

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 25-ENV-00071
Docket No. 25-ENV-00078

637 Kimo Drive Site Plan Application et al.

ENTRY ORDER

Title: Motion for Summary Judgment on Appellants' Questions 7 and 8 (Motion: #6)

Filer: James A. Dumont, Esq., and Jared K. Carter, Esq., counsel for ACRES et al.

Date: April 14, 2026

Response in Opposition to Motion for Summary Judgment, filed May 14, 2026, by Matthew B. Byrne, Esq., counsel for Appellants

Reply in Support of Motion for Summary Judgment and Opposition to Appellants' Cross-Motion, filed June 16, 2026, by James Dumont and Jared Carter

The motion is GRANTED.

Title: Cross-Motion for Summary Judgment (Motion: #9)

Filer: Matthew B. Byrne, Esq., counsel for Appellants

Filed Date: May 14, 2026

Reply in Support of Motion for Summary Judgment and Opposition to Appellants' Cross-Motion, filed June 16, 2026, by James A. Dumont, Esq., and Jared K. Carter, Esq., counsel for ACRES et al.

Reply in Support of Cross-Motion, filed June 29, 2026

The motion is DENIED.

These coordinated matters involve the Town of Essex (Town) Development Review Board (DRB)'s denial of an application by Scannell Properties, LLC and Allen Brook Development, Inc. (Appellants) for site plan approval for a $\pm$ 107,000 square foot distribution facility with associated parking located at 637 Kimo Drive, Essex, Vermont. In this matter, Appellants are represented by Attorneys Matthew Byrne, Jeffrey Polubinski, and James Howard (appearing pro hac vice). Attorneys James Dumont and Jared Carter represent ACRES and its various members. Interested Parties Sam Tatro, Georgianna Tatro, and Patty Davis appear pro se. The Town is represented by Attorneys Alexandra Gaboury and Michael Leddy.

Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate “that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). When considering a motion for summary judgment, the nonmoving party receives the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). When considering cross-motions for summary judgment, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc’ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332 (citation omitted). In determining whether there is a dispute over any material fact, “we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.” White v. Quechee Lakes Landowners’ Ass’n, Inc., 170 Vt. 25, 28 (1999) (citation omitted); V.R.C.P. 56(c)(1)(A). “An issue of fact is material only if it might affect the outcome.” In re Estate of Fitzsimmons, 2013 VT 95, ¶ 13, 195 Vt. 94 (quotation omitted). “The Court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record.” V.R.C.P. 56(c)(5). “Where . . . a party ‘fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion’ and ‘grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it.’” Citibank, N.A. v. Clough, No. 26-AP-004, 2026 WL 2031855 at *2 (Vt. July 10, 2026) (quoting V.R.C.P. 56(e)(2), (3)).

Factual Background

We recite the following facts solely for the purpose of deciding the pending cross-motions. These facts do not constitute factual findings because factual findings cannot occur until after the Court conducts trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.).

1. These matters involve the Town DRB’s denial of a Site Plan Review application for a proposed +/- 107,000 square foot distribution facility with associated parking (the Project) located at 637 Kimo Drive in Essex, Vermont.¹

¹ In Docket No. 25-ENV-00071 Appellants appealed from the DRB’s July 17, 2025 verbal decision denying their application for site plan approval and in Docket No. 25-ENV-00078 Appellants appealed from the DRB’s August 21, 2025 written decision denying the same site plan application.

2. Appellants propose to develop the Project on Lot 13 of the Saxon Hill Industrial Park (SHIP). Until March 2025, Lot 13 was part of a larger parcel, known as “Parcel B,” in the SHIP. In March 2025, the DRB issued final subdivision approval, creating Lot 13 and four other parcels of land out of the larger Parcel B.²
3. At all times material to this matter, the Town of Essex has had subdivision and zoning bylaws in effect that apply to the 5-lot subdivision and the Project, respectively.
4. In connection with their preliminary plan (subdivision) application, Appellants submitted a September 5, 2024 study by the Wall Consultant Group (the Wall Consultant Group study or the traffic study) to the Essex Planning Commission, which was reviewed by the DRB in January 2025.³
5. Section 2.8(B)(5) of the Town’s Subdivision Regulations states that Town staff may request a traffic study during preliminary subdivision review. The regulations require that the study show “the ability of the surrounding street system to accommodate traffic to be generated by the proposed subdivision.” Subdivision Regulations at 17.
6. The traffic study assumed the build out of all five lots in the subdivision and noted that the subdivision is expected to generate 180 new external vehicle trip ends in the AM and PM peak hours.
7. The traffic study describes its use of Institute of Transportation Engineers (ITE) data and the ITE’s Trip Generation Manual in arriving at its projection of vehicle trip ends.
8. On January 30, 2025, Appellants submitted both an application for Final Plan review for Phase II of the SHIP subdivision and a site plan review application for Lot 11.
9. On March 6, 2025, the Town DRB held a public hearing for final review of the 5-lot subdivision proposed for Parcel B of the SHIP. Following the hearing, the DRB voted to approve the final subdivision with conditions.
10. The Agenda Packet for the March 6, 2025 DRB hearing on the final subdivision approval application contains no reports on, or studies of, traffic impacts. The word “traffic” appears at four distinct points in the materials. They are: 1) labeling categories of comments from the Town Public Works Department and quoting a comment from the Fire Department; 2) in form

² Parcel B is also known as 132 Thompson Drive.

