

Memorandum

CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED

To: Shelburne Selectboard/Sewer Commission
From: Kristen E. Shamis, Esq.
Brian P. Monaghan, Esq.
Date: August 16, 2024
Re: O'Brien Brothers/Forest Park Realty Corporation Pre-Development Agreement

Selectboard:

You ask that we provide an update following our August 9, 2024 memo to address specific concerns residents have expressed relative to the proposed Pre-Development Agreement (Proposed Agreement) between the Town, O'Brien Brothers (O'Brien), and Forest Park Realty Corporation.

Town Plan

We understand residents are concerned that the Proposed Agreement may violate the Town Plan, and as such, believe the Town Plan must be updated before the Selectboard could expand the sewer service area to include the O'Brien parcel. We do not view the Town Plan as preventing the Selectboard from entering the Proposed Agreement or expanding the sewer service area if it chooses to do so.

First, the Selectboard is not required to adhere strictly to every recommendation in the Town Plan. Instead, the Town Plan is a general guideline or roadmap. "The regulations as adopted may indeed be inconsistent with the Town Plan, but ... total consistency ... is not a legal requirement. The plan is a general guideline to the legislative body, an overall guide to community development. Partial implementation is not unusual; the specific implementation is the part adopted in the zoning regulations." *Smith v. Winhall Planning Commission*, 140 Vt. 178, 183–84 (Vt., 1981). Whether or not a legislative body is required to adhere strictly to the Town Plan depends largely on the specific language at issue in the plan.

We should also keep in mind that the sewer service area is controlled by ordinance, and ordinances are adopted pursuant to Chapter 59 of Title 24 of the Vermont Statutes Annotated. Under 24 V.S.A. § 1971, "[a] municipality may adopt, amend repeal, and enforce ordinances or rules for any purpose authorized by law." Unlike zoning bylaws, ordinances enacted under Chapter 59 are not guided by the Town Plan. The Selectboard, acting as Sewer Commissioners, may update the Sewer Ordinance and sewer service area without implicating the Town Plan. Nonetheless, we address below some of the concerns we are aware of.

Page 20 of the Town Plan states, "[t]he area outside of Shelburne's Growth Area is designated as the Rural Area. It is the Town's policy to discourage development in the rural area in favor of development in the Growth Area." We have heard arguments that this language prevents the Town from entering the Agreement. This is contrary to Vermont

Supreme Court rulings, however, that treat this type of language, such as “discourage development,” to be a non-regulatory abstraction which does not have the legal force of a zoning regulation. “[B]road policy statements phrased as nonregulatory abstractions are not equivalent to enforceable restrictions. Thus, provisions that ‘recommend’ or ‘encourage’ certain uses are generally insufficient to create an enforceable obligation.” *In re B & M Realty, LLC*, 2016 VT 114.

One resident pointed to the Vermont Supreme Court’s decision in *Green Peak Estates*, 154 Vt. 363 (1990), as establishing the primacy of the adopted Town Plan as long as the language in the Town Plan is clear. There is a critical difference, however, between the instant matter and *Green Peak Estates*. In *Green Peak Estates*, the regional plan included language stating that, “[o]n slopes greater than 20%, residential development should not be permitted.” Given that the majority of the project occurred on slopes greater than twenty (20) percent, the Vermont Supreme Court upheld the trial court’s decision that the Selectboard’s findings were sufficient to support its conclusion that the project did not conform to the plan. Here, the facts are more similar to *In re Kiesel*, 172 Vt. 124 (Vt., 2000), where the Waitsfield Town Plan included language stating that upgrades of roads “should be discouraged.” The Vermont Supreme Court held, “[i]n contrast to the town plan in *Green Peak Estates*, which provided that certain development should not be permitted, here the plan provides that the upgrade of roads ‘should be discouraged.’ Thus, we are concerned that in addition to attempting to construe and apply an ambiguous plan, the Board has also given ‘nonregulatory abstractions in the Town Plan the legal force of zoning laws,’ action that we criticized in *Molgano*, 163 Vt. at 31, 653 A.2d at 775.” Here, the Town Plan does not state that no development can occur in the rural district, nor does it state that the sewer service area can never be expanded. Instead, it uses the exact type of non-regulatory abstraction language that the Vermont Supreme Court has determined not effective to create an enforceable obligation.

