

BC Community Housing, LLC

Act 250

Under Act 250, an improvement project related to “forestry” does not need a permit. The statute provides:

10 VSA 6001 (3)

(D) The word development does not include:

(i) The construction of improvements for farming, logging, or **forestry** purposes below the elevation of 2,500 feet.

However, the district commission may see the forestry work as “pre-construction” for a “commercial purpose.”

10 VSA 6001 (3)

(A) Development means each of the following:

(i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for **commercial** or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

The Project property is within the Designated Neighborhood Development Area, and certain projects related to mixed housing may be exempt from needing a permit. It is unclear whether Farrell intends to include the needed mix of affordable housing to qualify for the exemption.

Local Zoning Regulations

Riparian and Littoral Conservation Zone – Section 4.5.4

Zoning: Waterfront Residential – Medium Density
Natural Resource Protection Overlay (NR) District

The NR Overlay District has 4 sub-parts, and the Project parcel is in the “Riparian and Littoral Conservation Zone” which includes lands within 250 feet of the high water mark (100 feet mean sea level).

Section 4.5.4 provides:

4.5.4 Natural resource protection overlay (NR) district.

(a) Purpose and Authority: The Natural Resource Protection Overlay District is intended to:

- Protect surface waters and wetlands from encroachment by development, and from sources of non-point pollution;
- Protect the functions and values of Burlington’s wetlands;
- Protect and enhance water quality near public beaches and other water-based recreation areas from sources of non-point pollution;
- Preserve natural features and communities, geologic features and cultural sites for education and research.
- Provide opportunities for public access where feasible and appropriate;
- Facilitate connections and corridors for wildlife between areas of publicly protected sites.

- Ensure that development that occurs within a Flood Hazard Area conforms to the requirements of the National Flood Insurance Program.
- Minimize and prevent the loss of life and property, the disruption of commerce, the impairment of the tax base, and the extraordinary public expenditures and demands on public services that result from flooding and other flood related hazards; and
- Ensure that the design and construction of development in flood and other hazard areas are accomplished in a manner that minimizes or eliminates the potential for flood and loss or damage to life and property; and
- Manage all flood hazard areas designated pursuant to 10 V.S.A. § 753; and
- Make the City of Burlington and its residents eligible for federal flood insurance and other federal disaster recovery and hazard mitigation funds as may be available.

(b) Areas Affected: This overlay district consists of all areas delineated on Map 4.5.4-1-Natural Resources Protection Overlay (NR) District and is divided into four (4) subparts:

1. **A Riparian and Littoral Conservation Zone** which consists of all surface water and a corresponding upland buffer area, and specifically includes the following areas:

- A. Uplands within 250 feet of the Lake Champlain lakeshore (measured at 100-feet above mean sea level) with the exception of that portion of the shoreline between the northern extent of the Interim Development Area north of the former Moran Generating Station and the most westerly extent of Roundhouse Point described as the "Urban Waterfront" in the 2000 Open Space Protection Plan;
- B. Uplands within 250 feet horizontal distance measured from the top of the slope where the channel runs adjacent to a valley wall or high terrace, or top of the bank where the channel has access to its floodplain, of the Winooski River;
- C. Uplands within 100 feet horizontal distance measured from the top of the slope where the channel runs adjacent to a valley wall or high terrace, or top of the bank, where the channel has access to its floodplain, of Engelsby Brook, Potash Brook or Centennial Brook; and
- D. Uplands within 50 feet horizontal distance measured from the top of the slope where the channel runs adjacent to a valley wall or high terrace, or top of the bank where the channel has access to its floodplain, of all other minor streams, or the mean shoreline of all other minor ponds;

Under 4.5.4(c), only limited uses are "permitted." For trees, only selective cutting of less than 25% of the trees 6 inches or more in diameter in a 10 year cycle.

(c) District Specific Regulations: Riparian and Littoral Conservation Zone:

1. **Permitted Uses:** Except where otherwise noted herein, only the following uses are permitted within the Riparian and Littoral Conservation Zone and its associated buffer subject to the requirements and limitations set forth below under subpart 4.