³ The Court understands that the Town transitioned its Planning Commission and Zoning Board of Adjustment’s development review functions to a newly-formed Development Review Board in January 2025.

instructions on architectural plans; 3) in quoting sections of the Town Zoning and/or Subdivision Regulations; and 4) summarizing the minutes from the DRB's January 16, 2025 hearing.

11. On March 20, 2025, Appellants obtained final written approval from the Town DRB for a subdivision that includes Lot 13.⁴
12. In the written final subdivision approval, the Town included Section 3.5 of the Subdivision Regulations, which it referenced during the March 6 meeting. This section reads, "Streets shall be suitably located, of sufficient width, and adequately constructed to accommodate the prospective traffic and to afford satisfactory access to fire fighting and other emergency vehicles, snow removal and road maintenance equipment, and school buses." The approval also summarized comments contained in a memo from the Town's Public Works and Fire Departments dated 2/24/25.
13. The March 20, 2025 final subdivision approval did not mention, make findings about, or issue conclusions about any use planned for Lot 13 in the subdivision.
14. The March 20, 2025 final subdivision approval did not mention, make findings about, or make any conclusions about traffic impacts from the proposed subdivision as a whole or for any planned use of Lot 13 in particular.⁵
15. The March 20, 2025 final subdivision approval contained no findings or conclusions regarding an overall number of permissible vehicle trips for the subdivision.
16. The March 20 final subdivision approval was not appealed.
17. That same day (March 20, 2025) the DRB held a public hearing on and verbally approved Appellant's site plan for Lot 11. That plan involved a +/- 33,600 sq. ft. commercial warehouse at 572 Kimo Drive, Essex, Vermont.
18. During the March 20 site plan review hearing for Lot 11, several residents made comments to the DRB about the issue of truck traffic on Sand Hill Road, and the flow of traffic on roads outside the Lot's and subdivision's boundaries generally. They also noted concerns related to noise and pollution from truck traffic.
19. Barbara Zaloom and Mary Post, who are members of ACRES, spoke during the March 20, 2025 hearing on the Lot 11 site plan.

⁴ The March 20, 2025 final subdivision approval reflects the DRB's verbal approval on March 6, 2025, of Appellants' subdivision application.

⁵ The Court quotes facts 13 and 14 directly from ACRES' Statement of Undisputed Material Facts due to Appellants' failure to properly dispute these facts in their reply, pursuant to V.R.C.P. 56(e)(2). In their Response to Cross-Appellants' Statement of Undisputed Material Facts, Appellants copy and paste the same response to several of ACRES' statements of material fact. In the case of these two questions, that answer was not responsive to the questions posed.

20. The Town DRB issued its written approval for Appellants' Lot 11 site plan application on April 3, 2025, which was not appealed.
21. The final site plan approval for Lot 11 did not make findings or conclusions about regarding traffic impacts for Lot 13, or about any planned use for Lot 13.
22. The final site plan approval for Lot 11 did not include or reference an overall number of permissible vehicle trips for the subdivision.
23. ACRES did not exist at the time of the above-referenced subdivision and site plan approvals, as shown by its publicly available articles of incorporation.

Discussion

The parties cross-move for summary judgment on Questions 7 and 8 from Appellants' Amended Statement of Questions. These questions functionally ask whether, in issuing final subdivision approval for Parcel B of the SHIP, the Town's DRB approved all traffic projections and traffic-related impacts associated with approved lots for the remainder of the Town's development review process.

Appellants maintain that the DRB, having approved the 5-lot subdivision and the site plan for Lot 11, intended to approve all of their estimated traffic numbers and impacts such that further discussion of the issue in the context of the Lot 13 site plan review should be precluded under either: 1) 24 V.S.A. § 4472's statutory preclusion; 2) common-law issue preclusion, or 3) non-mutual offensive collateral estoppel. They specifically argue that the DRB received traffic data during the subdivision review process applicable to the development as a whole. They assert that aspects of the DRB's March 6 public hearing—including language in the Essex DRB Staff Report, comments by the Project's engineering consultant, and references to "traffic" in sections of the Town's Zoning and Subdivision Regulations—indicate that the DRB considered the issue of traffic during the process of final subdivision approval. On this basis, they argue that because that final subdivision approval was not appealed, § 4472 makes the approval final and precludes any further discussion of traffic during site plan review for Lot 13.

Appellants make similar arguments regarding the legal effect of the DRB's unappealed approval of the site plan for Lot 11, a different lot within the same subdivision. They base these claims in part on language in the Staff Report, comments by Town residents regarding traffic during the March 20 site plan review hearing, and the final site plan approval for Lot 11 itself.

ACRES responds that the final subdivision approval granted by the Town's DRB does not mean that all traffic-related impacts arising from the Project were "deemed approved" in the context

of site plan review.⁶ It disputes that any aspect of the March 2025 hearings represents a definitive conclusion on traffic intended to preclude further discussion of the issue. It argues neither final subdivision approval, nor Lot 11 site plan approval, bars further consideration of traffic impacts by the DRB. Finally, it disagrees that any member of ACRES is barred from participation in these matters by either issue preclusion or offensive collateral estoppel, primarily because ACRES did not exist at the time of those proceedings.

