

## MEMORANDUM

TO: City Council Ordinance Committee  
FR: Kimberlee J. Sturtevant, Assistant City Attorney  
DT: July 29, 2016  
RE: ZA 16-14--Spot Zoning & Compliance with the Plan

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You have requested an opinion regarding whether ZA 16-14, the proposal for a Downtown Mixed Use Core Overlay, is spot zoning. You have also requested an opinion regarding the compliance of ZA 16-14 with the City's Municipal Development Plan. As compliance with the City's plan is one of the criteria to review for spot zoning, this memorandum addresses both inquiries. For the reasons set forth below, in our opinion ZA 16-14 complies with the City's plan and would not be considered spot zoning.

### Spot Zoning Generally

"Spot Zoning consists of zoning that single(s) out a small parcel or perhaps even a single lot for a use classification different from the surrounding area and inconsistent with any comprehensive plan, for the benefit of the owner of such property." *Granger v. Town of Woodford*, 167 Vt. 610, 708 A.2d 1345 (1998) citing *Galanes v. Town of Brattleboro*, 136 Vt. 235, 239, 338 A.2d at 410.<sup>1</sup> In *Granger*, the Vermont Supreme Court used a four part test to determine whether a zoning amendment is spot zoning. The four steps are:

1. "whether the use of the affected parcel is very different from the prevailing use of other parcels in the area;
2. whether the area of the parcel is small;
3. whether the classification is for the benefit of the community or only to provide a specific advantage to a particular landowner;
4. whether the change in the zoning classification complies with the municipality's plan."

*Granger*. at 611, 708 A.2d at 1346. "Zoning enactments are entitled to the presumption of validity." *Galanes v. Town of Brattleboro* 136 Vt. 235, 240 (1978)(citations omitted). Further, "[i]n an equal protection clause challenge based on the federal constitution that alleges impermissible spot zoning, the plaintiff has the burden of demonstrating that the

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<sup>1</sup> For your reference, summaries of some Vermont cases that have substantively addressed the issue of spot zoning are provided at the end of this opinion.

zoning classification is not 'related to the public health, safety, morals or general welfare.' *Granger* at 610 citing *Galanes* at 240.

**Analysis with Respect to ZA 16-14**

To assess whether ZA 16-14 is spot zoning we have applied the facts related to the proposed amendment to each of the four established criteria.

1. *Whether the use of the affected parcel is very different from the prevailing use of other parcels in the area.*

The prevailing use within the overlay area is not different than the prevailing use of other parcels in the Downtown District. The only change affecting the Use Table is the level of review required for "Schools—Post-Secondary & Community College". In the Downtown District, "Schools—Post-Secondary & Community College" are allowed with Conditional Use Approval. In the current proposal, the overlay would allow "Schools—Post-Secondary & Community College" as permitted uses. The change does not go to the inclusion or exclusion of the underlying uses, but rather the review level required for allowance. The changes proposed within the overlay district are more to scale and form, not use.

2. *Whether the area of the parcel is small.*

It is our understanding that the area affected by overlay is approximately 8.7 acres, which is not a small area with respect to Burlington standards. In addition, the area affected by the overlay includes approximately 7 parcels and 4 different owners. However, even if the area were deemed small, as noted in the attached cases, that factor may be outweighed by compliance with the other factors. See *Granger v. Town of Woodford*, 167 Vt. 610, 708 A.2d 1345 (1998) (rezoning of 0.82 acre parcel was not deemed spot zoning).

3. *Whether the classification is for the benefit of the community or only to provide a specific advantage to a particular landowner.*

Although this change is being made because of a project proposed by a single landowner, the amendment affects, and potentially benefits, more than one property owner. The proposed amendment also includes a change in the official map to reconnect St. Paul and Pine Streets. This is a benefit to the entire community, whether the connection is for pedestrian, bicyclist and/or motorist use. In addition, the proposed

changes in scale allow opportunity for more housing and a larger tax base. This is clearly a benefit to the community. Even if an amendment benefits a property owner, the benefit does not render the change unconstitutional where there is a rationally-related benefit to the community. See *Granger v. Town of Woodford*, 167 Vt. 610, 708 A.2d 1345 (1998).

