VERMONT SUPERIOR COURT
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org

ENVIRONMENTAL DIVISION
Docket No. 23-ENV-00097

| **Lemelson 3-Lot Subdivision Appeal** | **DECISION** |
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In this on-the-record appeal, Boulder Spring Farm, LLC, Five Roads Stowe, LLC, PBF, LLC and Kevin D'Arcy (together, Appellants) appeal a decision of the Town of Stowe (Town) Development Review Board (DRB) granting approval for a 3-lot subdivision to Anjeza and Rev. Emmanuel Lemelson (together, Applicants) of their property on Edson Hill Road, Stowe, Vermont.

In this matter, Appellants are represented by Elizabeth A. Conolly, Esq. Applicants are represented by Christopher J. Nordle, Esq. The Town is represented by David W. Rugh, Esq. and Beriah C. Smith, Esq.

**Standard of Review**

In an on-the-record appeal made pursuant to V.R.E.C.P. 5(h), the Court considers only the decision below, the record made before the municipal panel, and the briefs submitted by the parties. In re Saman ROW Approval, No. 176-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Sept. 2, 2011) (Durkin, J.). The Court has no authority to consider new evidence. See In re Lawrence Site Plan Approval, No. 166-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. July 9, 2011) (Durkin, J.); In re Marble Dealership Realty LLC Site Plan Approval, No. 169-12-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Aug. 13, 20140 (Walsh, J.). Further, this Court has no authority to make our own factual determinations and, instead, we review the municipal panel's factual findings to determine whether the decision below "explicitly and concisely restate[s] the underlying facts that support the decision." See 24 V.S.A. § 1209(a)—(b). The Court will affirm factual findings only if they are supported by substantial evidence in the record below. See In re Stowe Highlands Resort PUD to PRD Application, 2009 VT 76, ¶ 76, 186 Vt. 568. When the Court examines whether there is substantial evidence in the record, it does not assess the credibility of witness testimony or reweigh conflicting evidence in the record. Devers-Scott v. Office of Prof'l Regulation, 2007 VT 4, ¶ 6, 181

Vt. 248; In re Appeal of Leikert, No. 2004-213, slip op. at 2 (Vt. Nov. 2004) (unpublished mem.). The Court simply looks to whether the record below includes relevant evidence that "a reasonable person could accept . . . as adequate" support for the factual findings. Devers-Scott, 2007 VT 4, ¶ 6 (quoting Braun v. Bd. of Dental Exam'rs, 167 Vt. 110, 114 (1997)).

When reviewing the underlying legal conclusions, the Court does so without deference, unless such conclusions are within the DRB's area of expertise. Stowe Highlands, 2009 VT 76, ¶ 7.

Our review is further limited to those issues raised by an appellant in their Statement of Questions. See V.R.E.C.P. 5(f). Thus, we review the DRB's decision on appeal with these legal standards in mind, and within the context of the legal issues preserved by Appellants' Statement of Questions.

**Factual Background**

Applicants own property having an address of 484 Edson Hill Road, Stowe, Vermont (the Property). The Property is approximately 28.11 acres and is improved by a single-family home and a family chapel. The Property is located within the RR-2 and RR-5 zoning districts as defined by the Town of Stowe Zoning Regulations (Zoning Regulations). The relevant portion of the Property at issue in the subject appeal is within the RR-2 District. Mr. D'Arcy owns property adjacent to the Property on Edson Hill Road. Remaining appellants own property across the Edson Hill Road from the Property.

On or about May 8, 2023, Applicants filed an application for a 3-lot subdivision at the Property, which was subsequently supplemented with additional information. The application did not include a stormwater management plan or an erosion and sediment control plan. Proposed Lot 1 is approximately 9.1 acres, Lot 2 is approximately 3.51 acres, and Lot 3 is approximately 3.5 acres (together, the Project). Lot 1 contains the existing family home and will be accessed by an existing driveway from Edson Woods Road. Lot 2 contains the existing chapel and is accessed by an existing driveway from Edson Hill Road. Lot 3 is unimproved and designed to be served by a proposed gravel driveway from Edson Hill Road.