Whether final subdivision approval or Lot 11 site plan approval necessarily decided future traffic issues

As noted above, Appellants contend that the DRB's March 20, 2025 final subdivision approval for Parcel B, coupled with site plan approval for Lot 11 (issued April 3, 2025), establishes that the DRB considered and decided all issues regarding permissible levels of traffic for future development on Lot 13.⁷ In support of this assertion, Appellants offer the traffic study, which was prepared by Appellants' engineers for presentation during preliminary subdivision review. Appellant's Exhibit C. The study estimates 180 daily vehicle trips for the subdivision as a whole and describes the methodology and data sources underlying that estimate. In Appellants' view, the fact that this report was submitted, referenced during the subdivision and site plan review hearings, and not objected to prior to issuance of final permits represents a final and binding determination regarding traffic issues:

Because the Essex DRB granted the permits both for the Subdivision [of five lots at 132 Thompson Drive, where Lot 13 is located] and the Site Plan Review [of Lot 11], it necessarily decided the traffic issues. Under 24 V.S.A. § 4472(d), Intervenor cannot collaterally attack the traffic issues, including the permissible 180 peak trips number. *See Taft Corners*, 160 Vt. at 593. The DRB approved the Subdivision Application. There was no appeal. In that application, the Applicant provided detailed traffic information, including information that there would be 180 new vehicle trips. The same issues came up in the site review decision when the 180-trip limit was referenced as a cap for the total number of trips in the Subdivision, which included Lot 11 and Lot 13. Because of the DRB approvals, all people are precluded in this proceeding from contesting any subsequent application that uses less than those 180 trips.

⁶ "Deemed approval" is a term of art in Vermont land use law that typically refers to a statutory remedy intended to discourage "indecision and protracted deliberations on the part of zoning boards and to eliminate deliberate or negligent inaction by public officials." *In re Ashline*, 2003 VT 30, ¶ 13 (quoting *In re Fish*, 150 Vt. 462, 464 (1988)). In this case, the Court understands the reference to "deemed approved" in Appellants' Question 8 to refer not to statutory deemed approval, see e.g., 24 V.S.A. § 4464(b)(1), but rather to the exclusivity of remedy and finality provisions of 24 V.S.A. § 4472(a) and (d).

⁷ We find Appellants' argument regarding site plan review lies at the outer bounds of our jurisdiction because Appellants fail to specifically raise this issue in their Statement of Questions. We address the Question under our authority to review questions intrinsic to the Statement of Questions because Appellants offer pieces of evidence from the DRB's prior subdivision and site plan meetings without distinction in making their broader argument that an act or decision of the Town DRB precludes further discussion of the issue of traffic in the context of the Project. *In re LaBerge NOV*, 2016 VT 99, ¶ 15, 203 Vt. 98.

Opposition to Motion and Memo in Support of Cross-Motion, filed 5/14/26, at 11.

ACRES responds that preclusion under § 4472 only applies to “conclusions” reached by a municipal panel. See In re 600 Waits River Rd. Zoning Permit Application, No. 24-ENV-00110, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Sep. 15, 2025) (McLean, J.) In other words, only “issues that were actually litigated and decided” fall within the ambit of statutory preclusion under § 4472. ACRES Motion at 6. ACRES argues that Appellants’ presentation of evidence related to traffic during the March 6 and March 20, 2025 DRB hearings on their final subdivision and site plan applications did not constitute the type of debate and final decision necessary to trigger preclusion. It bases this claim on the assertion that neither the final subdivision approval, meeting agenda, nor the hearing minutes contained any mention of traffic impacts or conclusions related to traffic. Further, it asserts Appellants’ citations to § 3.5 of the Town Subdivision Regulations (the Subdivision Regulations) and § 5.6(A) of the Town Zoning Regulations (the Zoning Regulations) do not establish in any way that the DRB reached definitive conclusions on traffic sufficient to preclude further discussion of the issue during site plan review for Lot 13. In fact, ACRES argues that § 5.1(A) of the Zoning Regulations necessarily means traffic may be considered anew during site plan review.⁸ Because that section allows the DRB to impose stricter conditions during site plan approval than were imposed during subdivision review, ACRES suggests there is a plausible scenario in which the DRB could elect to impose stricter traffic-related conditions during site plan approval, thereby overriding an aspect of an earlier subdivision approval and requiring amendment thereof.

As an initial matter, while ACRES reads § 5.1(A) of the Zoning Regulations correctly, that section does not apply in these circumstances. The relevant language reads: “In the event that a condition of site plan or conditional use approval is inconsistent with the conditions of subdivision approval, the more restrictive shall apply, and an amendment of a prior subdivision approval may be

⁸ Section 5.1(A) of the Zoning Regulations provides in pertinent part:

Coordination of Review: In the event that more than one development review process applies to a particular project, the timing and sequence of each review will be coordinated by administrative staff on behalf of the applicant and town, in accordance with the following:

(A) **Subdivision Review.** Subdivision review by the Planning Commission [now DRB], where required, generally shall precede site plan or conditional use review for the subsequent development of subdivided lots. Applicable conditions of subdivision approval shall be incorporated under site plan and conditional use review. In the event that a condition of site plan or conditional use approval is inconsistent with the conditions of subdivision approval, the more restrictive shall apply, and an amendment of a prior subdivision approval may be required as appropriate. Where feasible, site plan or conditional use review may be held concurrently with final subdivision review, particularly for development within planned unit developments under Article VI.

