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

Docket No. 21-ENV-00007

Stewart d/b/a Premiere Homes of VT Subdivision Permit #04-69

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion 2); Motion to Dismiss and for Summary Judgment (Motion 3)

Filer: Nicholas A.E. Low, Attorney for Applicant David Stewart and Premiere Homes, Inc.

Filed Date: March 12, 2021

Response Memoranda in Opposition filed March 27, 2021, by Brian Harrington, Pro Se

The motions are GRANTED IN PART and DENIED IN PART

Brian Harrington appeals a decision of the Town of West Rutland Development Review Board ("DRB") dated December 14, 2020, approving with conditions the application of David Stewart and Premiere Homes, Inc. (collectively, "Applicant") to amend a prior subdivision and site plan approval for a five-lot subdivision with frontage on Durgy Hill Road and Old Town Farm Road in West Rutland, Vermont, Parcel #22-0120370 ("the Project").[1] Mr. Harrington raises 8 Questions in his Statement of Questions. *See* Statement of Questions, filed Mar. 2, 2021. Applicant has filed two motions which together address all Questions before the Court: the first motion seeks the dismissal of Questions 1–4, 7, and 8 for lack of subject matter jurisdiction pursuant to V.R.C.P. 12(b)(1), and the second seeks summary judgment as to Question 5 and dismissal as to Question 6. Mr. Harrington is self-represented. Applicant is represented by Nicholas A.E. Low, Esq., and the Town of West Rutland ("Town") is represented by Gary R. Kupferer, Esq.

[1] Mr. Harrington's notice of appeal to this Court also purports to appeal the DRB's February 1, 2021, denial of his request for reconsideration. We have held that "the underlying [municipal] decision is not final until [the municipal panel's] decision on the request to reconsider is made." Punderson 2-Lot Subdivision, No. 106-10-18 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Mar. 29, 2019) (Durkin, J.). We have also held that "a DRB's decision to reconsider . . . simply returns the DRB's proceedings on the application to the point before the DRB would have voted on the merits of the application." In re Woodstock Cmty. Tr., Inc., No. 263-11-06 Vtec, slip op. at 10 (Vt. Envtl. Ct. May 10, 2007) (Wright, J.). Thus, the appeal period for the underlying decision is tolled by a proper request for reconsideration, and once a municipal panel has acted on the request one way or the other, this Court may take up a properly filed appeal on the merits of the application. *See* Punderson, No. 106-10-18 Vtec at 1–2 (Mar. 29, 2019).

Legal Standard

When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to V.R.C.P. 12(b)(1), we accept all uncontroverted factual allegations presented by the nonmovant as true and construe them in the light most favorable to the nonmovant. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245 (citation omitted). On a motion to dismiss for lack of subject matter jurisdiction, "consideration of matters outside the pleadings is permissible." Messier v. Bushman, 2018 VT 93, ¶ 12, 208 Vt. 261 (citation omitted).

We will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). We "accept as true the [factual] allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material," and we will give the non-moving party the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356.

Background

The proper resolution of Applicant's motions requires an understanding of the procedural and factual history preceding this appeal. Applicant has attached evidentiary material to its motion to dismiss to support its account of the relevant history. Applicant's motion for summary judgment incorporates the same history and includes a statement of undisputed material facts. Based on Applicant's unrebutted evidentiary production, we consider the following background as it relates to the motion to dismiss. See Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11 ("A court may consider evidence outside the pleadings in resolving a motion to dismiss for lack of subject matter jurisdiction . . .").

In 2005, the West Rutland Planning Commission granted Subdivision Final Plat Approval for the Project, with conditions (Permit #04-69, or the "2005 Approval").[2] Conditions 8, 9, and 10 are relevant here, and required:

> 8. That the applicant's engineer shall certify to the Town that the drainage system is in compliance with [the approved site plan].[3]
>
> 9. That the applicant's engineer shall certify to the [T]own that the Old Town Farm Road ditch has been repaired and is in compliance with the [approved design] with the exception of the concrete headwalls for the existing culverts that will not be built.[4]
>
> 10. That no lot shall be sold until the applicant's engineer certifies the drainage system complete, the escrow account is complete and the payment for the Durgy Hill drainage system is made.

