AGENDA

I. Agenda

II. Chair’s Report

III. Director’s Report

IV. Public Forum
Public forum for items not on the agenda. See the Agenda Packet for details on how to participate in the public forum for this meeting.

V. Proposed CDO Amendment: Article 14 Updates
The Commission will review its Ordinance Committee recommendations on proposed updates to Article 14 of the Burlington Comprehensive Development Ordinance. Information related to this item will be posted online.

Staff Recommendation: Approve Municipal Bylaw Amendment report and warn for public hearing.

VI. City Planning FY22 Proposed Work Plan & Budget
Staff will provide an update to the Commission on anticipated department activities in the upcoming year.

Staff Recommendation: Discussion item; no action is required.

VII. Update on Department of Permitting & Inspections
Staff from DPI will provide an update to the Commission on department activities.

Staff Recommendation: Discussion item; no action is required.

VIII. Commissioner Items
a. Upcoming Meetings: May 25 and June 8, 2021 at 6:30pm (anticipated on Zoom)
b. Reminder: Deadline for Commissioner applications is May 14 at 4:30pm. Visit:
   https://www.burlingtonvt.gov/CityCouncil/Public-Boards/Vacancies

IX. Minutes & Communications
a. The minutes of the April 27, 2021 meeting are enclosed in the agenda packet on p. 3.
b. Communications are enclosed in the agenda packet beginning on p. 6, with additional communications posted online at https://www.burlingtonvt.gov/CityPlan/PC/Agendas

X. Adjourn

The City of Burlington will not tolerate unlawful harassment or discrimination on the basis of political or religious affiliation, race, color, national origin, place of birth, ancestry, age, sex, sexual orientation, gender identity, marital status, veteran status, disability, HIV positive status, crime victim status or genetic information. The City is also committed to providing proper access to services, facilities, and employment opportunities. For accessibility information or alternative formats, please contact Human Resources Department at (802) 540-2505. Written comments on items may be directed to the Planning Commission at 149 Church Street, Burlington, VT 05401, or at mtuttle@burlingtonvt.gov
Guidance for Participating in a Virtual Planning Commission Meeting

As social distancing measures to preserve public health and safety continue to be required to prevent the spread of COVID-19, or are recommended as a standard practice, the Office of City Planning will be supporting the Planning Commission to conduct their meetings online via Zoom. Here is information about how to join a virtual meeting, and what to expect while participating.

General Guidance for Public Participation

Please remember that in this digital meeting environment, meetings are open to the public and anyone may be watching or listening even if you cannot see them. Meetings will be recorded, and both the recording and chat content of the meeting will be maintained as a public record.

Please ensure your display photo and screen name are professional, such as using your first and last name. Please test your audio and video prior to the start of a meeting, and familiarize yourself with how to join a meeting by your chosen method. And finally, please be patient with us. Technology doesn’t always work as planned, and we are all learning how to hold a successful virtual meeting!

How to Join a Virtual Meeting

Zoom allows participation via either computer or telephone. Each agenda for a meeting that will be conducted virtually will include details about how to join via either of these options, including a web address, phone number, Meeting ID, and password.

If you participate via computer, you have the option of seeing Commissioner videos and any presentation materials that may be shared. If you use either a standard phone or cell phone to call in, you will only hear the audio portion of the meeting. If you join via a smartphone, you may have the option to download the Zoom app, which will enable you to see and hear the meeting.

How to Participate in a Virtual Meeting

During meetings, only Planning Commission members and limited staff members will be viewed on video. Members of the public attending a meeting will be muted, except when invited to speak during public forum or a public hearing. Whether members of the public can speak at other times during the meeting is the discretion of the Chair.

If you want to speak during public forum, please take the following steps to assist us in making this process run as smoothly as possible:

- Email staff at mtuttle@burlingtonvt.gov by 5pm on the day before a meeting to indicate your interest in speaking. You do not need to provide your comments. Staff will enable your microphone as your name is called from a list of interested speakers.
- During a meeting, you can use the “Raise Hand” feature, or indicate in a chat message that you wish to speak during public forum. Staff will enable your microphone as your name is called.
- If you are interested in submitting your comments in writing instead of speaking during the meeting, you may do so by 5pm the day before a meeting; they will be forwarded to the Commissioners ahead of the meeting.
Members Present | E Lee, A Montroll, H Roen, A Friend, J Wallace-Brodeur, B Baker  
---|---  
Staff Present | D White, M Tuttle, S Gustin, K Sturtevant  
Attendance | S Bushor, A Gonyaw, D Lyons, Lindsay  

I. **Agenda**  
*Call to Order*: Time: 6:32pm  
*Agenda*: No Change.  

II. **Chair Report**  
A Montroll: Next Executive Committee meeting will be on May 11 before the Planning Commission meeting. Requested housing topic to be part of the Executive Committee meeting agenda.  

III. **Director’s Report**  
D White: Upcoming work on FY22 Budget and work plan. Will be working with Mayor’s office on another Housing Summit related to racial equity and missing middle housing. Met with Councilor Hanson who wants to pursue eliminating parking minimums city-wide.  