required as appropriate.” Zoning Regulations at 107. This is an appeal from the DRB’s denial of site plan approval for Lot 13 to Appellants. Accordingly, no site plan approval for that lot currently exists and, therefore, there are no site plan conditions that are inconsistent with the conditions of the existing subdivision approval.⁹

Distinction between subdivision approval and site plan approval

Prior to examining the specifics of the DRB’s March 6 and March 20 hearings, the Court reviews the distinct processes and purposes of subdivision and site plan review.¹⁰ Subdivision review fundamentally concerns the “division of a lot or parcel of land into two or more lots or other division of land for sale, development, or lease.” 24 V.S.A. § 4418; In re Taft Corners Assocs., 171 Vt. 135, 137 (2000) (citation omitted). Relevant for our purposes here, subdivision regulations may provide “standards for the design and layout of streets, sidewalks, curbs, gutters, streetlights, fire hydrants, landscaping, water, sewage and stormwater management facilities, public and private utilities, and other necessary improvements as may be specified in a municipal plan.” 24 V.S.A. § 4418(1)(B). By contrast, “[z]oning bylaws may permit, prohibit, restrict, regulate, and determine land development, including specific uses of land” 24 V.S.A. § 4411(a)(1) (punctuation omitted). Although there is some overlap between the two concepts because “land development” can include division of parcels and zoning regulation can be used to accomplish some of the purposes of subdivision, they remain distinct concepts. Taft Corners Assocs., 171 Vt. 137 (citations omitted). Site plan review, a form of zoning regulation, typically focuses on the internal operations of a project site. See e.g., Margaret Pratt Assisted Living Site Plan, Conditional Use and Act 250 Approval, Nos. 111-8-14 Vtec, 112-8-14 Vtec, 13-2-15 Vtec, 100-8-15 Vtec, slip op. at 21 (Vt. Super. Ct. Envtl. Div., June 21, 2016) (Durkin, J.). Consistent with this purpose, “[i]n reviewing site plans, the appropriate municipal panel may impose, in accordance with the bylaws, appropriate conditions and safeguards with respect to the adequacy of parking, traffic access, and circulation for pedestrians and vehicles; landscaping and screening; the

⁹ Because, with limited exceptions not applicable here, site plan approval is a prerequisite to issuance of a zoning permit based on a specific use in a specific location, it cannot be the case that a site plan approval for one use, in one location, translates to an approval for a different use in a different location, as Appellant argues. 24 V.S.A. § 4416(a) (“As a prerequisite to the approval of any use other than one- and two-family dwellings, the approval of site plans by the appropriate municipal panel may be required.”) Indeed, Appellant’s own position is belied by the fact that Appellant submitted separate applications for Lot 11 and Lot 13, one of which was denied.

¹⁰ While the Court’s conclusions here may bear some similarity to conclusions in the Stout affidavit, the Court does not rely on the affidavit in rendering any part of this decision. Vermont statute and caselaw firmly establish the distinction between these two regulatory review processes.

protection of the utilization of renewable energy resources; exterior lighting; the size, location, and design of signs; and other matters specified in the bylaws.” 24 V.S.A. § 4416(a).

The Vermont Supreme Court addressed a situation similar to this case in In re Taft Corners Associates, 171 Vt. 135 (2000). In that case, Taft Corners Associates sought to develop previously subdivided lots under an older set of zoning regulations. They argued that their disclosure during subdivision review that they planned to use the lots for “mixed use . . . retail and industrial” meant they had a vested right to develop retail stores as a permitted use despite a bylaw amendment making retail a conditional use in certain districts of Williston (including where the involved property was located). Id. at 140. This Court held that Taft Corners did not have a vested right to develop the subdivided lots under the provisions of the zoning regulations in effect at the time the subdivision approval was granted. Id. at 137. The Vermont Supreme Court affirmed, finding that the prior subdivision approval did not create vested rights under the zoning regulations in effect at the time that subdivision approval was sought or obtained because “subdivision review is not intended to police prospective uses of the subdivided lots.” Id. at 141. Indeed, the Supreme Court observed that “[n]o subdivider is required to specify what uses will be placed on the subdivided lots, and the act of subdivision does not restrict those uses. Indeed, there is no requirement that the subdivider know what uses will be placed on those lots.” Id. Thus, the Supreme Court noted that the “lack of specificity [regarding the proposed uses] was sufficient for subdivision review because that step in the process is not intended to look at proposed uses. We do not believe it can or should be sufficient to control the regulatory process when it does reach the stage of evaluating uses proposed by the landowner.” Id. at 142.

Although Taft Corners concerned the concept of vested rights as opposed to preclusion, it provides helpful guidance in the context of the question at issue here. In any scenario where further discussion of traffic during Lot 13 site plan review would be precluded by the DRB’s final conclusions on the issue, those conclusions must have been made with knowledge of the use of Lot 13. As in Taft Corners, any claim by Appellants here that the use of Lot 13 was disclosed during subdivision review is “at best, an exaggeration,” as discussed further below. Id. at 140.