[2] The Town has since established the DRB, which is now the appropriate municipal panel to act on a subdivision application.

[3] According to Applicant's subsequent amendment application and the DRB's decision of December 14, 2020, the site plan incorporated into Condition 8 of the 2005 Approval requires the construction of a concrete headwall at the end of two culverts on Durgy Hill Road.

[4] The Court does not have a full understanding of the facts surrounding the various headwalls for drainage culverts discussed in this case. It appears that the reference to headwalls in Condition 9 relates to culverts adjacent to Old Town Farm Road, while the headwall requirement incorporated in Condition 8 relates to culverts adjacent to Durgy Hill Road.

Both Applicant and Mr. Harrington note that the Project's drainage system, as originally proposed, contemplated the construction of grass and earthen swales on the westerly side of the proposed lots near Old Town Farm Road, along with upgrades and repairs to the existing Old Town Farm Road drainage ditch.

Following the 2005 Approval, Mr. Harrington and others appealed to this Court. On October 13, 2006, Judge Wright issued a Decision and Judgment Order approving the Project ("2006 Approval") and incorporating the terms of a settlement agreement put forward by the parties which included several conditions on 7 handwritten pages ("Settlement"). See In re Premiere Homes of Vermont, No. 186-9-05 Vtec, slip op. at 3 (Vt. Envt. Ct. Oct. 13, 2006) (Wright, J.). The Settlement itself incorporated the terms of the earlier 2005 Approval. Thus, under the 2006 Approval issued by this Court, the Project was subject to the conditions imposed in the 2005 Approval and the additional conditions set forth in the Settlement. No party appealed the 2006 Approval.

As relevant here, page 7 of the Settlement imposed a condition requiring the planting of 25 trees, approximately 8 feet tall and 10 feet apart, along Old Town Farm Road. The plantings were to be done "in consultation with" Applicant's engineer and were "[t]o [b]e planted at the time the seeding of the swale network is accomplished." Mr. Harrington asserts that the tree plantings were included to provide vegetative screening in place of trees that would be removed in the process of constructing the grass swale drainage system. The Settlement also modified Condition 9 of the 2005 Approval to require the construction of concrete headwalls for existing culverts.

As of 2020, none of the Project lots had been sold and the trees had not been planted. Now hoping to start selling the lots, Applicant applied to the DRB on November 9, 2020, for amendments and other determinations related to Conditions 8, 9, and 10 of the 2005 Approval.[5] Applicant sought an amendment to eliminate the requirement for a concrete headwall, which was incorporated into Condition 8. Applicant also sought a determination that the Old Town Farm Road drainage ditch had been repaired and the grass swale drainage system had been completed such that Conditions 9 and 10 were satisfied.[6] The application did not seek to amend the tree-planting condition which was part of the Settlement.

On December 14, 2020, after a hearing, the DRB issued a decision on the application ("2020 Decision"). The 2020 Decision concluded that Conditions 9 and 10 concerning the drainage ditch and grass swale drainage system along Old Town Farm Road had been satisfied. However, the DRB did not grant the amendment eliminating the requirement for a concrete headwall: instead, the 2020 Decision required a bond or escrow deposit for at least 50% of the estimated cost and noted that the mandate for a headwall should remain unless and until Applicant submitted a report to the Town from a Vermont licensed engineer stating that the headwall is unnecessary. Finally, although the application before the DRB did not seek a determination regarding the tree plantings, the DRB acknowledged

[5] As noted above, the 2005 Approval was incorporated into the final 2006 Approval issued by this Court. At that time, the Court should have remanded the matter to the Zoning Administrator to complete the ministerial act of issuing a zoning permit consistent with the Court's decision and judgment order. This would have yielded a permit containing all conditions of the 2005 Approval and the additional conditions imposed by the Settlement. However, it appears that no such action ever occurred. Here, Applicant applied for amendments and other determinations related to Conditions 8, 9, and 10 of the 2005 Approval, which would have the same effect as amending those aspects of the 2006 Approval. We also note that the application discussed other conditions which are not relevant to this appeal.

