VERMONT SUPERIOR COURT
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Grayson 3-Lot Subdivision	Docket No. 21-ENV-00012

DECISION ON THE MERITS

The present appeal involves an application to subdivide land in the Town of Waterbury (the "Town"). Applicant Charles T. Grayson first applied for and received approval to subdivide land he owns into three parcels in 2017. A neighbor of the proposed subdivision, Glenn C. Anderson, appealed that approval, as well as the approval of certain site clearing work, to our Court. We affirmed the Development Review Board's ("DRB") decisions. *see* In re Grayson Subdivision and Conditional Use Appeal, Nos. 19-3-17 Vtec, 74-6-17 Vtec (Vt. Super. Ct. Envtl. Div. Jul. 12, 2018) (Durkin, J.). Mr. Anderson then appealed our rulings to the Vermont Supreme Court, where the appeal was dismissed for failure to comply with a court order. In re Grayson Subdivision and Conditional Use Appeal, No. 2018-276 (Vt. Sept. 25, 2018) (unpublished mem.). However, Mr. Grayson then failed to record in the Town records a final plat depicting the approved subdivision within 180 days of the final approval, as required by the enabling statute. 24 V.S.A § 4463(b). When a mylar of the approved subdivision was not timely recorded, the subdivision approval was voided, because the enabling statute directs that the subdivision approval "shall expire" when a timely recording of the subdivision plat is not accomplished. Id.

In 2020, Mr. Grayson subsequently re-filed his subdivision application. In a written decision dated January 30, 2021, the DRB approved this resubmitted subdivision application. Mr. Anderson then filed this appeal with our Court.

Mr. Grayson is represented by attorney Christopher Nordle. Mr. Anderson is self-represented. The Town of Waterbury is represented by attorney David Rugh.

Procedural Background

In the present appeal, Mr. Anderson originally filed a Statement of Questions with 29 numbered Questions, many of which contained multiple sub-parts. In response to Mr. Grayson's motion to dismiss and/or strike portions of that Statement of Questions, this Court dismissed some of Mr. Anderson's Questions and directed that he revise others. *See* In re Grayson 3-Lot Subdivision, No. 21-ENV-00012, slip op. at 4–12 (Vt. Super. Ct. Envtl. Div. May 5, 2022) (Durkin, J.). In response, Mr. Anderson on July 4, 2022, filed a Revised Statement of Questions, listing seven Questions for our review in this appeal.[1]

In connection with Appellant's appeal of Applicant's 2017 application, the Court conducted a site visit along Sweet Road, both in front of Applicant's property, Appellant's property, and the Hunger Mountain Trail Head. The Court has a sufficient recollection of that previous site visit, and the parties agreed that an additional site visit was not necessary.

Based upon the credible evidence presented at trial, particularly that which was put into context by the previous site visit, the Court renders the following Findings of Fact, Conclusions of Law, and Order. A judgment Order also accompanies this Merits Decision.

Findings of Fact

I. Applicant's Proposed Subdivision.

1. Applicant Charles T. Grayson ("Applicant") owns a 45.1± parcel of land along the easterly side of Sweet Road in Waterbury, Vermont. Applicant's property is one of the larger remining tracts of undeveloped land in the immediate neighborhood.

2. In his first application, which was the subject of Docket No. 19-3-17 Vtec, Applicant sought and received subdivision and condition use approval for a proposed three-lot subdivision of the parcel.

3. In 2020, Mr. Grayson resubmitted his original application for subdivision approval. The pending subdivision application is a reproduction of the previously submitted application. Applicants pending subdivision application was admitted at trial as Exhibit 1.

4. Applicant's property is oddly shaped, sort of like a short-toed boot, with the heel and sole running along easterly boundary of Sweet Road. Reference is made to Applicant's Exhibit 2, which shows the general shape of the Applicant's parcel. Travelling easterly from Sweet Road, Applicant's property rises in elevation, with plateaus or terraces as the property rises.

[1] Mr. Anderson's first Question from his Revised Statement of Questions contains seven sub-parts.

