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February 17, 2021

City of Burlington, Vermont
Development Review Board
Department of Planning and Inspections
645 Pine Street
Burlington, VT. 05401

VIA ELECTRONIC MAIL
sgustin@burlingtonvt.gov

Re: *Permit Amendment Application #21-0414CA/MA,* 75 Cherry Street, BTC Mall Associates

To Whom It May Concern:

Barbara McGrew of 76 St. Paul Street, Apt. 8 NW, Burlington, Steven Goodkind of 260 Ethan Allen Parkway, Burlington, Michael Long of 55 Henry Street Burlington, and Lynn Martin of 101 College Street #211, Burlington hereby enter their appearances as interested persons in the proceedings before the Development Review Board in the above captioned matter. As of this date, this matter has been warned for public hearing commencing on March 3, 2021.

They do so to protect their vested rights stemming from their settlement of a series of legal challenges to the redevelopment being proposed for the former Burlington Square Mall at 75 Cherry Street.

- Barbara McGrew individually and Steven Goodkind on his own behalf and on behalf of a group of individuals had brought an appeal in *Devonwood Investors, LLC (75 Cherry Street)*, Vermont Superior Court, Environmental Division, Docket Number 39-4-17 Vtec regarding the local land use approval issued by the Development Review Board on March 17, 2017 to Devonwood Investors, LLC on behalf of the property owner BTC Mall Associates, LLC.

- Barbara McGrew individually brought the appeal *Devonwood Investors, LLC JO 4-255*, Vermont Superior Court, Environmental Division, Docket Number 63-5-17 Vtec claiming that Act 250 had jurisdiction to also review the proposal.

• Steven Goodkind, Michael Long and Lynn Martin in Counts I, II, and III of *Long et. al. v. City of Burlington et. al.* Vermont Superior Court, Civil Division, Docket No. 996-11-16 Cncv brought a taxpayer challenge to $22 million in Tax Increment Financing (TIF) provided by State and City property taxpayers to BTC Mall Associates to subsidize the project, and in Count IV of that action also as individual plaintiffs challenged a denial of a request for public records regarding that subsidy.

These claims, including these parking objections in the Environmental Division appeal, were all settled and compromised in a global *Settlement Agreement* between the appellants and the developers mediated by former Burlington Mayor Peter Clavelle. In terms of parking, the compromise provided for 967 on site spaces on nearly 386,000 SF of onsite parking floor area. Three of these four court actions were dismissed by the plaintiffs with prejudice and in the fourth they individually withdrew as per the *Settlement Agreement* in exchange for the conditions in that *Settlement Agreement.* This gave them both contract rights and *res judicata* rights in any proposed changes to the project. They contend that the proposed project amendment(s) violate those rights.

Disproportionate Reduction in Onsite Parking.

They support this rightsizing of the project as a major improvement in it. The overall size of the project has been reduced by one third.

However, the reduction has disproportionately fallen on the parking commitments made in that 2017 global settlement. The gross floor area devoted to non-parking uses has been reduced by 18%, while the floor areas devoted to off street parking has been reduced by 58%. In fact, this proposal is identical to that of a year ago by Brookfield except that it cuts out a floor of parking then proposed.

There is no public parking. This amendment has fewer parking spaces (422) than residential units (426). There is no parking for the customers or employees of the new retail elements. There is no parking to cover the loss of that provided for the LL Bean building, the developers' own offices, or the retail use in what remains of the old mall. The adjoining property at 100 Bank Street has dibs on some of those spaces. Additionally, there were 300 people holding parking space leases that the garage which was demolished which are currently being accommodated in City facilities, developers remain under contract to others provide some 300 long term rental spaces. The new *Amended and Restated Development Agreement* provides that alternatives for those spaces will be explored elsewhere, including in South Burlington.

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I. THE PROPOSED AMENDMENTS ARE PREMATURE BECAUSE THEY DO NOT COMPLY CONTRACTUALLY WITH THE *SETTLEMENT AGREEMENT.*

My Clients Have Not Agreed to the Amendments.

Justice Burgess' concurrence in *In re Dunkin Donuts,* 2008 VT 139, 185 Vt. 583 cautioned that there should be a proviso "that a party to a stipulated *judgment* cannot undo that agreement without the consent of the other person..." (emphasis original). Otherwise "no party in opposition to a permit application would risk compromise to settle litigation, for fear the other party has its fingers crossed behind its back." To protect against such crossed fingers, the *Settlement Agreement* ¶9 stipulated that it "may not be amended, modified, or terminated except by written consent signed by all the parties hereto." No written consent has been obtained from my clients for these amendments. Without their agreement, or without judicial resolution of their contract claim which is pending in the Civil Division, *McGrew et al. v. Devonwood Investors, LLC et al.*, Superior Court Chittenden Civil Division, Docket No. 118-2-19 Cncv, the zoning permit application is premature.

Demolition of the Cherry Street Garage Eliminated of 1/5 of Offstreet Parking in the Downtown.

