Montpelier Planning Commission
December 6, 2004
Memorial Room, City Hall

Subject to Review and Approval

Note: These minutes were produced based on a tape recording of the meeting. Just before 7:00 p.m., a different tape recorder was used to record the remainder of the meeting. At some point after that, it was discovered that the recorder had automatically reversed sides and was recording over an earlier part of the discussion. Ten to fifteen minutes of the discussion are estimated to have been lost. To avoid inadvertent misrepresentations by attempting to reorganize the summarized comments and reconstruct the recorded-over section, these minutes reflect how the discussion was captured on the tape recording.

Present: David Borgendale, Chair; Ms. Grodinsky, Vice Chair; Anne Campbell; Curt McCormack; Irene Facciolo; Marjorie Power
Staff: Valerie Capels, Planning & Community Development Director

Call to Order
The meeting was called to order by Mr. Borgendale at 5:10 p.m..

General Appearances
Mr. Borgendale asked if anyone wanted to speak on matters that were not on the agenda. No one responded.

Comments from the Chair
Mr. Borgendale said that he looked at the Secretary of State's guidance on public comment. The Planning Commission has flexibility in determining the format for public comment. The Chair may establish reasonable rules to prevent a free-for-all. Questions would be accepted at this meeting, but that the Commission will not entertain a debate. The purpose of the meeting was for the Planning Commission to seek guidance from the City's Attorney.

Discussion of Legal Issues with City Attorney
Mr. Borgendale introduced City Attorney Steve Stitzel. Mr. Stitzel said he would first like to note that he has reviewed the draft code, several e-mails, and had some discussions with Ms. Capels. He has not reviewed the meeting minutes or other related documents. He added that he would prefer to avoid engaging in debates about legal opinions.

Ms. Capels announced that the Development Review Board meeting will begin on the other side of the wall at 7:00 and that we will need to be careful about noise.

Ms. Capels suggested that the discussion start with the subjects of takings, spot zoning and conflicts of interest. Mr. McCormack asked Ms. Capels whether she sent the e-mail of Mr. McCullough's questions to Mr. Stitzel. Ms. Capels said that she had.

Conflict of Interest
Mr. Stitzel said that a conflict of issue exists when a Planning Commission member cannot exercise independent judgement in the best interest of the City due to some personal interest that conflicts with the City's interest. Quasi-judicial capacities such as the Development Review Board are subject to strictly interpreted conflict of interest rules. The rules are not as strictly applied to other bodies that are acting in a legislative capacity such as the Vermont legislature. Mr. Stitzel said that it is recognized that the people who make the laws will also be subject to them and there tends to be more tolerance of conflicts. The

Planning Commission is, to some extent, a quasi-legislative body in developing zoning regulations. It is quasi-legislative because the City Council makes the final decision on zoning ordinances. Mr. Stitzel gave the example of a community adopting a zoning ordinance for the first time. Each member will be impacted at a level comparable to all of the members of the community. He contrasted that situation with a community that has zoning regulations and is considering an amendment that will affect junk yards. In this example, the Chair is the owner of the only junk yard in the community. In that example, it was clear that the amendment would directly affect only one individual who is on the Planning Commission. The question is whether that individual is so uniquely and directly impacted that he cannot be objective and cannot participate in the matter from the perspective of what is best for the community. In that situation, he would consider it appropriate for that individual to not participate, even considering the looseness of the law on the subject. There is no legal requirement for recusal and no authority in the Planning Commission itself to require a Planning Commission member to recuse. It is really up to the judgement of the individual member.

Mr. McCormack said that when Mr. Stitzel spoke of impacts, it seemed he was referring to financial impacts. Mr. Stitzel said he would not limit it to financial impacts. He gave an example of two individuals who had a long history of hating each other. One was a member of the Zoning Board and the other had an application before the Zoning Board. No one believed that the Board member could be impartial.

Spot Zoning

Mr. Stitzel said that the concept of spot zoning is loosely recognized by the Vermont Supreme Court. Zoning must be consistent with some sort of comprehensive plan so that zoning regulations are not arbitrary and capricious. The comprehensive plan represents the vision of how the city wants the community to develop and the zoning regulations implement that vision. Mr. Stitzel said that the original concept of spot zoning was that it was something done to benefit an individual property owner rather than the community. The principal in case law was that the spot zoning involves one property owner. The prevailing view was that spot zoning needed to involve lots of less than three to five acres in suburban and urban settings. Once the parcels are larger than that, the courts have been more deferential. There may be physical circumstances that render a property suitable for a particular use.