Nothing in the Town Plan or in the Zoning Bylaws prevents development in the rural district. “[I]n the absence of pertinent zoning bylaws, the Board may not give nonregulatory abstractions in the Town Plan the legal force of zoning laws.” *Id.* The Selectboard is attempting to limit the impact of development by considering this Proposed Agreement. Without such an agreement, should O’Brien challenge the Selectboard’s decision and prevail, the density allowed would be significantly higher than under the Proposed Agreement. Furthermore, in its efforts to increase housing in the State, the Vermont Legislature has passed new laws each of the past two years loosening municipal authority to regulate density. We cannot predict what legislation may come forward in the coming years, but we do expect this legislative focus on increasing housing density to continue. With the Proposed Agreement, the O’Briens would be limiting this parcel permanently to no more than 375 units, regardless of future ownership or legislation.

Shelburne’s Town Plan acknowledges that there has been and will be development that occurs in the Rural District. The Selectboard is actively working to limit this development while also acknowledging that the development would provide an opportunity for much-needed housing in the Town, including a range of affordability. The existing Bylaws do not

include affordability requirements, and it is not known whether the updated Bylaws will include such a requirement. Here, the Selectboard was able to negotiate a significant eleven (11) percent affordability requirement, with a desired range of affordability.

We also understand that some community members are concerned that a change to the sewer service area would require an update to the Town Plan, specifically to Page 23, where a recommended action is to “[c]ontinue the Town’s policy of not extending sewer lines beyond the boundaries of the current sewer service area.” This parcel is unique in that it is not in the sewer service area, but does have sewer infrastructure on the parcel. Given this, no extension of the sewer lines is required to provide sewer access to this parcel. Furthermore, this language does not prevent the Town from expanding the sewer service area, which can be updated by the Board of Sewer Commissioners. In fact, on page 54 of the Town Plan, a recommended action is that as least once every five years, the sewer service area boundaries should be reviewed and updated if necessary. This is within the discretion of the Sewer Commissioners. Here, although the service area would be expanded, the Town’s sewer lines are not being extended. It is our understanding that any expansion would be a private line installed by O’Brien. While the Town may decide to take over the sewer infrastructure at some point in the future, that is not being considered under the Proposed Agreement, nor would it be required of the Town.

Last, should the Town authorize the expansion of the service areas, Act 47 would supersede the Town’s regulations and the Town Plan. This parcel would become “an area served by municipal sewer and water,” which would bring it under Act 47 purview.

Act 250

We have heard concerns that the proposed development could not obtain Act 250 approval because it does not comply with the Town Plan. First, there is no reason for the Proposed Agreement to be predicated on the proposed development being approvable by Act 250. Similarly, the Selectboard does not know whether the Town’s Development Review Board (DRB) will approve the proposed development. Whether the project can obtain Act 250 approval will be between O’Brien and the Act 250 District Commission. The Town will not be involved in those permitting processes and is not required to determine the project could be approved before it enters the Proposed Agreement.

Second, for the same reasons that we believe the Town Plan does not need to be updated, we do not expect that the District Commission would determine that the proposed project does not comply with the Town Plan. The Commission would typically examine the issue in the same manner as the courts and would likely determine the Plan’s limiting language to be not specific enough to prevent development within the Rural District or to prevent the sewer service area from ever being expanded. “A project only conflicts with a plan when the plan’s standards are stated in language that is clear and unqualified, and creates no ambiguity. In contrast, broad policy statements phrased as nonregulatory abstractions are not equivalent to enforceable restrictions.” *In re Chaves A250 Permit Reconsider*, 2014 VT 5, ¶ 38 (Vt., 2014).