Consideration of Traffic by Town DRB

The above analysis makes clear that subdivision and site plan review assess different aspects of land development, using different bylaws and regulatory mechanisms, often at different stages in the timeline of a project. This is the broad justification behind the principle that discussion of an issue in the context of one review cannot automatically preclude discussion of the issue in the context of a

different review. It may be the case that this principle alone suffices to answer the question of whether further discussion of traffic is precluded by any prior action or deliberation of the Town DRB. The “unique nature of land development litigation,” however, raises an additional question. Hinesburg Hannaford SP Application, No. 112-10-18 Vtec, slip op. at 7 (Vt. Super. Ct. Env'tl. Div., March 8, 2019) (Walsh, J.). As we have previously noted, “there are some preliminary determinations—if unappealed from—that are deemed final . . . ” under § 4472. In re Simpson Development Corporation, No. 54-3-05 Vtec, slip. op. at 8 (Vt. Super. Ct. Env'tl. Div.) (Durkin, J.).

Appellants argue that the text of the DRB’s final decisions, which we analyze in greater detail below, show that the Town DRB considered traffic issues. Relatedly, Appellants repeatedly invoke aspects of the DRB’s March 6 and March 20 hearings to “show that the Essex DRB actually heard evidence on traffic and considered traffic” on those occasions. Motion in Opposition and in Support of Cross-Motion at 7. They appear to argue that certain aspects of those hearings, such as comments by Town residents on traffic, or responses to certain questions by the Project engineer, go far enough to be considered “conclusions” on the issue of traffic such that further discussion should be precluded.¹¹ See, e.g., Motion in Opposition at 4–6; Reply in Support of Cross-Motion at 6–10. The Court considers each item in turn, and finds the evidence offered by Appellants falls far short of this standard.

Provisions of Subdivision and Zoning Regulations

Appellants argue in part that references to certain provisions of the Town Zoning Regulations and Subdivision Regulations in materials considered by the DRB necessarily mean that the municipal panel considered traffic. These provisions include § 3.5 – “Streets” of the Subdivision Regulations and § 5.6 of the Town Zoning Regulations. Under the subsection “Planning Standards,” § 3.5(A)(1) provides:

Streets shall be suitably located, of sufficient width, and adequately constructed to accommodate the prospective traffic and to afford satisfactory access to fire fighting and other emergency vehicles, snow removal and road maintenance equipment, and school buses.

Essex Subdivision Regulations, § 3.5 – “Streets” (A)(1).

¹¹ The parties appear to debate the exact scope of final decisions that may have preclusive effect under Waits River and In re Taft Corners Assoc., Inc., 160 Vt. 583 (1993). Appellants’ Reply at 6, ACRES Reply at 2. We find this distinction is not material to our analysis here and thus decline to reach the question.

In Appellants' view, because this passage of the Regulations requires considering whether the streets are adequately constructed to accommodate prospective traffic, the DRB must have considered the issue of traffic as a whole prior to granting the broader subdivision approval that covers Lot 13. The Court disagrees. As the Vermont Supreme Court noted in Taft Corners, a "subdivision permit will allow the owner to divide the land and create the infrastructure. The zoning permit will allow the landowner to develop the parcels by placing one or more structures on them." 171 Vt. 135, 138 (2000). The plain language of the section strongly suggests that this portion of the regulations was intended to address the placement and construction of streets, not to assess the capacity of that infrastructure to handle conditions generated by specific uses. That is the purview of site plan review (and, potentially, conditional use review). To assert otherwise misreads the holding of Taft Corners, where the Vermont Supreme Court distinguished the appropriate levels of information that must be provided to a municipal panel for subdivision and zoning review. In that case, subdivision approval did not create a vested right in the zoning context due in part to insufficiently detailed information about proposed uses. Similarly, a subdivision approval cannot preclude discussion of traffic in the zoning context under § 4472 simply because it required DRB members to consider the placement and construction of streets in the abstract without reference to the involved property's (or a lot's) specific future uses.

§ 5.6 of the Town Zoning Regulations relates to site plan review and imposes requirements that, if incorporated into an approval, could potentially preclude discussion of the issue of traffic. Appellants' existing site plan approval, however, suffers from a much more fundamental deficiency: that approval concerns a different lot (i.e., Lot 11) within the subdivision. It also concerns a different structure, in a different location, intended for a significantly different use than the project at issue here. The language of § 5.6 makes abundantly clear that the assessments undertaken by the DRB pursuant to site plan approval should be done at the individual lot level. Sections like 5.6(D)(1) mandate that a municipal panel assess the adequacy of "aisle widths to accommodate emergency vehicles, traffic and pedestrian movement patterns, and the location of parking areas and loading docks to prevent conflicts with traffic . . ." Regulations at 109 (punctuation and formatting omitted). It does not logically follow that site plan approval for Lot 11 precludes further discussion of traffic on other lots when that written approval discusses issues like the adequacy of parking for Lot 11 alone. The amount of parking required for a 33,000 square foot warehouse (as approved for Lot 11) has no direct or indirect bearing on the amount of parking that may be needed for a 100,000 square foot distribution

center (as proposed for Lot 13) and the impacts of each. They are simply not related in a way that has legal effect.

Comments by Residents; Discussion of traffic by DRB and Appellants' engineer at subdivision and site plan hearings

Appellants also point to comments by attendees at the March 6 and March 20, 2025 Town DRB hearings, and the ensuing conversation with the Project's engineering consultant, as proof that traffic was considered during the prior subdivision and site plan hearings.¹² In fact, those hearings reflect a lack of consensus on the issue of traffic by DRB members, as well as admissions by the Project's engineering consultant that the numbers offered by Appellants were estimates that could change following identification of a tenant and particular use for Lot 13.

