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

ENVIRONMENTAL DIVISION

4527 Mountain Road Permit 6521	Docket No. 21-ENV-00098

Decision in On-the-Record Appeal

In this proceeding, Michael Seaberg ("Mr. Seaberg" or "Appellant") appeals a September 1, 2021 decision of the Town of Stowe Development Review Board ("DRB"). That decision approved with conditions a conditional use application originally submitted by VTRE Investments, LLC ("VTRE"). Castine Mountain Road, LLC ("Castine" or "Applicant"), is the successor-in-interest to VTRE and now serves as Applicant in these proceedings. Its principal is Nicholas Lizotte ("Mr. Lizotte"). The proposed project is a duplex residential development situated on a parcel with six existing units of housing and several other pending proposals to build further housing on the site. Those other proposals are not before us in this appeal, except that new landscaping proposed as part of them might also be considered for purposes of satisfying the relevant review criteria as to this duplex development.

The Town of Stowe has elected to have decisions of its municipal zoning bodies reviewed "on the record," according to the requirements of the Vermont Municipal Administrative Procedures Act. *See* 24 V.S.A. chapter 36; 24 V.S.A. § 4471(b). In reviewing the merits of this on-the-record appeal, the Court has considered the parties' briefs and the record, which consists of the DRB's decision, any exhibits considered by the DRB, and the transcript of the proceedings below, as set forth in Rule 5(h)(1)(A) of the Vermont Rules for Environmental Court Proceedings (V.R.E.C.P.).

Background

The September 1, 2021, DRB decision followed a remand from our Court of an earlier appeal by Mr. Seaberg of the same application, to which we assigned docket no. 62-6-18 Vtec. We determined that the DRB, in its initial decision on this application, had imposed an unlawful condition subsequent as to front yard landscaping. *See* VTRE Inv. LLC CU Duplex, no. 62-6-18 Vtec, slip op. at 6–7 (Vt. Super. Ct. Envtl. Div. June 30, 2020) (Durkin, J.) (Hereinafter "VTRE Duplex I."). We also determined that the DRB's findings of fact and/or conclusions of law on front yard landscaping, side yard landscaping, garbage screening, stormwater impacts to neighbors, the need for a stormwater

management plan, compatibility with surrounding uses, and lack of an undue adverse impact on character of the area all lacked necessary specificity. Id. at 7–14. We vacated the condition on front yard landscaping and remanded to the DRB with instructions to make more specific findings of fact, separately delineated from conclusions of law, on each of these issues. We further directed the DRB to reopen the taking of evidence if necessary to do so. Id. at 7–15.

Following our remand, the DRB called a public hearing on May 18, 2021, to receive further evidence on front and side yard landscaping. In response to an email from Mr. Lizotte indicating that he wished to amend the application so that the proposed duplex would no longer connect to the municipal sewer utility but would instead rely on an existing on-site wastewater treatment system, the DRB also included the proposed amendment in the notice of the hearing. At the hearing, the DRB received testimony from Mr. Lizotte, Mr. Seaberg, and another neighbor to the project, Jen Burnett. To allow additional time to review the submitted materials, the DRB continued the hearing to July 20, 2021. Following that hearing, the DRB entered into deliberative session, and issued its decision on September 1. *See* In re 4527 Mountain Road, No. 6521, Findings of Fact & Conclusions of Law (Town of Stowe Dev. Review Bd. Sept. 1, 2021) [hereinafter, "Remand Decision"].

The Remand Decision states as condition number 2 that "[a]ll conditions of prior approvals . . . remain in full force and effect," except as specifically modified by the Decision. Among the further conditions imposed by the decision are the following conditions, relevant to this appeal:

> 3. Prior to the issuance of the zoning permit the Applicant shall file the following additional information:
>
> . . .
>
> b. An updated Erosion Control Plan showing the revised improvements and notations as shown on the Erosion Control Plan prepared by Grenier Engineering, last revised 3/21/18.
>
> c. A revised landscape plan with a planting schedule listing the quantity, species, caliper, etc. of the proposed trees. The proposed red maples shall be no smaller than 2.5" - 3.0" caliper (trunk diameter), measured at a height of five (5') feet. The proposed coniferous trees must be a minimum of 8' - 10' in height.
>
> d. An updated site utility plan that depicts the proposed utility connections.
>
> . . .
>
> h. An approved State of VT Wastewater & Potable Water (WW Permit) must be recorded in the Town Land Records.
>
> 4. The Applicant shall install and maintain a minimum of eight additional street trees at 30' increments along the edge of the road right-of-way in accordance with [§4.6(3)(D)(1-2, 4-5)].
>
> 5. The installation of exterior light fixtures is limited to those described and depicted within the application.

