June 6, 2022

Via E-mail

Scott Gustin, Principal Planner & Asst. Administrative Officer  
City of Burlington Development Review Board  
Office of City Planning  
City Hall, 3rd Floor  
149 Church Street  
Burlington, VT 05401  
sgustin@burlingtonvt.gov

Re: 51 Elmwood Avenue (ZP-22-199)

Dear Board Members:

I write on behalf of the Burlington Community and Economic Development Office (“CEDO”) regarding its application to operate a temporary emergency shelter community (“the Project”) that is warned for the Board’s June 21, 2022 meeting. Enclosed with this letter, CEDO is providing additional information on this application in response to staff, board, and public comments and questions as requested during the first, continued, hearing. This letter also responds to legal questions raised during that initial hearing regarding the Board’s review of this municipal project under 24 V.S.A. § 4413(a).

By means of background, I have attached the Burlington City Council’s March 21, 2022 resolution that recognized the urgent need to address housing insecurity in our community and approved the use of 51 Elmwood Avenue for this temporary emergency shelter. A copy of that resolution is attached as Exhibit 1. The City Council’s action responds to levels of homelessness “almost triple that of pre-pandemic times,” and reflects the “Burlington community’s strong desire to expend City resources” addressing this urgent issue. After seeking public input on investing American Recovery Plan Act (“ARPA”) funds, solutions for addressing homelessness emerged as a top community priority. At the February 7 and March 21, 2022 City Council meetings, after public notice and public input, the City Council allocated funds to construct and operate an emergency shelter and Community Resource Center, and subsequently authorized the proposed Project at 51 Elmwood Avenue.
Memorandum Regarding 24 V.S.A. § 4413(a)

This Board may only regulate “State- or community-owned and operated institutions and facilities” regarding limited, enumerated, attributes\(^1\) and “only to the extent that regulations do not have the effect of interfering with the intended functional use.” 24 V.S.A. § 4413. As noted by DRB staff, it has long been the DRB’s practice to review city projects subject to the constraints of § 4413(a).\(^2\) Nonetheless, a public comment questioned whether “state- or community-owned and operated” included municipal projects, to which the Board requested legal guidance from the City Attorney’s office.

On this question, the case law is clear—the Vermont Environmental Court has squarely interpreted the term “community” in § 4413(a) to include municipalities. *In re Town of Charlotte Recreational Trail*, No. 98-5-08 Vtec, 2011 WL 740711, slip. op. at 5–6 (Vt. Super Ct. Envtl. Div. Feb. 14, 2011). That case turned exclusively on the meaning of § 4413(a), which the court determined “unambiguously” included municipal projects such as the town-owned project under review. *Id.* The court recently reaffirmed this interpretation of § 4413(a) in *Capitol Plaza 2-Lot Subdivision*, No. 3-1-19 Vtec, 2020 WL 1231566, at *3 (Vt. Super. Ct. Envtl. Div. Feb. 10, 2020) (“We have held that the term ‘community’ in § 4413(a) includes municipalities.” (citing *Town of Charlotte*)).

The Board therefore has no authority to depart from its existing practice of reviewing city-owned projects subject to § 4413(a)’s constraints. That practice must also apply here because the Project is a municipally owned and operated facility subject to § 4413(a). The City Council’s authorization of this Project makes clear that 51 Elmwood is a City-owned lot and that the Project will be “construct[ed] and operat[ed]” with City resources through allocated ARPA funds. Exh. 1. Moreover, other City departments will continue to assist CEDO in the operation of the Project—for example, the Department of Public Works will continue to plow the access lane through the site.\(^3\)

As a result, any CDO standards for conditional uses that exceed the enumerated statutory criteria are not applicable to the Board’s review. In addition, even for those standards that are permissible under § 4413(a), “to the extent that [the b]ylaws establish restrictions pursuant to land use aspects listed in § 4413(a), even those [b]ylaws must be disregarded if it is concluded that such restrictions interfere with the intended functional use of the proposed public facility.” *Town of Charlotte*, 2011 WL 740711.