[6] Condition 10 is particularly important here, as it requires that "no lot shall be sold until the applicant's engineer certifies the drainage system complete."

concerns raised by Mr. Harrington and imposed a new requirement that the trees be planted – along with a bond or escrow deposit for at least 50% of the estimated cost.[7]

Following the 2020 Decision, Mr. Harrington filed a request for reconsideration with the DRB. The Zoning Administrator sent a letter on behalf of the DRB Chair to all parties on February 1, 2021, noting that the DRB had rejected the reconsideration request and declined to hold a hearing ("Reconsideration Decision"). The Reconsideration Decision also stated that the Town had received information from Applicant's engineer, indicating that a concrete headwall was not necessary. Mr. Harrington then filed a notice of appeal to this Court encompassing both the 2020 Decision and the Reconsideration Decision.

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

1. Applicant's November 9, 2020, application does not seek to alter any existing permit conditions regarding tree planting, and does not mention tree planting.[8]
2. The DRB's 2020 Decision nonetheless imposed permit conditions requiring tree plantings and a bond or escrow deposit for 50% of the estimated cost of the plantings.
3. The 2020 Decision also required a bond or escrow deposit for 50% of the estimated cost of installing a concrete headwall and required Applicant to install the headwall unless an engineer certified that it was not necessary.
4. Applicant's engineer analyzed the culvert under Durgy Hill Road and determined that no headwall is necessary.
5. On December 29, 2020, Applicant submitted the engineer's report to the DRB certifying that no headwall is necessary.
6. The DRB acknowledged receipt of this report in its February 1, 2021, Reconsideration Decision.

Discussion

Through two motions, Applicant argues that Questions 1–4, 7 and 8 should be dismissed for lack of subject matter jurisdiction, that the Court should grant summary judgment in its favor as to Question 5, and that Question 6 should be dismissed as moot.[9] We begin with Applicant's motion to

[7] The 2020 Decision noted that tree plantings were included as part of this Court's 2006 Approval. However, the DRB stated: "The Board concludes that its authority does not extend to interpreting, applying, or amending VT Superior Court decisions, lacking clarification or specific instructions from the Court." We intend to provide clarity to the Town in this Entry Order.

[8] Mr. Harrington disputes this characterization. The application sought to have Condition 10 of the 2005 Approval deemed satisfied. Condition 10 requires the grass swale drainage system to be certified as complete before any Project lots can be sold. Mr. Harrington contends that the drainage system cannot be complete, and therefore Condition 10 cannot be satisfied, until the trees are planted. He argues that this is because the 2006 Approval required the trees "[t]o [b]e planted at the time the seeding of the swale network is accomplished." Thus, Mr. Harrington asserts that the application sought to eliminate the tree-planting requirement by seeking a determination that Condition 10 was satisfied.

[9] Mr. Harrington does not number his Questions, and his Statement of Questions includes extraneous explanation and argument. *See, e.g.,* In re Champlain Marina, Inc., No. 28-2-09 Vtec, slip op. at 1-2 (Vt. Envtl. Ct. July 31,

dismiss Questions 1–4, 7, and 8, and then address Applicant's motion for summary judgment and dismissal as to Questions 5 and 6 respectively.

I. Questions 1–4, 7, and 8

Applicant contends that Questions 1, 2, 3, 4, and 7 are outside the scope of this appeal because tree plantings are not part of the present application, and further argues that Question 8 raises a procedural issue which is cured by this de novo proceeding. Mr. Harrington argues that the tree planting requirement imposed through this Court's 2006 Approval is a binding condition incorporated into the subdivision permit for the Project, and that the requirement is inextricably tied to Condition 10 of the original 2005 Approval. Mr. Harrington appears to suggest that the DRB's 2020 Decision effectively waives the tree planting requirement, allowing Applicant to sell Project lots with no assurance that the requirement will ever be fulfilled.