5. Applicant's property is located in several zoning districts. The section of Applicant's property that is within 1,000 feet of Sweet Road is located in the Medium Density Residential Zoning District ("MDR District"); the portion of Applicant's property that is located beyond 1,000 feet from Sweet Road is located in the Conservation Zoning District ("Conserv. District"). All of Applicant's property is located in an overlay district, known as the Ridgeline/Hillside/Steep Slope Overlay Zoning District ("RHS District").

6. Applicant proposes to divide his property into three lots, as depicted on the site maps admitted into evidence at trial as Exhibits 2, 3, 4, and 5.

7. As reflected on those site maps, Lot 1, on the northern part of the property, will contain 3.9± acres; Lot 2, in the middle of the property, will contain 9.73± acres; and Lot 3, on the southern part of the property, will contain 31.53± acres.

8. Each lot will have its own driveway access from Sweet Road on a to-be-cleared area of about 30 feet wide. The site map admitted at trial as Exhibit 4 depicts building envelopes on each lot, which will be used to identify where a house can be sited in the future.

9. The application does not include a request for the construction of any buildings.

10. Applicant proposes that any subdivision permit to be issued would be conditioned upon the future houses only being located within the designated building envelopes.

11. The property is currently heavily wooded. Clearing for the house sites will not occur until after Applicant or his successors apply for and receive development approvals.

12. Applicant anticipates that the area between the actual house sites within the designated building envelopes and to the edge of Sweet Road will only be selectively cut, so as to provide screening of the houses, the Road, and neighboring properties.

13. Exhibit 4 includes a depiction of the site clearing that was previously approved in Docket No. 74-6-17 Vtec. The approval of that site clearing became final when Mr. Anderson failed to timely prosecute his appeal before the Vermont Supreme Court.[2]

14. The approved site clearing work is to be conducted on Lots 1 and 3. The work on Lot 1 will consist of the clearing necessary for laying out the driveway. On Lot 3, the work will consist of the clearing necessary for the driveway, the community wastewater treatment system, and a force main for the potable water supply system.

[2] *See,* In re Grayson Subdivision and Conditional Use Appeal, No. 2018-276 (Vt. Sept. 25, 2018) (unpublished mem.).

15. All three lots will be served by a common potable water supply and wastewater treatment system that will be located on Lot 3. Easements will be conveyed between the individual lots to allow for the installation and maintenance of the water and waste lines and the water well and disposal systems.

16. Applicant applied and received approval for the wastewater treatment and water supply systems proposed for this subdivision in 2017. *See,* Wastewater System and Potable Water Supply Permit #WW-5-7349, issued on February 6, 2017 by the Department of Environmental Conservation, Agency of Natural Resources ("WW Permit"). A copy of this WW Permit was admitted at trial as Exhibit 13.

17. The Town of Waterbury Zoning Regulations (the "Zoning Regulations") require that newly created lots in the MDR District must contain two or more acres, must have at least 200 feet of road frontage, and must respect a 60-foot front and 50-foot side and rear yard setback minimums.[3]

18. Lots 1 and 2 are wholly within the MDR District. The building sites on Lot 3 are also entirely located within the MDR District, although a portion of Lot 3 is also located in the Conservation District.

19. Newly created lots within the Conservation District must contain 10 acres or more, must have at least 300 feet of road frontage, and must respect 100-foot front, side, and rear yard setback minimums. Lot 3 (the only lot to be created in the Conservation District) conforms to these zoning district dimensional requirements.

20. All three lots are within the RHS Overlay District.

21. All proposed lots and the building enveloped depicted within them conform to the front, side, and rear setbacks, and well as the dimensional minimums for their respective zoning districts.

22. Erosion protection and sediment control measures will be implemented during the initial clearing work and during any future development on the Lots.

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[3] We note that the Regulations were not submitted as evidence at trial. References to the Regulations in this decision are made with respect to the Regulation's online version, at the Town's website, see the Town and Village of Waterbury Zoning Regulations (amended through May 16, 2016) available at [Waterbury ZR 5-16-16 cert.pdf (waterburyvt.com)], or references made throughout the admitted evidence, such as notes on Applicant's site plans. We do so in order to provide context to this appeal. While this is not the Court's practice and we always encourage parties to submit the applicable Regulations as evidence at trial, given the Court's ultimate conclusion and the fact that a large majority of Appellant's Questions on appeal are made without reference to the Regulations, we do so here.

