VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00006

Cornerstone Lane Properties Project JO

DECISION ON MOTION

Title: Motion for Jurisdictional Opinion (Motion: 1)
Filer: Jon T. Anderson
Filed Date: May 27, 2022

NRB's Response to Appellant's Motion for a Jurisdictional Opinion, filed July 21, 2022 by Attorney Alison M. Stone

NKHS's Response to NRB's Response to Appellant's Motion for a Jurisdictional Opinion, filed July 27, 2022 by Attorney Jon T. Anderson

NKHS's Memorandum Responding to Questions Raised by the Court During December 6, 2022 Hearing, filed December 13, 2022 by Attorney Jon T. Anderson.

INTRODUCTION

This matter is before the Court on Appellant Northeast Kingdom Human Services, Inc.'s (NKHS) Motion for a Jurisdictional Opinion (Motion). Mot. for Jurisdictional Opinion at 1 (filed May 27, 2022) [hereinafter Appellant's Mot.]. NKHS and NRB stipulated that the Court should consider the present motion as a partial summary judgment motion pursuant to V.R.C.P. 56. See NHKS's Resp. at 1 (filed July 27, 2022). Other than responding to the posture and standard discussed in the Motion, the Natural Resources Board (NRB) has not filed an opposition. Conf. Hr'g (Aug. 1, 2022) (noting "Atty Stone says [ANR] will not be filing additional repl[y] [t]o motion."); see Correspondence to Court at 1 (filed Aug. 12, 2022) ("The NRB is not opposing your motion, and will defer to the Court.").

The Court conducted a hearing on the motion on December 6, 2022. NKHS filed a memorandum responding to the Court's questions raised at this hearing on December 13, 2022.

In this proceeding, NHKS is represented by Attorney Jon T. Anderson. Attorney Alison Stone represents the NRB.

PROCEDURAL HISTORY

As early as July 27, 2021, NKHS sought a determination from Act 250 administrators whether improvements—which include group home, crisis beds, transitional housing, and emergency call center—located on a 12.5-acre tract of land to be used to carry out its mental health support services (Project) is subject to Act 250 jurisdiction. Appellant's Mot. at 5; Appellant's Post Hr'g Mem. at 5 (filed Dec. 13, 2022). On December 16, 2021, the District Coordinator concluded that the Project was a pre-existing development, commercial in nature, and a substantial change, thus requiring an Act 250 Permit. Notice of Appeal, Attachment (filed Jan. 13, 2022) (Project Review Sheet) [hereinafter Jurisdictional Opinion]. As the basis for the District Coordinator's decision, the Jurisdictional Opinion provides:

> Act 250 Rule 2C(7) "Substantial change" means any cognizable change to a pre-existing development or subdivision which may result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10).
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> Act 250 Rule 2C(8) "Pre-existing development" mean[s] any development in existence on June 1, 1970 and any development which was commenced before June[.]
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> Act 250 Rule 2C(26) "Cognizable change" means any physical change or change in use, including, where applicable, any change that may result in a significant impact on any finding, conclusion, term or condition of the project's permit.
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> The Project encompasses a cognizable change and may result in significant adverse impact with respect to the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10) (eg Criterion 7 concerning the ability of the local governments to provide municipal or governmental services such as police services), thus constitutes a

> "substantial change" pursuant to Rule Act 250 Rule 2(c)(7) and requires a permit pursuant to 10 V.S.A. § 6081.

Id. NKHS then appealed the Jurisdictional Opinion to this Court on January 13, 2022, and the NRB entered its Notice of Appearance on February 3, 2022. Notice of Appeal at 1. The NRB and NKHS engaged in months of settlement discussions, but when those were ultimately unsuccessful, NKHS filed the present motion. See Status Conf. (March 28, 2022); see also Status Conf. (May 9, 2022).

UNDISPUTED FACTS

On May 27, 2022, NKHS filed a Statement of Undisputed Material Facts (SUMF) in support of its motion. Supporting its SUMF, NKHS filed two affidavits, and nine exhibits. The NRB did not file a response disputing any of the facts set forth by NKHS. As such, the Court adopts the assertions contained in the SUMF, the affidavits, and the exhibits so long as they were admissible and reasonably supported by the record. V.R.C.P. 56(c), (e). The Court excludes legal conclusions masquerading as facts, facts immaterial to the Court's conclusion, and the NKHS's advisory additions contained in the SUMF. The Court rewrites Appellant's SUMF to reflect the material facts the Court identified in the Appellant's filings in a more chronological and clear fashion. The Court sets out the following facts for the sole purpose of deciding the pending Motion. What follows is not a list of the Court's factual findings. See Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) ("It is not the function of the trial court to find facts on a motion for summary judgment"). The terms used below are consistent with the definitions contained in the Act 250 Rules or 10 V.S.A. § 6001.

1. NKHS is a State Designated Agency (DA) that provides mental health care for the Northeast Kingdom, including the Town of Lyndon where the Project is located. Green Aff. ¶ 2.

2. On or about February 26, 2021, NKHS purchased the property on which the Project is located from Fold Ministries. Green Aff. ¶ 3; Wieser Aff. ¶ 2.