Key to their appeal to the Environmental Division were their objections to the inadequacy of the parking requirements in the March 17, 2017 zoning permit issued by the DRB. My clients argued to the Environmental Division that:

> …The actual on-site parking required by the size of this project is more than double the 761 on-site spaces being proposed. The resulting parking deficit would choke off both existing business in the downtown and compromise the ability of the City to grow in the future.
>
> Because of its scope, the project is subject to the Major Impact Review section of the zoning ordinance (Part 5. Conditional Use and Major Impact Review §§ 3.5.1 -3.5.7, (attached). The stated purpose in §3.5.1 is "to provide for a more detailed consideration of development proposals which may present a greater impact on the community" by subjecting "projects of major significance or impact" to "a major impact review" and "to ensure that the city's natural, physical and fiscal resources and city services and infrastructure are adequate to accommodate the impact of such developments, both individually and cumulatively." It is sometimes referred to as the "mini Act 250 ordinance" because the review criteria of §3.5.6(b) include the same impact the review criteria as Act 250. In order to receive approval it must be satisfied that the proposed development shall not have adverse impact under the ordinance's enumerated criteria 1-12. Of particular relevance here are criteria that the project

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5. Not cause unreasonable congestion or unsafe conditions on highways, streets, waterways, railways, bikeways, pedestrian pathways or other means of transportation, existing or proposed;

7. Not place an unreasonable burden on the city's ability to provide municipal services;

9. Not have an undue adverse effect on the city's present or future growth patterns nor on the city's fiscal ability to accommodate such growth, nor on the city's investment in public services and facilities;

10. Be in substantial conformance with the city's municipal development plan and all incorporated plans.

1) The elimination of 1/5 of the existing off-street public parking capacity of the Downtown Core violates the *Burlington Municipal Development Plan*.

The Achilles heel of the project is the demolition of the 567-space Burlington Town Center Cherry Street parking garage and permanent loss of its off-street parking capacity. This garage was built in as the original parking anchor of the decades-old Champlain Street Urban Renewal Plan.[1] It is the second largest such facility in the City and accounts for one fifth of the total downtown off street public parking capacity of the City of Burlington (attached). The DRB's approval never even discussed this issue.

The demolition and loss of these spaces violates §3.5.6 (b)(10) of the Major Impact Review criteria because it directly conflicts with the *Burlington Municipal Development Plan*[2] whose *Transportation Plan*[3] component requires replacement of the Cherry Street garage's spaces to be lost by demolition:

Parking

Parking is a critical resource for any community, especially in the downtown/core area. It is a means by which a driver is converted into a

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[1] *See* Land Lease, March 1, 1974 at Vol. 219, P.449 of Burlington land records. The Lakeview garage, the College Street garage, and the Marketplace garage were added later. All but the Cherry Street garage are city-owned. The Cherry Street garage was privately constructed and owned, but built pursuant to a lease of the underlying City-owned land acquired in condemnation as part of the Champlain Street Urban Renewal Plan for the purposes of providing a public parking facility as part of its urban renewal project. Also *see* Act 250 permit *LUP#4C0116, Burlington Square Associates*, June 29, 1973.

[2] Published by the City of Burlington on the internet at www.burlingtonvt.gov/PZ/Municipal-Development-Plan.

[3] At Pp. 4-5 and 16.

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> shopper, client, visitor, or just plain citizen. Provision of appropriate parking in terms of location, quantity, and accessibility is essential to the survival and prosperity of any community's downtown core, including Burlington…
>
> It is the policy and priority of the City to better utilize the existing parking inventory by implementing improved parking management strategies, and to add to additional inventory in strategic locations necessary and as new development presents opportunities. *Parking in the downtown is currently inadequate and action should be taken to address this issue…*
>
> **Downtown Parking Supply**
>
> *Some parking in downtown is likely to be lost due to redevelopment. The City has a policy of no net loss, so these spaces will need to be replaced.* Additional parking spaces in strategic locations – particularly the Main Street corridor – also may be needed.
>
> Opportunities for increasing parking supply include expanding the Marketplace garage into the Handy air rights and adding on-street parking spaces with conversion to one-way streets. (emphasis added).

The pre-existing parking capacity that will not be replaced includes that which currently serves 254 thousand square feet of BTC Mall's own *existing* floor space:[4]

• 167 thousand square feet of existing retail floor space in BTC's own mall, 105 thousand sf of which will be demolished but fully replaced; and

• 87 thousand sf of existing retail and office floor space in BTC's own building at 101 Cherry Street.

According to public statements by Devonwood's representative, that retail square footage will be retained by, plus an additional 20 thousand square feet of net new retail space will be added to, the project,[5] totaling about 550 thousand sf of new space (attached).

The new 761 space parking facility will service the on-site parking needs only of the new portions of the facility and is calculated based only the *minimum* on-site-spaces required by the Parking Ordinance. It is based on servicing only the new office and residential space to be constructed, but none of the retail space – neither the 105 thousand existing sf being replaced nor the 20 thousand sf of net new retail space to be added. It will not replace any of the 567 space capacity

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[4] *See* the attached Burlington Assessor's Office material discussed above.