Though we agree with Applicant that Questions 1–4 and 7–8 raise issues beyond the Court's subject matter jurisdiction, we understand Mr. Harrington's concern. Therefore, we will endeavor to be very clear: the outcome of the present appeal does not change the fact that the tree planting requirement incorporated in the 2006 Approval is a final and binding term of Applicant's existing permit. We hope that the discussion below provides clarity to all parties about their rights and obligations moving forward.

2009) (Durkin, J.) (quotation omitted) ("[T]he statement of questions should be a short, concise and plain statement that will establish the scope of the appeal . . .."). We have assigned numbers to the Questions in the order of their appearance, and we interpret each Question as follows:

1. Condition 10 of the 2005 Approval states that "no lot shall be sold until the applicant's engineer certifies the drainage system complete." A condition of the Settlement requires trees "[t]o [b]e planted at the time the seeding of the swale network is accomplished." Is the drainage system complete before the trees are planted?
2. If the tree planting required by this Court's 2006 Approval must be complete before Condition 10 is satisfied, does the DRB lack authority to unilaterally rewrite (and essentially ignore) a prior order and judgment of this Court, one that was issued with the consent of the Town and the developer?
3. The Court's 2006 Approval inextricably ties the planting of the trees to a compliance requirement of the prior 2005 Approval. West Rutland Subdivision Regulations § 480.2 state that plantings required as part of a permit condition must have a 3-year guarantee of survival or replacement agreement with contractor or landscape companies. Should the required tree plantings have this guarantee attached?
4. If the trees are planted, the corresponding requirement of the 2006 Approval will be satisfied. However, future owners of the Project lots may remove the trees. Should a statement in the deeds of lots #2 and #3 be required to protect the plantings, prohibiting removal of the trees until and unless town approval is granted?
5. No party has ever requested, suggested, or offered bond posting as an alternative to the physical planting of trees. Yet the DRB's 2020 Decision included a required bond or escrow deposit for at least 50% of the estimated cost of the required work. Is this offer of a bond – never requested, discussed, or suggested, allowed and appropriate?
6. If the DRB bond is allowed, should the value of the bond required be at least 100% of the cost?
7. If the bonding is permitted, should the sale of lots #2 and/or #3 include the right of the developer or landscape contractor to access those lots and perform activities to plant and maintain the trees as needed? Did the DRB err in not requiring this deed stipulation?
8. Whether the DRB Chair may – without holding a hearing, without making the findings required under 24 V.S.A. § 4470, and without receiving a vote of the majority of the DRB – deny a request for reconsideration under section 4470, when such request was sought to address a new issue that the DRB itself created?

See Statement of Questions.

Question 1 asks whether the Project's drainage system can be complete before the required tree plantings are complete. *See* Statement of Questions. In essence, Question 1 relates to Mr. Harrington's argument that Condition 10 of the 2005 Approval cannot be satisfied until the tree planting requirement from the 2006 Approval is fulfilled. Due to the unique nature of this appeal, the answer to the Question explains why it is outside the scope of review.

As noted in our background discussion, the final 2006 Approval for the Project incorporated all conditions of the 2005 Approval and the additional conditions imposed by the parties' Settlement, the terms of which were incorporated into the Court's final Order. It appears that this was never memorialized in a consolidated permit setting forth all applicable conditions. Thus, the 2006 Approval effectively created two sources of binding conditions for the Project: (1) the terms of the 2005 Approval, and (2) the terms of the Settlement and the resulting Court Order.