3. Prior to Fold Ministries' purchases, there were three separate parcels owned by three separate persons—133 Cornerstone Lane (Parcel I), 142 Cornerstone Lane

(Parcel II), and 188 Cornerstone Lane (Parcel III). See Wieser Aff., Exs. 2–4 (deeds). Between 1976 and 1989, Fold Ministries acquired each of those separate but adjoining parcels, making "the Property" a signal "tract of land." Id. (showing Parcel I was acquired in 1976, Parcel II in 1988, and Parcel III in 1989); see Wieser Aff., Ex. 5 (depicting the layout of the Parcels); see Act 250 Rule 2(C)(12) ("'Tract of land' means one or more physically contiguous parcels of land owned or controlled by the same person or persons."). While the Property is now one contiguous tract of land, the Court will refer to each of the buildings by their original Parcel number for distinction purposes only.

4. As acquired by Fold Ministries, each of the parcels was improved with one "dwelling house." Wieser Aff., Exs. 2–4 (deeds). Those dwellings were built in either 1974 or 1975. See Green Aff., Exs. 1–3 (showing the dwellings on Parcels I and II were built in 1975 and Parcel III in 1974); see Act 250 Rule 2(C)(8) ("'Pre-existing development' mean[s] any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971."). There is no evidence regarding whether those dwelling houses contained one or multiple units at that time, though it is NKHS's belief[1] that Fold Ministries redeveloped the dwelling on Parcel II to add the office and converted each of the other buildings from single-family homes to multi-unit dwellings. Green Aff. ¶¶ 6–7.

5. When the Property was conveyed to NKHS in February 2021, the building on Parcel I contained 2 units: one apartment which Fold Ministries used for classes, the other as a one-bedroom apartment. Green Aff., Ex. 1. The building on Parcel II, as acquired

[1] Per the Statement of Undisputed Material Facts and their Supporting Affidavits, "NKHS *believes* that Fold Ministries redeveloped the dwelling home located on Parcel II as an office for church business" and "converted each of the other two buildings that are the subject of this Motion from individual dwelling homes into two unit buildings." Mot. for Jurisdictional Opinion at 4, ¶¶ 8–9 (emphasis added) (citing Aff. Derek Green ¶¶ 6–7 (same)) ("Statement of Material Facts"). Though undisputed, this statement does not state what actually occurred, but rather what NKHS believes occurred. While NKHS may be correct, from this statement, the best the Court can find is that NKHS believes this to be what occurred, but the Court cannot conclude that this is what occurred. Cf. Krupp v. Krupp, 126 Vt. 511, 514–15 (1967) (stating recitations of evidence are not findings of fact and cannot be considered so).

by NKHS, contained three units, which were attached to an office space: two units with one-bedroom and one unit with two-bedrooms. Green Aff., Ex. 2. Finally, as conveyed to NKHS, the building on Parcel III contained 7 units, either used as a counselling center and employee housing, Green Aff., Ex. 3, or a as a retreat where guests would stay for varying lengths, sharing a kitchen, see Jurisdictional Opinion at 1. See also Act 250 Rule 2(C)(23) ("'Unit' means . . . a room or suite of rooms within a hotel, motel, rooming house, nursing home, group home, residential care facility or dormitory.").

6. The Property as sold by Fold Ministries totaled about 12.5 acres and contained three individual dwellings with a total of 12 units (2-units on Parcel I; 3-units on Parcel 2; 7-units on Parcel 3) and was used for commercial purposes. Green Aff. ¶ 4; Green Aff., Exs. 1–3; see Appellant's Mot. at 4, ¶ 8 ("NKHS does not dispute that Fold Ministries may have been required to obtain an Act 250 permit for this conversion since an office is a commercial use and the Property then comprised more than ten acres of land.").

7. In February 2021, NKHS purchased the Property. Green Aff. ¶ 3; Wieser Aff. ¶ 2.

8. NKHS intends to use the Property for operating its mental health program (the Project). See Green Aff. ¶ 2; see Jurisdictional Opinion. When completed, the 12.5-acre tract of land will encompass crisis beds, transitional housing, group home, and an emergency call center used to carry out NKHS's mental health support services.

9. Specifically, NKHS proposes using the dwelling on Parcel I as follows: the three-bedroom unit as crisis beds for up to 2 clients with the third bedroom and kitchen area used as a staff room; the second unit will be rented as a one-bedroom apartment for transitional housing. See Appellant's Mot at 4; Jurisdictional Opinion. Parcel II will use the existing office space as an emergency call center office for up to six employees, and the existing apartment unit will be used as temporary transitional housing for one client. Green Aff. ¶¶ 11–12; Jurisdictional Opinion. Parcel III will be used for a five-bed group home for clients of the Intellectual and

Developmental Disabilities Services Program. Appellant's Mot at 4; see Jurisdictional Opinion.

10. In total, the Project as proposed by NKHS will house an emergency call center and nine housing units across three dwellings on 12.5. See Appellant's Mot. at 4–5, ¶¶ 10–12.

11. NKHS is presently seeking separate Act 250 approval for the uses on Parcel II—i.e., the emergency call center and temporary transitional housing unit. Green Aff. ¶ 10. The emergency call center is on the same tract of land as the rest of the Project. Id.; Aff. Paolo Wieiser, Ex. 5; see Act 250 Rules 2(C)(5), (12) (defining "involved land" and "tract of land"). Some calls could result in folks being housed at the Property, but the call center will not be used to administer the housing or housing support staff located at the Property. Green Aff. ¶ 9.

12. NKHS has not constructed any other housing within a five-mile radius of the Property within the last five years. Green Aff., ¶ 11.