This means that aspects of conditional use review, for example, CDO § 3.5.6(a)(2), which evaluates the “character of the area affected”—are not applicable to the Board’s review, notwithstanding Staff’s affirmative findings under that section. *See In re Goddard College*

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\(^1\) Uses subject to § 4413(a) “may only be regulated with respect to location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements.” *Id.*


\(^3\) *See Snow Plowing of Emergency Access Email attached to CEDO’s Application Update Memo, attached here as Exhibit 2.*
Applicable sections of the CDO under which the Project may be regulated include:

Article 3: § 3.5.6(a)(3) – noise impacts  
§ 3.5.6(a)(4) – traffic impacts  
§ 3.5.6(a)(6) – other city and state ordinances only to the extent permitted by § 4413(a)

Article 4: § 4.4.5(b) – Dimensional Standards and Density. Note that while the Project is an allowed use in the applicable district, review of uses under Article 4 is beyond the Board’s authority in this application.

Article 5: Lot coverage, building dimensional standards  
§ 5.4.13 – Special Use Regulations for Emergency Shelters to the extent they relate to the enumerated criteria of § 4413(a) and do not interfere with the Project’s functional use  
§ 5.5.1 – noise  
§ 5.5.2 – outdoor lighting

Article 6: § 6.2.2(l) – parking and circulation  
§ 6.2.2(m) – landscaping, fences, and walls  
§ 6.2.2(n) – public plazas and open space  
§ 6.2.2(o) – outdoor lighting  
§ 6.2.2(p) – integration of infrastructure into design  
§ 6.3.2(a)(1) – Architectural design: massing, height, and scale  
§ 6.3.2(h) – same, integrate infrastructure into the building design

Article 8: § 8.1.8 – minimum off-street parking  
§ 8.2.4 – bicycle parking

Neighboring Mackenzie House residents, through counsel, have contended that the Project neither meets the use limitations for community centers in this district nor the Special Use Regulations for Emergency Shelters. Both of these contentions are based upon the operating hours and methods of the Project which the Board does not have statutory authority to directly regulate. Mackenzie House’s arguments regarding the Project’s impact on the character of the area are also beyond the scope of the Board’s review, as discussed above. Goddard College CU, 2013 WL 5677442, at *1 (noting that review of impacts on the “character of the area affected” exceed § 4413(a)). Indeed, the City Council provided an opportunity to hear these public concerns at its March 21, 2022 City Council meeting, deliberated after public comment, and approved the project.

Moreover, if the Board chose to follow Attorney Byrne’s—or other commenters’—call to outright deny this application on any such basis, it would run afoul of § 4413(a)’s command to regulate without “interfering with the intended functional use.” I urge the Board to remain
mindful of its statutory authority under Title 24, which does not allow, in this case, consideration of, or interference with, the intended use of this urgently needed and democratically designated public project.

Please contact me if you need additional information or have any questions.

Sincerely,

[Signature]

Malachi Brennan, Esq.
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC
Attorneys for CEDO

cc: Samantha Dunn, CEDO

Encl.
Resolution Relating to

DESIGNATION OF 51 ELMWOOD AVENUE AS A SANCTIONED SITE FOR TEMPORARY EMERGENCY HOUSING IN THE CITY OF BURLINGTON.