4. *Whether the change in the zoning classification complies with the municipality's plan.*

In June of 2013, when planBTV Downtown and Waterfront was adopted by the City Council, it was incorporated by reference into Burlington's Municipal Development Plan (MDP). As stated in the MDP, "A new approach to the update of the Municipal Development Plan, now branded planBTV, has recently been developed in Burlington. Instead of preparing an overall update every 5 years, the Department of Planning & Zoning is now constantly working on various area-wide master plans or topic specific plans that eventually update the relevant chapters of this plan. The recent 2013 Downtown & Waterfront Master Plan is a great example of this new approach, which will allow, [sic], for a more in-depth look and understanding of the dynamics and character of each distinct city neighborhood." MDP at ii. PlanBTV Downtown and Waterfront looked specifically at the area under consideration in ZA 16-14 at pages 108-111, identifying that section as, "THE MALL". There are four elements of the plan included for the mall section: 1) downtown housing; 2) restoring connectivity of the urban grid; 3) strategic urban infill and liner buildings; and 4) street life.

With respect to the first element, downtown housing, the plan includes the following language:

...With undeveloped air space above the mall, and relatively high and flat area of the City that has little impact on prominent views, this quadrant of the downtown is well suited for larger residential structures. The plan suggests the addition of larger residential, mixed-use buildings by redeveloping underutilized parcels, essential for addressing citywide housing needs, reducing traffic congestion and parking demand, and supporting the continued vitality of our downtown economy.

planBTV, p. 108. ZA 16-14 complies with this goal as it allows for larger residential, mixed-use buildings within the downtown. It is also consistent with the stated implementation tool for this element, to "[e]nsure that zoning regulations render the development of housing easier, reducing barriers and costs."

ZA 16-14 also complies with the second element of the plan, restoring connectivity of the urban grid. “[T]his presents an opportunity to open the street level of the mall at Pine and St. Paul streets to create a public plaza and re-establish north-south traffic flow for pedestrians and bikes...” planBTV, p. 108. As indicated above, the amendment includes a change in the official map to reconnect St. Paul and Pine Streets (one of the stated implementation tools).

The third element is captioned “Strategic Urban Infill and Liner Buildings.” It is noted in that section that “[t]he BTC occupies a significant footprint in this quadrant of the City. Yet numerous opportunities exist for strategic infill and liner buildings along Cherry, Pine and Pearl Street. Such structures should be designed to reinforce the urban street wall and provide active ground floor uses to promote a vibrant streetscape.” planBTV, p. 109. ZA 16-14 is consistent this goal as, consistent with the stated implementation tools, it emphasizes building form, facilitates infill and activates the streetscape for pedestrians.

The final element within the “Mall” section is “Street Life.” Included in that section is the following language: “All along Cherry Street there are numerous opportunities for activating the street by turning the mall inside out and bringing retail and other activity back to the street. Strategic infill development, innovative building renovations, and streetscape improvements (such as trees and outdoor seating) would make for a more inviting, vibrant, and safer-feeling street.” planBTV, p. 109. ZA 16-14 is consistent with this goal as, consistent with the stated implementation tool, it emphasizes building form, facilitates infill and activates the streetscape for pedestrians.

Thus, in our opinion, proposed zoning amendment ZA 16-14 complies with Burlington’s plan.

In conclusion, ZA 16-14 seems to meet the *Granger* test, as the use of the affected parcel will not be very different from the prevailing use of other parcels in the area, the area of the parcel is not very small, the changes in the zoning provide a benefit to the community not just a particular landowner, and the proposed changes comply with the MDP. Therefore, it does not constitute spot zoning.

Please do not hesitate to contact me with any questions or concerns.

## A Review of the Relevant Caselaw

### Vermont Supreme Court Cases

*In re Hartland Group North Avenue Permit*, 2008 VT 92, 958 A.2d 685.