6. All outdoor light fixtures shall be installed, shielded, and aimed so that illumination is directed only to the designated area and does not cast direct illumination or cause glare beyond the boundary lines of a property. Outdoor light fixtures shall be on photocells or timers.

7. Exterior lighting fixtures shall not exceed 2,000 lumens (equivalent to an ISO-watt incandescent bulb).

. . .

12. Landscaping shall be installed and maintained as shown in the provided project plans prepared by McCain Consulting and amended herein. Any dead and dying plants and trees as shown on said plans shall be replaced within one (1) year of death.

. . .

15. Site construction shall adhere to the standards outlined in Section 3.12(2)(A-E) including:

. . .

- An adequate Stormwater drainage system must be continuously maintained to ensure that existing drainage patterns are not altered in a manner to cause an undue adverse impact on neighboring properties, town highways or surface waters.

Remand Decision at 21–22.[1]

Standard of Review

In an on-the-record appeal from a decision by a municipal panel, our role as the reviewing tribunal is similar to that of the Vermont Supreme Court when it hears appeals from administrative bodies. That is, we consider only the decision below, the record made before the municipal panel, and the briefs submitted by the parties. In re Saman ROW Approval, No. 176-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Sept. 2, 2011) (Durkin, J.). We do not take new evidence or complete our own determination of the facts. Instead, we review the municipal panel's factual findings to determine whether the decision below "explicitly and concisely restate[s] the underlying facts that support the decision." *See* 24 V.S.A. § 1209(a)–(b).

We will uphold the municipal panel's findings of fact if substantial evidence in the record supports them. In re Stowe Highlands Resort PUD to PRD Application, 2009 VT 76, ¶ 7, 186 Vt. 568. In examining whether there is substantial evidence in the record, we are not permitted to make our own assessment of the credibility of a witness's testimony or reweigh conflicting evidence in the record. *See* In re Appeal of Leikert, No. 2004-213, 2004 WL 5582097 (Vt. Nov. 2004 term) (unpublished mem.); Devers-Scott v. Office of Professional Regulation, 2007 VT 4, ¶ 6, 181 Vt. 248. We are simply to inquire whether the record includes relevant evidence that a "reasonable person could accept . . . as adequate" support for the findings rendered. Devers-Scott, 2007 VT 4, ¶ 6 (quoting Braun v. Bd. of Dental Exam'rs, 167 Vt. 110, 114 (1997)). Lastly, we review the municipal panel's

[1] The DRB's decision is not paginated. We impose page numbers, omitting the cover sheet to the Decision.

legal conclusions without deference unless such conclusions are within their area of expertise. Stowe Highlands, 2009 VT 76, ¶ 7.

The scope of our review in an on-the-record hearing, as when we sit in de novo review, is limited to answering issues raised by the appellant's statement of questions. *See* V.R.E.C.P. 5(f) ("The appellant may not raise any question on the appeal not presented in the statement as filed, unless otherwise ordered by the court . . .."); In re RACDC Retention Pond, no. 62-5-12 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jan. 29, 2013) (Walsh, J.) ("Additionally, our review on appeal is limited to issues raised by Appellant in his Statement of Questions.").

Furthermore, when we remand a matter to a municipal panel as we did in VTRE Duplex I, that panel is limited to considering the issues that we specifically referred back to it for its review. *See* State v. Higgins, 156 Vt. 192, 193 (1991) ("It is axiomatic that on remand the trial court is constrained to follow our specific directions as interpreted in light of the opinion.") (quotations omitted).

Having failed to raise an issue in its initial appeal to our court, an appellant may not subsequently raise that issue for the first time in an appeal from the panel's decision on remand absent other compelling circumstances. *Cf.* Parker v. Gorczyk, 173 Vt. 477, 478 (2001) (finding, in a case on appeal to the Vermont Supreme Court for the second time following remand, that a party *did not* waive an issue that was not raised in the first appeal, because that issue did not form part of the basis for the trial court's initial opinion and because the party *had* included the issue in its complaint).[2] In this case, however, following our remand, the DRB reopened the taking of evidence in response to a proposed project amendment by the Applicant. Appellant may therefore raise issues related to that proposed amendment in this appeal, regardless of whether Appellant raised them in his first appeal.

Discussion

A number of the issues raised by Appellant in his Statement of Questions and his brief turn on the distinction between lawful conditions that may be imposed as part of a land use permit and impermissible or unlawful "conditions subsequent."