RESOLUTION 6.06
Sponsor(s): Councilor Magee
Introduced: 03/21/22
Referred to:

Action: adopted
Date: 03/21/22
Signed by Mayor: 03/29/22

CITY OF BURLINGTON
In the year Two Thousand Twenty-Two ........................................................................................................
Resolved by the City Council of the City of Burlington, as follows:

1. That WHEREAS, the number of people experiencing homelessness and housing insecurity continues to be almost triple that of pre-pandemic times; and
2. WHEREAS, the public response to the survey on how to spend American Recovery Plan Act (ARPA) funds found that investing in solutions to homelessness is the top priority for our community; and
3. WHEREAS, the City has engaged the public on the issue and they have indicated that the Burlington community strongly desires to expend City resources to address chronic homelessness and to implement solutions to find humane housing for all; and
4. WHEREAS, on December 16, 2021, Mayor Weinberger released an action plan to fulfill the promise of housing as a human right; and
5. WHEREAS, that plan included a number of initiatives including the creation of a new low-barrier shelter pod community and Community Resource Center (CRC) in Burlington; and
6. WHEREAS, the shelter pod approach has proven effective in acting as a bridge to permanent housing in cities across the United States, as well as a cost-effective tool for sheltering the most vulnerable in a relatively quick manner; and
7. WHEREAS, on February 7th, 2022, the City Council approved an allocation of $2.975M in ARPA funds, to be used to target the homelessness crisis in Burlington; and
8. WHEREAS, this allocation of ARPA funds specifically included $1.47M for the construction and operation of a low barrier, shelter pod community along with provisions for social services; and
9. WHEREAS, this allocation of ARPA funds specifically included $970,000 for the construction and operation of a low barrier daytime Community Resource Center; and
10. WHEREAS, in response to the allocation of ARPA funds and the Mayor’s action plan, CEDO embarked on the process of developing an in-depth plan to procure a CRC, shelter pods and associated infrastructure, along with identifying potential locations for temporary emergency shelter; and
11. WHEREAS, CEDO and staff from other City departments considered a number of possible locations across the city to build the low barrier shelter pod community and it was decided that the city owned parking lot
DISTRIBUTION:

I hereby certify that this resolution has been sent to the following department(s) on

RESOLUTION RELATING TO

Adopted by the City Council

Approved, 20

Clerk

Mayor

Vol. Page
Resolution Relating to DESIGNATION OF 51 ELMWOOD AVENUE AS A SANCTIONED SITE FOR TEMPORARY EMERGENCY HOUSING IN THE CITY OF BURLINGTON.

at 51 Elmwood Avenue is the most suitable of the considered sites, as it provides both the necessary space and is within close proximity to other essential resources, including transportation, city water and sewer, human services; and

WHEREAS, the city is proposing to utilize the parking lot for up to 36 months, to serve as a location for the temporary emergency shelter and the Community Resource Center; and

WHEREAS, as previously authorized, CEDO has engaged with shelter pod manufacturers and executed contracts for the procurement of shelter pods of 64 square feet, designed to provide heat and electricity, a place to sleep and a space to store personal belongings; and

WHEREAS, 51 Elmwood Avenue has been identified as city owned property; and

WHEREAS, the Burlington Public Works Commission on March 16, 2022, temporarily decommissioned the property at 51 Elmwood Avenue as a city parking lot until April 30, 2025 in anticipation of the property being used for temporary emergency shelter;

NOW, THEREFORE, BE IT RESOLVED that to carry out the action plan intended to address the issue of chronic homelessness in Burlington, the City Council approves the use of 51 Elmwood Avenue as the location for temporary emergency shelter in the form of a shelter pod community and Community Resource Center through April 30, 2025, and authorizes CEDO to seek all necessary permits to ensure the property comports with any land use zoning and/or regulations pertinent to the parcel.

TM/JP/Resolutions 2022/ DESIGNATION OF 51 ELMWOOD AVENUE AS A SANCTIONED SITE FOR TEMPORARY EMERGENCY HOUSING IN THE CITY OF BURLINGTON.