Applicant proposes building sites for single-family residences on Lots 2 and 3 as shown on site plans provided as Exhibits 5 and 6. Single and two-family dwellings are permitted uses within the RR-2 District. Lot 2 will be served by an on-site septic system and drilled well. Lot 3 will be served by an on-site septic system and municipal water. Lot 1 is served by existing utility connections. Applicants do not seek approval to construct the proposed single-family homes on Lots 2 and 3 at this time.

All lots exceed the minimal lot area and width within the RR-2 District and the existing structures meet the minimum setbacks.[1] The proposed building sites also comply with setback requirements. The Property is within a rural area. The Property does not contain any open fields, forested mountains, or hillsides.

On August 1, 2023, the DRB approved the Project's application with the condition that the Applicants submit an erosion and sediment control plan for Lots 2 and 3 incorporating the State of Vermont erosion prevention and sediment control practices. The Project was reviewed pursuant to the Zoning Regulations and the Town of Stowe Subdivision Regulations effective July 16, 2012 (Subdivision Regulations). This appeal followed.

**Statement of Questions**

Appellants raise 6 Questions in their Statements of Questions. They ask:

> l. Whether the Stowe Development Review Board (hereinafter "DRB") erred by not considering the impact to the rural landscape as characterized by the Town of Stowe Subdivision Regulations, adopted June 25, 2012 and effective July l6, 2012 (hereinafter "Subdivision Regulations"), Section 5.1(4)(b), which dictates that there be minimum undue adverse impact to the rural landscape which exists, in part, due to scenic vistas, large uninterrupted forested areas, open fields along public roads, and *limited development along roads*?
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> 2. Whether the DRB erred by not observing Subdivision Regulations, Section 5.1(4)(b) which states that individual lots and building zones shall be delineated so as to mitigate the visual impact of new development on views from existing roadways, adjacent properties, and offsite vantage points?
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> 3. Whether the DRB erred by not requiring the Applicants to move the proposed building sites farther back from Edson Hill Road to mitigate visual impacts from the public road and neighboring properties pursuant to Section 5.1(4)(b) of the Subdivision Regulations?
>
> 4. Whether the DRB erred by not applying Section 5.1(4)(b)(v) of the Subdivision Regulations, which states that the DRB shall require lots having frontage on an existing public road to maintain a 50-foot vegetated, screening buffer from the existing public road to minimize the effect of the development on the streetscape, and states that the buffer area shall remain free of buildings, *parking*, or other structures?

[1] To the extent Appellants challenge whether the chapel meets the setback in the district, the DRB's conclusion is supported by substantial evidence in the record as shown in the transcript and associated Project maps.

> 5. Whether the DRB erred by not applying Section 5.1(4)(b)(vi) of the Subdivision Regulations, which states that the DRB should require the maintenance and preservation of public scenic vistas?
>
> 6. Whether the Zoning Administrator erred by deeming the subdivision application complete without the submission of stormwater management plans pursuant with Section 4.1(l)(k) and Section 4.2(1) of the Subdivision Regulations?

See PBG, LLC, Boulder Spring Farm, LLC, and Five Roads Stowe, LLC Statement of Questions (filed on Sept. 20, 2023); Kevin D'Arcy Statement of Questions (filed on Oct. 17, 2023) (emphasis in originals).

## Discussion

### I. Scope of Statement of Questions

Prior to addressing the merits of the dispute before the Court, we must determine whether arguments made by Appellants in their briefing are within the scope of this appeal based on their Statements of Questions. A significant portion of Appellants' briefing is focused on proposed Lot 2's compliance with RR-2 District density requirements as set forth in the Town of Stowe Zoning Regulations (Zoning Regulations) Table 6.3 and the Project's compliance with Subdivision Regulations § 5.1(2). Neither issue was raised by Appellants in their Statements of Questions, either explicitly or intrinsically. Therefore, both are outside the scope of this Court's review on appeal. See In re Garen, 174 Vt. 151, 156 (2002) ("[A]n appeal to the environmental court is confined to the issues raised in the statement of questions…").