23. No approval has been sought in the pending application for the houses that may be placed on each of the three lots. Applicant acknowledged that such approvals must be secured before any actual construction may begin.

24. Applicant has identified possible building sites on each of the three lots by delineating "building envelopes." *See,* Exhibit 5. There is one building envelope on Lot 1 and two building envelopes on each of the remaining Lots. Little to no clearing will occur outside of these building envelopes, save for clearing necessary for the driveways, community wastewater treatment and water supply systems, and associated utility lines.

25. The rear half of Lot 3 is heavily wooded; the rear portion of Lot 3 is adjacent to land owned by the State of Vermont and identified as the Northern Hardwood Forest. *See,* Exhibit 9-1. Applicant proposes that all development would be prohibited on the rear portion of Lot 3, consisting of 14.65± acres, and would be protected by a conservation easement. This protected area is identified on Exhibit 5 and detailed in the report of Applicant's environmental consultant, admitted into evidence as Exhibit 9.

26. Because the proposed subdivision has been represented as being only for residential purposes, it is not anticipated that the subdivision, if approved, and eventual development will cause any more noise or off-site lighting than flows from the other already existing neighboring residences.

II. Existing Neighborhood.

27. Appellant owns and resides at property located across Sweet Road from Applicant's property. Appellant's home is known as "the Meadows House" and consists of a log cabin that was built in the mid-1970s.

28. While Appellant uses this property as a residence, he also uses it for business purposes, such as renting the property out for weddings and other events of up to 180 guests. He also collects sap from the maple trees on his and neighboring properties and makes maple syrup.

29. Most of the properties in the immediate neighborhood are land parcels of several acres or more. Many of the properties nearby have been developed with single-family residences.

30. This area has experienced a significant increase in the residential development of properties over the last 20 years.

31. The development in the neighborhood results in regular traffic, although mostly of a rural nature. In addition to its residents, Sweet Road serves as an access point to the Hunger Mountain Trail Head, located to the immediate north of Applicant's property. The parcel that hosts the Hunger Mountain Trail Head access also hosts a parking lot, capable of serving up to thirty parked cars.

During the spring, summer and fall, there are frequent visitors who use Sweet Road to access the Hunger Mountain Trail Head.

32. Drivers also use Sweet Road as an alternate route to the neighboring Town of Stowe.

33. Sweet Road is maintained by the Town and is adequate to handle its existing traffic, as well as the future traffic that may be created by this subdivision.

34. A parcel on the westerly side of Sweet Road, south of Appellant's property, contains a medium-sized solar array.

35. We were aided in our review of possible impacts from this subdivision by an environmental assessment commissioned by Applicant and completed by Rose Environmental, LLC and its principal, Kristen Howell, Ecologist. Ms. Howell's report was admitted at trial as Exhibit 9 and was accompanied by various site maps admitted as Exhibits 9-1 through 9-6, inclusive.

36. Some wildlife, including deer, bear, amphibians, and birds occasionally visit the neighborhood. However, there was no credible evidence offered at trial that Applicant's property or the immediate neighborhood hosts a critical wildlife habitat or significant wildlife corridors.

37. Where wildlife has been observed in the neighborhood, including when crossing Sweet Road, it has generally been to the north and south of Applicant's property, and not on his property.

38. Deer and bear occasionally visit Applicant's property, but those wildlife visits did not appear to be significant.

39. There is a lengthy wooded and undisturbed area along Sweet Road north of the Hunger Mountain Trail Head. This undisturbed area provides significant opportunity for wildlife to cross the Road.

40. There was no credible evidence presented at trial that Applicant's property or the immediate area host identified historical sites or irreplaceable natural areas. There was also no evidence presented that Applicant's property hosts any rare, threatened, or endangered species of plant or animal, nor that the property hosts a deer wintering area.