As we explained at length the first time we considered this application, a municipal panel reviewing an application for a permit has an obligation to assure itself *at the time of approval* that the

[2] In contrast to when the Supreme Court hears appeals from a trial court decision, when we hear appeals from a municipal panel decision, there is no complaint below. Instead, an appellant may formally express its legal arguments for the first time on appeal to our Court through the statement of questions, which, as we have stated many times, "performs a similar function to a civil complaint." Hinesburg Hannaford Wetland Determination, No. 73-5-14 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2015) (Walsh, J.). Therefore, it is an appellant's statement of questions in their initial appeal that affects whether an issue is waived when an application appears before us for a second time on appeal with the same appellant.

project described by the application meets all relevant regulatory criteria. VTRE Duplex I at 5–6; *cf.* Norman R. Smith, Inc. and Killington, Ltd., #1R0593-1-EB at 18 (Envtl. Bd. Sept. 21, 1990), available at https://nrb.vermont.gov/sites/nrb/files/documents/1r0593-1-eb-fco-part2.pdf ("[Act 250] requires the [Environmental] Board to make positive findings *prior to* issuing a permit, and does not authorize the issuance of a permit based upon incomplete information that is conditional upon future efforts to comply with the law.") (emphasis original).

Yet this need to pre-review the merits of an application is balanced against the ability to impose prospective conditions on approval of a land use permit. The enabling statute for zoning empowers a municipal panel to "attach additional reasonable conditions and safeguards as it deems necessary to implement the purposes of this chapter and the pertinent bylaws and the municipal plan then in effect." 24 V.S.A. § 4464(b)(2). This authority parallels district commissions' authority to attach conditions in the Act 250 context. *See* 10 V.S.A § 6086(c). Acceptable conditions in either context "can include post-development actions or requirements to ensure that certain standards are met." VTRE Duplex I at 6 (citing In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶¶ 83–84, 206 Vt. 118). To be more specific, "[p]ermissible conditions include those with prospective application that are intended to alleviate adverse impacts that either are or would otherwise be caused or created by a project, or those necessary to ensure that the development is completed as approved, such as those requiring permittees to take specific action when triggered by certain events, incorporating a schedule of actions necessary for continued compliance with [relevant] criteria, and requiring future compliance related filings, including affidavits of compliance with respect to certain permit conditions." In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 12, 201 Vt. 532.

In contrast to these sorts of lawful conditions, a "permit condition that qualifies permit approval on future proof of compliance after the permit takes effect, or allows the permitting authority to alter an approved permit pending some future event, is regarded as an impermissible condition subsequent." VTRE Duplex I at 6 (citing Treetop Dev Co., 2016 VT 20, ¶ 14). Such conditions are impermissible because they "allow the reviewer to circumvent the requirement" that the reviewer validate *at the time of approval* "that projects which have been permitted satisfy the . . . [relevant] criteria." Id. A quintessential example of such a condition subsequent is one that approves a project "under a set of parameters and reserve[es] the authority to alter these parameters at any time," rendering the approval "illusory." Treetop Dev. Co., 2016 VT 20, ¶ 14.

Although such illusory approvals are obviously conditions subsequent, there are categories of conditions that are harder to classify as lawful conditions or unlawful conditions subsequent. Such

conditions do not explicitly reserve to the DRB the jurisdiction to continue to review revised plans. Instead, one class of such conditions requires the applicant to submit a revised map or plan in accordance with changes that were agreed upon during hearings on the application. In such cases, if the changes are clear, agreed upon, and easily understood, we would ordinarily consider that a lawful condition. *Cf.* In re Willowell Found. Conditional Use Certificate of Occupancy, 2016 VT 12, ¶ 29, 201 Vt. 242 (2016) (holding that "the Environmental Division did not err in directing the zoning administrator to issue a zoning permit on receipt of a revised site plan" to reflect changes ordered by our court during an appeal of a municipal zoning permit), *overruled on other grounds by* In re Confluence Behav. Health, LLC, 2017 VT 112, ¶ 17, 206 Vt. 302.