----------break in tape----------

Ms. Campbell said the language in the master plan says that the land use plan is not a zoning plan, but is intended to provide a general guideline for future land use distribution. She asked whether a land use map must be amended if it is found to be inconsistent with that language. Mr. Stitzel said that the map should reflect the Commission's consideration of issues such as environmental conditions, community preferences, and infrastructure. If those decisions are not being made now, do not attach a plan. Any time there is a conflict between what you say and what you show, it is not good and you should strive to resolve the inconsistencies. Ms. Campbell said the land use map in the current Master Plan appears to simply be showing the zoning regulations. Mr. Stitzel said that, as far a law is concerned, that land use map had to exist before the current zoning regulations were written. Ssince 1968, the comprehensive plan had to be in effect before the zoning regulations could be adopted.

Mr. McCormack asked if Mr. Stitzel said that if the Planning Commission reduces the number of housing units substantially, that act would constitute spot zoning or another illegal act. Mr. Stitzel said that was not what he recalled saying. The spot zoning has to be in the context of a parcel of land that is singled out for a zoning change that is not based on the overall community's interests or desires. The singling out of a one acre lot for down-zoning in an area of similar lots could be spot zoning unless it could be demonstrated to further a community purpose. Mr. McCormack said it sounded as though it is not spot zoning unless

you are singling out an individual property owner to favor or negatively impact him or her. Mr. Stitzel responded that the court looks at it from the question of whether the action is primarily intended to further some legitimate community purpose and whether it is accomplished at that location in accordance with some scheme of how the community wants to develop. If so, it is not spot zoning. Mr. McCormack said he understood that case law has been consistent in finding that it is not spot zoning unless it affects a small amount of land, less that three to five acres. Mr. Stitzel agreed, saying that he did not recall ever reading a spot zoning case involving a parcel of more than 100 acres as in this case. The question is how this parcel plays into the community plan.

Takings

Mr. Stitzel said that, historically, the constitutional prohibition of the taking of land without compensation was applied to the physical occupation of land. The concept of regulatory takings came into play in the early part of the 19th century and the general test of whether this type of regulation was a taking was the arbitrary and capricious standard. The Supreme Court then began to look at whether a land owner was left with some reasonable use of the property. Mr. Stitzel explained that courts have used various descriptions of what is a reasonable use, but the concept is that there has to be some use of the property. The line has been drawn on a case by case basis in which reasonable use of the property is balanced against community benefits. Mr. Stitzel noted a case in which a New Hampshire court upheld a one unit per 50 acre zoning in a situation where the community wanted to ensure the continued viability of commercial forestry in the north woods.

Ms. Facciolo asked how a community balances the conflicting community desires. Mr. Stitzel said that the City Council would ultimately make the determination of the community's best interests based on the weighing of competing goals and conflicting opinions. The courts tend to be deferential of the choices of the legislative bodies. You need to be able to articulate how the use benefits the community.

Ms. Power asked how the New Hampshire court determined reasonable use in the case that was mentioned. Mr. Stitzel said they noted that commercial forestry would remain viable so the landowner retained the historical use of the property. They then looked at the infrastructure needed to support the residential development in the area and whether the property owners were being greatly impacted by not being permitted to sell lots of less than 50 acres. The U.S. Supreme Court has evolving case law on this subject. The Lucas case dealt with a South Carolina land use regulation that limited the ability to rebuild after storms. The U.S. Supreme Court agreed that there was not reasonable use of the Lucas property which was a small lot in a predominantly developed ocean front. Courts will look at specifics such as the value of the land, taxes paid, the original purchase price, public and private investments in the land, how the community looks at the property in its planning and zoning, and how the property has historically been used.

Mr. Borgendale said that the Commission is considering establishing a new zoning district with the intention of applying it city wide, but would initially apply it only to one area. Mr. Stitzel said the plan that is in existence now is the plan that the Commission must rely on. Simultaneous revisions could be done. He has looked at the zoning proposal and does not find that there is some totally new approach. The practical issues in the implementation are twofold. First, the Commission is intending to apply these concepts citywide. It would be expected that some of the terminology and concepts in the zoning would be found in the Master Plan. If they are not found, that not necessarily a legal impediment. The second issue is that the Commission wants to adopt this sort of regulatory scheme on top of the existing regulations. Mr. Stitzel said he sees that as problematic. The Commission should stick with the procedural components of the existing zoning regulations. He would take out the components of the new code that the Commission wants to implement and incorporate them into an amendment of the existing zoning regulations. The

Commission would then be creating a new district within the existing scheme in which some new standards would apply. The key is that there is nothing unconstitutional or illegal in coming up with a new district concept and implementing it provided that it ties into an overall scheme. The Planning Commission will need to find that the zoning district is in compliance with the plan that exists.