[5] *Burlington Free Press*, March 25, 2017, P.2, Sinex sees `vertical rather than horizontal'.

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which currently serves BTC's existing 254 thousand sf of office and retail space.

2) Satisfaction of the minimum on-site requirements of the Parking Ordinance is insufficient under Major Impact Review.

Properly understood, this project is a modification to and expansion of BTC's existing complex. In aggregate terms, **it more than triples BTC's gross floor area** from 254 thousand to over 800 thousand sf, **but increases BTC's on-site parking capacity by only a third.** Consequently, while BTC's Cherry Street garage currently provides 1 parking space for evert 450 sf of gross floor area, its new garage would provide only 1 parking space for every 1,100 sf of gross floor area – **a 60% reduction in BTC's on-site parking per sf.**

Looking to the minimum requirements of the parking ordinance alone therefore also does not satisfy the cumulative impact criteria of the Major Impact Review ordinance. Section 3.5.2 requires that the applicant prove that "the city's physical and fiscal resources and city services and infrastructure are adequate to accommodate the impact of such developments *both individually and cumulatively*" (emphasis added). Relatedly under § 3.5.6(b) they must "not have an undue adverse impact on the city's present or future growth patterns nor on the City's fiscal ability to accommodate such growth…" The DRB decision itself noted that "approximately 1337 parking spaces could be provided under the maximum" of the ordinance, and that even more spaces are allowed within a parking structure because they are not even to be counted toward this maximum. Public parking spaces also are not counted toward this maximum.

a) The parking ordinance pre-supposes the existence of the very public parking and parking sharing opportunities to be demolished and lost.

The Parking Ordinance establishes baseline on-site parking requirements, and then §8.1.3 reduces them depending on the zone and the availability of existing parking resources and other factors:

> The demand for parking is highly dependent on the context within which a given use or structure is located. Factors such as proximity to other related uses, availability of public transportation, the density of land uses, and the ability to share parking with nearby uses are all factors which influence the demand for individual and dedicated off-site parking.

The greatest reduction from the baseline standards is within the Downtown Parking District. This is in large part because of "the extensive sharing of parking demand between nearby uses" and the presence of "an array of public parking facilities." CDO §8.3.1(c). This pre-supposes the existing of other on-site parking and parking-sharing alternatives – the very alternatives which in this case are

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going to be significantly reduced by this project. Indeed, none of the parking studies which have been conducted -- especially 2011 *PlanBTV Transportation Study*[6] created for the preparation of the municipal land use plan – ever contemplated the elimination of a facility such as the 567 space capacity of BTC Cherry Street garage without replacing it.

b) The loss of the Cherry Street garage capacity is aggravated by the unmet accommodation of the new parking demand created by the project itself.

1) Residential parking spaces.

The baseline on-site parking requirement is two spaces per residential unit. This is consistent with the U.S. Department of Transportation, Bureau of Transportation data (attached) that residential parking demand is just under *two* spaces per residential unit.[7] But only one space per residential unit is required in the Downtown Parking District. Therefore, the project will generate an **additional demand of nearly 272 more new spaces** that will need to be accommodated elsewhere either by sharing of parking demand or by the public parking facilities.

2) The net new retail floor area.

According to public statements by Devonwood's representative, 125 thousand sf of new retail space to be constructed, 20 thousand of which is net new retail space of the 105 sf of old space to be demolished. Under the baseline parking standards to accommodate this net new retail, **an additional 60 new spaces** would be required. The parking ordinance for the Downtown Parking District similarly also does not require any onsite parking because of the assumed availability of public parking. But one fifth of that inventory is now to be permanently eliminated with the demolition of the Cherry Street garage.

3) The use of tandem and stacked valet parking will deter use of the new facility and will create even more parking pressures outside of the new facility.

The floor plans submitted as part of the original December 15, 2016 permit application purported to show a standard parking configuration for the 761 spaces to be provided. But the applicant revealed for the first time in a power point during its February 7th, 2017 DBR presentation that due to space limitations,

[6] Published by the City of Burlington on the internet at www.burlingtonvt.gov/sites/default/files/PZ/planBTV/Downtown_Plan/Final%20Report_102511.pdf.

[7] The Burlington Zoning ordinance formerly required two spaces per residential unit. *See In re McGrew*, 2009 VT 44 ¶3, 186 Vt. 37.

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much of the parking was to be "stacked" or "tandem" two and three spaces deep which will require valet parking. The proposal is to have one valet per floor on duty. Customer waits to either park or retrieve vehicles resulting from this valet system, especially during peak hours, will create further pressures for users to find more convenient parking alternatives elsewhere, in terms of actual utilization effectively reducing the facility capacity from 761 spaces. This will mean a deterioration in the Burlington parking experience, not the improvement called for in the *PlanBTV* study.

The Global *Settlement Agreement* Resolved Three Cases Creating Contract Rights for My Clients' Forbearance.

The Zoning Appeal.