IV. **Public Forum**  
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<tr>
<th>Name(s)</th>
<th>Comment</th>
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| A Gonyaw: Own a 3-unit at King St. & Pine St. 2019 FD5 boundary included properties near this location, and believe that the property should have been included. Would like the Commission to strongly consider this request to use building in a way that is appropriate in FD5, such as a first level store front.  

V. **Proposed CDO Amendment: Height Measurement, Dormers & Eaves**  
| Action: Approve Municipal Bylaw Amendment report and warn for public hearing  
| Motion by: A Friend | Second by: J Wallace Brodeur | Vote: Approved unanimously  
| Type: Action | Presented by: D White  

Two amendments brought from the Ordinance Committee to clarify how building height is measured, how to measure dormers, and to define eaves. In particular, helps clarify measurement along a street, and to ensure that building height measured along a slope helps a building stair-step and mimic the topography.
VI. Proposed CDO Amendment: Act179 Changes

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<th>Action: Approve Municipal Bylaw Amendment report and warn for public hearing</th>
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<td>Motion by: E Lee</td>
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<td>Type: Action</td>
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Purpose is to amendment CDO to be consistent with statutory changes by the VT legislature intended to promote housing. Changes the CDO for definition and size requirements for ADUs, development on pre-existing small lots, and character of the area standards relative to projects of 4 or fewer units.

Ordinance Committee recommended an approach offered by staff to ensure that residential uses are not Conditional Use in residential districts. Change applies to duplexes in R-L district and multi-unit dwellings of 3+ units within Institutional District.

Specific changes are outlined in agenda materials posted at: https://www.burlingtonvt.gov/CityPlan/PC/Agendas

Discussion:
- Commissioners supported this change and several indicated that it is important to have a conversation about allowing multi-family in RL.
- A Commissioner also noted that if not changing the exterior of a building, this makes the process of adding an additional unit more predictable.
- S Bushor spoke to the changes for bedrooms and occupants for ADU’s and concerned that this will become a workaround for off-campus student housing and getting around the 4-unrelated ordinance.

VII. Proposed CDO Amendment: Article 14 Updates

<table>
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<tr>
<th>Action: Refer to Planning Commission Ordinance Committee to review, and to consider request to amend the Form District 5 Boundary</th>
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Amendment is a package of amendments including clarifications, corrections, and minor modifications to the downtown form-based code since it was adopted several years ago. Specific changes are outlined in agenda materials posted at: https://www.burlingtonvt.gov/CityPlan/PC/Agendas

Discussion & Notes:
- A Commissioner requested that the code reference consideration for the carbon impact of materials, particularly for sustainable hardwoods for decks that discourage use of Ipe; an exemption for requirement for canopies for high performance energy buildings; and to allow cast concrete to be used as a material.
- A Commissioner asked for clarification about the change to definition and standards for the location of parking. D White clarified that it is just to clarify whether the parking is incorporated within a building or in a standalone building behind another principal building.
- A Commissioner asked about the new civic space type intended for Perkins Pier. D White noted that it is intended to create a civic space type that reflects the level of lot coverage and types of uses that enable Perkins Pier to be reimagined, and reflects work done several years ago to identify allowable lot coverage for each City park.

VIII. Commissioner Items

Next Meetings are on May 11 and 25 at 6:30pm.
J Wallace-Brodeur shared that she will not be reapplying to the Planning Commission.
IX. Minutes and Communications

<table>
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<th>Action: Approve the minutes and accept the communications</th>
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<tr>
<td>Motion by: A Friend</td>
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<td>Second by: H Roen</td>
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<td>Vote: Approved unanimously</td>
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Minutes Approved: April 13, 2021
Communications Filed:
- In the agenda packet and posted online

X. Adjourn

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<th>Adjournment</th>
<th>Time: 7:47pm</th>
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<tr>
<td>Motion: H Roen</td>
<td>Second: E Lee</td>
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<td>Vote: Approved Unanimously</td>
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Planning Commission Agenda
Page 5 of 28
I am writing to request that the Planning Commission consider an amendment that is related to the recently adopted shoreline property setback ordinance. A lake and waterfront protection was not considered during the discussion.

The concern is located in Article 4, Sec 4.4.5 Residential Districts. The purpose of which is to control development in a safe, livable environment.

In a. #2 (RL-W) and #4 (RM-W) both end with the concluding statement “district RL-W and RM-W distinguished from RL and RM by their proximity to Lake Champlain and greater consideration needed for views from the lake and stormwater runoff.”

When originally drafted consideration was given to providing protection for the lake and water quality. Since implemented, society has become more aware of the environmental impact of stormwater runoff. In addition, the situation has become more acute, requiring closer scrutiny and additional protective actions.

In table 4.4.5-3 Residential Districts Dimensional Standards, note the column labelled waterfront. Under RL-W and RM-W, it states the minimum setback is 75 feet from the ordinary high water mark of Lake Champlain and the Winooski River.