With respect to density, Appellants' Statements of Questions contain no trace of a reference to density standards. Nor does any Question cite to any provision of the Zoning Regulations. Each Question contains reference and direct citation to the Subdivision Regulations only. None of those subsections address density implicitly or explicitly or through reference to the Zoning Regulations' density standards. See Subdivision Regulations §§ 4.1(1)(k), 4.2(1), 5.1(4)(b).

Appellants argument that density is intrinsic to the aesthetic regulations cited in their Questions is also unavailing. While this Court has jurisdiction over mattes intrinsic to those raised in an appellant's statement of questions, see In re Jolley Assocs., 2016 VT 99, ¶ 15, 203 Vt. 98, Appellants' Statements of Questions here specifically focus on the provisions of the Subdivision Regulations cited. No Question or citation to the Subdivision Regulations explicitly or intrinsically address compliance with the Zoning Regulations' density standards. Appellants assert that the issue is intrinsic to their Questions because density is a "underlying concern." Appellants' Reply Brief at 6 (filed on Sept. 9, 2024). Functionally, they argue that a project that fails to satisfy density standards

will impact aesthetic characteristics addressed in Subdivision Regulations § 5.1(4)(b). This assertion is too attenuated to conclude that the Project's compliance with Zoning Regulations § 6.3 is intrinsic to the specific citations to Subdivision Regulations § 5.1(4)(b) included in Appellants' Statements of Questions. Appellants' Statements of Questions provide no notice to parties and the Court that Zoning Regulations § 6.3 is an issue to be adjudicated in this appeal. Applicants, and the Court, had no notice that Appellants were going to take issue with the Project's density. Thus, to follow Appellants' argument here would be inconsistent with the purpose of the Statement of Questions. See V.R.E.C.P 5(f) (noting that the purpose of a Statement of Questions is to provide notice of the "issue[s] to be adjudicated at trial."); see also In re Saman ROW Approval, No. 176-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 21, 2011) (Durkin, J.).

Appellants failure to raise the issue of the Project's density in their Statements of Questions results in this Court lacking jurisdiction over the issue. See V.R.E.C.P. 5(f); see also Garen, 174 Vt. at 156. Thus, we conclude that density concerns are not before the Court.[2]

For the same reason, Subdivision Regulations § 5.1(2) is not before the Court. None of Appellants' Questions cite to Subdivision Regulations § 5.1(2) and instead contain separate citations to other provisions of the Subdivision Regulations, specifically Subdivision Regulations § 4.1(1)(k), 4.2(1), and 5.1(4)(b). None of those provisions in turn reference Subdivision Regulations § 5.1(2). While the provisions may contain interrelated issues, they are not such that a Question containing a reference to § 5.1(4)(b) makes the entirety of § 5.1(2) before the Court. Appellants Questions fail to put any party on notice that compliance with Subdivision Regulations § 5.1(2) is before the Court in this appeal. Thus, for the same reasons as with respect to density, we conclude that Subdivision

[2] To the extent that Appellants' arguments related to density of Lot 2 is at all intrinsic to any Question before the Court, the Court concludes that the DRB did not err in concluding that Lot 2 complied with the density standards set forth in Zoning Regulations § 6.3. In the RR-2 District, the minimum density is one single-family home per 2 acres. Lot 2 proposes a future single-family home and is 3.51 acres. Appellants assert that Lot 2 violates the density standards because it contemplates two primary uses on a single lot, the proposed single-family home, and the existing chapel**.** See In re Lemelson CU Appeal, No. 23-ENV-98 (Vt. Super. Ct. Envtl. Div. Nov. 1, 2024**)** (Walsh, J.) (affirming the DRB's decision granting the change of use permit for the chapel as a primary use). They assert that Lot 2 would need to be 4 acres to comply with the density standards for the district. First, Appellants cite to no provision of the Zoning Regulations limiting a lot to a single primary use. Nor is there any density standard for non-residential or lodging units, such as the chapel, a place of worship, or for "primary uses" generally. See Zoning Regulations § 6.3. The Zoning Regulations instead set density standards in the RR-2 district as, relevant here, one single family home per 2 acres. It is not disputed that Lot 2 is proposed to contain one future as-yet applied for single-family home and it exceeds 2 acres. Thus, the DRB did not err in concluding that Lot 2 complies with the density standards.