The *Settlement Agreement* incorporated by reference a *Stipulation for Final Judgment* along with a *Proposed Judgement Order* in zoning appeal Docket 35-4-17 Vtec. Paragraph 3 of that *Settlement Agreement* incorporated by reference a *Stipulation for Final Judgment* along with a *Proposed Judgement Order.* The *Stipulated Findings of Fact Supporting Final Judgment* were approved and signed by the appellants, the developers and the City. The *Proposed Judgment Order* was adopted by the Vermont Superior Court Environmental Division as a *Judgment Order* on July 17, 2017 in Docket 35-4-17 Vtec.

If Ms. McGrew and Mr. Goodkind had not exercised this forbearance, the developers would have been forced to litigate this zoning appeal both before the Environmental Division and subject to an appeal to the Vermont Supreme Court. Ms. McGrew and Mr. Goodkind are entitled to the benefit of their bargain and may enforce the *Settlement Agreement*. *Spaulding v. Cahill,* 146 Vt. 386, 388 (1985) .

Ms. McGrew's Claim of Act 250 Jurisdiction.

Also settled was Ms. McGrew's appeal of the decision of the District Environmental Coordinator whether there was Act 250 jurisdiction over the project. In exchange for the consideration of these stipulated amendments to the project, Ms. McGrew dropped her Act 250 jurisdictional challenge, and agreed not to oppose the developers in any further proceedings that might be necessary. The status of this Act 250 forbearance as independent from the zoning appeal is underscored by the express language of ¶4 of the *Settlement*.

> *…the Applicant and the appellant thereto stipulate that the project, as amended* to include the addition of subsurface parking capacity for approximately 200 automobiles (recognizing as stated above that the total number of automobiles accommodated will depend on engineering and other constraints including that the subsurface parking will not extend below one level and will not be included in the buildings constructed at and above ground), *is not subject to Act 250*

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> *jurisdiction,* and does not require an Act 250 permit because it is a Mixed-Use Priority Housing Project.(emphasis added)…
>
> If the Court does not approve a *Stipulated Final Judgment Order* resulting in a final adjudication that *the Project, as modified by the Settlement Agreement*, is exempt from Act 250 regulation, then Ms. McGrew will allow Applicant the time to seek confirmation that Priority Housing Project eligibility is satisfied *by the project, as modified by the Settlement Agreement*, and is exempt from Act 250 regulation (emphasis added).

A separate *Consent Judgment* regarding Act 250 jurisdiction was in fact issued by the Environmental Division.

If Ms. McGrew had not exercised this forbearance, the developers would have been forced to litigate the Act 250 jurisdiction question both before the Environmental Court subject to an appeal to the Vermont Supreme Court. She is entitled to the benefit of her bargain and may enforce the *Settlement Agreement*. *Spaulding v. Cahill, supra.* Zoning and zoning permit amendments do not have jurisdiction over and cannot change this bargained-for contractual obligation.

The Challenge to the Legality of the Project's Tax Increment Financing (TIF).

Also settled was the challenge brought by Ms. Martin, and Messrs. Long and Goodkind in the Civil Division to the legality of the vote held during a Burlington Special City Meeting held during the 2016 Presidential election approving $22 million in public Tax Increment Financing (TIF) for the project. In exchange for the parking commitments in the global settlement, they agreed in *Settlement Agreement* ¶5 to drop this challenge. Absent their forbearance, it was still subject to a Vermont Supreme Court appeal. Their forbearance resulted in not just the plaintiffs' withdrawal of their claim, but in the entry of an unopposed final judgment in the City's favor as well, which the City sought out of "an overabundance of caution" *Ruling on Unopposed Motion to Enter Final Judgment*, P.2). They are entitled to the benefit of their bargain and may enforce the settlement agreement under *Spaulding v. Cahill, supra.*

The Developers Benefitted from and Acted Upon Their Forbearance.

In the words of Justice Burgess' concurrence in the *Dunkin Donuts* case at ¶16, "(t)he settlement agreement here allowed the applicant to proceed with a project that might have been stalled, modified, or defeated, but for the settlement." My clients' forbearance in the *Settlement Agreement* allowed the developers first to secure a *Development Agreement* from the City executed on October 26, 2017. As a result of their forbearance, the developers were also able to secure zoning and demolition permits to commence work on the project in December of 2017. This was explained in the

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November 4, 2020 comments of Burlington Zoning Administrator Scott Gustin to the DRB:

> Zoning permit 17-0622CA/MA was approved by the Development Review Board on March 17, 2017. It was appealed to the Superior Court Environmental Division. A stipulation agreement was reached among the parties, and the project was ultimately approved on July 17, 2017.
>
> Pre-release conditions associated with the zoning permit were met in full November 16, 2017, and the zoning permit was picked up by the applicant the same day…
>
> Demolition work ensued December 2017 and continued through August 2018. At that point, activity at the construction site essentially stopped. Work associated with the zoning permit started within a year as required by standard condition 2… (Plaintiffs' Exhibit #5).

The demolition included that of the former 567 space public parking garage.