This is clear and protective however it can be eroded as defined by d.1.B.ii

Let me explain

d District Specific Regulations

1. Setbacks

B. Encroachment into the Waterfront Setback

ii. Averaging of Setbacks of Existing Structures

which states "If the waterfront setback of existing principal structures within a distance of one hundred fifty (150) feet on either or both sides of a lot is less than the required setback, the setback may be reduced to the average alignment of such structures."

Therefore allowing development to occur closer than the 75 feet minimum. This is contrary to the current policies the City has adopted to protect our lake and water ways.

I am requesting you consider striking d.1.B.ii, Averaging of Setbacks of Existing Structures and allow Table 4.4 5-3 waterfront requirements to stand without exceptions. This will help provide some added protection for our water ways.

Thank you for considering this request.

Sharon Bushor, Ward 1 resident
Request to keep open the record of this hearing.

In the process of the ongoing site investigation, the initial Burton/VHB Site Investigation Report was submitted to DEC on April 8, 2021. Based on sub-slab soil gas samples, the report concluded that there have been releases of trichloroethylene and 1,1 dichloroethane. Additionally, a release of naphthalene was detected in the southwest corner of the building near the former location of a leaking underground storage tank.

Both Burton/VHB and DEC have agreed that the site investigation is an iterative process. Therefore, Fire District #1 requests that the record remain open until DEC responds with comments to the April 8 report, a second site investigation plan is approved by DEC, and the approved site investigation work is completed by Burton. Without this documentation, there is no way for Fire District #1 to provide recommended conditions to protect our drinking water source or have any assurance that the hazardous waste contaminants that have been identified on the site will be properly remediated before any work or construction occurs on the property.

Failure to meet burden of production.

Burton has failed to meet its burden of production because it did not produce evidence on groundwater flow south of the building, and thus the Commission cannot make the findings under the affected criteria as applied to water. The only way to ascertain whether groundwater flows toward the well and Source Protection Area is to drill a small number of test wells in a strategic pattern along the southern perimeter of the site, comparing pressures and direction of flow, as well as relative height of the water table. Until that is done, the Commission cannot make findings under Criteria 1 and 1(B).

PROPOSED FINDINGS OF FACT

1. SBFD#1 is a municipal corporation within South Burlington that, under a Prudential Committee (PC), manages numerous assets, including (Exhibit 103 and S. Caflish Testimony):
   a. 1.35 acre parcel comprised of a green, basketball court, play structures, and 2 parking lots
b. .26 acre parcel that includes a lake overlook and stairway access to Lake Champlain.

c. .10 acre parcel that provides access to Lake Champlain

d. .14 acre parcel of largely wooded land with community garden and community firehouse

e. .25 acre parcel that connects SBFD#1 to Red Rocks Park including the drinking water well and all associated equipment.

2. South Burlington Fire District #1 (SBFD#1) is a municipality serving over 200 residents with high quality drinking water provided by a deep well that is just over 1000 feet from identified toxic waste contaminants found on the project site. Testimony of S. Crowley.

3. In an October 23, 2020 letter to Burton Exhibit 106, the VT Department of Environmental Conservation (DEC) found that information included in the site file for this location indicates that several releases of hazardous materials were identified and addressed at the General Dynamics site in the 1980s and 1990s. However, these previous site investigations regarding the identification and management of those legacy toxins do not meet current requirements. Therefore, DEC initiated a process of reviewing and bringing that situation to current standards. DEC identified as possible problems:

   a. Investigations conducted historically (most recently in 2000) were not comprehensive and do not address all areas where releases may have occurred during the production operations;

   b. Previous remediation activities were inadequate;

   c. New information is discovered regarding the migration of the hazardous materials, health effects of the hazardous materials, or site conditions;

   d. A new hazardous material is listed or identified that requires a response by the potentially responsible party (PRP);

   e. Any other condition that presents a threat of unreasonable exposure to humans or the environment from a hazardous material that was released from the site.

4. In a letter from Stone Environmental to DEC, on behalf of SBFD#1, dated December 22, 2020 Exhibit 108, the following conditions are recommended:

   a. Groundwater assessment should be performed Site-wide and include an evaluation to the potential for off-Site migration to the south and east.

      i. Hydraulic head determination should be performed Site-wide.
ii. Groundwater quality assessment should be performed along the southern property boundary to evaluate potential migration toward nearby potable water sources including the SBFD #1 well protection area and VELCO substation well.

b. Geologic assessment should be performed contemporaneously with the groundwater assessment to evaluate the geometry of the silt-clay contact.

c. An assessment of the various Site contaminants of concern should be performed of all potential release mechanisms and source areas. Samples should be collected that are representative of potentially impacted media and analyzed for relevant Site contaminants of concern.

d. Samples of groundwater and soil should be collected to specifically assess for the presence/absence and degree, nature, and extent of PFAS in the environment.

5. Little is known about the flow patterns of groundwater in the soil under the project site. The applicant has presented no evidence that definitively characterizes groundwater patterns. Applicant has presented no evidence of existence or absence of contamination or flow patterns in test wells surrounding the project site. Some historic documents reference test wells in a small area north of the site. Exhibit 105. There is no data about groundwater flow to the south and southwest, in the direction of the Fire District well and Source Protection Area.