- A. Normal maintenance of existing lawns and maintained grounds including mowing, trimming of vegetation and the removal of dead or diseased vegetation around a residence,

decorative landscaping and planting, vegetable and flower gardens, and the repair of existing private landscaping structures such as walkways and walls;

B. "Accepted agricultural and silvicultural practices" as defined under 24 V.S.A. Ch 117

C. Normal maintenance of constructed wetlands and stormwater systems, provided that naturally occurring wetlands are not disturbed in conjunction with the maintenance;

D. Normal maintenance of existing docks, roads, rail lines, bridges, and culverts provided that disturbance to any shoreland is minimized in conjunction with such maintenance;

E. Selective cutting of less than 25 percent of the trees six inches or more in diameter at breast height over any 10 year cycle; and

F. Recreational and educational activities such as hiking, walking, fishing, nature study, and bird watching and associated boardwalks and unimproved trails.

2. **Prohibited Uses:** Except where noted herein, the following uses shall be prohibited within the Riparian and Littoral Conservation Zone and its associated buffer.

A. The deposition or introduction of organic and inorganic chemicals, including herbicides and pesticides, except when the application of pesticides is reviewed and approved by the BCB and DRB, and performed by an applicator certified by the Vermont Department of Agriculture for the sole purpose of controlling invasive species and subject to the requirements of the City's pesticide application ordinance (Burlington Code of Ordinances, Chapter 17, Section 9); and

B. The off-road use of any motorized vehicles including ATVs or dirt bikes (the temporary use of motorized vehicles used to construct and maintain permitted or regulated activities are specifically exempted from this prohibition);

3. **Conditional Uses:** Except where otherwise noted herein, **all uses permitted or conditionally permitted in the respective underlying zoning district**, including any construction of buildings or other structures, and roads, parking areas or any other impervious surface, may be approved only within the Riparian and Littoral Conservation Zone and its associated buffer after review and approval pursuant to the **Conditional Use review provisions of Article 3 and subject to the requirements and limitations below under Subpart 4.**

4. Requirements:

1. **Any land disturbing activities (i.e., vegetation has been removed, or the landscape has been graded or filled resulting in bare soil surfaces)** shall include a stormwater management, erosion prevention and sediment control plan pursuant to the requirements of Sec. 5.5.3 to be reviewed by the **conservation board and approved by the city engineer.**

In making determinations and decisions required herein, the city engineer shall consider the requirements of the most recent State of Vermont Stormwater Management Rules and Guidance document. The city engineer shall require the best practicable means be used to manage stormwater, prevent erosion, and control sedimentation. The city engineer is hereby authorized to develop performance standards to ensure conformance with these state stormwater management rules;

2. Agricultural and silvicultural activities shall follow Best Management Practices for the Protection of Water Quality;
3. Installation of any seawalls, rip-rap or other shoreland retention structures shall be submitted for review by the conservation board who shall consult with the city engineer prior to issuance of a recommendation to the DRB; and
4. No new stormwater outfall shall directly discharge into any surface water without approval and implementation of a stormwater management plan approved by the city engineer.

Would this Project involve the removal of no more than 25% of trees 6 inches in diameter? If not, it will be subject to conditional use review.

Attached as an **Appendix** are portions of the Conditional Use review found in Article 3

Tree Removal – 5.5.4

Because conditional use review is required, it is doubtful the “Tree Maintenance Plan” option for tree removal will apply. This only requires a Level 1 Certificate of Appropriateness, which does not require DRB approval. The intent of this option for a Plan appears aimed at general oversight, with no development plans attached to any tree removal.

Because the public is very interested in this project, the DRB will want to review the tree removal and require the permit process.

Section 5.5.4 relates to tree removal, and provides:

5.5.4 Tree removal.

(a) Review Criteria for Zoning Permit Requests for Tree Removal:

1. **Grounds for Approval:** Tree removal involving six (6) or more trees, each of ten (10) inches or greater in caliper or the removal of ten (10) or more trees, each of which is three (3) inches or greater in caliper during any consecutive twelve (12) month period may be permitted for any of the following reasons:

- A. Removal of dead, diseased, or infested trees;
- B. Thinning of trees for the health of remaining trees according to recognized accepted forestry practices;
- C. Removal of trees that are a danger to life or property; or
- D. As part of a development with an approved zoning permit.