II. THE 2017 PROJECT AMENDMENTS MUST HONOR THE PARKING MITIGATION MEASURES RESOLVED IN THE 2017 PERMIT APPROVAL.

The 2017 zoning approval cannot be amended with no consideration of the parking mitigation issues previously resolved in the earlier permit process. That doctrine is called *res judicata*. It means that the matter has been decided. *Res judicata* prevents relitigation of the subject matter that was central to the litigation and that the settlement agreement resolved, including claims that the parties should have raised in the previous proceeding. *Bidgood, supra.* The same is true of settlement agreements in zoning cases.

> We have often indicated that a stipulated agreement incorporated into a court order has *the same* preclusive effect as a final judgment on the merits… Environmental Court consent judgments have *the same* effect as final judgments on the merits, and the successive-application doctrine is the appropriate method of seeking relief from a final zoning decision. *Dunkin Donuts, supra* at ¶12.

The application of the *res judicata* doctrine in zoning cases is done through the process described in *In re Application of Lathrop*, 2015 VT 49, ¶55 and *In re Hildebrand,* 2007 VT 5, 181 Vt. 562, and based upon an Act 250 case *In re Stowe Club Highlands,* 166 Vt. 33, 39 (1996). On one hand there must be some level of certainty in the zoning and use of land because "allowing changes in zoning applications without according respect to prior denials would encourage erratic, unpredictable land use," *Id.* at ¶10 On the other hand it is more flexible than traditional claim and issue preclusion principles, "that allows changes in proposals or permits without destroying the finality of decisions on which both interested parties and the public rely." *Lathrop,* supra at ¶59. The doctrine

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uses the criteria of *Stowe Club Highlands* for when amendments will be allowed: whether there are (a) changes in factual or regulatory circumstances beyond the control of the permittee; (b) changes in the construction or operation of the permittee's project not reasonably foreseeable at the time the permit was issued; or (c) changes in technology. *Hildebrand* at ¶7.

Lathrop at ¶65 describes the situation presented in the Washington case *DeTray v. City of Olympia*, 121 Wn. App. 777, 90 P.3d 1116 (Wash. Ct. App. 2004) as "a good example of the proper application of preclusion doctrines to facts like those before us." There the developer's original permit contained certain impact mitigation requirements. Later the developer submitted a permit amendment which called for a reduction in the original proposal, and which sought to eliminate the mitigation requirements on the grounds that the new proposal was a substantial change from the earlier one. The court rejected the argument that a substantial change in the overall development justified the striking of the original permit conditions.

> As in *DeTray*, the main question is whether the permit amendment is motivated by changes in construction or operation reasonably foreseeable at the time the permit was issued, one of the three critical factors in *Hildebrand*, 181 Vt. 568, 2007 VT 5, ¶7, 917 A.2d 478. The testimony regarding the contested application conditions indicates that no such change in circumstances occurred, but rather Lathrop finds the conditions impractical….Under the circumstances, we hold that the grounds for a permit amendment were not established…
> *Lathrop* at ¶73.

This is even more true here. The CityPlace developers acted on the *Settlement Agreement* and *Consent Judgment* creating the loss of parking that they were enacted to mitigate.

The Developers Commenced the Demolition of the Parking Garage Before Project Financing Was Secured.

Here, the need for financial viability and in-place financing was not only forseeable in the *Stowe Club Highlands* criteria, but was *forseen.* The problem was with the developers' own recklessness. The developers acted on the *Settlement Agreement* and consent judgment issued by the Environmental Division in July of 2017. They proceeded with construction of the project by commencing demolition in December of 2017. That included demolition of the former 567 space public parking garage. They did so before before any financing was in place or and before learning whether the *CityPlace* development was creditworthy. This was done in the face of the conditions of their October 26, 2017 *Development Agreement* with the City of Burlington imposed expressly "to provide assurance that he construction of the Project would continue without interruption." It required that before demolition was to commence, it required an executed construction contract which covered the performance of the site work, soils work, and foundation for the project. The developers had none.

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Demolishing the Collateral Which Secured the Existing Mortgage.

Worse, the real and personal property being demolished, and the gross revenues and rents generated therefrom including the Chery Street garage, were collateral which secured the then-existing BTC Mall mortgage and mortgage note. Upon information and belief this demolition of the mortgage collateral precipitated a notice of default or threat of same from the mortgage holder, Forethought Life Insurance Company. It is a subsidiary of the Global Atlantic Financial Group of Indianapolis. According to Burlington's land records Vol. 1418, P.109, Forethought's mortgage was discharged following a July 27, 2018 cash payoff. According to the defendants' own published statements in the *Burlington Free Press* on December 28, 2018, that payoff was $22 million. This was in addition to $24 spent million on demolition and other expenses totaling $46 million. This is what ground progress to a halt in the summer of 2018.

The Developers Painted Themselves into Their Own Corner.