Beginning with March 6, the recording of that hearing makes clear that certain members of the Essex DRB had not had the opportunity to review the relevant materials provided by Appellants.¹³ One DRB member repeatedly notes that he "has not seen anything on traffic" prior to the commencement of the hearing. Hearing Recording, 1:39:10. In response, another member recalls seeing the traffic study at the prior Planning Commission hearing.¹⁴ The conversation concludes with the first DRB member noting that the usual comments from the Town's Public Works Department (which the Court understands reviews traffic impacts in the Town's approval process) were not in the report. This does not approach a conclusion on any aspect of traffic as it relates to the Project.

Nor do the remarks of the Project's engineer during the hearing constitute a conclusion on traffic in any way. In response to questions about traffic information from DRB members, he responded that an individual from the Wall Consultant Group had performed a traffic study and the results of that study led to Appellants' request for a left turn lane to assist with access to the Project. Notably, in discussing the process for undertaking the study, he noted that Wall had done:

"[A] traffic study for full build out of the industrial park, alright, so we look at basically estimated trip generation for full build out, *and when you don't know what's going there, it can be pretty—you know, it can fluctuate quite a bit, like a gym uses a lot of peak PM trips, a warehouse uses next to none.*"

¹² As acknowledged by the parties in previous filings, this is a de novo appeal. In such appeals, this Court may consider the decisions of the municipal panel below for context but is not bound by them. Chioffi v. Winooski Zoning Board, 151 Vt. 9, 11 (1989).

¹³ The Court reviewed the recordings of the March 6 and March 20, 2025 hearings at the Town of Essex's Official Youtube Channel, which can be found at: <https://www.youtube.com/@essexvt/videos>.

¹⁴ The Court understands that the preliminary subdivision application was reviewed by the Town's Planning Commission in September 2024, and later reviewed and approved by the Town's newly constituted DRB in early January 2025.

March 6 Hearing Recording, 1:38:22–1:38:55 (emphasis added).

This amounts to an admission by Appellants’ engineering consultant that the numbers in the traffic study, generated for the purpose of preliminary subdivision review, do not provide a full picture of prospective traffic impacts because uses for all the subdivided lots have not yet been identified. In the words of Appellants’ own engineer, particular uses can cause the amount of traffic to fluctuate dramatically, which would unquestionably change the calculations of the DRB members assessing whether to approve the Project and the conditions of any such approval. Without relevant, up-to-date information before them, it cannot be said that the DRB even truly considered traffic impacts in the context of subdivision review, let alone reached a definitive conclusion in that regard.

The same can be said of questions raised by Town residents and the Project engineer’s remarks at the March 20 site plan approval hearing. Questions from Town residents about whether large trucks will need to use Sand Hill Road to access River Road/VT-117 and voicing concerns about the impact to residential properties in the area (and the ensuing response from Town staff), does not constitute consideration of traffic by the DRB. This would likely be true even if this hearing concerned the relevant site plan (Lot 13, as opposed to Lot 11). Moreover, the Project’s engineer again indicated that estimated traffic generation could change significantly after a tenant was identified. While Town staff was discussing trip generation numbers from the traffic study in response to the question about impacts to Sand Hill Road, the Project engineer noted: “Yeah we just gave typical—we don’t have a tenant in mind, so those sorts of trips are very directed to the tenant” March 20 Meeting Recording, 1:27:16–1:27:24.

This comports with Taft Corners’ recognition that different levels of specificity in an application may satisfy different steps in the land use permitting and approval process. Taft Corners, 171 Vt. 142 (“As we noted earlier, this lack of specificity was sufficient for subdivision review because that step in the development process is not intended to look at proposed uses.”). It does not mean briefly touching upon a topic in the context of one review precludes further discussion of that topic in the context of any other review. This is particularly true where the reviewing body should receive more information on a project at a later stage of review, allowing them to more accurately assess the impacts of the proposed development.¹⁵

¹⁵ The Court finds one moment from the March 20 hearing to be particularly noteworthy, given Appellants’ contention that site plan approval for one lot should transfer across the boundaries of subdivided lots, or from one site plan to another. In response to a question from a resident about the potential tenant for some of the lots, Al Senecal, the principal of Allen Brook Development, Inc., responds, “I think you might be misunderstanding that ours is not the next one.” March 20 Recording, 1:30:34. The Court understands Mr. Senecal to be assuaging the concerns of this resident by

The summary of the Town DRB's hearing from July 17, 2025, dispels any remaining question as to whether the DRB members reached definite conclusions on the Project's traffic impacts. In contrast with the March 6 and March 20 hearings, this hearing involved the site plan approval for Lot 13. At the hearing, at least three individual DRB members expressed concerns about the information provided in the traffic study referenced by Appellants. DRB members questioned both the completeness of the data and the methodology used, with two members specifically noting their belief that ITE trip generation was not an appropriate metric to evaluate the questions posed by the DRB in this instance. It cannot be the case that the Town DRB resolved the issue of traffic when its members do not agree that they have been given accurate information to consider.

Final Subdivision Approval

Our analysis of the distinction between subdivision and site plan review lays out the well-established principle that one form of review and approval cannot automatically take the place of another. Appellants have further argued that the DRB's final written subdivision approval establishes that "all people are precluded in this proceeding from contesting any subsequent application that uses less than those 180 trips." Opposition and Motion in Support of Cross-Motion at 11.