2. **Grounds for Denial:** Tree removal involving six (6) or more trees, each of ten (10) inches or greater in caliper or the removal of ten (10) or more trees, each of which is three (3) inches or greater in caliper during any consecutive twelve (12) month period may be denied if existing healthy trees are known to be:

- A. Providing a significant privacy or **aesthetic buffer** or barrier between properties;
- B. Providing **stabilization** on slopes vulnerable to erosion;
- C. **Located within a riparian or littoral buffer;**

- D. Provide unique wildlife habitat;
- E. A rare northern Vermont tree species as listed by the Vermont Natural Heritage Program; or
- F. A significant element of, or significantly enhances, an historic site.

(b) **Tree Maintenance Plans**: Institutions or other property owners who practice ongoing tree removal shall be exempt from the requirement to obtain a zoning permit for individual tree removal projects subject to obtaining approval from the DRB for a plan as follows:

1. A Tree Maintenance Plan prepared by a **certified arborist** shall be submitted as a **Level I Certificate of Appropriateness, with a level I application fee**. This plan shall include general and specific criteria for removing trees based on the criteria as per Sec. 5.5.4(a).
2. The Tree Maintenance Plan if approved by the Development Review Board. Approval of the Plan is valid for up to five (5) years.
3. In order to continue tree removal, Tree Maintenance Plans must be updated or re-written and approved by the Development Review Board at five (5) year intervals.

The 2 links below discuss the Certificate of Appropriateness fees and process. It appears that a Level I COA would not require DRB approval. For this reason, it is doubtful the City would permit the proposed forestry project to be approved via a COA I.

https://www.burlingtonvt.gov/sites/default/files/PZ/Applications-Forms-Checklists/zoning_fee_schedule_burlington_vt.pdf

<https://www.burlingtonvt.gov/PZ/The-Zoning-Review-Process>

Article 6 – Design Review Standards

Any permit application related to trees should incorporate the “Design Review Standards” in Article 6.

Article 6, Design Review Standards, also govern trees. It provides:

6.2.2 Review standards.

- (a) **Protection of Important Natural Features**: The landscape, existing terrain and any significant trees and vegetation shall be preserved in their natural state insofar as practicable in keeping with the objectives of the underlying zoning district. Development and site disturbance shall preserve watercourses, wetlands, steep slopes, flood-prone areas, rock outcroppings, wildlife habitat and travel corridors, specimen trees and contiguous stands of forest, and other sensitive ecological and geological areas insofar as practicable in keeping with the objectives of the underlying zoning district. Site plans shall provide suitable buffers from any proposed site improvements, and maintain continuity and contiguousness of greenspace while allowing reasonable development in support of the overall intent of the zoning district. Where any natural features are proposed to be removed or the topography altered, special attention shall be given to replace or mitigate the loss of such features. Any development occurring on parcels containing significant natural areas identified in the city’s **Open Space Protection Plan** shall avoid disturbance to these natural areas and establish appropriate buffers that protect their natural functions.

(m) **Landscaping and Fences:** Landscaping shall be used to beautify the development site and to provide specific functions and benefits to the uses and buildings on the site. These include but are not limited to stormwater retention and erosion control, winter windbreaks and summer shade, recreational and habitat corridors, buffers and screening of parking areas, and creating privacy for and from adjacent property.

Existing trees shall be retained and incorporated into a landscape plan to the extent possible, and existing trees to be retained shall be protected during construction in accordance with specifications provided by the city arborist. Contiguous green space, both within the site and with adjacent properties, should be provided on a site whenever possible and be designed to provide wildlife travel corridors and habitat preservation, as well as enabling recreational access. If open space is intended to be publicly accessible, it shall be designed to maximize accessibility for all individuals including the disabled, encourage social interaction, and facilitate ease of maintenance. Along the street edge, landscaping shall be used to provide a visual buffer into parking areas from the public street and reinforce the streetscape.

The selection of plant materials and planting sites should create a sustainable landscape, and consideration shall be given to factors such as hardiness, salt tolerance, disease resistance, invasiveness, root and canopy spread, underground and overhead utilities, soil conditions, and microclimates. The use of native plant materials is encouraged, and the use of plants considered invasive by VT Agency of Agriculture shall be prohibited. For more information on sustainable landscapes, applicants are encouraged to consult *Planting Sustainable Landscapes: A Guide for Plan Reviewers* prepared for the Vermont Department of Forests Parks and Recreation by the Vermont Chapter of the American Society of Landscape Architects.