Any burdens of complying with the parking mitigation measures agreed-to in 2017 are self-inflicted. Had they waited for financing, they would have learned that their project was not feasible before demolition of the Cherry Street garage was undertaken, we would still have had available that public parking infrastructure available to work with when deciding what to do next. They cannot now present the *fait accompli* of the demolished parking as a rationale for avoiding the agreed-to parking mitigation. This would violate *Lathrop* and *DeTray, supra.*

The Developers Are Consequently Estopped by the Consequences of their Actions.

Even without ¶9 of the *Settlement Agreement*, "(a)s a general rule one may be estopped by an agreement or stipulation made in a judicial proceeding." *Bidgood v. Town of Cavendish*, 2005 VT 64, ¶¶6-7, 179 Vt. 530, 878 A.2d 290; *In re Estate of Cartmell*, 120 Vt. 234, 240, 138 A.2d 592 (1958). Where a settlement agreement is incorporated into an order of dismissal, *res judicata* prevents collateral attack of the order. *Bidgood v. Town of Cavendish*, 2005 VT 64, ¶¶6-7, 179 Vt. 530. My clients contend that the proposed amendments are such a prohibited collateral attack on the *Settlement Agreement*.

III. THE NEWLY ADOPTED PARKING ORDINANCE IS NOT APPLICABLE TO THESE AMENDMENTS.

It has been suggested that the 422 parking spaces set forth in this proposed amendment are the maximum allowable under the new downtown parking ordinance. This is not true for three reasons.

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The 2016-17 Application was the "Vesting Event."

The Ordinances in effect in 2016-17 are the operative ordinance. The original application in 2016-17 is the "vesting event." Vermont law provides that the zoning ordinance which is applicable is the ordinance which was in effect at the time of the original permit application, and not subsequently enacted amendments. *In re Times & Seasons LLC Act 250 Reconsideration*, 2011 VT 76, ¶¶11-14, 190 Vt. 163 citing *Smith v. Winhall Planning Commission,* 140 Vt. 178, 181-82 (1981).

The Developers Cannot Take Advantage of Favorable Changes In The Ordinance.

Typically, this vesting issue comes up when a municipality enacts more stringent regulations after the developer has applied for a permit. In *Smith* this rule gave the developer a vested right to rely on the earlier, less stringent ordinance in effect at the time of his permit application. But *Smith's* vesting rule also applies when less stringent requirements are adopted after the original application. The purpose of this rule is

> avoidance of extended litigation and maneuvering, and certainty in the law and its administration. Allowing an applicant to take advantage of favorable changes in the law…would be contrary to these principles…(W)e conclude that holding the applicant to the laws in effect at the time of initial application is the more equitable approach in the long run.
> *Times & Seasons, supra.*

Here the minimum parking requirements in effect in 2016-17 were more stringent than those amended in 2020. But the result is the same: my clients as parties have a vested right to rely on the more stringent ordinance in effect at the time. That the demolition commenced before the project had bank financing and the project as permitted ran into difficulties which now require amendments does not change that, and is an aggravating factor.

The bottom line is that the effective parking ordinance is the one in effect at the time of the 2016 permit application, 2017 DRB approval, and 2017 consent judgment, which is in turn what the developers acted upon when they commenced demolition of the parking garage and the major part of the old mall. Again, s*ee* the November 4, 2020 comments of Scott Gustin in the developers' so-called relinquishment appeal. Also *see* the preamble to the *Amended and Restated Development Agreement.*

Public Parking is Exempted from the Current Ordinance.

Public parking is exempted by **Section 8.1.9 Maximum On-Site Parking Spaces** (a)(1) **Exemptions.** It provides

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1. **Public Parking**: Spaces provided and available for use by the public shall not be counted towards the maximum. Such spaces shall be available to the public at a minimum of nights and weekends, and be signed or marked accordingly;..

The 2017 Settlement Agreement was Based on the Major Impact Development Ordinance.

As discussed above, the 2017 appeal, settlement, and consent judgment were based upon impacts of the loss of the 567 space public parking facility under the major impact development ordinance, not the then-existing parking minimums. It remains on the books.

IV. THE EX PARTE FEBRUARY, 2018 PERMIT AMENDMENTS WERE ILLEGAL.

The developers' proposed project amendments incorporate parking reductions to the July 2017 consent judgment which were granted by the City on February 23, 2018. They reduced the parking floor area by nearly 37% to 245,339 SF. They were made administratively, not by the DRB, and without any notice to my clients. Those 2018 administrative amendments were consequently illegal and invalid.

The Absence of Actual Notice to Parties to the Consent Judgment Violated Chapter I, Article 4 of the Vermont Constitution.

Absent actual notice, Ms. McGrew and the other parties to the consent judgment did not and could not make a knowing and intentional waiver of their right to appeal any changes to that consent judgment as provided by the Planning Act. Chapter I Article 4 of the Vermont Constitution entitled them to actual notice of the proposed and granted amendments to the consent judgment. Failure to give them such notice renders the amendments invalid.