A more difficult still category of conditions is one where the permitting authority simply requires the applicant to meet a standard contained in the applicable regulations, without information before it demonstrating that the applicant's plans meet that standard, but also without explicitly reserving authority to revisit the issue later. Where the standard is quantitative, where it is in the nature of a technical detail and unlikely to have an impact on public health, safety, or welfare, where the applicant's necessary steps for compliance are understood by all interested parties, and where there is nothing in the application materials that suggests the applicant would not meet the standard, such a condition *might* be valid. *Cf.* Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624, 495 N.E.2d 892, 896 (1986) (summarizing the Massachusetts rule against conditions subsequent as follows: "[A] permit granting authority in a zoning case . . . may not delegate to another board, or reserve to itself for future decision, the determination *of an issue of substance, i.e., one central to the matter before the permit granting authority*" (emphasis added) and giving the illustrative example of water supply for a proposed hotel as an issue of substance and "design details of street lamps for a garden apartment" as a "comparatively, peripheral" issue).

Where, however, there is disagreement or an element of reasoned judgment necessary to determine whether a standard is met, the DRB must not abdicate its responsibility to exercise that reasoned judgment. In such cases, the DRB may not simply require the applicant to comply with the standard in question, for that defeats the entire purpose of reviewing projects before development begins. *See* In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 53, 206 Vt. 118 ("[R]eliance on [conditions and] enforcement proceedings . . . would shift to those proceedings questions that should be addressed at the permitting stage."); *see also* In re Town of Stowe, # 100035-9-EB at 47 (Envtl. Bd. May 22, 1998), available at https://nrb.vermont.gov/sites/nrb/files/documents/100035-9-eb-fco.pdf (finding, in the Act 250 context, a proposed condition that would

require an applicant to operate a project in a manner that avoided causing public health risks to be an "impermissible condition subsequent which cannot substitute for the affirmative finding required" under the relevant criterion).

In summation, conditions subsequent may be identified by the DRB's abdication of responsibility for reviewing an application against the relevant criteria in the present, and/or by the DRB reserving authority to revisit elements of its approval in the future. With the distinction between lawful conditions and unlawful conditions subsequent in mind, we turn to Appellant's Questions.

1. Did the DRB err in determining that existing or planned community facilities had the capacity for the proposed buildings?

The Town of Stowe Zoning Regulations ("Regulations")[3] require that "[a]s part of its conditional use review, the DRB must determine that the proposed development will not result in an undue adverse effect on the capacity of existing or planned community facilities and services." Regulations § 3.7(2)(A). Mr. Seaberg challenges the DRB's conclusion that this criterion is satisfied.

As an initial matter, Castine contends that Mr. Seaberg may not raise this question in this appeal because the topic of impact on existing or planned community facilities was not one of the issues on which we remanded the application to the DRB to make further findings. However, that argument is too simplistic. If the DRB could only take new evidence and issue new findings on the issues which we remanded, then it could not have considered the proposed amendment to switch to on-site wastewater treatment at its remand hearing, and its conclusions on issues affected by the switch would need to be vacated entirely. We conclude that the DRB could consider the proposed amendment in its remand hearings, so long as the public notice of the hearings informed interested parties that the amendment would be considered. We further conclude that Appellant may raise legal issues related to that amendment for the first time in this appeal. We reach this conclusion mindful that some flexibility is required in the land use permitting process to avoid a "procedural ping pong match" every time a minor amendment to an application is put forward. In re Sisters & Bros. Inv. Grp., LLP, 2009 VT 58, ¶ 21, 186 Vt. 103.

The uncontradicted evidence is that the DRB did include the proposed amendments in its notice of the public hearing. The impact of the project on the capacity of municipal services, specifically town sewers, is arguably changed by the proposed amendment. Because utilizing on-site septic was a change to the project from when it was previously appealed to our court, we conclude

[3] All references are to the edition of the Zoning Regulations effective as of July 3, 2017, submitted to our Court by the Town and undisputed as the version of the Regulations that govern this application.

that Appellant is not barred from raising the issue of the capacity of municipal services, specifically town sewer.

The DRB concluded that "the project, as conditioned, will not adversely impact the Town's existing or planned community facilities or services." Remand Decision at 6. Among its factual findings in support of this conclusion, the DRB noted that Castine now proposed to utilize existing on-site septic. Id. at 5. Among the relevant conditions noted by the DRB next to this conclusion are that "[t]he Applicant must submit an updated site utility plan that depict [sic] the proposed utility connections" and "[t]he Applicant must obtain an approved State [wastewater] permit for the wastewater system(s) and record said permit in the town land records." Id. at 6.

We are only analyzing the DRB's conclusion as it relates to the project's impacts on municipal sewer service since that is the only service impacted by the proposed amendment to the project. There has not been a suggestion that other municipal services are affected by the change to on-site septic and so the issue of impacts on other municipal services was not preserved through Mr. Seaberg's initial appeal.

