VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 22-ENV-00033

Windham & Windsor Housing Trust Permit Appeal	**DECISION ON MOTIONS**

Laura E. Campbell (Appellant) appeals a decision of the Putney Development Review Board (DRB) approving a Windham & Windsor Housing Trust's (WWHT) application for subdivision, conditional use, site plan, and planned residential development approval for the development of 25 units of affordable housing with associated infrastructure (the Project). Appellant resides at property that abuts the Project location. Through Appellant's Statement of Questions, as amended June 16, 2022, she raises issues generally concerning the Project's compliance with the Putney Zoning Regulations (Zoning Regulations) and Putney Subdivision Regulations (Subdivision Regulations). Presently before the Court are the parties' cross motions for summary judgment. Appellant moves for partial summary judgment on Questions 1 through 9, which generally concern the Project's compliance with relevant lot size and density requirements. WWHT moves for summary judgment on all matters before the Court.[1]

WWHT is represented by Peter Raymond, Esq. Appellant is generally self-represented, but represented on a limited basis with respect to the pending motions by Harold Stevens, Esq. The Town of Putney (Town) is represented by Lawrence Slason, Esq.

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 the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); V.R.E.C.P. 5. The nonmoving party "receives the benefit of all

[1] Due to the length of Appellant's Statement of Questions, the Court will only reproduce the relevant Questions when addressing the substance of the arguments relevant to each Question.

reasonable doubts and inferences." Robertson v. Mylan Labs., Inc., 2005 VT 15, ¶ 15, 176 Vt. 356. When considering cross-motions for summary judgment, as the Court presently has before it, 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.

For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary judgment, so long as they are supported by affidavits or other evidentiary material." Robertson, 2004 VT at ¶ 15. The party opposing a motion for summary judgment "cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to the factfinder." Id. (citing Gore v. Green Mtn. Lakes, Inc., 140 Vt. 262, 266 (1981); V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)).

Prior to making factual findings, we must first address two issues raised by the parties with respect to Appellant's Statement of Undisputed Material Facts in support of her motion, and Appellant's response to WWHT's Statement of Undisputed Material Facts in support of WWHT's motion.

First, Appellant did not submit a separate statement of undisputed material facts in support of her motion. At this point in time, Appellant was self-represented. Later, when she obtained counsel, she submitted a short statement of undisputed material facts. This is procedurally deficient under V.R.C.P. 56(c)(1). That said, a review of the facts relative to Appellant's motion for judgment on Questions 1 through 9, and WWHT's facts raised in support of its motion with respect to the same, show that the material facts are not in dispute. Further, given the fact that we conclude that WWHT is entitled to judgment on these Questions, we decline to strike Appellant's motion in its entirety and will consider the arguments raised therein. In so doing, and for practical purposes, we therefore **GRANT** Appellant's motion to enlarge time to file a statement of material facts.[2]

[2] We further **GRANT** WWHT's motion for leave to file a sur-reply to allow the Court to fully address all issues and arguments raised by the parties.

Second, to the extent that Appellant argues that V.R.C.P. 36 is relevant to responding to V.R.C.P. 56 Statements of Undisputed Material Facts, we conclude that the provisions of Rule 36 are irrelevant to a party's response to Rule 56 Statements of Undisputed Material Facts. Rule 36 sets forth the rules for requests for admissions in the discovery context, in which we are not. Rule 56 sets forth specific rules for responding to a statement of undisputed material facts, requiring that:

> A nonmoving party responding to a statement of undisputed material facts and asserting that a fact is genuinely disputed, that the materials cited do not establish the absence of a genuine dispute, or that the moving party cannot produce admissible evidence to support the fact, must file a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other admissible materials.

V.R.C.P. 56(c)(2).

This Court will apply the standards set forth in V.R.C.P. 56(c), and the case law interpreting these provisions, when determining whether a fact is truly disputed. Appellant was required to adequately dispute any factual allegations that she genuinely disputed. Failure to adequately dispute a fact pursuant to V.R.C.P. 56 will result the fact being deemed undisputed. V.R.C.P. 56(e); Gilman v. Maine Mut. Fire Ins. Co., 2003 VT 55, ¶ 10, 175 Vt. 554.

Undisputed Material Facts

We recite the following factual background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the sole purpose of deciding the pending motions. The following are not specific factual findings with relevance outside of this summary judgment decision. See Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.)).

1. WWHT seeks approval for a Planned Unit Development (PUD) with conditional use, site plan, and subdivision review to construct a 25-unit residential development with associated

parking and infrastructure at property located at Alice Holway Drive in the Town of Putney (the Project).

2. The Project is located within the Village Zoning District (VZD)

3. The Project will create permanent affordable housing units, with a mixture of one and two-bedroom units located in two buildings.

4. Currently, the lands proposed for development consist of six parcels of land and are owned by Putney Gateway Associates.

5. The Project proposes to consolidate the six lots into 3 lots, identified as Lot A1, Lot A2, and Lot B.

6. Lot A1 is ±0.91 acres.

7. Lot A2 is ± 2.02 acres.

8. Lot B is ± 1.03 acres.

9. Lot A1 and Lot B are located between Alice Holway Drive on the south and west, Carol Brown Way to the North, and Main Street/US Route 5 to the east. See WWHT's Ex. 4, (Site Plan).

10. Lot A2 is located across Alice Holway Drive from Lot A2, to the general southwesterly direction. See Id.

11. Lots A1 and A2 are currently unimproved, while Lot B contains a developed community garden.

12. Lot B is not proposed for development.

13. Lot A1 will be developed with two multi-family residential structures with associated parking.

14. A two-story structure containing 8 townhouses (the Townhouses) will be constructed on the westerly portion of Lot A1.

15. The Townhouses' structure will have a height of 28 feet.

16. A three-story structure containing 17 apartments (the Apartments) will be constructed on the easterly portion of Lot A1

17. The Apartments' structure will have a height of 34 feet, 11 inches.

18. Lot A1 will also contain 25 parking spaces.

19. Lot A2 will contain 15 further parking spaces.

20. All parking spaces are 9 feet by 19 feet.

21. Pedestrian infrastructure will include concrete sidewalks along the Townhouses, Apartments, and parking area on Lot A1, which will connect to the parking area on Lot A2 by an established crosswalk across Alice Holway Drive.

22. Alice Holway Drive is a Class III town road, running between Main Street/US Route 5 to the south and Carol Brown Way to the North.