41. Applicant's property hosts several Class III (unprotected) wetlands. There are no wetlands on Applicant's property that are afforded statutory or regulatory protection (i.e. Class I or Class II). There is also a man-made pond on what will be Lot 2. This pond has been classified as a Class III (i.e.: unprotected) wetland.

42. Thatcher Brook runs along the rear of some neighbors' lands, to the west of Sweet Road. This Brook does not traverse or even come close to Applicant's property. No other brook, river or stream come onto or close to Applicant's property, save for the tributary referenced below.

43. There is an unnamed tributary of Thatcher Brook that crosses under Sweet Road to the south of Applicant's property. This tributary originates to the east of Applicant's property and at times straddles the southerly boundary of Applicant's property, particularly along the rear border of Applicant's property, which is the most easterly lying portion of Applicant's property.

44. The area around this tributary is wooded, undisturbed by human development,[4] and is occasionally used by wildlife as a travel corridor to cross Sweet Road. This area is not located on Applicant's property, but rather located on the adjoining property to the south.

45. Some portion of this tributary may be within 50 feet of Applicant's southern boundary. Because of this, Applicant has proposed that any approval be conditioned upon any development respecting a fifty-foot buffer along either side of the tributary. We do not incorporate such a condition into our approval here, since that condition would only be appropriate if and when the future development of these subdivided lots is considered for approval.

46. Applicant's and the neighboring properties on the easterly side of Sweet Road gradually climb in elevation from Sweet Road and to the easterly rear of the parcels. Much of the development that has already occurred on these neighbors' lots has occurred relatively close to Sweet Road, where the land is somewhat level. Applicant has proposed that the building envelopes on his subdivided lots will mirror this pre-existing development pattern.

Conclusions of Law

We begin our legal analysis by first reviewing the legal issues raised in Appellant's Statement of Questions, as revised on July 4, 2022. We take those legal issues in the numerical order in which they were presented.

Question 1: This Question has an introductory query, asking "[d]id the Applicant, [sic] submit sufficient preliminary application information for due and proper consideration." Appellant's Revised Statement of Questions, filed on July 4, 2022, at 1 (Hereinafter referenced as "Revised SoQ"). It appears that by this Question, Appellant is challenging whether Applicant submitted a complete application before the Town. However, based upon the evidence presented at trial, we conclude that Applicant provided sufficient information to deem the application complete. We therefore turn to

[4] Some of the existing development to the west and south of Applicant's property is close to this stream or tributary. There was no evidence presented at trial that this close proximity of existing development has deterred wildlife from crossing Sweet Road in close proximity to the tributary.

the sub-parts of Question 1, whereby Appellant provides some specific challenges to the merits of Applicant's presentation.

Question 1(a): By this Question, Appellant asks whether "the proposed infrastructure [is] adequate to serve this use." Id.

Applicant presented credible testimony and other evidence detailing the infrastructure planned for his proposed subdivision. Each of the three proposed lots would provide access to the residential building sites via individual driveways for each lot of sufficient width. The three lots would be served by community water supply and wastewater treatment systems that have been approved by the Department of Environmental Conservation, which is a division of the Vermont Agency of Natural Resources. None of the proposed infrastructure would encroach upon protected wetlands or waterways. None of the infrastructure would interfere with critical wildlife habitat, since none was identified on or near the proposed subdivided lots.

In contrast, Appellant provided no credible evidence that the planned infrastructure would be inadequate to support the proposed subdivision. We therefore answer Appellant's Question 1(a) in the affirmative.

Question 1(b): By this Question, Appellant asks "have traffic studies been conducted or road congestion from adjacent existing activities measured?" Id.

Appellant failed at trial to provide the Court with citation to any requirement imposed by the subdivision regulations on a subdivision of this size to conduct a traffic study on road congestion from adjacent activities, not caused or connected to the proposed subdivision. We therefore decline to impose an obligation on Applicant here to conduct a traffic study, especially when it is undisputable that his proposed subdivision is relatively minor and there was no evidence that any traffic that may be created by this subdivision will measurably impact upon this neighborhood.

We recognize that Applicant's proposed subdivision could bring up to five new residential dwellings to this neighborhood, and with them the resulting traffic. We again note that no detail has been provided concerning the proposed future development of these subdivided lots, and no approval of any development of the individual lots has been asked for or rendered in these proceedings. Thus, any future development may only occur after a development application is both submitted and approved.