APPENDIX CONDITIONAL USE REVIEW

Article 5 discusses City Wide Standards and Article 3, Part 5 discuss conditional uses. Section 5.1.1 provides:

(d) **Conditional Uses:** A **conditional use** is listed in any district where denoted by the letters "CU" in Appendix A, Use Table. Such uses may be permitted by the DRB only after review under the **conditional use** provisions provided in Art. 3, Part 5, such further restrictions as the DRB may establish and such additional requirements as may be established by this ordinance such as but not limited to dimensional and intensity limitations, performance and design standards, and parking requirements.

Article 3, PART 5: CONDITIONAL USE AND MAJOR IMPACT REVIEW

3.5.1 Purpose.

These conditional use regulations are enacted to provide for a more detailed consideration of development proposals which may present a greater impact on the community.

Additionally, it is the intent of these regulations through the creation of a major impact review:

- (a) To ensure that projects of major significance or impact receive a comprehensive review under established criteria; and
- (b) 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.

3.5.2 Applicability.

(a) Conditional Use Review: Conditional Use Review shall be required for the approval of all development subject to the following provisions of this ordinance:

1. Any use identified under Article 4 and Appendix A - Use Table as a "Conditional Use" or "CU;"
2. Any Special Use specifically identified as being subject to conditional use review under Article 5, Part 3;
3. Any application subject to Article 9 - Inclusionary and Replacement Housing;
4. All applications for an Institutional Parking Management Plan pursuant to the provision of Article 8, Part 3;
5. All applications subject to Article 10 - Subdivision; and
6. All applications subject to Article 11 - Planned Development.

(b) Major Impact Review: In addition, Major Impact Review shall be required for the approval of all development involving:

1. The construction of five (5) or more dwelling units or the creation through adaptive reuse, substantial rehabilitation or conversion of ten (10) or more dwelling units;
2. The creation of five (5) or more lots;
3. The construction or substantial rehabilitation of fifteen thousand (15,000) s.f. or more of gross floor area of nonresidential development;
4. Land disturbance involving one (1) acre or more;
5. Site improvements involving fifty (50) or more parking spaces;
6. Site improvements and land development on parcels that contain designated wetlands as regulated pursuant to Article 4, or natural areas of state or local significance as identified in the municipal development plan;
7. Site improvements and land development on parcels seeking a waiver under Sec. 5.4.9 - Brownfields; or

8. Multiple projects by the same applicant or responsible party within any consecutive twelve (12) month period on the same property or on a property within one thousand (1,000) feet of the subject property that in the aggregate equal or exceed the above criteria.

(Ord. of 6-4-12(2))

3.5.3 Exemptions.

Major Impact Review shall not apply to applications involving one or more of the following:

- (a) Single-family dwellings;
- (b) Temporary structures;
- (c) Substantial rehabilitation that does not expand the floor area of an existing building or the structural capacity of existing development;
- (d) Projects that do not result in a change of use or increased parking demand as determined by the administrative officer; and
- (e) Subsurface site improvements including but not limited to underground utility lines and subsurface drainage ways.

(Ord. of 1-25-10(1))

3.5.4 Submission requirements.

In addition to the applicable application and submission requirements in Sec. 3.2.2, all applications for a zoning permit subject to Conditional Use and/or Major Impact Review under this Part shall provide any additional information necessary for the adequate review of the proposal under the applicable review criteria of Sec. 3.5.6 pursuant to Sec. 3.2.3.

Any development subject to Major Impact Review under this Part shall also include an affidavit or certification documenting that the Pre-Application Public Neighborhood Meeting requirement pursuant to Sec. 3.2.1(d) has been satisfied in accordance with the procedures and requirements set forth by the department of planning and zoning.

Pursuant to Sec. 3.2.8(D), the DRB may require the applicant to pay the reasonable costs and fees incident to an independent technical review of the application.

(Ord. of 6-4-12(2))

3.5.5 Public hearing required.

Applications involving Conditional Use and Major Impact Review shall require a public hearing pursuant to the provisions of Article 2 to provide an opportunity for public input and comment to the DRB on the proposed use and its conformity with the review criteria listed below.