Condition 10 of the 2005 approval states that "no lot shall be sold until the applicant's engineer certifies the drainage system complete," while page 7 of the Settlement states that trees are "[t]o [b]e planted at the time the seeding of the swale network [drainage system] is accomplished." Mr. Harrington contends that the tree planting requirement was intended to be tied to Condition 10, such that no lots could be sold until the trees were planted. Yet, we agree with Applicant that there is nothing in the language to tie one condition to the other: the fact that the trees were to be planted at the same time as the completion of the drainage system does not mean that the drainage system was dependent on the trees. Indeed, Mr. Harrington has made it clear that the trees were for visual screening, and there is no suggestion that the trees had any relevance to the drainage system whatsoever.

We conclude that Condition 10 of the 2005 Approval and the tree planting requirement on page 7 of the Settlement are separate conditions – though both are incorporated into the final 2006 Approval of the Project. The application at issue in this appeal sought certain determinations with respect to Condition 10. The application did not include any requests regarding the tree plantings or any other conditions of the Settlement.

The Environmental Division is a Court of limited jurisdiction. In this case the scope of our subject matter jurisdiction, and our review, is confined to those issues the municipal panel below addressed or had the authority to address when considering the original application pending before the DRB in 2020. *See, e.g.*, In re Torres, 154 Vt. 233, 235 (1990) ("The reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broader."). "Thus, we may only address legal issues if they are within the scope of [the application] and the DRB had the authority to address them." *See* Wolcott SD Final Plat Denial, No. 57-8-20 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2021) (Walsh, J.). As the tree planting condition is outside the scope of the application currently before us, we conclude that issues related to the tree plantings are outside the scope of our review and beyond our subject matter jurisdiction to address. *See, e.g.*, In re Transtar, LLC, No. 46-3-11 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. May 24, 2012) (Durkin, J.). Therefore, we conclude that Question 1 is outside the scope of review.

Mr. Harrington's Question 2 suggests that the DRB, through its 2020 Decision, ignored and effectively waived the tree planting requirement. *See* Statement of Questions. Question 2 is outside the scope of review in this appeal for the reasons set forth above: the planting requirement is not at issue in the application currently before us. *See* id.; Wolcott, No. 57-8-20 Vtec at 3 (Mar. 4, 2021). Furthermore, this is a de novo appeal "where the case is heard as though no action whatever has been held prior thereto." Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) (quotation omitted). Because the Court must hear the evidence anew and make its own determination as to the merits of

the application, we do not consider the propriety of the preceding DRB decision. *See* In re Bissig Subdivision Final Plat, No. 87-7-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Dec. 23, 2013) (Durkin, J.) ("[A] determination of the DRB's authority or the propriety of their conclusion is generally beyond the scope of our review."). For these reasons, we conclude that Question 2 is also outside the scope of our review.

Questions 3, 4, and 7 relate directly to the tree plantings, asking whether additional conditions or guarantees should be imposed to ensure their installation, longevity, and proper maintenance. *See* Statement of Questions. These Questions are outside the scope of the application, and as such they are outside the scope of review; thus, we conclude that Questions 3, 4, and & 7 are beyond our subject matter jurisdiction. *See* Transtar, LLC, No. 46-3-11 Vtec at 4 (May 24, 2012); Wolcott, No. 57-8-20 Vtec at 3 (Mar. 4, 2021).

Question 8 asks whether the DRB Chair may deny a request for reconsideration, without a hearing and without a majority vote of the DRB members. *See* Statement of Questions. Although the Court has no information to suggest that the DRB's procedure was inappropriate, the Question alleges some impropriety in the decision-making process. Applicant contends that Question 8 is rendered moot by the de novo nature of this appeal. We agree that any harm arising from the alleged impropriety is cured by this Court's de novo review, which requires us to consider the application and evidence anew. *See* In re JLD Props. of St. Albans, LLC, 2011 VT 87, ¶ 10, 190 Vt. 259 (indicating that "a de novo hearing would cure any harm resulting" from a conflict of interest below). To the extent Mr. Harrington is asking whether the decision itself was in error, that issue is also outside the scope of our review. *See, e.g.*, In re Freimour & Menard Conditional Use Permit, No. 59-4-11 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. June 6, 2012) (Durkin, J.) ("[W]e do not address questions seeking our review of the propriety of actions previously taken. . .."). We therefore conclude that Question 8 is outside the scope of review.