We received testimony, including from Appellant, that the Hunger Mountain Trail Head encourages visitors to this neighborhood, especially during the Spring, Summer, and Fall months. But this evidence did not convince the Court that the existing traffic causes unreasonable traffic

congestion, nor that the proposed subdivision will in any way unduly and adversely impact this neighborhood. We therefore decline to consider imposing a requirement upon Applicant to conduct a traffic study or specifically measure existing road "congestion," especially since we were not cited to a provision of the subdivision regulations that would authorize such a condition.

Question 1(c): By this Question, Appellant asks "[w]here would firefighting and emergency responder vehicles access the proposed development and how would emergency trucks, school busses, and delivery vehicles service these proposed units as well as turn-around [sic] within the development." Id.

Applicant's engineer detailed, both through his testimony and exhibits, how each lot would be served by an adequately sized access driveway that conformed to design standards. There was no credible evidence presented that firefighters, emergency responders, school vehicles, or delivery vehicles would have difficulty accessing the future developments on these lots. That said, no actual development plans for these subdivided lots have been presented or approved in these subdivision proceedings. As such, Applicant's query here is premature. Such approvals, and the adequacy of any such access, may only be considered when Applicant or his successors disclose such development plans and apply for development and construction permits.

We therefore conclude that Applicant has provided sufficient answers to the inquiries presented by Appellant in his Question 1(c) within the scope of the present subdivision application.

Question 1(d): By this Question, Appellant asks if "the proposed development [is] inconsistent with existing agricultural, recreational, and conservation uses in the immediate area and/or does it adversely impact the character of that area as defined by the municipal plan and the relevant zoning districts?" Id.

Contrary to the first portion of Appellant's Question 1(d), this proposed three-lot subdivision is entirely consistent with the existing uses in the immediate area. Many of the nearby properties have been developed for residential uses, many of which are on lots of less than four acres. Most residences are built generally in the area near to Sweet Road. Applicant proposes building envelopes for the subdivision to be limited to the area generally near to Sweet Road. While there are nearby properties that are currently used for agricultural or commercial purposes, they are in the vast minority.

The lots Applicant proposes to create in this three-lot subdivision are slightly to measurably larger than the lots of the existing residential developments. However, the Court cannot conclude that such larger lots would somehow detract or distract from the existing development. Applicant

also proposes in this subdivision to create a nearly 15-acre conservation area on the easterly portion of Lot 3, thereby conforming to some of the other neighboring lands pledged for conservation.

The proposed subdivision therefore conforms to the character of the area. Applicant's proposed subdivision will create uses that conform to the established and desired uses for this neighborhood. We therefore conclude that we must answer Appellant's Question 1(d) in the affirmative.

Question 1(e): By this Question, Appellant asks "[d]oes the proposal make adequate provision for the control of runoff and erosion as well as surface water flows patterns [sic] during and after construction?"

Again, Appellant appears to be asking this Court to go beyond our jurisdictional authority in this subdivision appeal by posing questions about impacts "during and after construction." Id; *see also* In re Torres, 154 Vt. 233, 235 (1990) ("The reach of the superior court in zoning appeals is as broad as the powers of the zoning board of adjustment or a planning commission, but it is not broader."). We cannot answer this question, since Applicant is not required to present construction plan details in this subdivision proceeding and is not seeking approval of any undisclosed construction plans.

To the extent that this Question addresses any alleged concerns related to proposed site work presently before the Court, we conclude that the Applicant does not propose impacts related to runoff, surface waters, and erosion. The proposed subdivision provides for limited clearing on each of the three proposed lots. This land gently rises as one moves away from Sweet Road and into these lots. The land then terraces as one travels further into the lots to the east. At this first terrace is where Applicant proposes all of the building lots and building envelopes, even though the land travels further east, particularly on Lots 2 and 3. Thus, Applicant proposes to avoid clearing much of the lands in front of and to the rear of his building lots. The lands that will remain wooded in front of the proposed building lots will provide adequate screening of the building areas. This wooded area will also provide natural control of stormwater runoff. In fact, given that much of the area on each lot will remain wooded, we conclude that it is unlikely that stormwater runoff will increase. There was no credible evidence presented that Applicant's lands experience stormwater runoff beyond its borders now, and we conclude that it is unlikely to occur in the future, after this subdivision is completed.