6. One private well (Velco) south of the site indicates sandy soil to a depth of 50 feet before reaching a few feet of clay then bedrock; no contaminant testing or flow assessment has been conducted on this well. S. Crowley testimony.

7. The northwest corner of the project site has been identified as the location of a 30’x5’x3’ waste disposal trench that served as a disposal location for over 600 gallons of waste containing, at a minimum, sodium dichromate and sulfuric acid. Exhibit 104. This legacy toxic trench has not been precisely located but is noted in Exhibit 104 as being located under an asphalt drive at the northwest corner of the property. This report also stated that “Potential Groundwater contamination could migrate to a municipal well.” The report identified only Fire District #1 well as the municipal well. This hazardous waste disposal site is not mentioned in any of the applicant’s plans. Applicant has produced no evidence that there has been any further assessment or monitoring of the trench since it was buried.

8. This is also roughly the location of the planned storm water basin, a rock-lined wetland, and which will support infiltration of collected stormwater. Exhibit 45. This is at the northwest corner of the site, a description matching that of the etching waste disposal trench. Exhibit 104. This area is indicated in the demolition schedule for removal of asphalt and soils to 28” below grade. Exhibit 34. Once exposed to the environment, contaminants can be released into the groundwater at the site by construction and operation of the proposed wetland pond and pretreatment swale.
9. Furthermore, outflow structures are characterized as “emergency overflow” structures, indicating that the design mode is infiltration. This contradicts statements made by the applicant that stormwater will not infiltrate. *J.Caulo testimony.*

10. Applicant proposes a search pattern of testing soils on a 25 ft x 25 ft grid. *Testimony of John Caulo.* This proposed grid pattern has a very low likelihood of locating the 5 ft wide trench. *Testimony of S. Crowley.* Test borings in a grid every 25 feet have a low likelihood of finding the trench even if it is not at a depth below the borings, and no chance if the trench is below the depth of the borings, which are proposed to be 3 feet in some places and six feet in others. Even if the trench is at a depth where it will be disturbed, the proposed grid pattern has a low likelihood of locating the trench. Thus, there is a high likelihood the project could disturb the contents of the trench without adequate protections in place or could result in infiltration that disturbs the contents of the trench.

11. SBFD#1 manages these assets on behalf of and with revenues derived from, residents of Queen City Park, a quiet, compact residential neighborhood nestled between Lake Champlain, Red Rocks Park, and the Potash Brook corridor. Central Ave is the sole access road to Queen City Park and to SBFD#1 properties. Like the other streets in Queen City Park, Central Avenue is a narrow residential street with no shoulder or sidewalk. Central Avenue is directly across the street from the proposed venue. Neighbors, (individuals, groups, parents with strollers, and elderly community members) are constantly walking, biking, and socializing in the street and on the green. The houses are close together and close to the street, creating a dense and closely connected residential neighborhood. Vehicles need to slow down and take care as they pass one another in numerous places, including the curve in the road not far from Queen City Park Road. Further down the street, numerous residents must park on the street because off-street parking is limited. This means cars must take turns as they pass the parked cars. These conditions make walking or biking dangerous if there is more than light traffic or there are drivers who are unfamiliar with the conditions or not attentive. *S. Caflisch testimony.*

12. This project as proposed will have a harmful impact on our community assets and quality of life. It is reasonable to expect that attendees to events, before or after the events, will visit, park, drive around, hang out, drink or smoke on SBFD#1 property, including the green, playground equipment, basketball court, beach access and parking lots. Even assuming parking is adequate, this concern is similar to the concern Councilor Emory expressed regarding people being drawn to Red Rocks Park. The green overlooks Shelburne Bay and beyond and is close to beach access, so it is a considerably greater magnet than the park near the current location of Higher Ground. Although the provision that Burton will not allow tailgating is reasonable, it will encourage people to park in Queen City Park and use SBFD#1 property, including in the Fire District parking lots even if parking at the venue is adequate, or to park at the venue and walk to the green. This increased use will increase wear and tear on the SBFD#1 assets and potentially create safety issues, both of which
will impact the ability of SBFD#1 to manage and maintain those assets. Problems will include increased litter, and wear and tear, which will degrade the aesthetics of these areas which we must manage and collect taxes to maintain. This increased use will also cause congestion that will impact the community’s use and enjoyment of these assets. Additional visitors also are likely to increase noise on the properties. In sum, even if parking at the venue is adequate, the project will adversely affect the ability of SBFD#1 to manage its property and residents' ability to enjoy SBFD#1 community assets. These impacts will be particularly problematic with large events.

S. Caflisch testimony.

13. For the reasons set forth in the Proposed Findings of Fact and Conclusions of Law Submitted by Smith et al., the parking proposed for the venue is inadequate.