----------break in tape----------

Mr. Stitzel suggested dealing with the new zoning as an amendment and weave it into the existing regulations if the Planning Commission is going forward with this approach. He did not find, on its face, that it was illegal or inconsistent with Chapter 117.

Planning Commission's Right to Enter Land

Mr. Borgendale asked for clarification of the power of planning commissions to enter lands to gather information under V.S.A. Title 24. Mr. Stitzel said that the power is there, but it is always subject to the right of the property owner to refuse. The Commission could then go to court for a court order if the owner is uncooperative. Mr. Borgendale asked whether there was a difference because the Planning Commission no longer has a quasi-judicial role. Mr. Stitzel said no, but added that the Development Review Board has more leverage to tell an applicant that they need to see the property to consider an application that is before them.

Additional Questions

A member of the public said that a letter was submitted regarding the conflict of interest of a Planning Commission member. He understood that the City's ethics policies require a response and asked whether the matter was dealt with at the December 3 meeting. Mr. Borgendale said that it was discussed and that it is the general feeling of the Planning Commission and staff as supported by the input from the City Attorney tonight that the member was not required to recuse himself.

Nancy Wasserman said the City ethics policy requires that, when requested, the body must act on the motion on whether the member should recuse due to a conflict of interest or appearance of a conflict of interest. Mr. Connor said the question is the appearance of a conflict, not just a conflict of interest. Mr. Stitzel said the appearance of partiality or bias is recognized by the Vermont Supreme Court in relation to quasi-judicial bodies. There is no discussion of the concept of the appearance of bias or conflict in relation to legislative or quasi-legislative bodies. He looks at anything that undermines public confidence in the public body as something that should be seriously considered by the body. If there is an expression of serious doubt supported by facts, recusal should be seriously considered. Mr. Stitzel said he has not read the policy, but it sounded like the members of the body (excluding the individual being asked to recuse) should vote on whether the member should recuse. Mr. Borgendale said the Chair was remiss in not being aware that formal action was appropriate. Ms. Power said the intention is for the zoning to apply to all properties in the city--how can the Planning Commission distinguish where recusals are needed? Mr. Stitzel said it is complicated in this situation when zoning is ultimately intended to apply to the entire city, but at this point, it is intended to apply to a specific parcel. Mr. Borgendale said there are really two matters before the Commission. One is the major modification to the zoning rules that have broad applicability. The second is the map. Mr. Borgendale said that the Commission will take up this matter at its next meeting.

A member of the public asked for clarification on the point that any new zoning or reconstituted zoning must eventually come into conformance with the Master Plan and that there is no issue as long as that happens. Mr. Borgendale said he heard that the Master Plan must come first or simultaneous with the zoning change. Mr. Stitzel said the zoning amendment must be in conformance with the Master Plan or be

subject to legal challenge. If a zoning change precedes a Master Plan change but the Master Plan amendment is underway, a court might wait to see what the Master Plan amendment does, but the zoning could be challenged. Mr. Stitzel said he strongly encouraged the Planning Commission to prepare an amendment to the Master Plan and pursue it simultaneously with the zoning amendment.

Mr. Connor asked Mr. Stitzel to talk about the changes to Chapter 117 in relation to 90% takings. Mr. Stitzel said that Chapter 117 says that the zoning regulations are to comply with the densities and provision of the Master Plan.

----------Break in tape----------

Ms. Grodinsky asked how the land use restrictions in Act 250 relate to the zoning regulations. Mr. Stitzel said that Act 250 does not have an overall plan component, but is an ad hoc, parcel-by-parcel review based upon performance criteria. The concept is that the Planning Commission considers site-specific issues in relation to zoning and development potential. These considerations would be taken into account in assigning the densities and zoning districting schemes. Within the zoning districts, the regulations have to be uniform. Ms. Grodinsky asked whether that was saying the Commission needs the natural resource inventory to identify what characteristics would make land inappropriate for development. Mr. Stitzel said that, as part of its work, the Planning Commission should develop a comprehensive plan identifying areas that are or are not suitable for development. Provisions can be placed in the zoning regulations stating that, while a district has an assigned density, a subdivision plan must be developed to determine the number of lots that can actually be achieve when a parcel contains sensitive lands.