13. NKHS will provide staff to support the crisis beds and the group home. Green Aff. ¶ 12.

14. NHKS has "completed virtually all construction for the Project." Mot. at 5; compare Jurisdictional Opinion (describing work to be completed) with Green Aff. ¶¶ 13–14 (describing work completed). NKHS since obtained municipal permits for all its proposed uses and construction at the Property, but no evidence in the record supports that assertion. Compare Appellant's Mot. at 5 with Green Aff. ¶ 13 ("All work completed by licensed contractors with proper *permits* and inspections.").

DISCUSSION

In NKHS's Motion, it argues that the undisputed material facts support that the Court should conclude that the Project is not development, and therefore does not require an Act 250 permit. Specifically, NKHS raises two arguments in the alternative. First, NKHS argues that the Project is, by itself, not subject to Act 250 jurisdiction because the Project is a housing project

and Act 250 "distinguishes between commercial uses and housing uses, even if such housing is commercial in nature." Appellant's Mot. at 7 (citing 10 V.S.A. § 6001(3)(A)(iv) and Act 250 Rule 2(C)(10) ("Dwelling")). Alternatively, NKHS argues that "if the Property must be considered as being encumbered by Act 250 jurisdiction" because Fold Ministries should have obtained an Act 250 permit for their use, "the Project is not subject to Act 250 review because it is not a substantial change." Id. at 8.

Here, the Jurisdictional Opinion below determined this development was a "pre-existing development," and applied the substantial change analysis. The Court first considers the efficacy of the facts supporting that determination. Because the Court concludes that the undisputed material facts do not support applying the substantial change analysis, the Court then considers whether the Project is a development triggering Act 250 jurisdiction, and addresses Appellants argument that part of the Project is a separatable housing project with less than 10-units and should be bifurcated from the Act 250 permit. Finally, because the Court concludes that the law does not support Appellant's bifurcated approach, the Court considers the two statutory limitations proffered by Appellant.

I. Summary Judgement Standard

"Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996).

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). Once the moving party has made that showing, the burden shifts to the non-moving party. Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). The non-moving party may not rest on mere allegations but must come forward with evidence that raises a dispute as to the facts in issue. Clayton v. Unsworth, 2010 VT 84, ¶ 16, 188 Vt. 432. The evidence must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8.

Finally, if the undisputed material facts support this Court granting summary judgement for the nonmovant or on grounds not raised by a party, the Court may do so "[a]fter giving notice and a reasonable time to respond . . . ." V.R.C.P. 56(f).

II. Statement of Questions

In the Environmental Division, the Statement of Questions "functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court." In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). The Statement of Questions notifies the other parties of the issues to be determined within the case, while also limiting the scope of the appeal. Id.

The Court quotes Appellant's Statement of Questions directly, but notes that it contains factual assertions not supported by the evidence in the record. The Court notes those deviations in footnotes. With that caveat in mind, Appellant's Statement of Questions presents the following questions for the Court's review:

> 1. The project involves maintenance to three buildings constructed on a more than 12 acre lot before Act 250 was adopted. The project also involves the conversion of one building from three units to a licensed group home with about eight residents with disabilities. The jurisdictional opinion subject to appeal asserts Act 250 jurisdiction based solely on this conversion.[2] Is there any other basis for asserting Act 250 jurisdiction? If so, does Act 250 jurisdiction arise under any such other basis for asserting jurisdiction?
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> 2. Does 24 V.S.A. § 4412(1)(G) require the proposed group home to be treated as a single family home?

[2] The undisputed material facts demonstrate that the Project involves construction of improvements to three buildings on a 12.5-acre tract. The undisputed material facts, however, do not support that the dwellings were constructed before Act 250 was adopted, but rather after its enactment in 1974 and 1975. Additionally, while the Statement of Questions asserts that this Project creates a group home for eight residents with disabilities, the undisputed material facts demonstrate that this Project is designed to service up to nine individuals, as well as house an emergency call center. Finally, the Jurisdictional Opinion subject to this appeal describes all renovations, construction of improvements, and changes in use, and concludes that it triggers jurisdiction because "[t]he Project encompasses a cognizable change and may result in significant adverse impact" without so narrowly describing what facts specifically gave rise to that conclusion.

3. Is the proposed change in use sufficient to trigger Act 250 jurisdiction?

4. Is the proposed change a "cognizable change" as such term is used in statement of the first condition for the assertion of Act 250 jurisdiction? See, e.g. In re Request for Jurisdictional Opinion re: Changes And Use as Burlington International Airport for F-35A, ("In re Burlington Int'l Airport") 2015 VT 41, 198 Vt. 510, 117 A.3d 457.

5. The jurisdictional opinion subject to review asserts Act 250 jurisdiction based solely on a conclusion that the proposed change in use has the potential for significant impact under Act 250 Criterion 7 only.[3] Is there any other Criterion under which the project has the potential for significant impact? If so, does the project have the potential for significant impact under such other Criteria?

6. Does the proposed change have the potential to significantly impact Act 250 Criterion 7 so as to satisfy the second condition for triggering Act 250 jurisdiction especially as the consideration of such change may be limited, in compliance with the Fair Housing Amendments Act, 42 U.S.C. §§ 3601, et seq.?

Statement of Questions (filed Feb. 7, 2022).