Analyzing that impact, the project now proposes *not* to connect the duplex to municipal sewer, where pre-remand it did propose to do so. Instead, Applicant proposes to connect to an existing on-site septic system. The DRB imposed a condition in its Remand Decision that Castine must receive an amended state wastewater permit approving of that connection before the zoning permit will issue. As we have frequently stated, "the Agency of Natural Resources ("ANR") is responsible for ensuring compliance with [the provisions of 10 V.S.A. chapter 64 governing on-site septic systems], including by issuing wastewater and water supply permits." Confluence Behavioral Health LLC CU, No. 15-2-16 Vtec, slip op. at 23 (Vt. Super. Ct. Envtl. Div. Jan. 23, 2017) (Durkin, J.). As a result, unless ANR delegates permitting authority to a town, that town "is without authority to permit a wastewater system design." Duval CU Denial, No. 93-8-18 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. May 21, 2019) (Walsh, J.).

Conditioning issuance of a municipal permit on the applicant's receipt of a wastewater system permit from ANR is therefore not an impermissible condition subsequent. In fact, the enabling statute for municipal zoning specifically allows as much. *See* 24 V.S.A. § 4414(13)(A)(ii) ([T]he municipality may condition issuance of a final permit upon issuance of a wastewater and potable water supply permit . . .."). When it imposed such a condition, the Stowe DRB was not "reserv[ing] continuing jurisdiction" to substantively review the wastewater aspects of the project, *cf.* In re Treetop Dev. Co.

Act 250 Dev., 2016 VT 20, ¶ 14, given that ANR has sole jurisdiction over the substantive review of on-site wastewater systems.

The DRB reasonably found that the use of on-site septic meant that the project would not have an adverse impact on municipal sewer service. We therefore answer Question 1 in the negative: The DRB **DID NOT** err in determining that existing or planned community facilities have the capacity for the proposed buildings.

We next turn to Appellant's argument that the DRB decision to approve the project, while requiring Castine to submit a revised site plan before issuance of the zoning permit, represented an unlawful condition subsequent.

2. Did the DRB err in conditioning the approval of permit on the applicant submitting an updated site plan to the zoning administrator showing proposed utility connections?

As a corollary to the need to avoid impermissible conditions subsequent, municipal panels generally must have the most current version of plans for a project before them when approving that project. *See* VTRE Duplex I at 5–7 (faulting the DRB for conditioning approval on Applicant subsequently submitting a revised landscaping plan that would sufficiently demonstrate to the DRB that the project met the Regulations' landscaping requirements). As we indicated in our decision in the first appeal, we shared Appellant's concern "that the DRB postponed its review of the front yard landscaping such that the review would occur after the permit was granted." Id. at 6. Core to our concern was the idea that the DRB deprived interested parties of the chance to understand and comment on the final landscaping plans. *Cf.* Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 53 (indicating a concern for "[n]eighbors' rights" impacted by the imposition of an impermissible condition subsequent).

The record reveals that the most recent version of the site plan considered by the DRB in reaching its remand decision was dated June 21, 2019. That version of the site plan did not depict proposed utilities; the most recent version depicting proposed utilities was dated January 25, 2019. Our understanding is that the only inaccuracy in the depiction of utilities on the January 2019 site plan is that it shows the duplex connecting to the municipal sewer, which is no longer Applicant's proposal. The transcripts of the remand hearing reveal that Appellant understood that this depiction on the site plan was no longer accurate given the proposed switch to on-site septic. *See, e.g.* Transcript of May 18, 2021 Stowe DRB Hearing at 21-22, 28, filed Feb. 22, 2022. In other words, revisions to the site plan in accordance with the DRB's directive would not present the DRB or interested parties with any *new* information that they did not have when the DRB took evidence and reached its Decision. The

necessary update to the site plan simply reflects the project as approved by the DRB (i.e. with no municipal sewer connection to the Property) and may therefore be completed administratively prior to issuance of the permit. We therefore answer Question 2 in the negative: The DRB **DID NOT** err in conditioning the approval of the permit on Applicant submitting an updated site plan to the zoning administrator showing proposed utility connections.

However, given our finding below that the DRB's cursory treatment of other issues requires a second remand of this application, we strongly encourage the DRB to require Castine to submit its final revised site plan prior to reaching its second decision on remand, as a matter of good housekeeping and avoiding any potential for confusion.

3. Did the DRB err in determining that the proposed side yard landscaping complied with the Town of Stowe Zoning Regulations?