14. Inadequate parking at the venue will create numerous adverse effects on SBFD#1 properties, including parking lots, as well as on community members using and seeking to access SBFD#1 properties.

   a. There are no public municipal parking lots available for concert attendees, no on-street parking on Queen City Park Road, and only quiet residential streets surrounding the proposed venue. One of those residential streets is Central Avenue, which is directly across from the venue. Many patrons who cannot find parking at the venue (or who anticipate they will not find parking at the venue, or who simply want to be able to exit more quickly after the concert) will undoubtedly travel into Queen City Park, and some will park in SBFD#1 community parking lots, thus reducing the availability of the lots for QCP residents and increasing the cost of managing and maintaining the lots. Others will park on the streets. Still others will need to turn around and exit because they cannot find parking in the neighborhood.

   b. Concertgoers seeking parking in Queen City Park, whether in SBFD#1 parking lots or on the streets, will cause congestion and dangerous conditions for community members, including those using or seeking to access SBFD#1 property.

   c. The congestion will impair access by emergency vehicles to the neighborhood, including access to deal with emergencies on SBFD#1 property.

   d. Patrons who park in QCP due to the lack of adequate parking at the venue will also use other SBFD#1 assets, worsening the impacts discussed in previous findings and increasing management and maintenance expenses for SBFD#1.

S. Caflisch testimony.
CONCLUSIONS OF LAW

Burton Did Not Satisfy Its Burden to Produce Sufficient Evidence Upon Which to Base Findings on Water Contamination Under Criteria 1 and 1(B).

PROPOSED CONDITIONS:

If the Commission decides to issue a permit, SBFD#1 seeks the following conditions:

1. **Implement recommendations from Stone Environmental letter, Exhibit 108 (Criteria 1, 1(b)).**
   a. Groundwater assessment should be performed Site-wide and include an evaluation to the potential for off-Site migration to the south and east.
      i. Hydraulic head determination should be performed Site-wide.
      ii. Groundwater quality assessment should be performed along the southern property boundary to evaluate potential migration toward nearby potable water sources including the SBFD #1 well protection area and VELCO substation well.
   b. Geologic assessment should be performed contemporaneously with the groundwater assessment to evaluate the geometry of the silt-clay contact.
   c. An assessment of the various Site contaminants of concern should be performed of all potential release mechanisms and source areas. Samples should be collected that are representative of potentially impacted media and analyzed for relevant Site contaminants of concern.
   d. Samples of groundwater and soil should be collected to specifically assess for the presence/absence and degree, nature, and extent of PFAS in the environment.

2. **Etching Waste Trench (Criteria 1, 1(b)).**
   The applicant shall locate, sample for all known and potential contaminants, and remove all etching waste trench contamination at the “northwest corner” of the site prior to any demolition activity for development of the property:
   a. Utilize sensory technology, such as ground penetrating radar, to locate the remains of the disposal trench.
   b. If this fails, use a grid pattern for assessing distribution of potential toxic materials, such as every 4 x 4 feet, at sufficient depth that assures the trench will be found if it is in the area to be disturbed.
3. **Noise at SBFD#1 Properties (Criteria 1, 7, 8, 9(J) and 9(K)).**
The following conditions are based upon Ex. 9, Act 250 precedents, and the examination of Mr. Duncan.

   a. Noise subject to these conditions includes noise from events, noise of persons on the patio, noise of persons and cars in parking lots, noise from persons walking to and from cars parked on streets at close of events, and noise of cars parked on streets at close of events.

   b. Noise limit of 70 dbA Lmax at the Burton property line and 55 dbA Lmax at areas of frequent outdoor use such as SBFD#1 properties.

4. **Limits on the hours of operation (Criteria 1, 5, 7, 8, 9(J) and 9(K)).**
   A. Events, and all associated activities such as patio use and restaurant use, shall terminate no later than 10 pm except as set forth in B and C.

   B. One weekend night per week, either a Friday or Saturday, all events and associated activities such as patio use and restaurant use will terminate no later than 11 pm. A weekend is Friday evening or Saturday evening.

   C. Up to 4 events per calendar year may close after midnight. Burton shall provide public notice on its website at least 30 days in advance of each such event.

   D. The total number of events per year shall not exceed 120 evenings; daytime events are not subject to this limit.

   E. On weekdays all events will start after peak traffic hours, as identified by VHB’s report to the Commission.

5. **Limits on number of tickets (Criteria 1, 5, 7, 8, 9(J) and 9(K)).**
   Although enforcement of no-parking rules may help (see below), persons who have paid for their event tickets, and/or driven a significant distance, are not going to turn around and drive home when they find that the Burton lot is full. They will park wherever they can find a space, and will treat the cost of a parking ticket as part of the price of attendance. Therefore, the following is needed.

   A. Tickets sold shall be limited to 1000. This is the number of parking spaces approved by DRB, 426, times 2.5 = 1065, based on the FHWA guidance document, minus parking spaces for staff and entertainers and their trucks and buses.
B. If additional parking spaces are leased, or use of shuttle buses from UVM or downtown parking garages has been demonstrated to reduce the number of cars driven, Burton may return to the District Commission for amendment of permit.