For all these reasons, we answer Appellant's Question 1(e) in the affirmative.

Question 1(f): By this Question, Appellant asks "[w]ill the proposed development result in undue noise pollution?" Id.

This subdivision will not create noise, other than during the brief period of pre-development tree clearing, which we conclude will not be undue. Since no new noises will be introduced to the neighborhood due to this subdivision, we conclude that the subdivision as proposed will not result in undue noise pollution.

For all these reasons, we answer Appellant's Question 1(f) in the negative.

Question 2: By this Question, Appellant asks "[w]ill the proposed subdivision result in undue adverse impact to water quality or downstream properties?" Id. at 2.

The Regulations include provisions governing the subdivision of lands in the Town. *See,* Regulations §§ 1201–1204. Pursuant to Regulations § 1202(a)(3), we are directed to determine that the "proposed subdivision will not result in undue adverse impact to water quality or downstream properties, and will not cause undue adverse impacts to soil through erosion or reduction in the capacity of the land to hold water." While Appellant does not cite specifically to this provision, we conclude that Regulations § 1202(a)(3) provides us with the legal authority to address this question.

We note that we have already made specific determinations, detailed above, regarding stormwater flows, or lack thereof, on Applicant's property, both before and after the proposed subdivision.

Trial testimony revealed two other water courses on or near Appellant's property. The first is a man-made pond located on lands included in the proposed Lot 2. *See*, Exhibit 2 and 5. This pond is classified as a Class III wetland and therefore does not enjoy regulatory protection. In addition, it is outside of the building envelopes proposed for this lot. No credible evidence was presented that the proposed subdivision will result in any impacts, much less adverse impacts, upon this pond.

The second water course is outside the boundaries of Applicant's property. It is an unnamed tributary to Thatcher Brook that is located south of Lot 3, as depicted on Exhibits 2 and 5. This unnamed tributary if far removed from the building envelopes within the proposed subdivided lots. There was no credible evidence presented that the proposed subdivision will have any impact, much less an adverse impact, upon this unnamed tributary.

For all these reasons, we conclude that the subdivision as proposed will not result in undue adverse impacts upon area water quality or upon downstream properties. We therefore answer Appellant's Question 2 in the negative.

Question 3: By this Question, Appellant asks "[w]ill the proposed development have an undue adverse impact on significant natural resources pursuant to [Regulations §] 1202(a)(5) and/or

irreplaceable natural areas under [Regulations] § 303(e)(2)(C), specifically nearby wetlands?" Revised SoQ at 2.

Interestingly, this Question marks the first time that Appellant provides a specific citation to the regulatory provisions that allow us to address the specific legal issues that he presents. We again note that the Regulations were not submitted as evidence at trial. We therefore refer to the online source to give context to this Question. Given the Court's ultimate conclusion, and the credible and complete report by Rose Environmental, we therefore look to the specific language of those Regulations.

Regulation § 1202(a)(5) provides that, together with other regulatory provisions, that we may only approve a proposed subdivision if it "[w]ill not have an undue adverse impact on significant natural resources." Id. Answering this question is made somewhat easier because the credible evidence did not disclose that any "significant natural resources" exist on or near the property proposed for subdivision. The regulations define "significant natural resources" as "[a]reas that include streams; Class I & II wetlands; prime agricultural soils; wildlife resources, including the Natural Heritage sites, as shown on the Waterbury Wildlife Resources Map in the Municipal Plan; and rare, threatened or endangered species." Regulations Art. XIV at p. 83. We were not made aware of any such resources on or near the proposed subdivision.