The right to participate in municipal development proceedings is recognized as fundamental, protected by the due process clause of the Vermont Constitution Chapter I Article 4. Any waiver of the right to participate in a land use adjudicatory proceeding, whether in an administrative process or before the courts, must be knowing and intentional. The right to participate in municipal development proceedings is "fundamental," protected by Chapter 1 Article 4 of the Vermont Constitution. *Weinstein v. Leonard*, 2015 VT 135, ¶¶15-17, 200 Vt. 615. *In re Appeal of Hignite,* 2003 VT. 111, ¶8, 176 Vt. 562 recognized, but did not resolve, "whether due process or fundamental fairness requires that a party deprived of notice of a zoning permit be allowed to contest the permit, notwithstanding the strong policy interests in finality" provided by 24 V.S.A. § 4472(d). Ms. McGrew claims that in the circumstances of this case, the due process consideration of Chapter I Article 4 of the Vermont Constitution trump § 4472(d) finality. Chapter I Article 4 of the Vermont Constitution is self-executing and therefore provides

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an independent basis for a determination whether adequate notice was provided. *Nelson v. Town of St. Johnsbury*, 2015 VT. 5.

Where a "substantive right" conferred by statute or common law exists, Article 4 protects against deprivation of that right without due process. *Id.* The rights at issue here are created both by common law and statute. By both common law and statute they also are enforceable under *res judicata*. *Dunkin Donuts, supra* at ¶12; *Hildebrand, supra; Lathrop*, *supra* ¶¶ 55-66. They do so because "*the parties* and other interested persons reasonably rely on the permit conditions…" *In re Nehemiah Associates,* 168 Vt. 288, 294, 689 A.2d 102 (1998)(emphasis added); The policy behind this finality is to "protect the courts and *the parties* from the burden of relitigation" (emphasis added) of these environmental and quality of life issues *Lathrop* at. ¶58. "Otherwise, the initial permitting process would be merely a prologue to continued applications for permits." *Hildebrand, supra*.

These rights and interests are not worth a plug nickel if all parties to the judgment are not notified of proposed changes to a consent judgment so that they can be asserted. "The right to be heard is worth little unless one is informed that the matter is pending and one can choose 'whether to appear, or default, or acquiesce, or contest.'" *Town of Randolph v. White*, 166 Vt. 280, 283 (1997). "We must ensure that any waiver of the important right to participate in a land use adjudicatory proceeding, whether in an administrative process or before the courts, is done knowingly and intentionally." *Id.* Without notice, there has been no knowing and intentional waiver.

The Developers Failed to Comply with the Notice Provisions §3.2.1(d) of the *Comprehensive Development Ordinance.*

The *Comprehensive Development Ordinance* §3.2.1(d) did in fact require actual notice to Barbara McGrew of the proposed 2018 amendments.

> A Pre-Application Public Neighborhood Meeting *shall be required for all development involving the construction of five (5) or more dwelling units* and/or ten thousand (10,000) s.f. or more of gross floor area of non-residential development in order to allow neighbors to become aware of potential development projects at an early stage of a development's conceptual design and for applicants to take into consideration neighborhood comments and concerns. Procedures and requirements regarding matters including but not limited to scheduling, location, public notice, and documentation shall be set forth by the department of planning and zoning (emphasis added).

Barbara McGrew is an immediate neighbor. She lives directly across Bank Street from the project. That notice was never provided even though the February 2018 amendments involved the construction of 16 additional residential units. In fact, no §3.2.1(d) meeting was ever held at all on these 2018 amendments. Unaware of the amendments she lost her opportunity to appeal them to the DRB under 24 V.S.A. § 4465.

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By contrast a §3.2.1(d) neighborhood meeting on the 2020 project amendments proposed by Brookfield *was* held on February 27, 2020 regarding them. Ms. McGrew *did* receive actual notice of that meeting by mail and had her counsel attend the meeting. Also a neighborhood meeting on the current amendments was held virtually in October of 2020 which she attended. Ms. McGrew was provided written notice in February of 2021 of this hearing by the DRB, as was her counsel. It is absolutely inexcusable that this also did not occur regarding the 2018 amendments.

The Developers Also Failed to Comply With the Requirements of Posting Notice.

On March 14, 2018, after having learned that these amendments were granted without actual notice to them, I sent the City of Burlington a letter asking that the appeal period be re-opened. This prompted Ms. O'Neil to email BTC Mall's/Devonwood's architect

> As you are aware, John Franco has requested re-opening the appeal period for the February permit for 75 Cherry Street…
>
> Can you confirm for me:
>
> 1. That the red "Z" card was posted on the property;
> 2. Please define *where* it was posted; and
> 3. *When* it was posted. Did it remain for 15 days?
>
> (Emphasis original).

The architect responded on March 19, 2018 that it was posted by BTC Mall Associates at the LL Bean Entrance to the Mall, was posted on January 26th, and remained there at least 15 days. This prompted a follow-up email from Ms. O'Neil on March 20, 2018:

> Do you know the date it was removed?

To which the architect replied:

> BTC Mall Assoc. removed it on Monday February 26th.

