

# VAIL HOMEOWNERS ASSOCIATION

## Updates On: VailPoint Proposed Rezoning Conflicts of Interest?

March 16, 2020



Proposed Avanti Lodge

### **VailPoint Proposed Rezoning**

In a “wait-them-out” approach, an all too familiar strategy in Vail development, VailPoint is once again trying to covert covenant protected open space, the so-called “fenced-in” land on Hanson Road at the “Kindel” property, to a commercial use so it can build a larger building at the site. And, once again, another development is rushing forward with scant public notice as the first calendar on this proposal only became available on March 6<sup>th</sup> and a final vote is scheduled for tomorrow (March 17th) before the Town Council, just 11 days later.

To recap. [VailPoint wants to expand the use of the old Kindel home site to build a large luxury lodge \(Avanti Lodge\) that would be marketed to “high net-worth travelers.”](#) Although it has been pursuing this goal since it purchased the property in 2015, so far its efforts have been rebuffed.

Originally, VailPoint bought only the original Kindel property. That did not include the adjacent “fenced-in” land (portions of Tract E and Lot D-1). But in 2017, to be able to build a larger project, VailPoint sought to buy a large portion of Tract E and Lot D-1, which included the “fenced-in” land, with plans to convert the zoning to PA (Public Accommodation) zoning. That sale was rejected by the Town Council.

VailPoint then struck a deal with Vail Resorts, the title holder for Tract E and Lot D-1, to have a “friendly,” uncontested adverse possession suit so it could gain title to the “fenced-in” portions of Tract E and Lot D-1. With title in hand, VailPoint then requested to consolidate the two pieces of property into a single lot and rezone the entire parcel to PA zoning. That would have allowed a bigger building than just the original Kindel property. In 2018, the Council allowed the property to be consolidated into a single lot, but the request for rezoning was rejected. VailPoint tried again in 2019, and, once again, the rezoning request was rejected.

Now on March 9<sup>th</sup> the PEC voted 4 -2 (Commissioners Hopkins, Siebert, Kjesbo and Kurz in favor; Perez and Gillette opposed; Lockman absent) to recommend to the Town Council to change the zoning on the “fenced-in” land from Agriculture and Open Space (A) to Public Accommodation (PA). The Town Council will now take up the matter at its March 17<sup>th</sup> session.

Nothing has changed since VailPoint’s earlier efforts. The land in question is still covenant protected open space. The project is still the same as that which failed to get approval in 2018 and 2019. VailPoint still is seeking to rezone the infamous “fenced in” part of its property, the same rezoning that has now been rejected multiple times.

And VailPoint still makes the same argument for the rezoning—that the overall property has two different zonings, both “A” and “PA.” But VailPoint knew this when it purchased the Kindel property and later when it obtained title to the “fenced-in” land. As one commissioner noted at a 2019 PEC work session, VailPoint created the very situation it now wants the Town to “fix.”

This “fenced-in” land has a long history of aborted efforts to change its zoning to a commercial use. In addition to VailPoint’s various efforts, in the early days of Vail, the original owner, Ted Kindle, sought to do exactly what Vail Point now seeks—rezone the fenced in portion to a Public Accommodation use. Even then, the Council made it clear that public lands could not be used for private purposes.

**A flawed process.** Prior to the recent PEC meeting, the Town staff issued a recommendation to approve the rezoning. It is not known to what degree that recommendation affected the PEC vote, but there were serious flaws in the recommendation. The staff’s recommendation makes no mention of the fact that this is covenant protected land. Specifically, the covenant on the “fenced-in” land provides that it:

[shall be used, held and maintained ... for use at all times as a vacant and undisturbed open area in its natural condition or landscaped with trees, shrubs and grass and no structure, building or improvement of any kind or character, whether temporary or permanent, may be erected or maintained thereon.](#)

It is hard to imagine stronger language. Tract E and Lot D-1 were unequivocally dedicated as open space. To this day, Tract E and Lot D-1 remain under those protective covenants that require those lands remain open space for all the public to use. And to this day, notwithstanding the fence, Tract E has been maintained as open space, and the public has continued to use Lot D-1 as a through-way to the mountain. But Town staff ignored that covenant and, in effect, recommended that the Town do an illegal act, i.e., establish a prohibited use on the property.

The staff recommendation was also in conflict with one of the primary goals of the Vail Village Master Plan, a matter that was glossed over in the staff report. Goal No. 4 of the Plan provides that “existing natural open space ... shall be preserved as open space.” This is one of the key community priorities.