Our conclusions here are reinforced by the representations and report made by Rose Environmental, which we found to be credible and not contradicted by any trial testimony. We adopt her determinations here that the proposed subdivision and its "related activities will avoid the identified wetlands, wildlife habitat, and the stream corridor. The project follows the objectives of the Waterbury Municipal Plan, Chapter 6. Natural Resources. The project also conforms to the Town of Waterbury Zoning Section 303: 'will not have undue adverse effect on the scenic or natural beauty of the area, historic sites, or rare and irreplaceable natural areas.'" Exhibit 9 at 4-5.

We recognize that the parties' neighborhood includes beautiful areas. Even though the area has been the subject of considerable additional development, it still contains large tracts of undeveloped land that host many types of wildlife and natural areas, such as open field, ponds, and streams.

More to the point of what this regulatory provision appears to seek to protect, there was no credible evidence presented that the proposed subdivision will have "an undue adverse impact" upon the beautiful natural areas in this neighborhood, even if they do not clearly fall within the stated areas that the Regulations define as "significant natural resources."

Regulations § 303(e)(2)(C) provides for similar protection: it directs that a proposed subdivision may only be approved if, in addition to all other stated regulatory provisions, "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, historic sites, or rare and irreplaceable natural areas . . .." Id.

Applicant has designed his proposed subdivision to have little, if any, effect upon the scenic or natural beauty of the area. We were also not made aware of any historic sites or rare and irreplaceable natural areas on the lands of this proposed subdivision or adjoining areas. Further, there was no credible evidence presented that the proposed subdivision would have an undue adverse effect on the scenic or natural beauty, historic sites, or rare and irreplaceable natural areas within this neighborhood. We therefore answer Appellant's Question 3 in the negative.

Question 4: By this Question, Appellant asks "[w]ill the proposed development result in undue light pollution pursuant to Bylaws §303(e)(2)(B)?" Revised SoQ at 2.

This Question addresses development that is not before this Court and, therefore, this Court is without jurisdiction to review. No lighting fixtures are proposed within this subdivision approval application. While future development of these lots may include lighting fixtures, an assessment of that light, and whether it may cause "undue light pollution" is not a proper inquiry in these proceedings. A review of these concerns may be had if and when development of each of the subdivided lots is put before the DRB, or this Court.

We are not here to assess the impacts of a proposed future "development." We are merely here to assess the impacts of this proposed subdivision. There is no credible evidence that the proposed subdivision as proposed will result in undue light pollution. Because Applicant's question here is centered on the possible future "development" of these lots, we conclude that his Question 4 is not justiciable in these proceedings.

Question 5: By this Question, Appellant asks "[w]ill the proposed development have an undue adverse impact on significant natural resources pursuant to Bylaws §1202(a)(5), irreplaceable natural areas under Bylaws §303(e)(2)(C), and/or wildlife travel corridors pursuant to Bylaws §1004(c)(6), specifically critical ecosystems, or wildlife resources, including habitat and travel corridors?" Revised SoQ at 2.

The first two thirds of this question appear to be a repetition of the legal issues posed in Appellant's Question 3. We therefore will not repeat our analysis, but rather refer the reader to our analysis of Question 3, above.

We must add here that in both Question 3 and here in Question 5, Appellant does not focus his query on the impacts from the subdivision proposed in this application, but rather upon the possible impacts that may occur from the future development of these individual lots. As we have stated above, the future development of these lands will be the subject of a future development application. Since no disclosure has been made in these proceedings of what that future development may be, we leave any analysis of the possible impacts that may arise from that future development to those future application proceedings.

This question poses a third query concerning the possible impacts that may be governed under Regulations § 1004(c)(6). We note that Regulations Art. X, of which this section is a part, is entirely focused upon the regulation of "development in higher elevation areas." Regulations § 1000(a). Nonetheless, since Article X "appl[ies] to all development and redevelopment of properties in the Town of Waterbury that are located in the RHS Overlay District" pursuant to Regulations § 1001(a), we will address Applicant's question here.

Appellant has again presented us with a legal issue that we have no authority to consider in this subdivision proceeding as no physical development is proposed. We are not authorized here to consider development or its possible impacts.