In response to a question from the public, Mr. Borgendale asked for an opinion on zoning 90% of a parcel for one unit per acre when the parcel is currently zoned for quarter acre lots. Mr. Stitzel said the property owner would not have difficulty in finding an attorney to take the case. He was not going to predict the outcome, but thought that the City would have a heavy burden in demonstrating how the community would benefit from the zoning. If, in fact, the value of the property was reduced by 90%, the property owner could argue that the action was not warranted unless there was a compelling public need. Mr. Borgendale clarified that the reduction would be in the development potential of 90% of the land area, rather than the land value. Mr. Stitzel said that the issue is not the acreage, but the use that is retained for the property.

Ms. Wasserman asked what would happen if you change the zoning of an area where you already had an AI-PUD. Mr. Borgendale said that the answer is not known at this time.

Mr. Connor asked if the only public purpose to be accomplished was a scenic view for a City Councilman and a half dozen neighbors with no public access, would the zoning meet the burden of proof. Mr. Stitzel said that he would defer to the Planning Commission and Council to determine what the benefit is.

Mr. Stitzel said one question he received by e-mail was whether a provision that limits the number of units on a lot to four would violate State law regarding group homes serving up to eight persons. He said that he did not see that as an issue since a group home is a permitted use as a matter of right. He added that the provision limiting group homes to one per 1,000 feet may be illegal based on the Federal Fair Housing Act. Some courts have been receptive to striking down those limitations.

Mr. Stitzel said that another question he received by e-mail related to whether ADA requirements are violated by the 1½ story minimum being considered for houses in the T-4 zone. He did not have an ADA concern with this requirement, but did have concerns about whether the requirement could be considered arbitrary and capricious. He said that the Planning Commission needs to look at the area and see what

standards it wants to apply. If this standard is primarily an aesthetic requirement, then it would have to be justified on aesthetic grounds. Mr. Borgendale said he was assuming that more support would be required than a finding that it is preferred by a subcommittee of the Commission. Mr. Stitzel agreed, saying that he would like to see some type of professional consultant report explaining how this aesthetic standard is appropriate to achieve specific goals. Ms. Campbell asked whether the fact that an applicant could seek conditional use approval would resolve the issue. Mr. Stitzel said that was not necessarily the case and that the Planning Commission would still need to justify why the standard was adopted.

A member of the public asked how the design requirements would interact with State law that says that mobile homes cannot be precluded. Mr. Stitzel said he did not know and would need to see more of the proposal. Ms. Campbell asked if the law provided that mobile homes must be allowed anywhere. Mr. Stitzel said that they must be allowed anywhere that homes are allowed. He said the law actually says that no mobile, modular or prefabricated home shall be excluded except on the same conditions that a single family home is excluded. That is why the Planning Commission must substantiate the design standards. He explained that if the purpose of the standard were to exclude those types of structures, the standard would not be acceptable.

Ms. Grodinsky said that part of the new neighborhood design is that a certain percentage of the land will remain open space. She was wondering if the Commission can mandate more cluster development with higher densities in the developable areas. Mr. Stitzel said he has written ordinances that require that a parcel of a certain size must be reviewed as a PRD. He has also written development standards for large lots that require clustering and preservation of open space. Ms. Power said that is essentially what the Planning Commission is doing here, although there may be some disagreement regarding whether there is a reduction in the number of units.

Ms. Campbell asked whether a standard mandating that a certain percentage of a parcel remain open space would remove the tax benefit of donating land or easements. Mr. Stitzel said that it would. He said that, typically, a landowner donates the land prior to the permitting process. The conserved land is then considered as the open space in the PRD process.

Adjournment

Ms. Power made a motion that the meeting be adjourned. Ms. Campbell seconded the motion. The motion was approved unanimously. The meeting adjourned at 7:50 p.m.

Respectfully submitted,

Valerie Capels

These minutes are subject to approval by the Planning Commission. Changes, if any, will be recorded in the minutes of the meeting at which they were acted upon.

Transcribed by Kathleen Swigon