3.5.6 Review criteria.

The application and supporting documentation submitted for proposed development involving Conditional Use and/or Major Impact Review, including the plans contained therein, shall indicate how the proposed use and associated development will comply with the review criteria specified below:

(a) Conditional Use Review Standards: Approval shall be granted only if the DRB, after public notice and public hearing, determines that the proposed conditional use and associated development shall not result in an undue adverse effect on the following general standards:

1. The capacity of existing or planned community facilities;
2. The character of the area affected as defined by the purpose or purposes of the zoning district(s) within which the project is located, and specifically stated policies and standards of the municipal development plan;
3. Traffic on roads and highways in the vicinity evaluated in terms of increased demand for parking, travel during peak commuter hours, safety, contributing to congestion, as opposed to complementing the flow of traffic and/or parking needs; if not in a commercial district, the impact of customer traffic and deliveries must be evaluated;
4. Any standards or factors set forth in existing City bylaws and city and state ordinances;
5. The utilization of renewable energy resources; and

In addition to the General Standards specified above, the DRB:

6. Shall consider the cumulative impact of the proposed use. For purposes of residential construction, if an area is zoned for housing and a lot can accommodate the density, the cumulative impact of housing shall be considered negligible;
7. In considering a request relating to a greater number of unrelated individuals residing in a dwelling unit within the RL, RL-W, RM and RM-W districts than is allowed as a permitted use, in addition to the criteria set forth in Subsection (a) hereof, no conditional use permit may be granted unless all facilities within the dwelling unit, including bathroom and kitchen facilities are accessible to the occupants without passing through any bedroom. Additionally, each room proposed to be occupied as a bedroom must contain at least one hundred twenty (120) square feet. There must also be a parking area located on the premises at a location other than the front yard containing a minimum of one hundred eighty (180) square feet for each proposed adult of the dwelling unit in excess of the number of occupants allowed as a permitted use. All other green space standards must be observed.
8. May control the location and number of vehicular access points to the property, including the erection of parking barriers.
9. May limit the number, location and size of signs.
10. May require suitable mitigation measures, including landscaping, where necessary to reduce noise and glare and to maintain the property in a character in keeping with the surrounding area.
11. May specify a time limit for construction, alteration or enlargement of a structure to house a conditional use.
12. May specify hours of operation and/or construction to reduce the impact on surrounding properties.

13. May require that any future enlargement or alteration of the use return for review to the DRB to permit the specifying of new conditions.

14. May consider performance standards, should the proposed use merit such review.

15. May attach such additional reasonable conditions and safeguards, as it may deem necessary to implement the purposes of this chapter and the zoning regulations.

(b) Major Impact Review Standards: Before a major impact development may receive approval, the DRB must be satisfied, based on documentation provided by appropriate city agencies, experts, interested parties and/or the applicant that the proposed development, in addition to meeting the review standards for conditional use review above, shall:

1. Not result in undue water, air or noise pollution;
2. Have sufficient water available for its needs;
3. Not unreasonably burden the city's present or future water supply or distribution system;
4. Not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result;
5. Not cause unreasonable congestion or unsafe conditions on highways, streets, waterways, railways, bikeways, pedestrian pathways or other means of transportation, existing or proposed;
6. Not cause an unreasonable burden on the city's ability to provide educational services;
7. Not place an unreasonable burden on the city's ability to provide municipal services;
8. Not have an undue adverse effect on rare, irreplaceable or significant natural areas, historic or archaeological sites, nor on the scenic or natural beauty of the area or any part of the city;
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;
11. Not have an undue adverse impact on the present or projected housing needs of the city in terms of amount, type, affordability and location; and/or
12. Not have an undue adverse impact on the present or projected park and recreation needs of the city.

3.5.7 Development review board decisions, findings of fact.

In issuing a decision regarding an application for development subject to Conditional Use and/or Major Impact Review, the DRB shall issue Findings of Fact regarding the proposed application's satisfactory conformance with each of the review standards of Sec. 3.5.6, and may attach such

additional reasonable conditions and safeguards as it may deem necessary to implement the purposes of this ordinance and the city's municipal development plan.

Pursuant to the requirements of Sec. 3.2.8(e), the DRB shall act to approve or disapprove any such requested conditional use within forty-five (45) days after the date of close of the final public hearing held under this section, and failure to so act within such period shall be deemed approval.

Any and all plans and documents pertaining to a request for Conditional Use and/or Major Impact Review as approved by the DRB along with the Findings of Fact issued, shall be incorporated into any permit issued, and except as otherwise provided, all development shall occur strictly in accordance with such approved plans, applications, findings, and conditions.