



MEMORANDUM

TO: Airport Rezoning Task Force
Kelsey Peterson, City Planner

FROM: Amanda S. E. Lafferty, Deputy City Attorney

SUBJECT: Zoning Authority

FOR: Task Force meeting on March 17, 2022

Burlington International Airport (BTV) has requested that the City amend the Land Development Regulations to change the zoning district designation of several parcels that total approximately 11 acres and are located near the intersection of Kirby Road and Airport Parkway. BTV wants the City to consider redesignating these 11 acres of land, currently located in the Residential 4 Zoning District, as Airport District.

In challenges to zoning amendments that change how a parcel may be developed, including amendments that change the zoning district classification of a parcel, the amendments must fulfill two overlapping minimum requirements. In order for a court to affirm them as valid, such amendments must be reasonably related to the promotion of a valid public interest and must sufficiently reflect the municipal plan.

Zoning regulations are constitutional as a valid exercise of the police power of the state when reasonably related to public health, safety, morals, or general welfare. *See* 24 V.S.A. § 4302; *see also Galanes v. Town of Brattleboro*, 136 Vt. 235, 240 (1978). The exercise of the police power to institute zoning is constitutional without compensating the affected properties for loss in value, subject to certain conditions. *See id.* There must remain in the owner some practical use of the affected land and there must be a public good or benefit that is of sufficient magnitude to justify the burden that zoning imposes on the affected property. *See id.*

The power to adopt (and amend) zoning regulations in Vermont is contingent on the prior creation of a plan. *See* 24 V.S.A. §§ 4381, 4382, 4401; *see also Smith v. Town of*

Johnsbury, 150 Vt. 351, 360 (1988). Zoning ordinances must have as their purpose the implementation of the municipal plan and must be in accord with the policies set forth therein. *See Town of Sandgate v. Colehamer*, 156 Vt. 77, 87 (1990). However,

. . . partial implementation of a plan is not unusual. The plan is merely an overall guide to community development. It is a general guideline to the [City Council] for its consideration of the municipality's land-use program and of the community's needs and desires. Often stated in broad, general terms, it is abstract and advisory. Zoning bylaws, on the other hand, are specific and regulatory. Zoning is properly conceived of as the partial implementation of a plan of broader scope. It must reflect the plan, but it need not be controlled by it.

See Smith v. Town of Johnsbury, 150 Vt. 351, 360-361 (1988). Although the plan may recommend many desirable approaches to municipal development, only those provisions incorporated in the bylaws are legally enforceable. *See In re Confluence Behavioral Health, LLC*, 206 Vt. 302, 311 (2017)(citing *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225-26 (1979)).

Regulatory takings challenges are governed by the standards set forth in the *Penn Central* case, which identified several factors to consider in evaluating regulatory takings claims:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with the property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)(citations omitted). In deciding whether a particular governmental action has effected a taking, the court focuses both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. *See id.* at 130-131. Courts have rejected uniformly the proposition that diminution in property value, standing alone, can establish a "taking" . . . the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. *See id.* at 131.

I am available to discuss this further in executive session if the Task Force so chooses.