III. Act 250 Jurisdiction

Most generally, the purpose of Act 250 is to "protect and conserve the lands and environment of the state from the impacts of unplanned and uncontrolled changes in land use." In re Audet, 2004 VT 30, ¶ 14, 176 Vt. 617. To accomplish this goal, Act 250—and its accompanying regulations—require a permit to "commence development" or "substantial[ly] change" a pre-existing development, 10 V.S.A. § 6081(a)–(b), or an amended permit to "material[ly] change . . . a permitted development," Act 250 Rule 35(A). Thus, it is pursuant to one of these three analysis that Act 250 Jurisdiction may be triggered.

[3] The Jurisdictional Opinion provides that the Project has the potential for "result[ing] in a significant adverse impact with respect to the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(1) (*eg Criterion 7* . . .)." Jurisdictional Opinion. Thus, while the Jurisdictional Opinion only specifically calls out Criterion 7, it explicitly does so as an example, not to suggest it is the only possibly affected criteria.

a. 10 V.S.A. § 6081(b) - Substantial Change to Pre-Existing Development

Most of Appellant's Questions ask whether the changes occurring to the property are sufficient to trigger Act 250 jurisdiction—i.e., applying the substantial change to a pre-existing development analysis. Statement of Questions at 1–2, ¶¶ 3–6. Act 250 does not require all "pre-existing developments" to obtain a permit. 10 V.S.A. § 6081(b). A pre-existing development is "any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971." Act 250 Rule 2(C)(8); see 10 V.S.A. § 6001(3)(A) ("Development"). If a development meets this definition, the development may continue operating without a permit unless there is a substantial change to that pre-existing development. Id.; Vermont RSA Ltd. P'ship, 2007 VT 23, ¶¶ 9–10. If a pre-existing development substantially changes its operations, however, Act 250 Jurisdiction is triggered, and the development must get a permit. 10 V.S.A. § 6081(b); Big Rock Gravel, LLC, Act 250 Jurisdictional Opinion, No. 174-8-08 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Oct. 19, 2010) (Wright, J.). A "substantial change" is defined as "any cognizable change to a pre-existing development or subdivision which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)." Act 250 Rule 2(C)(7). A "cognizable change" is "any physical change or change in use, including, where applicable, any change that may result in a significant impact on any finding, conclusion, term or condition of the project's permit." Id. Rule 2(C)(26).

The Environmental Board established a two-prong test for determining whether there has been a substantial change, and the Vermont Supreme Court has "repeatedly upheld" that test. Vermont RSA Ltd. P'ship, 2007 VT 23, ¶ 10. Under the two-prong substantial change test, the Court first determines whether a cognizable change to the pre-existing development will result from the project. Then, if there is a cognizable physical change, the Court considers whether the project has the potential for significant adverse impact under one or more of the Act 250 criteria. Id.

Here, the Court cannot conclude from the undisputed material facts that the development is a "pre-existing development." The undisputed material facts demonstrate that the buildings that make up the project were built in 1974 and 1975, well after June 1, 1970.

See Green Aff., Exs. 1–3 (Town of Lyndon Listers cards for the Parcels, showing the buildings on Parcel I and II were built in 1975, and Parcel III in 1974). Therefore, the construction, fundamentally, cannot qualify as a "*pre-existing* development" as all construction occurred after Act 250 became effective.

Moreover, the undisputed material facts demonstrate that, when the buildings were constructed, they were built as single-family dwellings on three separate parcels owned or controlled by three separate persons, each with an acreage less than 10-acres. Wieser Aff. Exs. 2–4 (showing deeds conveyed to Fold Ministries). As such, the construction of the dwellings was not considered "development" for Act 250 purposes. 10 V.S.A. § 6001(3)(A). Because the Project was not a "development" when it was initially constructed nor was it "pre-existing" the enactment of Act 250, the Court concludes that the substantial change analysis is not the operative triggering event for this Project.

Because the Court cannot conclude that the Project is a "pre-existing development," the Court cannot apply the substantial change analysis. Baker v. Town of Goshen, 169 Vt. 145, 152 (1999) (stating that questions on appeal "must be a necessary part of the final disposition of the case to which it pertains"). As such, the Court DISMISSES Questions 3, 4, 5, and part of 6, as the Court is without power to reach the issues raised in these questions, since they all relate to the two-prong substantial change analysis. Id. As based on the undisputed material facts, the appropriate analysis for determining whether the Project triggers Act 250 analysis is whether it is a development as defined by the statute, pursuant 10 V.S.A. § 6081(a).

b. 10 V.S.A. § 6081(a) – Commencing a Development for a Commercial Purpose, Residential Housing Project, or State Purpose

Appellant asks whether there is any other basis for asserting Act 250 jurisdiction over the Project. Statement of Questions at 1. The Court concludes that there is another basis for assertion Act 250 jurisdiction over the project, namely that the Project requires a permit to "commence development." See 10 V.S.A. § 6081 ("No person shall . . . commence development without a permit.").

"The statute carefully defines what may be covered by the term 'development' for purposes of Act 250 jurisdiction, and certain activities are specifically excepted from this definition." In re Vitale, 151 Vt. 580, 584 (1989). A development can be any one or more of the 10 listed activities in § 6001(3)(A). See Burlington Airport A250 JO 4-231 (F-35A Jets), No. 42-4-13 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. May 13, 2014); see Jurisdictional Opinion ("Type of Project (check all that apply)"). Thus, the operative question is whether the Project is a development pursuant one or more of the definitions in the statute. 10 V.S.A. § 6001(3)(A).