6. **Law Enforcement at Burton/HG expense (Criteria 5, 7, 8, 9(J) and 9(K))**

   A. Burton and/or Higher Ground contract with a Sheriff’s Department for one or more officers to be on duty in South Burlington, Burlington and Red Rocks Park, to enforce parking bans, authorize towing of parked vehicles, enforce violations of Burlington and South Burlington ordinances as well as state law and direct traffic. The Sheriff’s Department shall commence duty two hours before event times until after the event starts; return to duty at the scheduled end of the event at least one hour, until the parking lot is empty of customer cars.

7. **Curb cuts (Criterion 5)**

   A. The property curb cuts shall be relocated to the western edge of the property onto the north south portion of QCP Road to reduce congestion on the one lane bridge and in preparation for the eventual completion of the Champlain Parkway.

8. **Signaling or signage at the one lane bridge (Criterion 5)**

   A. In addition to the conditions imposed by the Development Review Board, a traffic signal or two flaggers shall be on duty at the one-lane bridge during the hour before and the hour after events.

9. **Indemnification and Surety Bond (Criteria 1 and 7)**

   Pursuant to Criterion 7, the following conditions are appropriate (see, e.g., *Re Howard and Louise Leach Land Use Application, #6FO316-EB, Findings of Fact and Conclusions of Law, 6/11/86 at p.30*).

   A. Burton shall reimburse Fire District No.1 for its increased costs at its properties caused by Higher Ground events, including but not limited to costs of security and maintenance, and also any increased costs caused by potential or demonstrated migration of contaminants, including but not limited to increased monitoring costs and costs of remediation.

   B. In the event payment is not promptly made after billing, the Fire District may request amendment of this condition to require that a surety bond shall be posted by Burton to indemnify the Fire District for the amounts set forth above. The amount of the bond shall be determined by the Commission and
may be revised at any time upon application by the City of South Burlington, Fire District No.1, or Burton.

10. **Entertainment Permit (Criteria 1, 5, 7, 8, 9(K) and 10)**

   A. Conditions 1-10 shall be incorporated into every application for a Burlington Entertainment permit as a proposed condition of that permit.

   B. Every application for an entertainment permit shall be warned at least 14 days in advance of the filing of the permit application by email or mail to residents of Queen City Park, Arthur Court, and Austin Drive, including a representative of the City of South Burlington, who inform Burton that they wish to be notified and state the manner of notice; the application for the Entertainment Permit shall certify that this notice has occurred.

11. **Violation of Conditions**

   A. Significant violation of any of these conditions is grounds for permit revocation.

Date: April 26, 2021 For South Burlington Fire District #1:

/s/Stephen Crowley

/s/Stephen Caflisch

/s/Sharon Behar
STATE OF VERMONT
NATURAL RESOURCES BOARD
DISTRICT 4 ENVIRONMENTAL COMMISSION

Act 250 Land Use Permit Application )
#4C0174-6 & 4C0368-3 )
The Burton Corporation, Burlington )

CERTIFICATE OF SERVICE

I, Stephen Crowley, certify that on April 26, 2021, I served copies of the SBFD#1 Response to March 26, 2021 Hearing Recess Order and associated exhibits on behalf of the South Burlington Fire District #1 to the service list below by email:

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Katherine Schad, Town Clerk
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Dated at South Burlington, Vermont, April 26, 2021.  

By:  Stephen Crowley  
Asst Water Operator
April 28, 2021

District #4 Environmental Commission
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Re: Agency of Natural Resources Recommendations Regarding Application #4C0116-21H

Dear Commissioners:

The Agency of Natural Resources (“Agency”) reviewed application #4C0116-21H pursuant to 10 V.S.A. § 6086b - Downtown Development; Findings. Co-Applicants Devonwood Cherry Street Associates, LLC and Burlington School District propose an after-the-fact change in use of the former Filene's/Macy's store into the host site for the Burlington High School (the “Project”).

10 V.S.A. § 6086b(3)(E) requires that the Agency submit written recommendations on whether the proposed improvements will have a significant impact on any land or facilities under its jurisdiction or on any important natural resources other than primary agricultural soils. The Agency finds the Project will not have significant impacts on important natural resources and Agency lands and facilities protected by Act 250 criteria 1, 1(A), 1(B), 1(C), 1(D), 1(E), 1(F), 1(G), 2, 3, 4, 8, 8(A), 9(C), and 9(K).

Please contact me at (802) 798-2087 or kevin.anderson@vermont.gov if the Agency can be of further assistance in this matter.

Sincerely,

/s/ Kevin Anderson
Kevin Anderson
Regulatory Policy Analyst
Vermont Agency of Natural Resources
E-Notification CERTIFICATE OF SERVICE FILE #4C0116-21H

I hereby certify that I, Kevin Anderson, Regulatory Policy Analyst for the Agency of Natural Resources’ Office of Planning, sent a copy of the foregoing recommendations, dated April 28, 2021, regarding File #4C0116-21H by U.S. mail, postage prepaid, to the individuals without email addresses and by electronic mail to those with email addresses as indicated:

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/s/ Kevin Anderson
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Agency of Natural Resources
Office of Planning
RESPONSE BY SMITH ET AL. TO NEW EVIDENCE
SUBMITTED BY ANR, THE CITY OF BURLINGTON, AND BURTON ON 4-26-21