This failed to comply with the posting notice requirements of the Planning Act at 24 V.S.A. § 4449(b). It requires that the "Z" card be posted "until the time for appeal in section 6654 of this title has passed." This requirement appears on the face of the "Z" card itself. That period did not pass until March 10, 2018, as stated on the permit. ["An interested person may appeal a decision of the Zoning Administrator to the Development Review Board until 4 pm on March 10, 2018"]. Therefore by BTC Mall's own admission, the notice was removed 12 day *before* the appeal period expired, and the movants' request for an appeal to the DRB was timely. This consequently failed to

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comply with the posting notice requirements of the Planning Act, denying the appellants due process of law under Article I Chapter 4 of the Vermont Constitution rendering the amendments invalid and the bar of 24 V.S.A. § 4472(d) inapplicable.

The 2018 Amendments Circumvented the 2017 *Judgement Order* Which Required DRB Review and Approval of Any Amendments.

The July 2017 *Judgment Order* provided that the project would be constructed as per the March 17, 2017 findings and order of the DRB. The DRB's findings and order required that *all* amendments to the project must be reviewed and approved by the DRB. Consequently, the administrative officer lacked jurisdiction to granted the 2018 permit amendments for the project.

The 2018 Amendments Failed to Comply with the Planning Act's Requirements that Variances Be Granted Only by the DRB.

About 600 of the parking spaces shown on these amended parking floor plans did not comply with the minimum dimensional requirements of the Burlington *Comprehensive Development Ordinance* §8.1.11 Parking Dimensional Requirements (attachment #4). There is no distinction between variances from use requirements and area requirements. *In re Mutschler, Canning & Wilkins*, 2006 VT 43 ¶¶8-11, 180 Vt. 501; *In re Ray Reilly Tire Mart,* 141 Vt. 330, 331 (1982). The Planning Act requires DRB or ZBA as applicable to make findings that the applicant has meet each of the five statutory requirements for approval of a variance under § 4469(a)(1)-(5). *Mutschler* and *Ray Reilly Tire Mart, supra; Gadhue v. Marcott*, 141 Vt. 238, 239 (1982); *Sorg v. North Hero Zoning Board of Adjustment*, 135 Vt. 423, 426-27 (1977). Variances are disfavored and are not justified on the basis of personal convenience or maximizing profitability, *Mutschler, supra* at ¶11. They cannot be granted where the hardship that was created by the applicant, *Ray Reilly Tire Mart* at 331, 335-35. The second of the statutory criteria, which serves as an escape valve against a regulatory taking, requires that there be no possibility that the property can be developed at all in strict conformity with the provisions of the zoning regulation. *Mutschler* and *Ray Reilly*, *supra*.

Under 24 V.S.A. § 4460(e)(11) when presented with a request for a variance, "the matter shall come before the panel by referral from the administrative officer. Any such referral decision shall be appealable as a decision of the administrative officer." The same requirement for a referral applies under §4460(e)(12) for "(a)ny reviews required by the bylaws" such as the requirement of Burlington's *Comprehensive Development Ordinance.* It provides that "(t)hese standards shall be adhered to except in situations where a lesser standard is deemed necessary by the DRB …" Since the only action by the administrative officer which is an appealable administrative decision under 24 V.S.A. § 4465(a) would have been a *referral* to the DRB, Ms. O'Neil's grant of this permit is not an appealable administrative decision and the bar of §4472(d) was not triggered. The permit amendments were ineffective under *In re Burns Two-Unit Residential Building (Michae Long et al. Appellants)* 2016 VT 63 ¶¶11, 12, and 15, the appeal period of §4465(a) was never commenced, did not run, and did not trigger the bar of §4472(d).

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Ms. O'Neil Lacked the Necessary Statutory Authority to Grant the February, 2018 Amendments.

The City has since claimed that Ms. O'Neil was nominated and appointed as an assistant administrative officer. But that alone does not satisfy the statutory requirements of 24 V.S.A. § 4448(b). The City must provide "clear policies regarding the authority of the administrative officer in relation to the acting or assistant officer." Also see *Burns* at ¶12. Those clear policies were not provided by the City. Burlington's *Comprehensive Development Ordinance* §2.3.3(c) simply provides "One or more assistant administrative officers may be appointed by the ZAO *and shall have such authority and duties as delegated to them by the ZAO*." (emphasis supplied). This ordinance therefore does not satisfy the requirements of §4448(b). Ms. O'Neil's grant of the permit amendments was therefore not an action of the "administrative officer' under § 4465(a) and did not trigger the appeal period of §4472(d) under *Burns, supra.* The administrative officer lacks authority to supply them because *Herbert v. Town of Mendon*, 159 Vt. 255, 259 (1992) requires that such policies be adopted by ordinance. They prescribe "a permanent rule of conduct or government that will remain in effect until repealed" which "affects the people of a municipality in an important or material way." *Id.*

Conclusion.

For these reasons the requested amendments must be denied.

Thank you for your attention to this matter. Please provide us with actual notice of any and all actions taken on this application, including but not limited to advance notice of the dates and times of all hearings before the DRB.

Very truly yours,

/s/*John L. Franco, Jr*

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