Regulations § 5.1(2) is not raised by the Statement of Questions, either explicitly or intrinsically, and therefore are not within the jurisdiction of this Court on appeal.[3]

## II. Question 1 through 3

Question 1 addresses whether the DRB erred in concluding that the Project complied with Subdivision Regulations § 5.1(4)(b), generally. Questions 2 and 3 address compliance with other aspects of § 5.1(4)(b).

Section 5.1(4)(b) states that "[s]ubdivisions in rural areas shall result in minimum undue adverse impact on the rural landscape as characterized by open fields, forested mountains and hillsides." Subdivision Regulations § 5.1(4)(b). It then goes on to state that the rural character exists in this regard "due to the scenic vistas, large uninterrupted forested areas, open fields along public roads, and limited development along roads." Subdivision Regulations § 5.1(4)(b). This clause is the crux of Question 1. Further, "individual lots and building zones shall be delineated so as to mitigate the visual impact of new development on views from existing roadways, adjacent properties, and offsite vantage points." This is addressed by Questions 2 and 3.[4]

Appellants argue that the Project will not comply with Subdivision Regulations § 5.1(4)(b) because it will impact scenic vistas and result in increased development along Edson Hill Road.[5]

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[3] To the extent that compliance with Subdivision Regulations § 5.1(2) is intrinsic to any issue before the Court, we conclude that the Project complies therewith. Subdivision Regulations § 5.1(2) states, in relevant part, that "[a]ll subdivisions shall be designed to prevent undue adverse impact on . . . aesthetic resources and scenic vistas, including views onto and arising from subject property." First, the DRB found that no aesthetic resources or scenic vistas would be impacted by this Project. See DRB Decision at 7. To the extent that Appellants assert on appeal that finding is unsupported, the Court disagrees. There is no evidence in the record to support a finding that scenic vistas or aesthetic resources are impacted by the Project. Appellants baldly state that such resources exist, but do not define any such vista or resource. The sole alleged resource Appellants assert that the Project unduly impacts is the alleged fact that "the neighborhood consists of large estate lots, and its character would be marred by the addition of small, subdivided lots along the road." Appellants Brief at 15 (filed on Mar. 22, 2024). Appellants fail to present any argument based in law that the existing lot sizes are a scenic vista, aesthetic resource or otherwise protected under Subdivision Regulations § 5.1(2). This is particularly true when the proposed lots exceed the minimum lot size for the RR-2 District. Further, to the extent that Appellants assert that the proposed building sites must be moved further from the road, Appellants do not dispute the finding that the building house sites comply with the minimum setbacks in the district. Appellants do not provide any resource that would justify a larger setback under Subdivision Regulations § 5.1(2)(b). This is further supported by the DRB's findings that the proposed building sites were adequately screened by existing vegetation and that Applicants propose to retain such vegetation. Because Appellants have not identified any resource protected by Subdivision Regulations § 5.1(2) that would be impacted by the Project and the DRB's finding that no such resources were to be impacted is supported by the record, the DRB did not err in concluding that the Project complies with Subdivision Regulations § 5.1(2).

[4] Subdivision Regulations § 5.1(4)(b) goes on to address how preservation of the protected character may include certain methods, some of which are addressed through Appellants additional Questions and are addressed by the Court below.

[5] The Court notes that, as set forth in footnote 3 herein, Appellants assertion that scenic vistas are impacted by the Project is without support in the record.