Furthermore, should the Town expand the sewer service area pursuant to the Proposed Agreement, any Act 250 review will be pursuant to Act 47. Act 250 will not be looking at whether the Town should have expanded the service areas – the service area would have been expanded before Act 250 review. The argument that the District Commission would view the development as in conflict with the Town Plan does not take into consideration the fact that the Commission will give weight to Vermont law, in this case Act 47, where it conflicts with the Town Plan. Act 47’s statutory density requirements would preclude the District Commission from denying the density based on the Town Plan.

Act 47

We are aware that since the time we initially advised the Town on O’Brien’s Act 47 arguments, the State Agency of Commerce and Community Development has updated its Frequently Asked Questions (FAQ) page to better address communities with defined sewer service areas. The page notes that the information is the Department’s “non-binding perspective.” The page now states that “[m]unicipalities have discretion regarding how to amend municipal bylaws or municipal water/wastewater ordinances to define areas served by water and sewer. Until bylaws are amended, municipalities should consider whether the area for a permit application and site in question may be feasibly connected to municipal water and sewer service.”

Additionally, we have seen arguments that 24 V.S.A. § 4303(42)(A)(ii), as updated by Act 47, specifically defines areas “served by municipal sewer and water infrastructure” as the Town sewer service area. This section of the statute states an area served is, “an area established by the municipality by ordinance or bylaws where residential connections and expansions are available to municipal water and direct and indirect discharge wastewater systems.” However, this section goes on to state that these established areas, “may exclude” the following:

- (I) flood hazard or inundation areas as established by statute, river corridors or fluvial erosion areas as established by statute, shorelands, areas within a zoning district or overlay district the purpose of which is natural resource protection, and wherever year-round residential development is not allowed;
- (II) areas with identified service limits established by State regulations or permits, identified capacity constraints, or municipally adopted service and capacity agreements;
- (III) areas served by sewer and water to address an identified community-scale public health hazard or environmental hazard;
- (IV) areas serving a mobile home park that is not within an area planned for year-round residential growth;
- (V) areas serving an industrial site or park;
- (VI) areas where service lines are located to serve the areas described in subdivisions (III)–(V) of this subdivision (ii), but no connections or expansions are permitted; or

(VII) areas that, through an approved Planned Unit Development under section 4417 of this title or Transfer of Development Rights under section 4423 of this title, prohibit year-round residential development.

24 V.S.A. § 4303(42)(A)(ii).

Of these seven allowed exclusions to the service areas, the only one that appears to apply to the O'Brien parcel is in section II – municipally adopted service agreements. This is the same exclusion that the Town viewed as applying under 24 V.S.A. § 4303(42)(A)(i), so the analysis would be the same.

Regardless of which section of the statute the Town relies on, we agree with the comments that this parcel is not currently in an area “served by municipal sewer and water,” as it falls outside of the Town’s defined service areas. An interpretation by one State department, however, would not be binding from a court’s perspective. Many citizens have expressed the opinion that the Town has a solid legal argument that this parcel does not need to be incorporated into the Town’s sewer service area under Act 47. We agree that the Town has a legal argument to support this claim, but we do not know how a court would rule. Because of the unique location of this parcel, abutting the sewer service area and with municipal sewer infrastructure already on the parcel, there is also a legal argument that the parcel should be treated as an “area served by water and sewer.” Even if the case against including this parcel in the service areas is strong, there is inherent risk and significant expense in leaving the decision to a court. As an alternative, and as discussed in previous memos, the Selectboard is considering entering this Proposed Agreement to provide certainty and to be sure the Town’s concerns and concerns are addressed to the extent possible.

As additional legal concerns are raised, we are available to discuss.