23. Alice Holway Drive's speed limit is 35 miles an hour.

24. Functionally, driver's speeds along the road are lower than 35 miles per hour.

25. There are no current traffic concerns along Alice Holway Drive.

26. Traffic counts of Alice Holway Drive show 487 vehicle trips per weekday, with 50 to 60 peak hour vehicles.

27. The Project is estimated to generate 169 vehicle trips per day.

28. This includes 84 vehicles entering the Project and 85 vehicles exiting.

29. The Project is estimated to result in only 10 additional morning peak hour trips and 13 additional evening peak hour trips.

30. The Project is not located in a "high crash location" as that term is defined by the Vermont Agency of Transportation (VTrans).

31. Vtrans guidelines currently recommend that a traffic study should be considered if the proposed development would result in more than 75 peak hour trips.

32. The Project's proposed traffic generation is relatively modest and will not adversely impact the traffic in the area.

33. The estimated traffic impacts do not include considerations to pedestrian infrastructure in the area which might decrease traffic impacts, including new sidewalks connecting the Project to a transit stop located at Carol Brown Way and Alice Holway Drive, new sidewalks connecting the Project to existing sidewalks leading to Putney Village and the adjacent Putney Co-op, a grocery store.

34. The Project will receive policing services from the Windham County Sheriff's Office, and the Vermont State Police.

35. The current policing services can service the Project and will not result in public safety concerns in this regard.

36. The Project will receive fire services from the Town of Putney Fire Department, located across US Route 5 from the Project.

37. With the inclusion of a new fire hydrant, a wet/dry standpipe hose connection within the Apartments, and the potential inclusion or re-siting of the Fire Department's existing helicopter landing zone, the current fire services can service the Project, and the Project will not result in public safety concerns in this regard. See WWHT's Ex. 13 (Letter from Town of Putney Fire Department) (setting for items the Fire Department would require within the overall scope of the Project).

38. The property is not located within a flood hazard area, nor a river corridor.

39. On or about November 22, 2021, the State of Vermont Department of Housing and Community Development (DHCH) approved the "Putney Village Center" as a "neighborhood development area" (NDA) pursuant to 24 V.S.A. § 2793e.

40. The Project is in the NDA.

41. On February 15, 2022, the DRB held a warned public hearing on the Project and WWHT's application.

42. On March 9, 2022, the DRB approved the Project, granting WWHT PUD, conditional use, site plan, and subdivision approval.

43. Appellant appealed the DRB's decision to this Court.

Conclusions of Law

I. Questions 10–13, 22, 24, 25, 27, 29, and Addendum: De Novo Review and Subject Matter Jurisdiction

Prior to addressing the substantive issues raised with respect to the Project, we first address the jurisdictional concerns posed by Appellant's Questions 10 through 13, 22, 24, 25, 27, 29 and Addendum. Those questions provide:

> Question 10: On February 15, 2022 at the sole Public Hearing on WWHT's Application 21-12-24, did the DRB Chair violate the spirit and letter of Vermont Open Meeting Law by repeating to Interested Persons and other participants that their questions and concerns would be addressed later in the agenda, but then not

honoring his assertion by circling back around, thus effectively silencing concern and public participation and not addressing a large number of questions? 1 V.S.A. Sections 310-314 which implements the command of Chapter I, Article 6 of the Vermont Constitution.)

Question 11: Given the length and complexity of considerations presented by the WWHT Permit Application, the number of attendees with valid concerns about the sudden appearance of the Application, and the DRB Chair's reiterations of lack of time to discuss topics it contained, why were not 3 Hearings scheduled to cover the plans being presented?

Question 12: Where and when was clear and accessible information and instruction about the appeal process provided to Interested Persons, including contact information for the appropriate entity as recipient of any appeal?

Question 13: At Open Meetings of the Putney DRB and Affordable Housing Committee, and at Public Hearings of the DRB, when reasonable queries about foreseeable negative impacts on Putney Community of WWHT's proposed project are routinely dismissed by Putney's DRB chair, or the Affordable Housing Committee Chair, for alleged lack of relevance or time, are violations of Open Meeting Law, which "clearly emphasizes openness of and accessibility to government" and is "meant to empower the public to play an effective role as not only an active participant in government but also a check on it as well", occurring? (VLCT on Vermont's Open Meeting Law)

. . .

Question 22: Did the DRB address testimony from interested persons that WWHT allots too few parking spaces and does not provide any apartment storage spaces thereby forcing tenants to use individual apartment exterior entryways or exits in projects where they exist, existing grounds or parking spaces where individual apartment entry and egress do not exist, or parked cars - registered and operational or not - for a variety of personal storage containers and for children's toys at their multigenerational facilities?

. . .

Question 24: [Based on] Article 1, STATUTORY AUTHORITY AND PURPOSE, Section 1.1 of Putney Subdivision Regulations . . . why have all questions related to Permit statements which depart from

the stated purposes of the Subdivision Regulations been summarily dismissed by the DRB chair?

Question 25: Why were simple, direct questions from a concerned public including abutters and interested persons attending DRB and Select board meetings though the late summer and fall of 2021, as well as Applicant's presentation of a radically revised post-soil testing construction plan on November 15, 2021, dodged, or deflected, or met with inconclusive equivocation by DRB and Select Board Chairs and Applicant representatives during the Q and A session on November 15, 2021?

. . .

Question 27: . . . Why is a misrepresentation of Putney Meadows, a 26-unit (not a 28-unit) building, as a 3-story building introduced when in fact Putney Meadows is 2 stories above the ground line, with a 6-unit basement half-floor level downhill in the rear, and appears to be in compliance with Putney Zoning Regulations?

. . .

Question 29: . . . Why does the DRB assert that "No abutters participated in the February 15, 2022 Hearing or provided any testimony about landscaping or screening" when in fact abutters and Putney Meadows residents did attend and did participate, and neighbors of the Applicant's proposed project did air concerns about landscaping, screening, and traffic sight lines related to the project?

. . .

Addendum A. Inasmuch as "Village District", "Village Area", and "Village Center" are terms used seemingly interchangeably in Putney DRB Zoning Permit Decision #2022-02-15 and the Town Plan, to exactly what locations do these three different identifications refer or are they synonymous?