Mr. Seaberg argues that the DRB still has not reached the necessary conclusions under the Regulations as to side yard landscaping. *See* Regulations § 3.7(2)(B)(7) (requiring applicants to submit landscaping plans "designed to conform to the terms and conditions of Section 4.6") and § 4.6(3)(A)-(C) (requiring "the use of both deciduous and coniferous shade trees in available yard area, especially front and side yards . . . Shade trees shall be placed to interrupt the facades of buildings, to visually reduce the scale and bulk of large buildings, and to enhance environmental quality.").

We disagree. In its remand decision, the DRB remedied its earlier inadequate findings of fact and conclusions of law regarding side yard landscaping. It found, based on the revised landscaping plans dated January 25, 2019, that there would be five new maple trees planted as part of this project: three along the eastern edge of the driveway and two on the eastern edge of the property, between the proposed duplex and Mr. Seaberg's property. It also found, based on the landscaping plan, testimony, and renderings, that existing coniferous trees would remain along the eastern edge of the property. Remand Decision at 14. It drew the necessary legal conclusion that the new maple trees, along with the existing coniferous trees, would "interrupt and filter the proposed building façade," including as seen from the Seaberg property. Id. at 15. These are much more specific conclusions than the DRB reached in its original decision. *See* In re VTRE Invs. LLC, Findings of Fact & Conclusions of Law, at 4–5 (Town of Stowe Dev. Review Bd. May 22, 2018) [hereinafter, "DRB 2018 Decision"]. The revised findings and conclusions indicate that the relevant criteria on side yard landscaping have been met.

In his brief, Mr. Seaberg mischaracterizes the evidence when he says "The Applicant's plans clearly show that the only landscaping in the side yard will be deciduous maple trees. There are no

coniferous trees, no deciduous or evergreen shrubs, and no ground cover." In fact, the DRB found that numerous existing coniferous trees will remain in the side yard, as shown on the landscaping plan. Nothing in the Regulations requires that new trees be a mix of coniferous and deciduous, as long as the resulting aggregate of new and existing trees evidence such a mix.

In a previous decision concerning a different project on this same parcel, we determined that the Stowe side yard landscaping requirements do not require that an existing building which is presently hidden by landscaping must remain hidden by such landscaping when the building is redeveloped. VTRE Invs. CU, No. 36-3-18 Vtec, slip op. at 8–9 (Vt. Super. Ct. Envtl. Div. Dec. 28, 2018) (Durkin, J.). Similarly, we conclude now that the side yard landscaping requirements do not require a new building to be completely hidden from neighbors by trees and bushes, but only for the visual bulk of the building to be adequately interrupted. The DRB's legal conclusion flows from its findings of fact, and those findings were reasonably supported by the evidence. Thus, we answer Question 3 in the negative: the DRB **DID NOT** err in determining that the proposed side yard landscaping complied with the Town of Stowe Zoning Regulations.

4. Did the DRB err in determining that proposed front yard landscaping complied with the Town of Stowe Zoning Regulations?
5. Did the DRB err in requiring applicant to plant eight additional trees in the front yard at 30' increments while failing to specify tree types or sizes or allowing the public to review the proposed revised landscaping plan at a warned meeting?

We treat these Questions together, as the infirmity in the DRB's previous decision on front yard landscaping was that it deferred consideration of whether Applicant had met the requirements of § 3.7(2)(C)(2)(a). That provision requires development to maintain a "suitably landscaped" twenty-foot strip of land between the street line and the balance of the lot in the Upper Mountain Road ("UMR") District. The specific standards along Route 108 (also known as Mountain Road) require one street tree for every thirty feet of landscaping strip. § 4.6(3)(D). This specific requirement helps define what it means for the front yard strip to be "suitably landscaped" along Mountain Road. We previously held that the Regulations required the DRB to determine either that this application satisfied § 3.7(2)(C)(2)(a) or that "design, screening, or other mitigation" measures could accomplish the objectives established for the UMR District, per § 3.7(2)(C). VTRE Duplex I at 7. By choosing initially to require Applicant to resubmit landscaping plans that would convince the DRB the requirements of 3.7(2)(C) were met, even while it purported to approve of the application, the DRB imposed an impermissible condition subsequent. Id. We vacated that condition and remanded to the DRB to make the necessary findings and conclusions before approving the application.