For the reasons above, we conclude that Questions 1–4, 7, and 8 are outside the scope of review and beyond our jurisdiction to address in this appeal. We therefore conclude that Questions 1, 2, 3, 4, 7, and 8 must be **DISMISSED**.

II. Questions 5 and 6

Applicant's motion for summary judgment and dismissal seeks judgment in its favor as to Question 5, and the dismissal of Question 6, claiming it is moot. Question 5 asks whether the new condition imposed in subpart (f) the DRB's 2020 Decision, which requires a performance bond or escrow deposit for 50% of the estimated cost of the tree plantings, is "allowed and appropriate." *See* Statement of Questions. Though Mr. Harrington argues to the contrary, we have already concluded that the issue of tree plantings is not part of the application before the Court and is outside the scope of review.[10] Because the plantings are outside the scope of review, Applicant contends that neither the DRB nor this Court have jurisdiction to impose a condition requiring a related bond or escrow payment. Applicant asks us to strike the DRB's bond or escrow requirement for the trees.

Both Applicant's argument and Question 5 itself are phrased in a way which conflicts with the confines of our de novo review. In de novo review, this Court evaluates zoning applications anew as if there were no prior proceedings. 10 V.S.A. § 8504(h); V.R.E.C.P. 5(g); In re Cote NOV, No. 273-

[10] As we discussed above in the context of Applicant's motion to dismiss Questions 1–4, 7, and 8, the 2006 Approval incorporates both Condition 10 of the 2005 Approval and the tree planting requirement imposed by the Settlement. However, both are separate conditions of approval. Mr. Harrington has not provided a sufficient reason to credit his assertion that the two conditions are interdependent such that they must be considered together.

11-06 Vtec, slip op. at 3 (Vt. Envtl. Ct. Aug. 22, 2007) (Durkin, J.). This wipes the slate clean of conditions imposed by the municipal panel below when those conditions are appealed. Thus, a party who wants to preserve any appealed conditions must resubmit them for consideration by this Court. We can impose the same conditions, modify them, or decline to condition the application at all. *See, e.g.*, In re Torres, 154 Vt. 233, 236 (1990) ("[W]hatever the [relevant municipal panel] might have done with an application properly before it, the superior court may also do if an appeal is duly perfected.").

Implicit in Mr. Harrington's Question 5 is the question whether a condition requiring a bond or escrow payment for the tree plantings should be reinstituted by this Court on appeal. For this reason, we evaluate the condition as if Mr. Harrington presented it to us for reconsideration in our de novo review. Likewise, we interpret Applicant's motion for summary judgment to argue that the Court lacks authority to impose conditions related to the tree plantings in this appeal. Because the Court has the same authority to act as the municipal panel below, and because we conclude that the issue of tree plantings is outside the scope of review for the DRB and this Court, we further conclude that the Court lacks authority to impose any conditions related to the tree plantings. Applicant's motion for summary judgment on Question 5 is therefore **GRANTED** to the extent it argues that the Court cannot impose any conditions with respect to the tree plantings.