Also, not mentioned in the Town staff’s recommendation was the fact that there has already been litigation concerning commercial uses on Tract E. In 2001, the Tap Room wanted to extend an upstairs deck in such a fashion that it would intrude into Tract E, and it obtained an easement for that purpose from Vail Resorts. Litigation followed, and in that litigation, the Court made it clear that the public had accessibility rights to all of Tract E, and the proposed deck would interfere with those rights. Once that became clear, the deck expansion plans were shelved and the litigation was then dropped, but it does provide a clear picture about the enforceability and meaning of the protective covenant.

And in May 2019, VailPoint requested a work session with the PEC to explore what it could build. That meeting ended with the PEC asking for more information about how the proposed designs impacted/crowded the surrounding open space and adjacent buildings, how parking was to be accommodated and for shading studies on building’s effect on Hanson Ranch Road. To date, there has been no response from VailPoint. Instead it sought the zoning change to put itself in a position to claim that it had a “right” to use the open space land for its building.

To compound matters, the process was tainted by one Commissioner’s (Pete Seibert, Jr.) participation. Mr. Seibert was an original member of the VailPoint “team” and reportedly appeared at a 2017 Council meeting and spoke in favor of the project. Although Mr. Seibert claimed he had no conflict because he was no longer involved in the project and had no financial interest in it, that did not remove the appearance of a conflict. And it, therefore, came as no surprise that Mr. Seibert did not see the fenced-in land as open space and voted to approve the rezoning. If Vail had a robust and strong conflicts of interest provision—more on that below—Mr. Seibert would have been prohibited from participation.

**Right of use.** Zoning creates a “right to use” property to the maximum extent permitted under the zoning. If VailPoint gets the zoning change, it will argue that it then has the right to use the property to build a larger building. Vail has been down this road before. This is very reminiscent of the Booth Heights project where the developer first got a zoning change and then argued that it had a “right” to build on the property to the maximum extent possible. This might be a clever strategy, but the TOV should not allow itself to be once again boxed in.

**Variations and set-back waivers are to come.** Although not yet up for consideration, it is clear that even if VailPoint gets the requested rezoning, it still intends to seek setback relief and parking variances so it can maximize its building. As VailPoint has admitted, it could build a luxury lodge on just the original Kindel property so a denial of a zoning change would not impede the eventual construction of the Avanti Lodge. On

the other hand, granting zoning change would be wrong, both as a matter of principle and legality. It would be wrong as a matter of principle because, as Vail's history makes clear, there was a deliberative decision to protect these lands from any development or commercial use, and the land has, historically, always been open space public land. It would be wrong legally because protective covenants run with the land and cannot be zoned away.

Therefore, even though Vail Point holds title to the "fenced in" portions of Tract E and Lot D-1, that property remains covenant protected open space, and no structure or improvement of any kind, including any deck, hot tub or fence, should be constructed on it. Nor should it be zoned for public accommodations.

## **Conflicts of Interest**

It's now been 118 days since the "new" Town Council was sworn in and still no action on a conflict of interest provision. As the PEC consideration of the VailPoint rezoning request makes clear, conflicts of interest continue to be a reoccurring problem. When a member of a developer's original team moves into government and then votes in favor of projects he was formerly involved in, it does not speak well of the integrity of the process. And it's not just actual conflicts that matter; standard conflict of interest provisions bar even the appearance of a conflict.

[As VHA has urged, Vail needs a comprehensive conflict of interest law.](#) Aside from prohibition on gifts and the use of confidential information, which already exist, such a law should cover both real and apparent conflicts of all kinds. There should be mandatory disclosure (Mr. Seibert acknowledged he believed his "conflict" would come up, yet he made no advance disclosure, only acknowledging it when questioned about it) and automatic prohibitions. And the law should apply to all Town officials, elected and appointed. That way the public will have faith that the government processes are fair and unbiased and not subject to special interest manipulation.

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If these are issues that concern you, you should make your views known to the Town Council and the Town Manager at: [towncouncil@vailgov.com](mailto:towncouncil@vailgov.com) and [srobson@vailgov.com](mailto:srobson@vailgov.com). These issues are typical of what the VHA investigates and reports on. In that connection, the VHA endeavors to bring attention to matters of community interest. We believe that good government requires a healthy dose of sunlight. If you value our reports, we invite you to join VHA or become a subscriber to our reports. Together we can make our voices heard and make a difference for the good and the future of our community.

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