#### **Facts:**

- In 2004, the appellee, Hartland Group, met with members of Burlington's Department of Planning and Zoning (P&Z) to discuss the existing language of the maximum-density exceptions in the City's zoning ordinance.
- In 2004, Sec. 5.2.6(b)(2) of the Burlington Zoning Ordinance, pertaining to exceptions for adaptive reuse, allowed a density of up to forty units per acre for adaptive-reuse or residential conversion projects provided that lot coverage did not exceed 80% and the number of ancillary newly constructed units did not exceed 175% of the units contained in the original structure.
- P&Z agreed with the Hartland Group that the existing provision had the potential to cause confusion and suggested that amending the ordinance was appropriate.
- On May 28, 2004, after a full review process by the Planning Commission and the City Council, the mayor signed an amendment that removed the 175% limitation on the allowable number of new units.
- Hartland's evidence showed that the amendment would potentially affect forty-nine properties. A group of neighbors, the appellants, contested this number, but did not contest that the amendment applied to at least fifteen to twenty properties across the City.
- On February 4, 2005, Hartland applied to the Burlington Development Review Board (DRB) for a zoning permit for the adaptive reuse or residential conversion of an existing 16,500 square-foot industrial warehouse located on 0.65 acres at 237 North Avenue.
- 237 North Avenue is located in a medium-density residential zoning district.
- At the time of application, the warehouse was permitted to operate as a nonconforming industrial use.
- Hartland's application was to convert the structure into twenty-five units of mixed-income residential condominiums, thirty enclosed parking spaces, and a forty-seat café on North Avenue, intended to serve the neighborhood.
- The application was approved by the DRB in its findings dated June 10, 2005.
- A group of neighbors appealed the DRB's approval to the Vermont Environmental Court.
- One of the issues identified by the neighbors was whether the 2004 amendment to the zoning ordinance was spot zoning.

#### **Holding:**

The Environmental Court found that the 2004 amendment did not amount to spot zoning under any of the criteria enumerated in *Granger*. Rather, the court found that the removal of the 175% limitation allowed more parcels, including the one owned by Hartland, to be converted to residential use in residential zoning districts. The amendment, therefore, did not incite anomalous use but instead allowed the use of such parcels to become more similar to current residential uses in those districts. The court further determined that the amendment had the potential to affect numerous parcels in the medium-density residential district and decided that the land area of the potentially affected parcels was not small. The court also acknowledged that, while Hartland's proposal prompted the amendment, the removal of the limitation applied generally in the medium-density residential district and would benefit other properties in addition to Hartland's. Finally, the court found that the amendment complied with the city's municipal plan by encouraging an increase in residential development through the adaptive reuse of existing structures and gradually reducing nonconforming uses in the City.

On appeal, the Vermont Supreme Court cited the Environmental Court's reasoning and found that, "Landowners have failed to establish that the amendment to the ordinance—which was adopted only after public hearings before both the Burlington Planning Commission and City Council—is unreasonable, let alone unconstitutional spot zoning, in light of the goals of the adaptive-reuse provision of the ordinance." *Id.* at ¶ 16.

*Granger v. Town of Woodford* 167 Vt. 610 (1998)

**Facts:**

- On March 1, 1994, a majority of the Town of Woodford's electorate voted to change the zoning classification of a .82 acre parcel from "Rural Residential" to "Roadside Commercial". The Parcel at issue was owned by David and Rosalie Wright.
- The reclassified parcel contained an automobile repair shop operating out of a three story garage.
- Until 1994, there were several parcels of land that contained pre-existing, non-conforming commercial uses within Woodford, including the Plaintiffs, Dorothy and Raymond Grangers (landowners) antique business and a motel. There were no parcels of land zoned for commercial use.
- Landowners filed a complaint for declaratory judgment with the Bennington Superior Court, alleging that the creation of the "Roadside Commercial" district was unconstitutional because it constituted unlawful spot zoning.

**Holding:**

The trial court relied on the four-factor test set forth above finding that while the “small size of the Wright’s parcel may work in favor of the [landowners’] claims, this one factor is far outweighed by “the facts that (1) the Wright’s use of their land was not very different from the surrounding uses; (2) there was a discernible public benefit; and (3) the change in the zoning classification may not have “significantly conflicted with the town plan”.

The Vermont Supreme Court upheld the lower court’s decision. “We conclude that due to the lack of land suitable for development, the benefits provided to the community, the other commercial uses in the immediate vicinity, and the reasonable reflection of the town plan, the reclassification of the Wright’s parcel is rationally related to the public’s general welfare and, therefore, is not ‘unreasonable, irrational, arbitrary or discriminatory beyond dispute.’” *Id* at 613. Internal citations omitted.

The Vermont Supreme Court noted that at the time the Wright’s zoning classification was changed, there were two other parcels of land within the town that were also used for commercial purposes. In fact, they were located on the same heavily-travelled road – Route 9 – and within one mile of the Wright’s parcel. Additionally, the use of the Wright’s zone for a commercial purpose will provide a benefit to the community, i.e., an increase in the town’s tax base and an in-town garage and inspection station. The Court also noted that while the Wright’s have also benefited from the reclassification, that benefit did not render the reclassification unconstitutional, because there also was a rationally-related benefit to the community.