Applicant's motion also appears to seek judgment on Question 5 as to conditions imposed in the DRB's 2020 Decision which relate to a concrete culvert headwall. Subpart (b) of the 2020 Decision requires the construction of a headwall unless Applicant's engineer certifies that no headwall is necessary, while subpart (f) includes a requirement for a performance bond or escrow deposit for 50% of the estimated cost of the work. Applicant asks the Court to determine that subpart (b) is satisfied, and that subpart (f) is moot as it relates to the headwall. Just as this Court's scope of review is limited by the application before us, it is further limited to the issues raised in the Statement of Questions. *See* In re Garen, 174 Vt. 151, 156 (2002) (noting that an appeal to Environmental Division is confined to the issues raised in the Statement of Questions); *see also* In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190 (the Environmental Division may consider matters intrinsic to the statement of questions, even if they are not literally stated). Mr. Harrington's Question 5 appears directly aimed at the issue of the tree plantings, not the culvert headwall requirement. *See* Statement of Questions. In fact, there is no mention of the headwall issue anywhere in Mr. Harrington's four-page Statement of Questions or his various arguments. *See* id. As the Statement of Questions does not raise the issue, and Applicant has not filed a cross-appeal, we conclude that the headwall requirements are outside the scope of review and beyond our jurisdiction here. *See* Garen, 174 Vt. at 156; Jolley Assocs., 2006 VT 132, ¶ 9. Applicant's motion for summary judgment is **DENIED** to the extent it relates to culvert headwall requirements. Further, since Appellant's Statement of Questions does not raise any challenge to the conditions the DRB imposed concerning a concrete culvert headwall, those conditions remain unchanged by this appeal.

Finally, Applicant argues that Question 6 should be dismissed as moot. Question 6 asks: if the condition requiring a bond for the cost of the tree plantings is allowed, should the value of the bond be at least 100% of the cost? *See* Statement of Questions. We have concluded that this Court lacks the authority to impose conditions related to the tree plantings in this appeal. As we cannot impose a condition requiring a bond or escrow payment for the plantings, we conclude that Question 6 is **MOOT**.

At this point it is important that we clarify how the various approvals in this case's history impact the parties' rights and obligations. Mr. Harrington is understandably concerned that he will be left with no recourse to enforce the requirement for 25 trees to be planted along Old Town Farm Road; a requirement which was incorporated into the 2006 Approval. The Town, for its part, has

indicated that it is reluctant to wade into the details of the 2006 Approval without further instructions from the Court. Based on the information before us, we offer the following thoughts.

The 2006 Approval issued by this Court has the same force and effect as an approval issued by the DRB. In de novo zoning appeals, this Court sits in the shoes of the DRB, thus its decisions are made in place of the DRB. No party appealed the 2006 Approval, therefore it is final and binding, and may only be altered if the circumstances warrant the grant of a permit amendment. *See* In re Hildebrand, 2007 VT 5, ¶ 12, 181 Vt. 568 (2007) (discussing the finality requirement of 24 V.S.A. § 4472). To avoid the confusion we now face, the Court in 2006 should have remanded the matter to the Zoning Administrator to issue a permit consistent with the Court's decision. However, the fact that this was not done has no impact on the enforceability of the 2006 Approval as the final and binding zoning approval for the Project.

As explained in the background discussion above, the 2006 Approval incorporated all conditions of the 2005 Approval, and all conditions of the Settlement. Therefore, after 2006 the Project was required to meet all conditions of the 2005 Approval and the Settlement, unless and until any amendments were granted. To be clear, these conditions are permit conditions because they are incorporated into the final and binding subdivision and site plan approval issued by this Court in 2006.

Municipal zoning permit conditions run with the land: they are binding on the applicant as well as any successors in interest. *See* Hannaford SD Revision, Nos. 68-5-14 Vtec, 69-5-14 Vtec, 70-5-14 Vtec, slip op. at 12 & n.5 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2016) (Walsh, J.) ("Municipal land use permits apply to and run with the land."); Zins 2-Lot Subdivision Denial, No. 115-10-19 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. Dec. 15, 2020) (Durkin, J.) (quoting Hildebrand, 2007 VT 5, ¶ 11) ("Failure to appeal a permit condition 'binds the successor in interest.'"). Thus, the conditions incorporated into the 2006 Approval are binding on Applicant and any future owners of the Project lots. *See* Zins, No. 115-10-19 Vtec at 6–7 (Dec. 15, 2020) (noting there was "no dispute" that the applicant was bound by the terms of the original subdivision permit that created his parcel). This includes the condition on page 7 of the Settlement requiring the planting of trees.