Motion for Permission to Respond, or for Cross-Examination and Rebuttal

The Commission asked the Agency of Natural Resources, the City of Burlington, and Burton to file additional materials by April 26, 2021; they did so, on April 26, 2021. This was the same day Proposed Findings of Fact and Conclusions of law were due. Mr. Smith, Ms. Waters, Mr. Turner, Mr. Logan, Ms. De Terra, Mr. Goodman, Ms. Landauer, Ms. Bratt, Ms. O’Neill, Dr. Walrath, Ms. Herrick and Ms. Ellis have had no opportunity to respond to, cross-examine the authors of, or rebut the documents filed on April 26. They hereby move for permission to submit a brief response (below), pursuant to § 809(c), to the documents filed on April 26, 2021, or if this response is not allowed, they move for permission to cross-examine the authors of the documents filed on April 26, and to submit brief rebuttal testimony.

Memorandum in Support of Motion

Sections 809(c) and 810 of the Vermont Administrative Procedure Act guarantee Smith et al. the right to respond to, to cross-examine about, and to rebut the new evidence submitted on April 26. In re Crushed Rock, 150 Vt. 613, 625, 557 A.2d 84 (1988). Smith et al. believe that the response below would suffice, but if this response is not allowed they ask to cross-examine the authors of the documents and to submit rebuttal documents and/or testimony.

Response to Documents Filed on April 26, 2021

Exhibits 142, 144 and 148 re: Contaminated Soils

Exhibit 142 consists of an Entry of Appearance by the Agency of Natural Resources (ANR), Comments by ANR, and a memorandum from Ms. Lynda Provencher of the Soils Planning Commission Agenda
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Management Section (SMS) of ANR’s Hazardous Sites Program to Ms. Jennifer Mojo of ANR. The Comments respond to the request by the Commission for a “comment letter” containing proposed permit conditions to prevent release of hazardous materials. Ms. Provencher’s memorandum states that soil precharacterization has been proposed by VHB on behalf of Burton, but that precharacterization is not required by SMS. Nonetheless, SMS “is in favor of any entity conducting proactive sampling...” If that sampling shows that a release “has occurred,” the corrective measures of the I-Rule will be triggered.

Exhibits 144 and 148 are a letter from Burton’s counsel and a memo from VHB witness Kurt Muller, P.E. They respond to the Commission’s questions about soil precharacterization. They describe the work and state it will not be commenced until after an Act 250 permit is issued (Ex. 148 p.4).

Ms. Provencher’s memorandum demonstrates that the I-Rule remedies past releases and their effects on preexisting land uses, unlike Act 250 which considers proposed future land uses, including those proposed for sites with contaminated soils. Her memorandum conforms to the I-Rule. See § 35-1010 (the purpose of the I-Rule is to protect the public “where a release of hazardous materials has occurred”), § § 35-304(b)(1) and (2) (site investigation work plans must disclose the identity of the person who released the materials and the “current land use and activities of the property”); and § 35-306(b)(3) (site investigation reports must address the “Current use or uses of the property.”) The only mention of new land uses in the entire, 102-page I-Rule is the discussion of proposed future corrective plans, the purpose of which is to remedy past releases. See §§ 35-604, 35-606.

The I-Rule does not authorize ANR to: determine whether a proposed new land use may cause a future release of contaminants; or decide upon permit conditions that would prevent a
proposed new land use from causing future releases; or require indemnification of the operator of a nearby public water supply if that does happen; or ultimately, to decide if the potential impacts of the proposed new land use would be sufficiently undue as to require rejection of the proposed new use. The sifting and weighing of evidence that addresses these questions is an obligation that Act 250 imposes exclusively upon the members of the District Commission.

Mr. Muller’s memorandum states point-blank that the precharacterization will not inform the Act 250 decision-making process. Burton has chosen to pre-characterize the soils only after Burton receives its Act 250 permit, regardless of its burden of production.

A ruling that found Criterion 1 to be satisfied by the availability of ANR’s I-Rule to remedy any contamination that may be found during post-permitting characterization or during construction -- instead of requiring the applicant to demonstrate what and where those contaminants are, and whether there is potential hydrogeological connection to the nearby public water supply – would be an evasion of the District Commission’s statutory obligation. It would be the same error the Environmental Division committed in In re Hinesburg Hannaford, 2017 VT 106 ¶¶ 51-53, 2016 Vt. 118, 179 A.3d 727 (reversing Environmental Division’s grant of an Act 250 permit where Division lacked evidence that stormwater control swale would function to filter stormwater and instead relied on applicant’s assurance that, in the future, if the swale did not function properly, the NRB would require some other stormwater control method to ensure compliance with Act 250).

In the absence of evidence that the proposed swale would likely work as intended, the court's reliance on enforcement proceedings to assure the functionality of the swale would shift to those proceedings questions that should be addressed at the permitting stage. That would significantly impact Neighbors’ rights. Although interested parties may participate in enforcement proceedings, they have no right “to initiate such proceedings or raise additional violations.” Treetop, 2016 VT 20, ¶ 13 n.4; see 10 V.S.A. § 6027(g) (assigning to NRB discretion to initiate
enforcement on matters related to land use permits). Thus, the trial court's reliance on enforcement proceedings, in the absence of evidence supporting the trial court's finding that the swale would likely work, deprives Neighbors of their only certain opportunity to present evidence demonstrating that the system would not function as designed because of the particularities of its location.