The DRB has corrected this infirmity in the remand decision. It imposed a condition requiring Castine to plant eight additional trees in the front yard buffer at 30' intervals, in accordance with the specific requirements for those trees contained at § 4.6(3)(D). Remand Decision at 21 (condition 4). With that requirement in place, it determined that landscaping for the duplex project had been designed in a manner consistent with the defined purposes of the UMR District under § 3.7(2)(C). Id. at 20. We note that while Applicant's landscaping plan initially designated some of the proposed landscaping to occur under other projects whose final approval is pending, Mr. Lizotte committed during the remand hearings to creating those landscaping improvements regardless of whether those other projects are ultimately permitted. Transcript of May 18, 2021 Stowe DRB Hearing at 17, filed Feb. 22, 2022. The DRB appears to have accepted Mr. Lizotte's word on this; bullet point S under its conclusions on landscaping indicates as much. Remand Decision at 14. Among such improvements are a berm with two blue spruce trees planted in front of it near the front of the Property.

Section 4.6(3)(D)(1)-(2) require that street trees shall "1. Be a minimum of 2.5" - 3.0" caliper (trunk diameter), measured at a height of five (5') feet, unless otherwise specified by the DRB upon consideration of site conditions; 2. Be an appropriate species of nursery stock *deciduous* shade tree - *not* flowering ornamental *or conifers*" (emphasis added). Via condition 4, the DRB required Applicant to follow the above conditions in its choice of street trees and to submit revised plans depicting those trees before a permit issued. Mr. Seaberg contends that because the DRB did not have in front of it the precise species or sizes of trees that would be planted in the buffer strip, this condition remains an impermissible condition subsequent.

Ordinarily, we would be inclined to disagree. This is the sort of condition we described earlier as among the most difficult to classify, but which under the theory we espoused would likely be valid. It does not reflect the DRB attempting to circumvent its responsibility to make a reasoned legal judgment about a plan's compatibility with criteria based on a review of the evidence. Instead, the DRB required Applicant to follow quantitative, technical, easily understood standards where there was nothing in the submitted plans contrary to the idea that Applicant would meet those standards. We would therefore ordinarily view this as the sort of administrative detail the DRB could impose via a condition.

Castine's brief in this appeal makes clear, however, that in this case, the DRB really must review the landscaping at a granular level of detail. The brief states, "Castine infers the condition [that it must plant eight additional street trees] to require eight *evergreen* trees in additional [sic] to the two proposed." Appellee's Brief at 8 (emphasis added). Most, if not all, evergreen trees are conifers. *See*

Webster's II New College Dictionary, conifer (3rd ed. 2005): "A predominantly evergreen cone-bearing tree, as a pine, spruce, hemlock, or fir." Applicant's assertion reveals it does not intend to comply with the specific requirement of § 4.6(3)(D)(2), which forbids the use of conifers as street trees.

Since other factors discussed below require a remand, we conclude that upon remand, Castine must submit a revised landscaping plan and the DRB must ensure that the application complies with the landscaping regulations in their totality. The DRB must confirm that the species and size of street trees to be planted in the thirty-foot street buffer, as well as the caliper of new trees throughout the property, match the Regulations' specifications.

6. Did the DRB err in determining that the proposed development will not create undue adverse stormwater impacts on abutting properties?

Section 3.12 of the Regulations imposes a number of requirements for stormwater control and drainage. For example, § 3.12(2)(C) requires applicants to submit an erosion and sediment control plan if construction will disturb more than half an acre of land. § 3.12(2)(F) requires applicants to submit a stormwater management plan if their development will create more than half an acre of new impervious surfaces.[4] As we discussed in our previous decision on this application, however, even if neither an erosion and sediment control plan nor a stormwater management plan is required under §§ 3.12(2)(C),(F), § 3.12(2)(E) still applies to land development involving new construction. This section states that "*All development* must provide for an adequate stormwater *drainage system* to ensure that existing drainage patterns are not altered in a manner to cause an undue adverse impact *on neighboring properties*, town highways or surface waters." (emphasis added).

Throughout these proceedings, Mr. Seaberg has indicated his concern that the duplex, which creates new impervious surface relatively close to the septic field on the western edge of his property, will direct stormwater onto that septic field, potentially leading to its failure. To respond to this concern, Applicant has included a proposed swale behind the duplex on its site plans. Those plans and Applicant's engineer's testimony during the DRB's pre-remand hearings indicate that the swale is intended to redirect water so that it does not adversely impact Mr. Seaberg's septic field but instead flows south towards the floodplain and river. Unfortunately, the DRB, in its initial decision, did not even mention section 3.12 (much less section 3.12(2)(E)) in discussing its decision not to require a stormwater management plan under § 3.7(2)(B)(8). DRB 2018 Decision at 5. And, while the DRB

[4] Regulations § 3.7(2)(B)(8) also indicates that "[t]he applicant shall, at the request of the DRB, submit a plan for the management of stormwater generated by the proposed development."

mentioned the swale and its purpose during its remand proceedings, it did not make any findings about whether the swale would work as intended. Remand Decision at 17–18.