Addendum B. Does the re-naming and re-zoning of Putney Historical District as "Village District" in Spring of 2021 involve "spot zoning" initiatives on the parts of Putney Town Officers with apparent conflicts of interest as Chairs of the Planning Commission, the DRB, the Selectboard, and the Affordable Housing Committee?

Addendum C. Was the DRB extension of the what is referred to in Permit #2022-02-15 as "Village District" yet seems to qualify as the NDA required "Village Center", from the former Putney Historical District limits by the allowed quarter of a mile from the area of Putney Public Library to the south "down to the Dummerston Town

> Line" as was explained by Chair of the Putney DRB in October 2021, also preparation for granting of NDA designation to benefit and enable WWHT's Alice Holway Drive development plans underway since 2019 to proceed?
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> Addendum D. Were the purposes of 2021 zoning changes involved in expanding the former Historical District to the "Village District" to meet NDA application requirements properly warned, with public notices posted in timely fashion, and opportunities for public comment scheduled, especially notices of meetings intended to inform residents and businesses in the former Putney Historical District of the changes?
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> Addendum E. (DRB Decision "Findings of Fact" #s 8 and 17) Why do the proposed subdivisions total 4.13 +/- acres in #8 and 3.96 acres in #17 where it also states "Lots A1 and A2 will remain 'contiguous' [as they have never been] under common ownership"?

Appellant's Am. Statement of Questions at 3–6 (filed June 16, 2022).

This Court is one of limited jurisdiction. 4 V.S.A. § 1001(b). Further, with limited exceptions not relevant here, we review appeals de novo. 10 V.S.A. § 8504(h). As such, we hear the case "as though no action whatever has been held prior thereto." Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989). Therefore, we generally do not consider the underlying decision of, or proceedings before, the municipal panel below, "rather, we review the application anew as to the specific issues raised in the statement of questions." In re Whiteyville Props. LLC, No. 179-12-11 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Dec. 13, 2012) (Durkin, J.). We are further limited "to consideration of the matters properly warned as before the local board." In re Maple Tree Place, 156 Vt. 494, 500 (1991). This means that our subject matter jurisdiction is confined to those issues the municipal panel below had the authority to address when considering the original application. See In re Transtar LLC, No. 46-3-11 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. May 24, 2012) (Durkin, J.). Finally, as the Vermont Supreme Court holds, "Courts are not authorized to issue advisory opinions because they exceed the constitutional mandate to decide only actual cases and controversies." In re Snowstone, LLC Stormwater Discharge Authorization, 2021 VT 36, ¶ 28, 214 Vt. 587. Issues presented on appeal "must be a necessary part of the final disposition of the case to which it pertains." Baker v. Town of Goshen, 169 Vt. 145, 151–52 (1999) (citing Wood v. Wood, 135 Vt. 119, 121 (1977)).

The Questions cited in this section fall outside of the Court's jurisdiction of at least one of the above reasons. We address them in turn.

a. Questions 10–13, 22, 24, 25, 27, and 29, and Addendum A and E: DRB Proceedings

Because of this Court's de novo trial process, allegations of decisionmaker bias or improper procedure on the part of the municipal panel are outside the scope of our review, In re JLD Props. of St. Albans, LLC, 2011 VT 87, ¶ 10, 190 Vt. 259, as is a determination of the panel's authority to make, or propriety of, their conclusions, In re Bissig Subdivision Final Plat, No. 87-7-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Dec. 23, 2013) (Durkin, J.); Moore 3-Lot Subdivision, No. 123-9-13 Vtec, slip op. at 6–7 (Vt. Super. Vt. Envtl. Div. July 28, 2014) (Walsh, J.). Simply put, questions entirely related to the procedures before the municipal panel when it was considering the application presently before the Court on appeal are outside the scope of this Court's subject matter jurisdiction and must be dismissed.

Each of the above-referenced Questions are outside the scope of this Court's jurisdiction as they either relate to the procedures before the DRB or the propriety and/or accuracy of the DRB's decision on the Project. They address Appellant's concerns regarding the general proceedings below (Question 10–12), the procedures related to giving and receiving testimony (Question 13 and 25), the accuracy and appropriateness of the DRB's findings and conclusion (Question 22, 24, 27, 29, and Addendum A and E), or some combination of all three. These alleged deficiencies have been cured by Appellant's appeal to this Court and our de novo review.

b. Addendum B through D: Re-Zoning

To the extent that Addendum B, C, and D seeks to address a re-zoning that Appellant alleges may be the subject of spot zoning, assuming that such re-zoning occurred, any re-zoning is not before this Court. See Transtar LLC, No. 46-3-11 Vtec. at 4 (May 24, 2012). Further, we note that the alleged re-zoning appears to have occurred prior to WWHT's application before the Court. Presently before the Court is an appeal of WWHT's permit application, not of changes to the zoning regulations themselves. Thus, these Questions are outside the scope of this Court's review.

Therefore, while WWHT has requested summary judgment on these questions, we conclude that Questions 10–13, 22, 24, 25, 27, 29, and the Addendum must each be **DISMISSED**

as outside the scope of this Court's subject matter jurisdiction. See In re Verizon Wireless Barton Permit, No. 133-6-08 Vtec, slip op. at 8 (Vt. Envtl. Ct. May 20, 2009) (Durkin, J.) (holding that this Court has "an independent obligation to determine whether subject-matter jurisdiction exists . . . .") (internal quotation and citation omitted); see also V.R.C.P. 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").[3]

II. Questions 2 and 26: Spot Zoning

Appellant, through Question 2 and Question 26 raise concerns related to "spot zoning."[4] While WWHT does not specifically address the issue, because Appellant repeatedly raises this term, we address it prior to turning to her substantive concerns with the Project. Appellant's Questions in this regard state:

> 2. Is Decision 2022-02-15 approval of a 1.85 acre reduction in the required minimum acreage for 25 housing units from 2.76 acres to .91 of one acre an instance of spot zoning inasmuch as: 1. the area in question is small (under 1 acre); 2. proposed use of the parcel Lot A1 for mixed-income housing is different from the current uses of the other parcels (Lot A2 open space; Lot B agricultural) in the 3.96 acre areas on Alice Holway drive WWHT proposes to buy; 3. change in Zoning Use Classification significantly conflicts with Putney's Town Plan for Lot A1, Lot B and Lot A2, and; 4. the benefit of the Conditional Use Zoning Classification is for a specific advantage to a particular [prospective] landowner (WWHT) rather than for the benefit of Putney Community as a whole?
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> 26. Exhibit 10c, (Application) Whereas no elevations for the upper stories of either of Applicant's proposed 3-story buildings are provided, nor is there a scale enabling one to determine accurately what those elevations shown are, do the ridge lines of the two building exceed the 35' limit of the Zoning Regulations (HEIGHT "Measurement Standard" 506.1) as they appear to do by some 5-15 feet and as such constitute an instance of spot zoning?