Regulations § 1004(c)(6) directs that a "proposed development will be designed and maintained so that there is no undue adverse impact on, or undue fragmentation of, critical wildlife habitat and wildlife travel corridors, unique or fragile resources, or natural and scenic resources." Appellant's question here suffers from the same infirmity that it asks us to assess "development" which we are not authorized to do in these proceedings. This may be an appropriate inquiry for the future proceedings when Applicant or his successors seek approval of specific development plans, but it is not appropriate in these proceedings.

We further note, as stated above, that the proposed subdivision does not contain "critical wildlife habitat [or] wildlife travel corridors" or the other important natural areas that this regulatory provision seeks to protect.

For all these reasons, we conclude that we must answer Appellant's Question 5 in the negative.

Question 6: By this Question, Appellant asks "[w]ill the proposed development have an undue adverse impact on significant natural resources pursuant to Bylaws §1202(a)(5), including specifically the following species: Eastern Whippoorwill, Spotted Turtle, American Marten, foxes, foxes, [sic] Red-tailed Hawks, and Barred Owls?" Revised SoQ at 2.

In our analysis above concerning Appellant's Question 3, we cited the specific concerns detailed in Regulations § 1202(a)(5) concerning the protection of significant natural resources. We concluded that there was no credible evidence presented that the proposed subdivision will have an undue adverse impact upon significant natural resources, particularly since no significant natural resources were identified on or near Applicant's property.

At trial, we did learn of some of the wildlife that inhabits and visits this neighborhood, including the wildlife that Appellant identifies in this question. But we received no credible evidence that the proposed subdivision will have an impact upon that wildlife, and particularly an undue adverse impact, which is what Regulations § 1202(a)(5) seeks to protect against. For all these reasons, we answer Appellant's Question 6 in the negative.

Question 7: By this Question, Appellant asks "[m]ust the Court impose, as a condition of approval, measures to mitigate wildlife displacement as a result of the proposed subdivision?" Revised SoQ at 2. Since there was no credible evidence that the proposed subdivision will cause a measurable displacement of wildlife, we cannot consider imposing any such condition. We therefore answer Appellant's Question 7 in the negative.

We have now addressed all the legal issues that Appellant has presented in this appeal. We therefore turn to the Order that our legal determinations require.

Order

Having concluded that all legal issues presented in this appeal must be answered in Applicant's favor, we conclude that Applicant's proposed subdivision as presented must be **APPROVED**. Based upon the credible evidence presented, we also condition our approval by replicating the conditions imposed by the DRB, which are as follows:

> l. The Applicant shall complete the project in accordance with the Court's findings and conclusions and the plans and exhibits admitted into evidence.
>
> 2. Any future proposal to build on or further subdivide the lots will require DRB review and approval for development or future subdivision.
>
> 3 The conservation easement identified on the Plat shall include language in any conveyance deed concerning Lot 3. Such deed language shall state that there will be no development, as defined by the Waterbury Zoning Regulations, and that such lands shall be conserved in perpetuity. These restrictions shall also be noted on the survey plat.
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> 4. Except as amended herein, this approval shall-incorporate all DRB and Court Findings of Fact, Conclusions of Law, and Conditions in zoning permits #079-16T and #015-17.

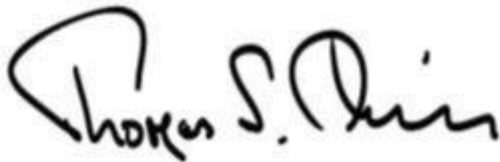
5. The Applicant shall comply with erosion protection and sediment control measures when development commences on the lots.

6. The proposed clearcutting, pre-development and construction activities shall comply with the most current version of the State of Vermont Low Risk Site Handbook for Erosion and Sediment Control, as published by the Vermont Department Environmental Conservation, and other regulations applicable to silvicultural activities.

7. The approved final plat, signed by the DRB Chair (or his designee), shall be duly filed and recorded in the office of the Clerk of the Town of Waterbury, within 180 days from this approval, in accordance with 24 V.S.A. § 4463.

This completes the current proceedings before this Court concerning this appeal. A Judgment Order accompanies this Merits Decision.

Electronically signed at Brattleboro, Vermont on Tuesday, January 3, 2022, pursuant to V.R.E.F. 9(d).



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