Appellants assertion disregards the first sentence of § 5.1(4)(b). Section 5.1(4)(b) states that "[s]ubdivisions in rural areas shall result in minimum adverse impact on the rural landscape as characterized by open fields, forested mountains and hillsides." The DRB found that the Project was in a rural area. See DRB Decision at 5. No party disputes that finding. The DRB then found that the parcel "does not contain open fields, forested mountains or hillsides." Id. Appellants do not challenge that factual finding either. To the extent that they do by challenging the DRB's conclusions with respect to § 5.1(4)(b), generally, the Court concludes that the finding is supported by substantial evidence in the record and will not disturb it on appeal. Stowe Highlands, 2009 VT 76, ¶ 76; Devers-Scott, 2007 VT 4, ¶ 6; In re Appeal of Leikert, No. 2004-213, slip op. at 2 (Vt. Nov. 2004) (unpublished mem.). This is because the record is devoid of evidence that such resources are within the Property or impacted by the Project.

The Court must therefore determine how this factual finding impacts the scope of review of the Project under Subdivision Regulations § 5.1(4)(b). This is a legal conclusion that the Court reviews without deference. Stowe Highlands, 2009 VT 76, ¶ 7.

When interpreting zoning ordinances, we apply the rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, the Court will "construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance." Id. (citations omitted). If there is no plain meaning, we will "attempt to discern the intent from other sources without being limited by an isolated sentence." In re Stowe Club Highlands, 164 Vt. 15, ¶ 7, 178 Vt. 29. The Court will therefore "adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense." In re Laberge Moto-Cross Track, 2011 VT 2, ¶ 8, 189 Vt. 578; see also In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49, 195 Vt. 586 (1986)) ("Our goal in interpreting [a zoning regulation], like a statute, 'is to give effect to the legislative intent.'"). Finally, because zoning regulations limit common law property rights, we resolve any uncertainty in favor of the property owner. Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22.

The Subdivision Regulations define "rural landscape" under § 5.1(4)(b) "as characterized by open fields, forested mountains and hillsides." Appellants disregard this limitation as to what constitutes the "rural landscape" under the Subdivision Regulations and focus their analysis on the remainder of § 5.1(4)(b). Appellants' interpretation renders § 5.1(4)(b)'s specific characterization of what constitutes the rural landscape mere surplusage. In re Jenness, 2008 VT 117, ¶ 24, 185 Vt. 16. The Court will not adopt such an interpretation of § 5.1(4)(b).

Functionally, Subdivision Regulations § 5.1(4)(b) sets forth a process to determine a project's compliance with its terms. First, there must be a determination of whether a proposal is within a rural area. If not, the provisions of § 5.1(4)(b) do not apply. If so, as is the case here, the project may only have a "minimum undue adverse impact on the rural landscape as characterized by open fields, forested mountains and hillsides." This necessitates a determination as to whether the proposal will impact any of these characteristics that constitute the "rural landscape." If a proposal does not impact the rural landscape as characterized, the remainder of Subdivision Regulations § 5.1(4)(b), which addresses how to preserve or mitigate impacts to the rural landscape as defined therein, are not relevant. The plain language of Subdivision Regulations § 5.1(4)(b) is clear: only if an application proposes an "impact on the rural landscape as characterized by open fields, forested mountains and hillsides" do the mitigation and preservation methods become relevant.

Here, the DRB found the Project would not impact the rural landscape because there were no "open fields, forested mountains and hillsides" on the Property. The plain language of Subdivision Regulations § 5.1(4)(b) ends the analysis of the Project's compliance with the remainder of the provision at point. Appellants arguments as to the Project's compliance and/or need for conditioning based on further provisions of § 5.1(4)(b) is therefore irrelevant.

Thus, the Court concludes that the DRB's finding that the Project does not contain any "open fields, forested mountains and hillsides" is supported by substantial evidence in the record. As such, we affirm the DRB's conclusion that the Project will conform with § 5.1(4)(b) as applied because this conclusion is consistent with its terms. We therefore answer Questions 1, 2 and 3 in the negative.

**III. Questions 4 and 5**

Questions 4 and 5 address whether the DRB erred in not applying Subdivision Regulations § 5.1(4)(b)(v), related to lots having frontage on public roads maintaining a 50-foot vegetated screening buffer from the public road, and § 5.1(4)(b)(vi), requiring the maintenance and preservation of public scenic vistas.

