of Delivery
 8/5/13

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

7007 3020 0002 0019 7651

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1