[3] To the extent that the remainder of Questions address further proceedings before the DRB but also the Project's compliance with substantive standards within the Zoning Regulations, we will disregard aspects of the Question related to DRB proceedings or the DRB decision and instead focus on the substantive standards the Question implicates.

[4] Appellants Question Addendum B similarly addresses "spot zoning." For the reasons set forth above, however, that Question is not within the scope of this Court's jurisdiction and has been dismissed on those grounds.

Appellant's Am. Statement of Questions at 1, 5.

"Spot zoning" is a term of art in the practice of zoning law. It addresses impermissible zoning that "single[s] out a small parcel or perhaps even a single lot for a use classification different from the surrounding area and inconsistent with any comprehensive plan, for the benefit of the owner of such property." Galanes v. Town of Brattleboro, 136 Vt. 235, 239 (1978). Thus, spot zoning concerns the zoning or re-zoning or a parcel of land, not the issuance of a permit.

Questions 2 and 26 do not address the zoning or re-zoning of the Project lands. Instead, these questions address whether the issuance of the permit itself constitutes "spot zoning." Question 2 in particular seeks to apply the standards set forth by the Vermont Supreme Court, and United States Supreme Court, to determine whether a zoning classification of a specific parcel of land is unconstitutional. See, e.g., Granger v. Town of Woodford, 167 Vt. 610, 611 (1998) (mem.) ("The[] elements [of spot zoning] are: (1) whether the use of the parcel is very different from the prevailing use of other parcels in the area; (2) whether the area of the parcel is small; (3) whether the classification is for the benefit of the community or only to provide a specific advantage to a particular landowner; and (4) whether the change in the zoning classification complies with the municipality's plan.").

These spot zoning factors are not applicable in the context of the issuance of a zoning permit. There is no re-zoning before this Court. Question 2 and Question 26 do not address efforts by the Town or any entity thereof to re-zone the Project lands to allow of a series of uses inconsistent with the surrounding areas which may constitute spot zoning. The action before the Court is a consideration of whether a permit should be approved or denied based on the relevant standards of an existing zoning district. As such, this is not spot zoning, but a permitting decision contemplated by Vermont statutory law and the Zoning and Subdivision Regulations. These Questions address the propriety of the issuance of the permit itself. This is not "spot zoning." As such, we answer Question 2 and 26 in the negative and **GRANT** WWHT's motion for summary

judgment on these Questions and **DENY** Appellant's motion for summary judgement in this respect.[5]

III. Questions 1, 3–7, and 9: Lot Size and Density

In Questions 1 through 9 of her Statement of Questions, Appellant raises concerns related to the size of the Project lands and the ability to develop the project lands with 25 housing units (i.e., density).

> 1. How do Putney's Development Review Board, Zoning Administrator, Selectboard, and Windham & Windsor Housing Trust planners reconcile Director of Real Estate Development Peter Paggi's statement quoted from Applicant's Permit Application, Exhibit 3, page 2, paragraph 5, "The minimum required lot area for 25 units is 2.76 acres", with the fact that Applicant's current plan is to build the 25 units on .91 acres identified as Lot A1?
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> . . .
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> 3. Exhibit 3, pp. 2 and 3 (Application): Given that the Eleventh Edition (2004) Concise Oxford English Dictionary defines "contiguous" is "sharing a common border", "next to or together in a sequence", and "touching", how can Lots A1 and A2 on opposite sides of Alice Holway Drive, a heavily trafficked roadway owned, maintained and overseen by the Town of Putney, be described as "contiguous"? (Section 410 PRD Standards for Review, 410.1 C #1)
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> 4. When we read in Vermont Supreme Court 578 A.2d 112 (1990) Route 4 Associates v. Town of Shelburne Planning Commission and Town of Shelburne... that Webster's Ninth New Collegiate Dictionary (1986) defines "contiguous["] as 1. "being in actual contact: touching along a boundary or at a point", why, other than to manipulate Putney Zoning Regulations and Subdivision Bylaw intended to "assure the comfort, convenience, safety, health and welfare of the people", is it important for WWHT with Putney DRB's approval of Decision 2022-02—15, to call Lot A1 and Lot A2 contiguous when they do not touch along any boundary?
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> 5. Does acreage in separate parcels on either side of an active thoroughfare which is under Town of Putney ownership and maintenance, warrant the characterization of "contiguous" in "Findings of Fact" #17 the of Permit #2022-02-15, where, the final

[5] To the extent that Question 26 seeks to raise concerns related to the Project's compliance with height standards, we address the substance of that issue below.

> sentence declares "Lots A1 and A2 will remain contiguous and under common ownership"?
>
> 6. Other than Applicant's need to include 2.02 acres of un-developable land in Lot A2 to the West of Alice Holway Drive in addition to the .91 acres of Lot A1 East of Alice Holway Drive, in order to fabricate the minimum acreage of 2.76 for construction of 25 units, what grounds are there for calling Lots A1 and A2 contiguous when they are not coterminous at any point?
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> 7. Exhibit 3, p. 2, #3 (Application) Since, in paragraph 5, line 3 of the Narrative prepared by Peter Paggi, Applicant's Director of Real Estate Development, he states, "The minimum required lot area for 25 units is 2.76 acres", how can he arrive at a minimum acreage the 25-unit project needs except by misrepresenting Lots A1 and A2 as "contiguous parcels" thereby conflating Lot A1's and Lot A2's 2.02 acres to arrive at 2.93 acres and exceed the minimum by .17 acres?
>
> . . .
>
> 9. If, as stated in Putney Zoning Regulations 320.5 D., the Village District dimensional requirement is a 10,000 sq. ft. lot minimum for up to a 3-family dwelling, is Lot A1, proposed construction site (Findings of Fact #19) at .91 acres or 39,639.6 sq. ft., adequate for 25 family units, or is the construction site adequate for a maximum of 11.89 dwelling units only? (Also Decision 2022-02-15, Section 410 PRD Standards for Review, 410.1 C #2)

Appellant's Am. Statement of Questions at 1–2.