3/17/2022
DISTRIBUTION:
I hereby certify that this resolution has been sent to the following department(s) on
CEDO Director Pine

ORIGINAL

RESOLUTION RELATING TO

Designation Of 51 Elmwood Avenue As A Sanctioned Site For Temporary Emergency Housing In The City Of Burlington

Adopted by the City Council
March 21, 2022

Clerk

Approved
March 27, 2022

Mayor

Attest:
Lori Olberg
Licensing, Voting and Records Coordinator
Vol. Page

* * * * * * * * * *
MEMO

To: Burlington Development Review Board  
From: Samantha Dunn and Brian Pine, CEDO  
Date: June 6, 2022  
RE: ZP-22-199; 51 Elmwood Avenue; Application Update

This memo provides additional information regarding CEDO’s application for a temporary emergency shelter community at 51 Elmwood Avenue. These updates fall into four categories: 1) Address conditions identified in the Staff Report; 2) Address follow-up questions from the DRB; 3) Address community comments/concerns; 4) Timing.

Conditions
We are addressing the following three conditions identified in the Staff Report for this application, dated May 17, 2022:

1. The wastewater capacity letter from the Department of Public Works is attached;
2. The front yard setback has been recalculated based on the 4 neighboring properties (2 on each side); the attached Revised Site Plan shows the updated calculation which increases the setback from 5 feet to 5.5 feet; moving the community resource center was not required to be compliant;
3. A bicycle rack for seven (7) bikes is shown near the primary entrance to the community resource center on the attached Revised Site Plan.

The proposed project will comply with all other conditions of the permit set forth in the Staff Report.

DRB Follow-up Questions
“I have a concern that the 12 to 14 foot wide emergency access in the site plan for 51 Elmwood Avenue is a potential safety concern. I would like to see a formal comment from the Burlington Fire/Rescue representative on the site plan design for 51 Elmwood Avenue. “

The design and layout of the site was coordinated with the Fire Department. Please find attached a letter from the Fire Department stating the layout is acceptable.

“Removing snow from the pod areas, the emergency access, and the parking area for 51 Elmwood Avenue will be difficult. Additionally, there is no place to put the snow other than onto Elmwood Ave. I see this as an inconvenience for the pod occupants and a potential safety issue should emergency access be needed.”
We agree that removing snow will be difficult on this site, as it is at many sites in Burlington. We have confirmation from the Department of Public Works (see attached email correspondence) that they will maintain the emergency access lane as part of their normal snow removal in this neighborhood. We will have equipment (shovels, snow blower) and staff on site to maintain the pedestrian pathways on the site. The attached Revised Site Plan shows snow storage areas on the site. In the event that the snowfall exceeds the snow storage capacity on the site the Department of Public Works can remove snow from the site as they have done in the past when it was operating as a parking lot.

Community Comments / Concerns
We heard numerous comments, concerns, and questions from community members during the public comment period. We take input from the community very seriously and have developed a website to provide up to date information on the development of the project, including a detailed and evolving FAQ where we add questions and answers as we hear them, and listed opportunities for engaging with the City in a dialogue about this important project. Preceding the first DRB hearing we have had several opportunities to gather input from the community and have incorporated that feedback into our design of the site and development of the operating plans as we are able (the draft Operating Plan is now available on the website). The website also provides a phone number and email address for communicating directly with our staff.

https://www.burlingtonvt.gov/CEDO/Ending-Homelessness

The project has been on the Wards 2 &3 Neighborhood Planning Assembly (NPA) agenda in both April and May. On May 12, 2022, The Wards 2 &3 NPA voted on the following resolution in support of the project: “The Wards 2 & 3 Neighborhood Planning Assembly endorses the establishment of a temporary Shelter Pod Village and Community Resource Center on Elwood Avenue to support community members who are experiencing homelessness and we require the city to take proactive efforts to keep abutting neighbors informed about development plans and activities at the site.” The resolution passed, 23 Yes, 8 No.