*Smith v. Town of St. Johnsbury & Pratt*, 150 Vt. 351 (1988)

**Facts:**

- On March 4, 1986, the voters of the Town of St. Johnsbury voted to change the zoning of 10.17 acres of land owned by defendant Northern Petroleum Company (Northern) at the intersection of Route 2 and Western Avenue from Rural Land-1 to Highway-Commercial.
- Plaintiffs, who are adjoining landowners, brought an action first to prevent the vote and then, after the vote, to invalidate the zoning change. The case was submitted to the superior court on an agreed statement of facts.

**Holding:**

The Court upheld the zoning amendment, determining that the zoning classification was not invalid as spot zoning. The Court noted that the town plan contemplated some rezoning of areas near interstate highway accesses to Highway-Commercial zoning. In looking at the rezoning proposal, the planning commission noted that there was very little area in the western side of St. Johnsbury for Highway/Commercial purposes and this land was suitable for such a designation. The

Court acknowledged that it would be desirable to the Town to encourage uses along the highway so that truck and other commercial traffic serving these uses would have direct access to the traffic corridor without going through other areas of town. The Court also noted that the access would make the Town a desirable location for certain kinds of uses that would aid its tax base without drawing heavily on its resources. The Court found that adequate public benefit had been shown.

The Court also found that the conflict of uses, emphasized by the plaintiffs, was less serious than might otherwise appear. Although the new Highway-Commercial zone abutted residential zones, there was actually a very steep grade—at points a cliff—between most of the residential uses. It appeared that the rezoned area was environmentally and aesthetically part of the interstate highway corridor rather than being an island of commercial use in a residential “sea”.

Finally, the Court found that one factor or spot zoning applicable to this zone change—the small size of the area—was more acceptable in this case because of the nature of the zone. The type of zoning involved will be applicable only in relatively small areas right around access road to the interstate highway. It is entirely possible that the land in question is the only land that will be eligible for this classification because other land will require that the highway traffic pass by other uses to get to the land.

*Galanes v. Town of Brattleboro* 136 Vt. 235 (1978)

**Facts:**

- The Town of Brattleboro has had zoning since 1948. The area in question, a strip of land 200 feet deep along either side of Western Avenue for 1000 feet, was designated “Roadside Commercial” since that time. The zone was entirely surrounded by residential area.
- In 1973, Brattleboro amended its zoning ordinance. In so doing, the “Roadside Commercial” zone was redesignated “Neighborhood Business.” That classification included as business establishments only limited retail trade serving the daily needs of the residents in the immediate neighborhood.
- At the time of the zoning change, the concerned area included a state liquor store, a roofing company, a gasoline station, a plumbing operation, a wine and cheese shop, a lawnmower business, and a restaurant which has since become a real estate agency office. None of the businesses, except possibly the real estate office would be permitted in the “Neighborhood Business” zone if they were not already there. There was also a parcel specially exempted by the ordinance for the construction of a bank.
- The rezoning did not change the size of the parcel, which has been in existence for thirty years.
- Plaintiffs challenged the rezoning as it affected their property, restricting the uses that would be allowed and lowering the value from \$50,000 to about \$15,000.



**Holding:**

The trial court found that the rezoning was not properly applicable to the Plaintiffs, determining that it was improper because it amounted to reverse spot zoning for the private benefit of the present commercial enterprises on Western Avenue. However, the Supreme Court felt that the facts did not support the trial court's decision and overturned it.

The Court noted that in, "[l]ooking at the findings, three things immediately appear: (1) the zone is and is in a residential area; (2) the rezoning narrowed the available business uses; and (3) among the purposes put forth at the hearings and meetings were preservation of the neighborhood character of the area and prevention of commercial development as had occurred along Putney Road." *Id.* at 241. The court also noted that, "[t]he size of the parcel was not properly at issue in the proceeding since it did not result from the rezoning. That is not to say that rezoning of a pre-existing small area could never be condemnable as spot zoning if the purpose of the rezoning was to give a private benefit and depart from the comprehensive plan." *Id.* at 239.

Additionally, the Court explained that it is not necessary that all of the public health, safety, morals, and welfare concerns be benefitted, but only that one or more be implemented to the general public good.