These issues are interconnected because the size of the Project lands will dictate the allowable density. As such, we will first determine the size of the Project lands, then the Project's compliance with relevant density standards.

In interpreting zoning ordinances, we apply the rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, we "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. 272, 280 (1995). In construing statutory or ordinance language, our paramount goal is to implement the intent of its drafters. Morin v. Essex Optical/The Hartford, 2005 VT 15, ¶ 7, 178 Vt. 29. We 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 1, ¶ 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. With these provisions of interpretation in mind, we turn to the applicable regulatory and statutory provisions.

The Project is a planned residential development (PRD). A PRD is defined by the Zoning Regulations as "[a]n area of land to be developed as a single entity for 2 or more dwelling units which do not correspond in lot size, dimensional requirements or type of dwelling to the regulations of the district in which it is located." Zoning Regulations, Article IX. PRDs are a subset of planned unit developments, and municipalities are authorized to adopt provisions related to such development by 24 V.S.A. § 4417. Section 4417 sets forth that municipalities may adopt planned unit development regulations "to permit flexibility in the application of land development regulations for the purposes of section 4302 of [Chapter 117] and in conformance with the municipal plan." 24 V.S.A. § 4417(a). Planned unit developments are defined by statute as:

> *[O]ne or more lots, tracts, or parcels of land to be developed as a single entity*, the plan for which may propose any authorized combination of density or intensity transfers or increases, as well as the mixing of land uses. This plan, as authorized, may deviate from bylaw requirements that are otherwise applicable to the area in which it is located with respect to lot size, bulk, or type of dwelling or building, use, density, intensity, lot coverage, parking, required common open space, or other standards.

24 V.S.A. § 4303(19) (emphasis added).

The Zoning Regulations mirror that the purposes of PRDs are to encourage flexibility in land use planning. See Zoning Regulations § 400.1 (noting the purposes of PRDs as "to encourage maximum flexibility of design and development of land in such a manner as to promote the most appropriate use of land; . . . PRDs may provide for greater opportunities for varied and affordable housing; . . . [PRDs] are designed to allow for multiple-use and/or multiple-structure projects which may not conform to the zoning district in which they are found, but which offer a creative

alternative that would be desirable to the Town in a manner consistent with the Putney Town Plan.").

The crux of Appellant's argument is that Lots A1 and A2 are not contiguous and, therefore, cannot be considered one "lot" that could host the Project. This interpretation is not supported by the applicable law.

To the extent that Appellant asserts that we must conclude that contiguity is required based on Route 4 Assocs. v. Town of Sherburne Planning Commission, we conclude that Route 4 Assocs. is not controlling in this case. In Route 4 Assocs., a developer sought permitting for a planned unit development on lots separated by a strip of privately owned land. 154 Vt. 461, 461 (1990). The Vermont Supreme Court concluded that lots were not "contiguous" and, therefore, applicant was not entitled to a permit. Id. at 462–64. Further, this conclusion was based on the applicable zoning regulations, which specifically required that "lot area" be defined as "total contiguous area within the property lines of a lot" and the general definition of the word "contiguous." Id. at 462–63. In reaching this conclusion and interpretation, however, the Vermont Supreme Court explicitly noted that there would be exceptions to its conclusion, based on the applicable legislative intent required. Id. at 463.

The plain meaning of a PRD as defined by the Zoning Regulations and by statute requires us to conclude that the Project lands need not be contiguous to constitute a lot for PRD purposes. First, there is no requirement that a PRD be located on one single "lot." Instead, PRDs are specifically authorized to be on more than one lot. See 24 V.S.A. § 4303(19); see also Zoning Regulations, Article IX (defining PRDs as being "[a]n area of land . . . ."). Second, there is no provision of law within the Zoning Regulations, or the statutes authorizing and defining PRDs, that would require the lots that make up a PRD project lands be contiguous. We will not read such a requirement in as, to the extent there is any ambiguity in this regard, we must resolve this ambiguity in favor of WWHT. Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22. The legislative intent, both of § 4303(19) and the Zoning Regulations, are clear on their face. PRDs are intended to provide flexibility in land use permitting to allow for development in accordance with the applicable town plan. To read in a more stringent provision requiring that lots in a PRD be contiguous is contrary to the legislative intent. Thus, we conclude that the Project need not be

contiguous, and the fact that Alice Holway bisects Lots A1 and A2 is not fatal to the Project. Thus, we **GRANT** WWHT summary judgment on Questions 3 through 7 and **DENY** Appellant summary judgment on the same.

Having reached the conclusion that the Project lands may consist of both Lots A1 and A2, we address the Project's compliance with applicable density requirements.

For a PRD, "[t]he overall density of the project shall not exceed the number of residential and non-residential structures which could be constructed if the land were subdivided into lots in accordance with district lot area requirements . . . ." Zoning Regulations, § 410.1C. In the Village District, the required lot area for up to three-family dwellings is 10,000 square feet. Zoning Regulations § 320.5.D.

The Project lands are 2.93 acres total, or 127,630 square feet. Based on the Village District's lot area requirements, 12 lots could be possible on the Project lands if they were to be subdivided into separate lots. Because the Village District allows up to three-family dwelling units to be constructed on each of these would-be lots, 36 dwelling units could be housed on the 12 lots. Pursuant to Zoning Regulations § 410.1C, the Project could contain up to 36 dwelling units on the 2.93-acre Project lands.

To the extent that Appellant asserts that the acreage of Lot A1 alone should dictate the Project's density, we disagree. First, as set forth above, the Project lands validly consist of both Lot A1 and A2. Further, § 410.1C states that density of a PRD is calculated as "the <u>overall</u> density of the project . . . ." Because the Zoning Regulations direct density to be measured on an "overall" project basis, we conclude that the entirety of the Project lands may be considered.

As the Project proposes only 25 units on the Project lands, we conclude that the Project complies with the density requirements set forth by § 410.1C. Thus, we conclude that the Project lands are sufficiently sized, and the Project complies with the applicable density requirements for a PUD. We therefore **GRANT** WWHT summary judgment in its favor on Questions 1 through 9 and **DENY** Appellant summary judgment on Questions 1 through 9.