Timing
This project, a temporary emergency shelter community, is being developed in response to a homelessness crisis that the City is facing (as are other communities across the United States). The 36 month duration allows for the rapid deployment of shelter with services while the City and partners work together to build new permanently affordable housing units and a system of coordinated entry and services that will make the need for this shelter obsolete. This project is being developed as a temporary shelter because we must act quickly to get shelter in place for the most vulnerable members of our community and we urge you to act quickly on this application.

Attachments:
Water Sewer Capacity Letter
Revised Site Plan
Emergency Access Letter
Snow Plowing of Emergency Access Email
May 2, 2022

Michael Schramm, P.E.
Water Resources Engineer
235 Penny Lane
Burlington, VT 05401

Re: Conditional Water and Sewer Capacity for Shelter Community at 51 Elmwood Avenue

Dear Mike,

This letter is to inform you, Burlington Zoning Division, the State of Vermont Environmental District and other interested parties that the City of Burlington’s water and wastewater facilities have sufficient capacity to handle additional flows associated with a Shelter Community at the above address. Using Table 8-3 from the latest Vermont Environmental Protection Rules you have calculated water and sewer flows to be 2,790 gpd (gals/day). Your calculations are attached.

Flow from this area is treated at our Main Wastewater Plant located on Lavalley Lane. It is important to note that this letter only addresses treatment plant and not distribution or collection system capacities.

The capacity request is conditional given the expected temporary nature of the Elmwood Emergency Shelter Community. Here are our conditions:

1. This capacity approval letter is good until 4/30/2025. If this site is still active past this date reapplication is necessary.
2. Consideration of our CSOM (Combined Sewer Offset Mitigation) policy is waived given the temporary nature of this project but will be required if this site is permanently redeveloped in the future.
Any changes in flow estimates or property usage requires reapplication. Please feel free to call me at 343-0125 if you have any questions.

Sincerely,

Steve Roy, P.E.
Senior Water Resources Engineer

Elmwood Emergency Shelter Community
Water & Wastewater Flow Estimates

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<th>Use of Campsite</th>
<th>Units</th>
<th>Gallons Per Day Per Unit</th>
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<tr>
<td>Campsites for Tents and Other Camping Units with No Interior Plumbing</td>
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</tr>
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<td>central toilets with showers</td>
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<th>Use of Campsite</th>
<th>Units</th>
<th>Gallons Per Day Per Unit</th>
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<tr>
<td>Bathhouse</td>
<td>30 pods</td>
<td>75 gpd/unit</td>
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<tr>
<td></td>
<td>2,250 gpd for Bathhouse</td>
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| Community Resource Center (CRC)                      | 100 max daily patrons | 4 gpd/patron | 400 gpd |
|                                                     | 7 total max employee shifts (1 day shift) | 20 gpd/shift w/showers | 140 total gpd for employees (all shifts) |
|                                                     | 540 gpd for CRC            |

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<tr>
<td>without showers</td>
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<tr>
<td>with showers</td>
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<tr>
<td>with cafeteria</td>
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<tr>
<td>with public toilet</td>
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</tbody>
</table>

| total gpd for Bathhouse and CRC                          | 2,790 gpd |

Date: 5/23/2022

To: Samantha Dunn
Assistant Director for Community Works

Reason: 51 Elmwood Ave., Emergency Shelters, Fire Department Access

The Fire Department access to this site is acceptable. The south side of the access road will be unobstructed, allowing room for vehicle doors to open. The north side of the access road after passing through the gate will also allow for vehicle doors to open.

Matthew Stone
Fire Marshall
Hello Samantha,

The City is prepared to clear the one main emergency access lane through the 51 Elmwood Avenue site. We will need to work out the details in the coming months, but the City has the staffing and equipment resources to undertake the work.

Let me know if you need any further information.

Best,
Chapin

Chapin Spencer (he/him), Director
Department of Public Works
645 Pine Street, Burlington, VT
www.burlingtonvt.gov/DPW
802-863-9094

Our Mission: To steward Burlington’s infrastructure and environment by delivering efficient, effective, and equitable public services.