While Applicant has apparently failed to comply with this simple planting requirement for over a decade, Mr. Harrington and the Town should be aware that the requirement may be enforced by the Town regardless of who owns the subject property.[11] Mr. Harrington has recourse by way of a request to the Zoning Administrator to enforce the terms of the 2006 Approval. *See* In re Minor Subdivision Plot Approval No. 88-340, 156 Vt. 199, 202 (1991) ("A violation of a condition of a subdivision permit would be a violation of the zoning ordinance itself."). This Court also retains the authority to enforce the Settlement. *See* Newbury v. Celeste, No. 50-3-10 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. July 28, 2010) (Wright, J.) (citation omitted) ("If the settlement had been . . . incorporated into a court order, then the Court would have authority directly to enforce its terms, through a contempt proceeding or other post-judgment proceeding.").

Though it appears that the Zoning Administrator has authority to enforce the tree planting condition, we note that this authority is time-bound. The condition arises from the 2006 Approval and Order, which was issued October 13, 2006. In re Premiere Homes, No. 186-9-05 Vtec (Vt. Envtl. Ct. Oct. 13, 2006). Pursuant to 24 V.S.A. § 4454(a), an enforcement action must be instituted "within 15 years from the date the alleged violation first occurred, and not thereafter." If an enforcement

[11] While we hope to provide some clarity, the Court does not and cannot reach a final determination on any of these broader issues in the context of this appeal. Our discussion here simply lays out the principles which, in the absence of other complicating factors, appear to govern the parties' rights and obligations.

action is not initiated before October 13 of this year, 2021, the statute of limitations may bar the Town from pursuing the issue at a later date. *See* 24 V.S.A. § 4454(a).

It is worth reiterating that this current proceeding involves Applicant's most recent amendment application, which related only to the terms of the 2005 Approval. No changes have been requested or made regarding the conditions of the Settlement. The 2006 Approval, incorporating both the 2005 Approval and the Settlement, is still in effect. Therefore, following this Entry Order, the Project is subject to: (1) all conditions of the Settlement (2) all conditions of the 2005 Approval which were not amended by the DRB's 2020 Decision; and (3) all conditions of the 2020 Decision which are not inconsistent with this Entry Order. We encourage the Zoning Administrator to consider issuing a clarifying zoning permit incorporating all of the above.

Conclusion

For the foregoing reasons, we conclude that Questions 1–4, 7, and 8 are outside the scope of review and beyond our jurisdiction to address in this appeal. Applicant's motion to dismiss is therefore **GRANTED.** Questions 1, 2, 3, 4, 7, and 8 are **DISMISSED**.

We further conclude that Applicant motion for summary judgment on Question 5 is **GRANTED** to the extent Applicant argues that the Court lacks jurisdiction in this proceeding to impose conditions related to preexisting tree planting requirements that were not raised in the 2020 amendment application.

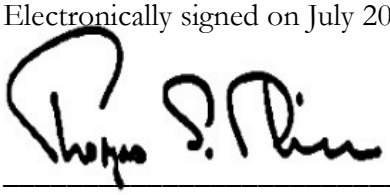
The Court also lacks jurisdiction to consider issues relating to culvert headwall requirements imposed by the DRB's 2020 Decision, therefore Applicant's motion for summary judgment on Question 5 is **DENIED** to the extent it relates to headwall requirements.

Question 5 is answered as follows: Applicant's November 9, 2020, application does not request any amendments or determinations regarding preexisting tree planting requirements, thus there is no authority to consider the issue and it is not appropriate to impose conditions or render determinations with respect to the tree plantings.

Finally, we conclude that Question 6 is **MOOT**. This resolves all legal issues presented in the appeal now before the Court. A Judgment Order accompanies this Entry Order.

So Ordered.

Electronically signed on July 20, 2021, at Burlington, Vermont, pursuant to V.R.E.F. 7(d).



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Thomas S. Durkin, Superior Judge
Environmental Division