IV. Remaining Questions: Project Compliance with Substantive Standards

Having reached the conclusion that the Project lands are sufficiently sized to house the requested units and, therefore, comply with the applicable density requirements for a PRD, we turn to the Project's compliance with the substantive standards Appellant raises in her Statement of Questions, representing the remainder of the Questions before the Court. WWHT has moved for summary judgment on these Questions. Appellant has not cross moved on these Questions. Instead, in response to WWHT's motion with respect to these Questions, Appellant has simply referred to her assertion that the Project lands are insufficiently sized, and the Project is overly dense. Appellant has wholly failed to present any substantive argument as to why the Project does not comply with the standards raised in her Questions. Appellant has further failed to adequately dispute facts and evidence set forth in WWHT's Statement of Undisputed Material Facts. See *supr*a section **Legal Standard**, at 1–3. With this in mind, we turn to the remaining Questions before the Court.

a. Question 8: Town Plan

Question 8 asks the Court to consider the Project in light of the goals in the Town Plan. Specifically, Question 8 asks:

> 8. Inasmuch as Putney's Town Plan, "Introduction", page 6 top reads, "Promoting working landscapes was as important to [planning] group members as economic development. 'Working landscapes' were discussed for their potential for food production and for sustainable forestry", and it continues, "Conservation of open land included preserving natural resources, as well as creating public and community spaces", is it not clear that installing 25 mixed-income units on less than an acre of prime agricultural soils as Applicant Permit 2022-02-15 proposes is in conflict with Putney Town Plan?

Appellant's Am. Statement of Questions at 2.

Zoning Regulations § 400.1.I states that the purpose of PRDs is to support the development of specific projects "in a manner consistent with the Putney Town Plan." Therefore, PRDs must be consistent with the Town Plan. Zoning Regulations § 410.1.A; see also Zoning Regulations § 100.2 (Enactment and Purpose of the Zoning Regulations). We interpret Question

8 as asking this Court to determine whether the Project complies with the Town Plan. We conclude that it does.

The Town Plan is a sprawling policy document, over 100 pages long and containing numerous planning goals for the Town. The Town Plan states that "[a]ffordable housing was the biggest concern of Putney residents who attended" planning meetings. Town Plan at 5. It then places affordable, safe housing within the Statement of Objectives. Id. at 7. There is a full section of the Town Plan dedicated to "Housing," in which the Town Plan discusses the current level of, and need for, affordable housing in the area, and setting forth clear policies and goals relative to affordable housing stock. Id. § IX ("Housing"). The Town Plan also states that economic development is a planning goal. Id. at 5. In support of this, it adopts as a policy "support[ing] efforts to provide affordable housing . . . integral to sustaining a stable workforce." Id. at 75.

In reaching this conclusion, we reject the Appellant's apparent argument that, since the Project may impact prime agricultural soils, it conflicts with the Town Plan. This is an overly narrow reading of the Town Plan. Appellant asks us to ignore the many goals and policies set forth in the Town Plan that the Project seeks to further. Even assuming that the Project will impact prime agricultural soils, Appellant asks this Court to value the Town Plan's policy of supporting working lands as above those relative to affordable housing. Appellant has pointed to no provision of the Town Plan or the Zoning Regulations to allow the Court to do so and has provided no basis for the Court to reach the conclusion that the Project will negatively impact prime agricultural soils. Again, the Town Plan has many goals and policies. It is clear, for the reasons set forth above, that affordable housing is a Town goal. Thus, we conclude that the Project is consistent with the Town Plan.

We therefore **GRANT** WWHT's motion for summary judgment on Question 8.

b. Questions 14 through 16, and 21: Traffic

Questions 14 through 16 and 21 contemplate the Project's impacts on traffic. Specifically, those Questions ask:

> 14. (Zoning Regs 220.1C) Are the existing roadways - Alice Holway Drive, Carol Brown Way, Rte. 5, and Old Rte. 5 - adequate for even present traffic levels let alone the demands of an increase in vehicular circulation of 37-75 additional residents and their visitors on Alice Holway Drive?

> 15. (Decision, "Subdivision Review Findings" Section 4.4, #5) [note: this is the 2nd #5]: Since repeated requests for a site-specific traffic impact study from Putney DRB Hearing attendees, participants, and interested persons concerned about high crash areas in the vicinity of Applicant's proposed project and about the outdated nature of the VTRANS study from 2015 were dismissed by the DRB Chair, does the Applicant's proposed facility and the increased traffic present a danger to public health and safety?
>
> 16. When #8 of "Statement of Objectives" in Putney Town Plan, p.7, states, "Establish the principle that the public good of the entire community must be of primary consideration as we plan for the future of our Town", how can pedestrian use of Alice Holway Drive be safely managed in the absence of sidewalks, where throughout its length, automobile, truck, bicycle, Moover, school bus, and Fire Dept. traffic is ever present, and no traffic study has been undertaken?
>
> . . .
>
> 21. "Conditional Use Review Decision and Conditions" 1.C How did the DRB arrive at their assertion that "the proposed use will not adversely affect traffic on the road and highways in the vicinity" without a site-specific traffic impact study upon which such an assertion might be made?

Appellant's Am. Statement of Questions at 4–5.

Questions 14, 15, and 21 address traffic, and Question 16 addresses the existence of a sidewalk.[6] Due to its brevity, we address Question 16 first.

Question 16 alleges that there are no sidewalks proposed along Alice Holway Drive. While Appellant points to no provision of relevant law that would require sidewalks, it is undisputed that the Project will provide sidewalks along Alice Holway Drive. Because the material facts are not in dispute, we **GRANT** WWHT's motion for summary judgment on Question 16. Having made this conclusion, we turn to the remaining traffic issues posed by Appellant's Questions.

Zoning Regulations § 220.1(C) states that a development "shall not adversely effect . . . [t]raffic on roads and highways in the vicinity." Subdivision Regulations § 4.4(L) states that, should the DRB conclude that a subdivision "presents the potential for significant traffic impact

[6] Again, we adopt the liberal reading of these Questions set forth by WWHT to allow for a reading presenting issues that would be properly before this Court. Appellant, in her opposition to WWHT's motion, has not contested this interpretation of her Questions. Therefore, we conclude that she assents to the interpretations thereof.

on Town or State roads, village centers, or other significant areas, a traffic impact study may be required." We conclude that the undisputed material facts show that the Project will not result in an adverse impact to traffic in the area, nor will the Project pose a potential significant impact on traffic that would justify a traffic study.