Of the activities constituting a "development," the Court has identified three that are relevant to the Court's analysis here. First, "development" means "[t]he construction of improvements[4] on a tract or tracts of land,[5] owned or controlled by a person,[6] . . . for commercial[7] or industrial purposes . . . ." 10 V.S.A. § 6001(3)(A)(i)–(iii).[8] Second, "development" also means "[t]he construction of housing projects such as . . . dwellings[9] . . .

[4] "'Construction of improvements' means any physical change to a project site except for:" (1) activity principally for planning, (2) construction for a home occupation, or (3) de minimis construction with no potential to impact any Act 250 criteria. Act 250 Rule 2(C)(3).

[5] "'Tract of land' means one or more physically contiguous parcels of land owned or controlled by the same person or persons." Act 250 Rule 2(C)(12).

[6] "For the purposes of a 'development,' person means an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; a municipality or state agency; and, individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the 'development' of land." Act 250 Rule 2(C)(1)(a).

[7] "'Commercial purpose' means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value." Act 250 Rule 2(C)(4).

[8] When the construction of improvements is for commercial or industrial purposes, the acreage "of involved land within a radius of five miles of any point of involved land" is either one acre or 10 acres depending on whether the municipality has adopted permanent zoning bylaws or elected by ordinance to have one-acre jurisdiction apply. While the Court does not have any evidence regarding the status of Lyndon's zoning regulations, here, it is undisputed that the Property is about 12.5 acres, so which operative "commercial purpose" provision applies is irrelevant.

[9] "'Dwelling' means a place which is intended for human habitation including . . . any commercial residential building, including but not limited to, a hotel, motel, rooming house, nursing home group home, residential care facility, or dormitory which is usually occupied in exchange for the periodic payment of a fee, contribution, donation or other object or service having value." Act 250 Rule 2(C)(10)(b).

with 10 or more units[10]" on a tract of land owned by a person "within any continuous period of five years." 10 V.S.A. § 6001(3)(A)(iv). Finally, "development" can also mean "[t]he construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county, or State purposes." 10 V.S.A. § 6001(3)(A)(v).[11]

When determining whether the project is a development triggering Act 250 jurisdiction, "the area of the entire tract or tracts of involved land owned or controlled by a person will be used." In re Stokes Commc'ns Corp., 164 Vt. 30, 36 (1995). Then, once Act 250 jurisdiction attaches, it generally applies to "the entire tract of land on which the construction occurs, even if construction only occurs on a portion of it." See Eastview at Middlebury, Inc., 2009 VT 98, ¶ 15 (describing NRB's "bright line test" for determining the scope of the permitted project).

There are exceptions to the general rule, however. First, the Statute expressly contemplates a limited exception to the general rule:

> When development is proposed to occur on a parcel or tract of land that is devoted to farming activity as defined in subdivision (22) of this section, only those portions of the parcel or the tract that support the development shall be subject to regulation under this chapter. Permits issued under this chapter shall not impose conditions on other portions of the parcel or tract of land that do not support the development and that restrict or conflict with required agricultural practices adopted by the Secretary of Agriculture, Food and Markets.

10 V.S.A. § 6001(3)(E). The inclusion of this express limitation further supports the NRB's and this Court's understanding: generally, that jurisdiction applies to the entire tract of land and the permit may impose conditions on other portions of the tract of land that do not support the development. Eastview at Middlebury, Inc., 2009 VT 98, ¶ 15; see In re Downer's Est., 101 Vt.

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[10] "'Unit' means an individual and discrete residence within a dwelling . . . including but not limited to an apartment within an apartment building, each separate residence of a duplex or multiplex home, or a room or suite of rooms within a hotel, motel, rooming house, nursing home, group home, residential care facility or dormitory." Act 250 Rule 2(C)(23).

[11] "'State, county or municipal purposes' means the construction of improvements which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public." Act 250 Rule 2(C)(15).

167 (1928) ("Expressio unius est exclusion alterius"). The Court has narrowly extended this limited exception to the other *express* exceptions to "development" contained in the rule. 10 V.S.A. § 6001(3)(D) ("The word 'development' does not include . . ."); see, e.g., In re Green Crow Corp., 2007 VT 137, ¶¶ 10–11 (limiting scope of permitting authority to only the part of the parcel above 2,500 feet because the statute express excludes logging activities below 2,500 feet from the definition of "development").

Here, Appellant does not dispute that Act 250 jurisdiction attaches to the Emergency Call Center on the tract of land. Green Aff. ¶ 10. Rather, Appellant argues that jurisdiction only applies to the components of a Project that independently trigger Act 250 jurisdiction as a development, and thus the "residential" component is beyond the scope of that jurisdiction. 10 V.S.A. § 6086. Appellant does not point to an express exception in the statute, but rather relies on In re Request for Jurisdictional Opinion re Changes in Physical Structures and Use at Burlington Int'l Airport for F-35A to support its assertion that the Court cannot consider the residential component in the Act 250 permit because it is not independently a "development." Mot. Hr'g at 10:25:14 (referencing 2015 VT 41, 198 Vt. 510 [hereinafter Burlington Int'l Airport]).