In our previous decision, we stated that one of the infirmities of the DRB's treatment of stormwater issues in this application was that the DRB "did not make findings on the *effectiveness* of the proposed drainage system or the impact on neighboring properties." VTRE Duplex I at 11 (emphasis added).

Unfortunately, the DRB's remand decision suffers from the same infirmities. The DRB still has not included § 3.12(2)(E) among the applicable standards listed under its discussion of Stormwater Management. Remand Decision at 16–18. Similarly, the DRB still has not made any factual findings about the efficacy of the proposed swale behind the duplex and whether it will effectively divert stormwater away from the neighbor's septic system. In the conclusion to this section of its decision, the DRB merely describes how Castine's engineer explained the swale was intended to work during the original hearing. Remand Decision at 18; *see also* Transcript of May 15, 2018 Stowe DRB Hearing at 13–14, filed as part of the record Oct. 20, 2021 (engineer's testimony on which the DRB findings appear to be based). Instead of verifying that the application satisfies the relevant criteria, the DRB has imposed as part of condition 15 a requirement that "[s]ite construction shall adhere to the standards outlined in Section 3.12(2)(A-E) including . . . an adequate stormwater drainage system must be continuously maintained to ensure . . . [no] undue adverse impact on neighboring properties . . .." Remand Decision at 22.

The applicant carries the burden of proof on all applicable standards, including § 3.12(2)(E), and, as discussed at the beginning of this decision, it is the DRB's responsibility to ensure that those standards will be met when it permits a project. It was clear error for the DRB not to take *any* evidence that would enable it to conclude that a swale will work as intended and to instead impose a condition requiring compliance with the applicable regulatory provision. In this instance, the DRB did abdicate its responsibility to exercise its reasoned judgment to ensure that the relevant standards are met before approving an application, instead relying on enforcement of its condition. *See* In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 53, 206 Vt. 118 ("In the absence of evidence that the proposed swale would likely work as intended, the court's reliance on enforcement proceedings to assure the functionality of the swale would shift to those proceedings questions that should be addressed at the permitting stage. That would significantly impact Neighbors' rights."). The portion of Condition 15 quoted above is an unlawful condition subsequent and must be vacated, such that the DRB may solicit the evidence it needs to ensure these provisions of the regulations will be met.

7. Did the DRB err in determining that proposed outdoor lighting was in compliance with the Stowe Zoning Regulations?

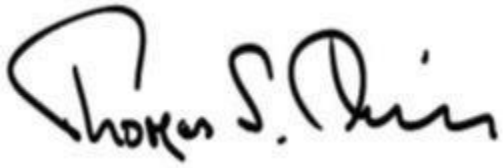
Mr. Seaberg did not raise the issue of outdoor lighting in his initial appeal. *See* VTRE Duplex I at 4 (describing the issues raised in the original statement of questions). Outdoor lighting was therefore not part of the scope of issues on remand. Nor did Applicant propose an amendment to its outdoor lighting plans that might otherwise give us jurisdiction to review the DRB's conclusions in this regard. *See* discussion *supra* on Question 1. Mr. Seaberg points out that the DRB imposed new conditions on lighting in its remand decision that were not a part of its original approval and argues that he could not have raised his concerns with those conditions in his initial appeal. However, those conditions were in furtherance of the DRB's initial conclusions on outdoor lighting detailed in its 2018 decision. Given that Mr. Seaberg did not challenge those conclusions in his initial appeal, we conclude that he has waived his right to challenge the conclusions and associated conditions in this continuation of the matter following remand. We therefore **DISMISS** Question 7.

Conclusion

In light of our conclusions above, we hereby vacate the part of Condition 15 requiring Applicant to maintain "an adequate stormwater drainage system . . . to ensure . . . [no] undue adverse impact on neighboring properties." We remand this matter to the DRB to make the necessary findings of fact and conclusions of law regarding undue adverse stormwater impacts on neighboring properties under § 3.12(2)(E). We further direct the DRB to review Applicant's revised landscaping plans to ensure that § 4.6(3)(D) is satisfied. Further, we suggest that it would be wise for the DRB to require Applicant to submit a revised site plan that no longer depicts the duplex connecting to town sewer before a public hearing, if the DRB calls one, and before beginning its deliberations if it does not.

This completes our on-the-record review of this appealed DRB decision on remand. A Judgment Order accompanies this decision.

Electronically signed at Brattleboro, Vermont on Sunday, July 31, 2022, , pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division