In the context of land use permits, the Vermont Supreme Court has repeatedly affirmed that "[c]onditions that are not stated on the permit may not be imposed on the permittee." In re Kostenblatt, 161 Vt. 292, 299 (1994) (citing In re Farrell & Desautels, Inc., 135 Vt. 614, 616–17 (1978)). Put another way, "Conditions imposed by a zoning board . . . cannot incorporate by reference statements made by an applicant at a hearing." Id. (quotation omitted). This is because "[w]ithout the requirement of explicit conditions . . . aggrieved parties would have difficulty appealing permits for they would have no notice of all conditions imposed, and similarly, subsequent purchasers would lack notice of all restrictions running with the property." Id. The requirement that conditions must be explicitly stated in a permit to be binding extends to subdivision permits. In re Stowe Club Highlands, 164 Vt. 272, 276 (1995) ("We see no reason for the purposes of the *Kostenblatt* holding to distinguish between zoning and subdivision permits.").

saying something to the effect of, "the impacts from this use on this particular lot are not the object of your concern, rather, the impacts of the use that is about to be discussed on a different lot should be the object of your concern." Even if that proposal did not concern Lot 13, this is a tacit admission that a blanket estimate of traffic impacts for the entire subdivision does not accurately convey the cumulative impacts of all the lots in the subdivision once tenants and uses have been identified. It also shows that impacts from one site plan do not necessarily transfer to another. Additionally, a similar exchange occurs with a different resident less than 15 minutes later. March 20 Recording, 1:43:27.

Unlike the issue of traffic generally, it is true that this number of trips was referenced in multiple DRB hearings and in the traffic study provided by Appellants. The Project's engineer explicitly mentions this number in conversations with DRB members on multiple occasions. Even so, the 180-trip limit is not a binding permit condition because it is not memorialized in writing anywhere in either the subdivision or site plan approvals provided to the Court. Kostenblatt, 161 Vt. 299. The DRB cannot incorporate the 180-trip limit simply by reference to it in hearing. Id. To be clear, the unappealed subdivision approval precludes further discussion of whether the parcel may be subdivided and the appropriate number of lots. In re Simpson Development Corporation, No. 54-3-05 Vtec, slip. op. at 8 (Vt. Super. Ct. Envtl. Div.) (Durkin, J.). It also establishes a number of infrastructural aspects of the development, such as an easement for water lines or the extension and installation of certain power lines (Conditions 7, 33). It does not, however, establish an ironclad number of vehicle trips to which Appellant is forever entitled going forward.

Issue Preclusion and Non-mutual Offensive Collateral Estoppel

In addition to statutory preclusion under § 4472, the parties debate whether members of ACRES are precluded from raising traffic concerns by either common law issue preclusion or non-mutual offensive collateral estoppel. Appellants distinguish between current members of ACRES present at the March DRB meetings—Barabara Zaloom and Mary Post—and other members of the group not present at those meetings. Appellants argue the elements of both concepts are present here, and thus the subject of traffic impacts from Lot 13 may not be revisited by any member of ACRES. ACRES argues neither form of preclusion applies and they do not bar further discussion of traffic impacts.

Issue Preclusion

The common law test for issue preclusion, which requires meeting five factors to potentially bar further consideration of an issue, is as follows:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

In re M.V., 2022 VT 31, ¶ 26.

In this case, neither factor 1 nor factor 2 of the test has been met. For this reason, the Court does not proceed to analyze the remaining factors. First, as ACRES notes, privity cannot exist between an individual and an organization (here, a Vermont nonprofit corporation) that has not yet been formed. Memorandum in Support of Motion for Summary Judgment and Opposition to Cross-Motion at 7, ACRES Exhibit 7, filed 4/14/26. The hearings Appellants claim foreclose Ms. Post and Ms. Zaloom’s participation occurred in March 2025, and the founding documents submitted by ACRES show that the nonprofit corporation was founded in June 2025. Thus, it is not possible that they were in privity with the organization or that ACRES was a party to the earlier action. These documents also show that the organization’s founding member appears to be Anne Miller. As such, Appellants’ further contention that discovery is required so that they may understand if the group’s “founding members or attorney participated in the prior proceeding” is unavailing. Reply in Support of Cross-Motion at 8.

Further, the Court’s analysis above clearly shows that as it relates to traffic, there was no “final judgment on the merits” that resolved the issue. In re M.V., at ¶ 26. While the final subdivision approval operates as a final judgment in limited areas, it does not extend to the issue of traffic generally. Thus, issue preclusion cannot apply to either Ms. Post or Ms. Zaloom.

Non-mutual Offensive Collateral Estoppel

Offensive collateral estoppel describes a situation where “a new plaintiff seeks to estop a defendant from relitigating an identical issue that the defendant previously litigated and lost against another plaintiff.” Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 n. 2 (1990) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)). “The use of offensive collateral estoppel is more controversial than the use of defensive collateral estoppel and generally requires additional considerations.” In re M.V., 2022 VT 31, ¶ 41 (quotation and punctuation omitted). These include “whether: (1) the plaintiff could easily have joined in the earlier action; (2) the plaintiff adopted a “wait-and-see” approach hoping that another plaintiff obtained favorable judgment against the defendant; (3) a defendant failed to litigate vigorously in the first action; (4) the second action affords the defendant procedural opportunities that were unavailable in the first action; and (5) it would be unfair to apply collateral estoppel to a judgment that is inconsistent with previous judgments in favor of the defendant.” Id.¹⁶ “Trial courts exercise broad discretion in determining when to apply the

¹⁶ The nature of the cases at issue before the Environmental Division compels us to use the terms Appellant and Appellee in place of Plaintiff and Defendant. The fact that this case also involves cross-appellants means that these traditional labels do not apply cleanly in this situation.

doctrine of offensive non-mutual collateral estoppel.” State v. Living Essentials, LLC, No. 443-7-14 Wncv, slip. op. at 1 (Vt. Super. Ct. Civ. Div. Aug. 25, 2017) (Teachout, J.) (citation omitted). “Even if a court concludes that all four prongs of the nonmutual offensive collateral estoppel analysis have been established, it must still assure itself that it is fair to apply the preclusion doctrine.” Bifolck v. Phillip Morris USA, Inc., 936 F.3d 74, 84 (2019) (citing Parklane, 439 U.S. at 331).