The Project estimates generating 169 vehicle trips per day, representing 84 vehicles entering the Project lands and 85 vehicles exiting.[7] This includes 10 estimated morning peak hour trips and 13 estimated evening peak hour trips. Currently, Alice Holway Drive has 487 weekday vehicle trips, with 50 to 60 of those trips being during the peak hour. There are no current traffic concerns along Alice Holway Drive and the Project is not in the vicinity of a VTrans "high crash location." We conclude that the Project's additional traffic impacts are modest considering the current traffic in the area and the fact that Alice Holway Drive does not presently suffer from traffic concerns. Having reached this conclusion, we conclude that a traffic study is not required pursuant to Subdivisions Regulations § 4.4(L).

Both of these conclusions are bolstered by the fact that it is undisputed that VTrans guidelines specify that a traffic study should be considered when a project will generate 75 or greater peak hour trips. WWHT's Ex. 8 at 4. The evidence shows that there are no concerns with existing traffic conditions. WWHT's Ex. 8. Nor have there been any allegations that other factors warrant a traffic study. Ultimately, the undisputed material facts demonstrate that, even with the inclusion of Project's peak hour trips along Alice Holway Drive, all peak hour traffic will be under 75 trips.

For these reasons, we conclude that the material facts are not in dispute and, therefore, **GRANT** WWHT summary judgment on Questions 14, 15, and 21.

[7] Appellant has simply responded to material facts relevant to traffic proposed by the Project and currently at Alice Holway Drive with "denied." This is insufficient to create a legitimate dispute of material fact. Burgess v. Lamoille Hous. P'ship, 2016 VT 31, ¶ 17, 201 Vt. 450). She has provided no argument as to why WWHT's traffic report and estimates are insufficient or inaccurate other than to baldly state that she disputes the facts therein. We, therefore, conclude that she has failed to adequately create a dispute of material fact in this regard.

c. Question 17: Public Health and Safety

Question 17 asks:

> (Subdivision Review Findings 4.2, Section 2, p. 15) Has the DRB considered significant evidence and testimony that Law Enforcement services are rarely available due to ongoing reductions in Windham County Sheriff's Dept. staffing with resulting increases in arson, burglary, stalking, theft, visible drug trafficking and use, unlawful mischief, fire arm packing, and general endangerment of the community, as admitted with regret by Mark Anderson, Sheriff, and Lieutenant Anthony French of Vermont State Police at a special Selectboard meeting (1/11/2022) on the current critical lack of law enforcement presence in Putney?

Appellant's Am. Statement of Questions at 4.

For the reasons set forth in Section 1, Questions related to the DRB proceedings, and decision, are outside the scope of this Court's subject matter jurisdiction. See *supra* Subpart I.a, at 9–10. WWHT, however, has consented to liberally reading this Question as raising the issue of whether the Project complies with Subdivision Regulations § 4.2, which corresponds with the DRB's finding cited in the Question, with respect to public health and safety, which would be within the scope of this Court's jurisdiction. We will adopt WWHT's liberal reading of this Question as posing an issue within our jurisdiction.[8]

Subdivision Regulations § 4.2(A) states that "[a]n application to subdivide land of such character that it cannot, in the judgment of the Board, be safely used for the proposed purposes because of danger to public health or safety shall not be approved."

The undisputed evidence shows that the Project will not pose a danger to public health or safety. The Windham County Sheriff's Department, the law enforcement agency that serves Putney, has provided a letter in support of the Project stating that there are adequate police services to meet the needs of the Town and to meet the needs of the Project, and that the Project will not result in a negative impact to the public safety services provided by the office to the Town.[9] To the extent this Question seeks to take issue with the current level of law enforcement

[8] Again, Appellant has not contested WWHT's proffered interpretation and, therefore, we conclude that Appellant has assented thereto.

[9] In fact, the Sheriff has provided an opinion that the lack of affordable housing may pose public health and safety risks. It is this problem that the Project seeks to work to alleviate.

or public safety services in the Town, such would be outside the scope of this Court's jurisdiction. If any such allegation were to be relevant to our analysis here, however, we conclude that Appellant has not provided sufficient evidence to dispute the evidence provided that the Project would not pose public health and safety concerns.

Further, the Town of Putney Fire Chief has similarly provided an opinion that the Project will not pose a concern with respect to fire services, provided that certain infrastructure be installed. See WWHT's Ex. 13 (explaining that this infrastructure includes a new fire hydrant installed at the entry to the parking lot, a wet/dry standpipe hose within the Apartments, and the potential inclusion/re-siting of the Fire Department's transport helicopter landing zone). We have received no evidence disputing the Fire Chief's opinion.

We therefore conclude that, based on the undisputed material facts, the Project will not pose a danger to public health and safety and, therefore, **GRANT** WWHT's motion for summary judgment on Question 17.

d. Questions 18 through 20: Parking

Questions 18 through 20 ask:

> 18. Do the DRB and Putney Zoning Regulations 220.1D and 510 adequately address the parking needs of what could be as many as 50–70 tenants at 0 Alice Holway Drive (based on the occupancy of Applicant's other Putney properties) when traffic circulation and current parking access at Putney Consumers' Co-op and along Alice Holway Drive and Carol Brown way are already problematic?[10]
>
> 19. Is there adequate acreage in Lot A1 for the proposed parking lot there and in Lot A2's proposed overflow parking lot is there a sufficient number of parking spaces?
>
> 20. Is Applicant's suggestion, that the discrepancy between Putney Zoning Regulation (510.1 and 510.2) minimum requirement of 37 parking spaces for the proposed 25-unit housing facility be resolved by construction of a separate non-contiguous parking lot in Lot A2 across a highly trafficked roadway, in compliance with Zoning Regulations, the "safety and well-being of the people", or the Town Plan?

[10] To the extent that Appellant takes issue with the standards within the Zoning Regulations relevant to parking, such a grievance is outside the scope of this Court's jurisdiction. We therefore interpret Question 18, as well as Questions 19 and 20 as addressing the Project's compliance with applicable parking standards. Appellant has not, through her opposition to WWHT's motion, contested this interpretation.

Appellant's Am. Statement of Questions at 4.