For the reasons set forth above, the DRB found that the Project contains no "open fields, forested mountains and hillsides" that would constitute the "rural landscape" to be protected under Subdivision Regulations § 5.1(4)(b). That finding is supported by evidence in the record and is largely not challenged by Appellants in this case. Subdivision Regulations § 5.1(4)(b)(i)—(iv) only apply when a project will impact the "rural landscape" as defined therein. Based on the DRB's supported finding that "open fields, forested mountains and hillsides" are not a part of the Project, and for the reasons set forth above, the DRB correctly concluded that the Project will comply with Subdivision

Regulations § 5.1(4)(b). Thus, because there was no "rural landscape" as defined by § 5.1(4)(b), methods of preservation set forth in Subdivision Regulations § 5.1(4)(b)(i)—(vi) are inapplicable to the Project. As such, we answer Questions 4 and 5 in the negative.

## IV. Question 6

Question 6 asks whether the Zoning Administrator erred in deeming the application complete without stormwater management plans as required by Subdivision Regulations.

Subdivision Regulations § 4.1(k) states that a preliminary application for a subdivision shall contain or include stormwater management plans in accordance with Zoning Regulations § 3.12.

Zoning Regulations § 3.12(2)(C) requires that development "involving the disturbance of more than one-half acre" shall submit an erosion control plan and § 3.12(2)(F) requires a stormwater management plan when development creates more than one-half acre of additional impervious surface.

The DRB found that the Project will involve less than one-half acre of new impervious surfaces. Appellants in their briefing do not challenge this factual finding and there is sufficient evidence in the record to support the DRB's finding. Thus, by the plain language of § 3.12(2)(F), no stormwater management plan was required with the application because the Project does not involve the amount of new impervious surfaces that would require such a plan. Thus, the Zoning Administrator did not err in deeming the application complete absent a stormwater management plan, nor did the DRB err in not requiring one.

With respect to erosion and sediment control, the DRB found that the Project contemplates more than one-half acre of soil disturbance. No party disputes this finding. The DRB conditioned the subdivision permit such that site construction comply with Zoning Regulations § 3.12(2)(A)—(E). See DRB Decision at 9—10. Further, the DRB conditioned its approval on Applicant's submittal of an erosion and sediment control plan for Lots 2 and 3 that conformed with the State of Vermont erosion prevention and sediment control practices. Id. at 9. Lots 2 and 3 are the sole lots that would contain soil disturbance. Submittal of that plan must be completed prior to recording the final subdivision survey plat. See DRB Decision at 9—10.

Appellants assert that the DRB erred in issuing the decision before receiving a plan because § 3.12(2)(c) requires receipt of such a plan before a zoning permit is issued. The Court notes that submittal of a plan that complies with the terms of § 3.12(2)(C) is a condition of the subdivision permit. Failure to submit the permit will render the DRB's decision approving the application ineffective. Such a requirement is a typical condition of land use permitting decisions.

Further, while the Project proposes building sites for single-family homes, no present development is proposed by the application and a zoning permit has not been sought or received for future development on any new lot. A zoning permit has not been issued for any future as-yet applied for construction within the proposed building sites. The DRB's decision contemplates that future review by the Zoning Administrator under the Regulations for permitted uses. See DRB Decision at 10. The adequacy of the plan may be addressed in the context of any application for a zoning permit to construct the future proposed residences. No zoning permit has been issued for the single-family homes contemplated by the Project. The Zoning Administrator therefore did not err when deeming the application complete absent an erosion control plan and the DRB did not err in requiring a plan as a condition of the decision on the subdivision application. Thus, we answer Question 6 in the negative.

**Conclusion**

For the foregoing reasons, the Court concludes that the DRB's findings are supported by substantial evidence in the record. All Questions before the Court are answered in the negative and the DRB's decision is **AFFIRMED**.

This concludes the matter before the Court. A Judgment Order accompanies this Decision. Electronically signed this 1st day of November 2024 pursuant to V.R.E.F. 9(D).

Tom Walsh

Thomas G. Walsh, Judge
Superior Court, Environmental Division