Appellants urge this court to apply offensive collateral estoppel to the members of ACRES other than Ms. Post and Ms. Zaloom, asserting that no member of the group should be permitted to raise questions regarding the issue of traffic on Lot 13. Appellants acknowledge that no other members of the group participated in the relevant DRB hearings. ACRES responds that the Parklane criteria do not apply to this situation because the factors assume “the party against whom preclusion is sought was a party to the first action.” ACRES Reply in Support of Motion and Opposition to Cross-Motion at 7.

To begin, Appellants fail to consistently analyze the factors with respect to the posture of the parties involved, which hampers the Court’s analysis. They note:

“[Members of ACRES] who appeared in the first action did not litigate it vigorously as they decided not to appeal the earlier decisions. The second action provides no greater opportunity to litigate than the first action. Finally, it would be unfair for the Applicants to be subject to inconsistent judgments on traffic issues, especially when they took the time to put together a traffic study and simulations for the entire development.”

Appellants’ Reply in Support of Cross-Motion and Opposition to Motion at 14.

Appellants refer to themselves as “Applicants” in their analysis of factor five. As quoted above, application of factor five turns on an assessment of the defendant’s relationship to the prior proceeding. This is also the case with factor three. The above analysis shows, however, that Appellants have analyzed factor three with ACRES in the position of the defendant. This is incorrect. The factors in this analysis apply to specific parties and may not be inverted to produce the most favorable result for the party seeking estoppel.

Even assuming Appellants had analyzed the factors with the parties properly positioned, they fail to meet the first two elements of the offensive collateral estoppel test and to show that application of the principle would be fair here. Assuming either the March 6 or March 20 hearing represents the “earlier action,” ACRES did not yet exist and so could not have joined. Accordingly, ACRES could also not have adopted a “wait-and-see approach” while hoping another entity obtained a favorable

judgment against Appellants.¹⁷ Finally, Appellants' contention their investment in the traffic study means further discussion of the issue would be unfair misconstrues the nature of their obligations to the Town DRB and the purpose of subdivision review. The Town Subdivision Regulations provide that Town staff may request a traffic study at the preliminary subdivision review stage to evaluate the ability of the surrounding street system to accommodate traffic to be generated by the proposed subdivision, and they were fully within their rights to do so.¹⁸ As Appellants note, they received final subdivision approval, which was the impetus behind generating the traffic study in the first place. Receiving approval at one stage of the development review process and a denial at a further, different stage does not inherently mean a reviewing body is offering inconsistent judgments. Rather, it is much more likely an applicant made the appropriate showing at one stage and failed to do so at another. As such, Appellants have not demonstrated that applying preclusion here would be fair, and the Court declines to apply offensive collateral estoppel here.

Leave to Amend

In closing, Appellants request leave to amend their Statement of Questions to add (or modify) two Questions essentially asking whether the Town DRB's final subdivision and site plan approvals precluded further discussion of traffic as it relates to the Project. This Court previously granted Appellants leave to amend their Statement of Questions pursuant to their motion filed May 1, 2026. Further, the Court directly addresses and grants dismissal of both Questions—with consideration given to both the prior subdivision and site plan approvals—in this order, meaning there is no need to further amend the Statement of Questions as proposed. Thus, the request to amend is MOOT and therefore denied.

¹⁷ The caselaw makes clear that this factor contemplates a “calculated strategy” on the part of an individual to bring a second action with greater assurance of success based on the outcome of the first action. In re M.V., 2022 VT 31, ¶ 43. Putting aside that this factor does not apply here for the reasons above, it is not clear to this Court that a prior denial of an application for site plan approval would qualify as a “favorable judgment” for ACRES in the sense that phrase is intended. Id.

¹⁸ Section 2.8 of the Subdivision Regulations specifically states:

(5) Traffic Study: When requested by Staff, the applicant shall provide a traffic study demonstrating the ability of the surrounding street system to accommodate traffic to be generated by the proposed subdivision. If there is any question about the need for a traffic study, staff shall refer the matter to the Planning Commission.

(a) Traffic studies shall conform to the standards set forth by the Town Public Works Department.

CONCLUSION

For the foregoing reasons, we **GRANT** ACRES' Motion for Summary Judgment on Appellants' Questions 7 and 8, and **DENY** Appellants' Cross-Motion for Summary Judgment, which renders their Request to Amend **MOOT**.

Electronically signed on August 25, 2026, pursuant to V.R.E.F. 9(d).

A handwritten signature in blue ink, appearing to read "Joseph S. McLean", with a stylized flourish at the end.

Joseph S. McLean
Superior Court Judge
Environmental Division