Appellant's reliance on Burlington Int'l Airport is misplaced for several reasons.[12] Most significantly, the issue in Burlington Int'l Airport was whether Act 250 review was *triggered* by a

[12] In Burlington Int'l Airport, the Court addressed whether Act 250 Jurisdiction extended to the project under three discrete issues: (1) whether the project was a "development" requiring Act 250 review; (2) whether the project was a substantial change to a pre-existing development, since the original construction of the Airport predated 1970; and (3) whether it was a material change to a permitted development, since the runway at the Airport is encumbered by an existing permit. Id. ¶ 8. Each issue had its own separate analysis and operative holding. Relevant to Appellant's argument here are the holdings to issues one and two. On the first issue, the Court held this construction project was not a "development" because it only served a federal purpose, not also a State purpose. Id. ¶ 19. Regarding the second issue, the Court concluded it was not a cognizable change because the changes did not amount to development, reasoning that "any construction of improvements to preexisting development must itself amount to development under Act 250 for it to trigger the need for a permit." Id. ¶ 23.

Beyond the distinction discussed in the body of this decision, Appellant's reliance on Burlington Int'l Airport is inapplicable for several additional reasons. First, the facts in Burlington Int'l Airport provide no helpful analogy to the facts and issue here. In Burlington Int'l Airport, the Court was considering whether a construction project that solely served a federal purpose and was occurring on a tract of land already encumbered by Act 250 as either pre-existing development or a permitted project requiring review. Here, the Project potentially serves many

subsequent construction project at the Airport—namely the siting of the National Guard's F-35As and its associated construction. 2015 VT 41, ¶ 1. There were no other components to the project at issue in that matter. Id. Unlike here, the Court in Burlington Int'l Airport was not considering which parts of a project were within the scope of the NRB's Act 250 review once Act 250 jurisdiction was triggered or whether the federal component was excepted from a broader project that otherwise triggered jurisdiction. The Court was merely considering whether Act 250 Jurisdiction was triggered. Id.

As such, Appellant's argument confuses the issue of whether Act 250 jurisdiction is triggered with the issue of whether a subsequent change is within the appropriate scope of an already "permitted project" on the tract of land. See In re Eastview at Middlebury, Inc., 2009 VT 98, ¶¶ 13–15, 187 Vt. 208 (distinguishing these issues); cf. McCullough Crushing Inc. Amended CU, No. 179-10-10 Vtec, slip op. 12–13 (Vt. Super. Ct. Envtl. Div. Feb. 16, 2017) (applying the analysis Appellant proffers appropriately to a change occurring to encumbered

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purposes—commercial, residential, and state—and is occurring on land that is not encumbered by Act 250. Further, there is no dispute amongst the parties that the Emergency Call Center on the property serves a commercial purpose, only disagreement about whether the scope of the permit may condition other components of the project on the tract of land, a substantively distinct determination. Second, Appellant's argument asks the Court to find that the commercial component of the Project is not a development because when the residential component is considered in isolation, it is not a development. In effect, this argument applies the holding from issue two to the question presented in issue one. Here, the issue before the Court is whether the project is a "development"—i.e., issue one. Id. ¶¶ 9–19. However, Appellants suggest this Court should only consider the changes occurring for the commercial component on the property and whether those changes independently trigger Act 250 jurisdiction, thereby applying the analysis and holding from the second, discrete issue in Burlington Int'l Airport. Id. ¶¶ 20–23. Third, after the Court reached this conclusion, the NRB amended the relevant Act 250 Rules to make the text more consistent with its prior analysis. When Burlington Int'l Airport was decided, the Rules defined "substantial change" as "any change in a pre-existing development or subdivision which may result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. §§ 6086(a)(1) through (a)(10)." Act 250 Rule 2(C)(7) (Oct. 1, 2013). The old rules had no definition for nor made any reference to "cognizable change" in the substantial change analysis. Id. Today, the Act 250 Rules define "substantial change" as "any cognizable change to a pre-existing development or subdivision which may result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)" and broadly define "cognizable change" as "any physical change or change in use . . . ." Act 250 Rule 2(C)(7), (26). To the extent that the Court may one day need to reconcile the current Act 250's Rules with the holding in the second issue of Burlington Int'l Airport, this case does not present facts to require that analysis. Baker, 169 Vt. at 152 (stating issues "must be a necessary part of the final disposition of the case to which it pertains"). Therefore, the Court does not consider it now. Id. at 151 ("[C]ourts are not instituted to render advisory opinions.").

property). While Appellant is correct that this Court and the Supreme Court have held that a "permitted project" "may ultimately encompass 'something less than the entire tract' where construction on a portion of the tract bears an insufficient relationship with, or nexus to, the rest of the tract," Eastview at Middlebury, Inc., 2009 VT 98, ¶ 15, that rule is inoperative here as there is no "permitted project" on the land.

Further, as noted, Appellant argues that Act 250 jurisdiction or the scope of its permitting authority only extends to the components of a project that individually qualify as "development"—effectively a bifurcated permitting approach. The Court disagrees. But even assuming arguendo that the Court were to bifurcate Projects in this way, that argument is immaterial here because the undisputed material facts demonstrate that both the housing component and the emergency call center individually trigger Act 250 jurisdiction. As applied to the facts, there are two possible definitions of "development" to apply to the housing component that are not mutually exclusive from the housing element. 10 V.S.A. § 6001(3)(A). First, as determined by the District Coordinator, the housing component serves a commercial purpose. 10 V.S.A. § 6001(3)(A)(i)–(iii). Appellant concedes that the "proposed housing may be commercial in nature because NKHS expects to be reimbursed for its costs of providing such housing" and the attendant services. Appellant's Mot. at 7; Act 250 Rule 2(C)(4) ("Commercial purpose" includes "the provision of facilities, goods or services . . . in exchange for payment").