Id. ¶ 53.

Act 250 requires that these decisions be made now, as part of Act 250 permitting, where the parties have the opportunity to participate. In order for that to occur, Burton must satisfy its burden of production instead of relying on post-permit I-Rule regulation.

**Exhibit 143 re: Sidewalks, Cross-walk & Bike Path**

Exhibit 143 consists of a report from Burlington Department of Public Works Engineer Susan Molzon. The exhibit responds to two questions the Commission asked about plans to construct sidewalks along Queen City Park Road and a cross-walk and/or a bicycle path near the intersection of Queen City Park Road and Central Avenue. Question 7 asked when the sidewalks would be constructed and asked for the planned design of the sidewalks. Question 8 asked if the City has plans for a cross-walk and/or a bike path at the intersection. Engineer Molzon states that these questions will be answered in the future in the context of the regional planning process.

Ms. Molzon’s memorandum, by relying on the regional planning process in the future, does not address the statutory criterion, which is whether the proposed development will cause unreasonable congestion or unsafe conditions, and if so what feasible mitigation measures are needed before the proposed development opens its doors to the public. In *In re Hinesburg Hannaford*, Id., ¶ 74, a traffic light mitigation condition imposed to remedy traffic exacerbation likely to be caused by the proposed development was reversed because there was no evidence the traffic light was feasible. The traffic light was proposed for a state highway, not the applicant’s
property, and there was no evidence that VTrans would consent to, much less construct, the traffic light. Here, Burton owns the land upon which the sidewalks are needed.

The regional planning process cannot and will not answer those questions. Even were the regional planning process to address those questions, Act 250 requires that they be answered now, in this proceeding. *In re Hinesburg Hannaford*, Id., ¶ 53.

The need for that mitigation has been shown. According to the undisputed testimony, Queen City Park Road lacks sidewalks and cross-walks but is heavily used by pedestrians and bikers. The undisputed evidence from Burton is that its performance event will add at least 500 cars at its large evening events,\(^1\) which is an additional 1000 trips per day\(^2\) and an additional 300 cars at daytime events, which is another additional 600 trips per day.\(^3\) Smith et al.’s proposed conditions 4, 6, 7 and 8 are reasonable, feasible conditions under Criterion 5 that would protect pedestrians and bicyclists.

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\(^1\) Burton Proposed Finding of Fact 139 states that using a vehicle occupancy rate of 3 persons per vehicle, there would be 500 added vehicles. Five hundred vehicles means 1000 trips. Burton Proposed Finding of Fact 142 states that the FHWA average of 2.5 persons per vehicle (which would require 600 parking spaces and 1200 trips) predates ride services such as Uber. If Uber substitutes for privately driven vehicles, the number of trips per person will double for each Uber-transported attendee. There will be two trips to deliver the customer and two trips to pick up the customer. If the occupancy rate is 3, if only 426 parking spaces are available (the proposed number), and if Uber fills the 74-vehicle gap, there will be \(1,148\) added trips. If the rate is 2.5 as FHWA states, and if Uber fills the gap created by hosting only 426 spaces, there will be \(1,548\) added trips per day.

\(^2\) Five hundred additional cars is an additional 1000 trips, not an additional 500 trips as Burton’s Proposed Finding of fact 186 states.

\(^3\) Burton’s Proposed Findings do not mention the added 600 trips from daytime events.
**Exhibit 147 re: Traffic**

Exhibit 147 is a memo from VHB traffic engineer Jenn Conley that responds to the Commission’s fifth question, seeking information on the conditions that Burton could implement if a post-permit traffic study reveals problems.

The VHB memo omits any standards or criteria that would trigger mitigation or that would determine the nature of the mitigation. Instead, Burton’s traffic engineers will use their professional judgment to evaluate the need for mitigation. If they determine that mitigation needed, they will again exercise their professional judgment to determine what those measures should be. They would then seek approval from the Development Review Board. Presumably, the District Commission also would have some role in approving their judgments.

The absence of standards or criteria governing when mitigation is needed, and what the mitigation would consist of, fails to respect the requirement of Act 250 that these matters must be decided now, as part of these proceedings. In re Hinesburg Hannaford, Id. Smith et al.’s proposed conditions 4, 6, 7 and 8 remedy this deficit by imposing clear mitigation conditions. For example, unless and until Burton demonstrates to the Commission that it can accommodate more than 1000 patrons with its 426 spaces, ticket sales will be capped at 1000.

**Conclusion**

Smith et al. ask that the Commission accept the comments above or, if not accepted, for the opportunity to cross-examine and rebut the authors of these exhibits.

Date: May 5, 2021

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I hereby certify on this 5th day of May, 2021, a copy of Response by Smith et al. to New Evidence Submitted by ANR, the City of Burlington, and Burton on 4/26/21, was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

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