Zoning Regulations § 510.2 sets forth parking requirements. Pursuant to Zoning Regulations § 510.2(A)(1), a residential development must provide "[o]ne space for each residential dwelling unit, plus half a space for each dwelling unit in excess of 2 for visitor parking." Parking spaces are to be 9 feet by 18 feet. Zoning Regulations § 510.1(A).

The Project consists of 25 residential units. Section 510.2(A)(1) requires a 25-unit residential project to provide 37 parking spaces. The Project provides 40 parking spaces on the Project lands. Lot A1 is 0.91 acres and Lot A2 is ± 2.02 acres. For the reasons set forth above, we conclude that the Project lands are sufficiently sized to house the Project, including the parking on Lot A2. Further, there is no requirement that the Project lands consist of either one single lot, or two lots that are "contiguous" as Appellant employes the term (i.e., not bisected by a public road). Project plans further show that the parking spaces meet the 9-foot by 18-foot dimensional requirements. We, therefore, conclude that the undisputed material facts show that the Project complies with the Zoning Regulations' parking requirements and, therefore, **GRANT** WWHT's motion with respect to Questions 18 through 20.

e. Question 23: Flood Hazards

Question 23 contemplates potential flooding hazards. Question 23 asks:

> Inasmuch as a September 2022 soil assessment of Lot A2, which makes up 2.02 acres of the 3.93 total acreage Putney Gateway Associates' property, determined that Lot A2 could not be developed due to clay soils and flooding, why is "NO" checked in #3 "PROPERTY, Location: Is Property in Flood Hazard Area?"

Appellant's Am. Statement of Questions at 4.

The Zoning Regulations state that "Flood Hazard Areas" are those that are "shown on the Vermont Agency of Natural Resources on the Natural Resources Atlas as the Statewide River Corridor Map Layers." Zoning Regulations § 760.3.A.1. WWHT has provided mapping from the Agency of Natural Resources, Natural Resources Atlas showing that the Project is not located in a Flood Hazard Area. WWHT's Ex. 14. Appellant has provided no contrary evidence or adequately disputed this fact or exhibit as required by V.R.C.P. 56(c). Thus, there is no dispute of material fact in this regard. We therefore conclude that the Project is not within a flood hazard area and **GRANT** WWHT summary judgment in its favor on Question 23.

f. Question 26 and 28: Height

Questions 26 and 28 discuss the Project's building heights. Those questions ask:

> 26. . . . Whereas no elevations for the upper stories of either of Applicant's proposed 3-story buildings are provided, nor is there a scale enabling one to determine accurately what those elevations shown are, do the ridge lines of the two building exceed the 35' limit of the Zoning Regulations (HEIGHT "Measurement Standard" 506.1) as they appear to do by some 5-15 feet and as such constitute an instance of spot zoning?[11]
>
> 28. Is the height of Putney Meadows apartment building's have stayed within Putney Zoning Regulations' limit of 35' due to the fact that Putney Meadows' construction in 1992-93 was subject to and under Act 250 Review for its permit #2W0910, whereas the WWHT proposed buildings' exceeding Putney Zoning regulations limit of 35' has been permitted in DRB Decision 2022-02-15 because the WWHT proposed buildings have been exempted from Act 250 review (as well as from Act 250 Appeal) under the NDA designation?[12]

Appellant's Am. Statement of Questions at 5.

Structures cannot exceed a height of 35 feet in the Village District. Zoning Regulations § 506.1. The Zoning Regulations specifically define how building height shall be measured. Id. Building height, for zoning purposes, is "measured from the average elevation of the proposed finished grade at the front of the building to the highest point of the roof for flat or mansard roofs, or to the midpoint between the eaves and ridgeline for other roofs . . . ." Id. The Project does not propose flat or mansard roofing. The buildings' height is therefore measured to the midpoint between the eaves and ridgeline.

As defined by § 506.1, the Townhouses will have a building height of 28 feet and the Apartments will have a building height of 34 feet, 11 inches. See WWHT's Ex. 3 at 2.[13] Appellant

[11] We have addressed the allegation of spot zoning above in Section II.

[12] The Court, and WWHT, find this Question unclear. Appellant has not clarified this confusion through its opposition or other briefing. To the extent that Appellant addresses her building's compliance with its permitting regime, such is not before this Court. For the same reasons, WWHT's compliance or exemption from Act 250 review is not before this Court. We therefore interpret this Question as seeking to address WWHT's compliance with the Zoning Regulations' height requirements.

[13] To the extent Appellant challenges that elevations were not provided, we conclude that elevations and evidence sufficient to determine the buildings' heights were provided. See WWHT's Ex. 3 at 5.

has not disputed these measurements and has, in fact, admitted to the heights. See Appellant Response to WWHT Statement of Undisputed Material Facts, ¶¶ 7, 9. To the extent that she disputes the heights, however, a review of her interrogatories, provided by WWHT as exhibits to its motion, show that Appellant's concern with the building height is that the buildings appear to be taller than 35 feet. While Appellant may perceive the buildings as being taller than 35 feet, and the ridgeline of at least the Apartments will be over 35 feet, the undisputed facts show that each building's height will be below 35 feet as that term is defined by the Zoning Regulations. We therefore conclude that the buildings' heights comply with § 506.1.

Thus, we therefore **GRANT** summary judgment to WWHT on Questions 26 and 28.

Conclusion

For the forgoing reasons, we conclude that Questions 10 through 13, 22, 24, 25, 27, and 29, and the Addendum are outside the scope of this Court's subject matter jurisdiction and are hereby **DISMISSED**. We further conclude that the material facts are not in dispute and **GRANT** WWHT's motion for summary judgment on all remaining Questions and **DENY** Appellant's motion for summary judgment on Questions 1 through 9. In reaching this conclusion we conclude that the Project: complies with applicable lot size and density requirements, despite the fact that Alice Holway Drive bisects the Project lands (Questions 1 through 7, and 9); complies with the Town Plan (Question 8); will not adversely affect traffic in the area, and a traffic study is not required for the Project (Questions 14 through 16, and 21); will not adversely affect public health and safety (Question 17); complies with parking standards (Questions 18 through 20); is not in a Flood Hazard Area (Question 23); and complies with height standards (Questions 26 and 28).

Having reached these conclusions, we **AFFIRM** the DRB's issuance of PRD, conditional use, site plan, and major subdivision approval to WWHT for the Project. This concludes the matter before the Court. A Judgement Order accompanies this Decision.

Electronically signed February 15, 2023, pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division