Additionally, "development" can also mean "[t]he construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county, or State purposes." 10 V.S.A. § 6001(3)(A)(v). NKHS is a State Designated Agency that provides mental health care for the Northeast Kingdom. Green Aff. ¶ 1. Designated agencies are tasked with "ensur[ing] that community services to persons with a mental condition or psychiatric disability and persons with a developmental disability throughout the State are provided . . . ." 18 V.S.A. § 8907(a). NKHS's Project comprises a five-bed group home, two crisis beds, transitional housing, and an emergency call center. Appellant's Mot. at 4–5, ¶¶ 10–12. From these undisputed material facts, this Court concludes that, in addition to the commercial purpose

triggering Act 250 jurisdiction, the housing component of the Project serves a state purpose, thus independently meeting the definition of development. 10 V.S.A. § 6001(3)(A)(v).

The Court concludes that the undisputed material facts demonstrate that there is another basis for asserting Act 250 jurisdiction here. Specifically, the Project involves the construction of improvements on a tract of land involving more than 10-acres, owned or controlled by NKHS for a commercial purpose (and a State purpose), as triggered by the Emergency Call Center. 10 V.S.A. § 6001(3)(A)(i)–(iii), (v). The Statute does not provide a limitation to imposing conditions on other portions of the tract of land that do not support the development. Cf. 10 V.S.A. § 6001(3)(E). Thus, NKHS's project is a "development" requiring a permit, which applies to the entire tract of land. 10 V.S.A. § 6081(a).

The Court concludes the undisputed material facts do not entitle Appellant to summary judgment. As such, Appellant's motion for summary judgment is DENIED. Moreover, the Court finds that the undisputed material facts demonstrate that the Project has triggered Act 250 jurisdiction because it is a development requiring a permit, 10 V.S.A. §§ 6001(3)(A), 6081(a), and no exceptions within the statute apply to the residential component of the project, see, e.g., 10 V.S.A. § 6001(3)(E). Thus, unless either of the Appellant's proffered statutes limit or preempt Act 250 regulation, the Project is a development requiring a permit.

c. 24 V.S.A. § 4412(1)(G) and 42 U.S.C. §§ 3601 et seq. – Jurisdictional Limitations

Appellant proffers two potential limitations to Act 250 jurisdiction. Specifically, Appellant asks whether 24 V.S.A. § 4412(1)(G) requires the proposed group home to be treated as a single-family home, and whether Act 250 jurisdiction may be limited by compliance with the Fair Housing Amendments Act, 42 U.S.C. §§ 3601, et seq. Statement of Questions at 1–2.

Section 4412(1)(G) provides that the certain land development provisions apply to every municipality. Among those statewide land development provisions,

> A residential care home or group home to be operated under State licensing or registration, serving not more than eight persons who have a disability as defined in 9 V.S.A. § 4501, shall be considered by right to constitute a permitted single-family residential use of property. This subdivision (G) does not require a

> municipality to allow a greater number of residential care homes or group homes on a lot than the number of single-family dwellings allowed on the lot.

24 V.S.A. § 4412(1)(G). The legislature's purpose in enacting this zoning statute was to protect residential care facilities and group homes from exclusionary zoning by municipalities. In re S-S Corp./Rooney Hous. Devs., 2006 VT 8, ¶ 22, 179 Vt. 302 (citing repealed but substantively identical 24 V.S.A. § 4409(d)).

This matter, however, does not involve a municipal zoning limitation, but rather the statutory Act 250 permitting structure. "Act 250 analysis and municipal zoning interpretation serve different purposes—Act 250 considers actual use of the land rather than the overall purpose of a development scheme to ensure accountable land development, while zoning ordinances are enacted to provide for development that is consistent with a town or municipal plan." In re Confluence Behav. Health, LLC, 2017 VT 112, ¶ 19 n. 3, 206 Vt. 302.

Most generally, the purpose of Act 250 is to "protect and conserve the lands and environment of the state from the impacts of unplanned and uncontrolled changes in land use." In re Audet, 2004 VT 30, ¶ 14, 176 Vt. 617. As such, Act 250 cases are inherently use-based. In re BHL Corp., 161 Vt. 487, 490 (1994) ("[T]he proper starting point for determining Act 250 jurisdiction is the actual use of the land, not necessarily the overall purpose of a development scheme.").

The Act 250 Rules contemplate "group homes" in the regulations. The definition of "dwelling" includes any commercial residential building such as group homes. Act 250 Rule 2(C)(10)(b). The Group Home designation has no bearing on the Rule's measure of what constitutes a unit; indeed it is contemplated by the Rule. A "unit" is "an individual and discrete residence within a dwelling" and expressly includes "a room or suit of rooms within a . . . group home . . . ." Act 250 Rule 2(C)(23). A housing development only triggers Act 250 jurisdiction if it builds 10 or more units on a tract of land within a 5-year period. 10 V.S.A. § 6001(3)(A)(iv). Conversely, 24 V.S.A. § 4412(1)(G) only limits restrictive zoning if the group home serves no more than 8 individuals. Thus, if a group home were to qualify for single-family home consideration under 24 V.S.A. § 4412(1)(G), it would not trigger Act 250 Jurisdiction pursuant

the development of a housing project analysis. As such, the structure of these two statutes is not inconsistent.

