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To: Alex Weinhagen, Peter Erb, DRB

From: E. M. Allen

Re: Development on Property in Two Zones, preliminary opinion

There is no Vermont Supreme Court case precisely on point. In re Champ-lain Oil, 2014 VT 19 would have addressed this issue, but the Appellants chose to dismiss that portion of the appeal.

McLaughry v. Town of Norwich, 140 Vt. 49 (1981) holds that a split lot must comply with each district. There, a large barn was located directly on the boundary between residential and commercial districts, but the owner sought to develop the property for commercial use. The Court held that front half of the barn could be used for commercial purposes but the back half could only be residential space.

In re Appeal of Windjammer Hospitality, 172 Vt. 560 (2001) deals with an attempt to subdivide a property situated on a zoning boundary so that one of the resulting lots would have insufficient frontage. The case is useful for our purposes because the Court distinguishes cases from Massachusetts which had been cited by the Appellants. The Court states that these cases involve landowners who “were permitted to make a passive use of the more restricted zone to meet zoning requirements for active improvements planned for the less restricted portion of the lot.” The Court then cites a subsequent Massachusetts case which stated “the use of land in another zoning district....solely to meet dimensional requirements is considered a permissible abstract or passive use where....it appears both zoning districts permit the proposed active use.” The Court then proudly states that this position is “consistent” with the McLaughry holding. Of course, the requirement that “the proposed active use” be permissible in both districts is very inconsistent with the older Massachusetts cases and, it seems to me, also inconsistent with

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McLaughry . Hopefully, that's not our problem to resolve.

In our case, the older Massachusetts rule would have allowed the pond in the agricultural zone if a detention pond is a passive use. Even under the newer, more restrictive, Massachusetts rule, seemingly endorsed by our Supreme Court, this arrangement could be acceptable. If residential use with a detention pond is an acceptable use in the Agricultural District, its connection to residential use in another District but in the same parcel would be permitted. I read McLaughry as setting a slightly lower standard; it would only require that the detention pond itself be an acceptable use in the Agricultural District. McLaughry should be the controlling authority for us.

I don't see anything in the Zoning Ordinance that prohibits this arrangement. While the pond isn't "greenspace and/or community facilities," the only prohibition stated for PUD's straddling a boundary is the one regarding density. §4.5.6(6). Am I correct in assuming that the density within the Residential District is acceptable for the land within that district without relying on the "combined allowable density if each district?"

Hopefully this meets the needs of your schedule. If I come up with something more, I'll let you know.