Finally, whether 24 V.S.A. § 4412(1)(G) applies to this Project is irrelevant on two considerations. First, as noted above, the Project's Emergency Call Center serves a "commercial purpose" and thus the number of units is irrelevant to the consideration of whether Act 250 Jurisdiction has been triggered. Second, 24 V.S.A. § 4412(1)(G) cannot apply to this group home because a requirement of § 4412(1)(G) is that the group home "serv[e] not more than eight persons who have a disability" and this Project is capable of serving up to 9 individuals.

Similarly, to the extent that Appellant asks whether the Federal Fair Housing Amendments Act limits Act 250 application to this Project, see Statement of Questions at 2, ¶ 6, the Court cannot conclude that Act 250 "purports to require or permit any action that would be a discriminatory housing practice" under Federal Law. 42 U.S.C. § 3615. Generally speaking, the Fair Housing Amendments Act prohibits discrimination in the sale or rental of housing or the provision of brokerage services. See generally 42 U.S.C. §§ 3604–3607. Section 3615 of the Fair Housing Act is not preemption of a total field of law because it invalidates only those state laws which conflict with the Fair Housing Amendments Act. Therefore, the analysis is whether Act 250 conflicts with the Federal Fair Housing Amendments Act.

Conflict preemption falls into two categories: "first, when 'compliance with both federal and state regulations is a physical impossibility,' and second, when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig., 725 F.3d 65, 97 (2d Cir. 2013) (quoting Arizona v. United States, 567 U.S. 387, 399 (2012)). There are several variations of the "impossibility" branch. Id. When narrowly applied, federal law will preempt state law only when "compliance with both federal and state regulations is a physical impossibility." Id. The more expansive analysis finds "impossibility" when "state law penalizes what federal law requires," or when state law claims "directly conflict" with federal law. Id.

The second category of conflict preemption—obstacle preemption—applies when state law "stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress." Arizona v. United States, 567 U.S. 387, 399 (2012). Obstacle analysis precludes state law that poses an "actual conflict" with the overriding federal purpose and objective. Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 162 (2d Cir.2013). What constitutes a sufficient obstacle is "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Id. (internal quotation marks omitted). Congress's purpose in enacting the law is the ultimate standard, and "the conflict between state law and federal policy must be a sharp one." Marsh v. Rosenbloom, 499 F.3d 165, 178–180 (2d Cir. 2007) (cleaned up).

The burden of establishing either impossibility or obstacle preemption is heavy. See MTBE Prod. Liab. Litig., 725 F.3d at 97 ("Impossibility preemption is a demanding defense"); see also Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 241 (2d Cir. 2006) ("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.")

The Court cannot conclude from the undisputed material facts that it is impossible to comply with both the Fair Housing Act and Act 250, or even that Act 250 stands as a substantial obstacle to carrying out the federal purpose of the Act. As noted above, the purpose of Act 250 is to "protect and conserve the lands and environment of the state from the impacts of unplanned and uncontrolled changes in land use." Audet, 2004 VT 30, ¶ 14. By contrast, the purpose of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. It is wholly possible to protect and conserve the lands and environment of the state without discriminating "in the sale or rental, or . . . otherwise mak[ing] unavailable or deny[ing], a dwelling to any buyer or renter because of a handicap of . . . due to the handicap of . . . a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." Id.; 42 U.S.C. § 3604(f)(1)(B).

Thus, to the extent that Appellant asks whether 24 V.S.A. § 4412(1)(G) requires the proposed group home to be treated as a single-family home, or whether 42 U.S.C. §§ 3604, 3615 limits the State's authority to regulate under Act 250, the Court cannot conclude that

Appellant is entitled to summary judgment from the undisputed material facts. As such, Summary Judgment to Appellant is DENIED, and unless the parties respond within 10 days of the issuance of this decision with a substantive objection, the Court will conclude that the Project has triggered Act 250 Jurisdiction and GRANT summary judgment to the NRB.

CONCLUSION

For the forgoing reasons, the Court concludes the undisputed material facts do not entitle Appellant to summary judgment. First, the undisputed material facts demonstrate that the Project is not a pre-existing development, and as such the Court cannot apply the substantial change analysis and Appellant's Questions 3–6 are not properly before the Court. Baker, 169 Vt. at 152 (stating that questions on appeal "must be a necessary part of the final disposition of the case to which it pertains"). Additionally, Appellant has failed to demonstrate that that the Project is not a development requiring a permit pursuant 10 V.S.A. § 6081(a). As such, Appellant's motion for summary judgment is DENIED.

Moreover, the Court finds that the undisputed material facts demonstrate that the Project has triggered Act 250 jurisdiction because it is a development requiring a permit, 10 V.S.A. §§ 6001(3)(A), 6081(a), and no exceptions, exemptions, or limiting preemptions apply to the residential component of the project, see 10 V.S.A. § 6001(3)(E); 24 V.S.A. § 4412(1)(G); 42 U.S.C. §§ 3601 *et seq*. Thus, unless the parties respond within 10 days of the issuance of this decision, the Court will conclude that the Project has triggered Act 250 Jurisdiction and GRANT summary judgment to the NRB on Question 1 independent of the motion. V.R.C.P. 56(f); Burns 12 Weston Street Nov, No. 75-7-18 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Oct. 25, 2019) ("Under [56(f)] authority, this Court would normally have to give notice and a reasonable time of 10 days from the filing of this Order for the [party] to respond.").

Electronically signed December 15, 2022 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division