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

Benson Road Site Plan & Cond. Use Application (Application No. 2020−05−034)	**Docket No. 20-ENV-00023**

DECISION ON THE MERITS

Jeffrey Nyewide ("Applicant") owns three adjoining parcels of land off Benson Road in the Town of Manchester. In the aggregate, Applicant's three parcels contain a total of just under 54 acres of land. The previously developed parcel currently hosts a renovated farmhouse, barn, and associated out buildings. The parcels also host a falconry school. The combined properties have an E-911 address of 507 Benson Road in Manchester.

Applicant seeks permit approvals to further develop his to-be-combined properties with what Applicant refers to as an "eco resort," which would include renovation of many of the existing buildings, construction of 43 one-bedroom (double occupancy) camp shelters, and various support infrastructure to help guests enjoy and interact with the natural settings on the property. The proposed improvements would also allow Applicant to host various events, such as weddings, corporate retreats, cultural gatherings, and business conferences.

The Town of Manchester Development Review Board ("DRB") conducted hearings over four days, beginning on June 10, 2020, and continuing on July 1, August 5, and September 2, 2020; the DRB also conducted site visits on June 18, 19, and 25, 2020. On October 15, 2020, the DRB issued its Decision, granting conditional use and site plan approval for Applicant's proposed resort, subject to 31 specified conditions.

On November 10, 2020, Brian Benson, Susan Benson, John Benson, Donna Benson, and Mary Benson Herba (collectively "Appellants" or "Neighbors"), filed a timely appeal from the DRB's conditional use and site plan approvals. Neighbors filed a Statement of Questions on November 25, 2020. On December 14, 2020, Applicant filed a timely cross-appeal. In his Statement of Questions, Applicant gave notice that he only objected to a single condition imposed by the DRB (Condition #4), which required Applicant to re-apply to the DRB for approval of future events planned for the

resort that would anticipate a number of attendees in excess of the resort's capacity for overnight guests.

The parties endeavored to resolve their legal differences through private pre-trial settlement discussions but could not reach agreement on settlement terms. They also could not agree on whether the Court should order the parties to engage a mediator and complete that mediation process, so the Court declined to enter a mediation directive. Once the parties completed the discovery process, Appellant Neighbors filed a motion for summary judgment on some, but not all of the legal issues presented in their Statement of Questions (specifically, Questions 1, 2, 3, 5, 11, 13, 14, and 15). By Decision filed on December 2, 2021, this Court granted, in part, Appellant Neighbors summary judgment on their Question 1, which asked how lot coverage and density should be calculated. See Benson Rd. Site Plan and Cond. Use Appeal, No. 20-ENV-00023, slip op. at 11 (Vt. Super Ct. Envtl. Div. Dec. 2, 2021) (Durkin, J.) [hereinafter "2021 SJ Decision"]. We address these lot coverage and density issues in more detail in our Discussion section.

The Court also concluded that summary judgment must be granted, in part, to Appellant Neighbors as to their Question 11, ruling that "Applicant must submit his specific plans for off-site parking for large events if he continues to seek approval [at trial] for hosting such events as part of this application." 2021 SJ Decision at 21. But we declined Neighbors' request that we deny the pending application in total on the basis that Applicant had yet to submit a specific off-site parking plan to the DRB. Rather, we concluded that, if Applicant continued to rely upon off-site parking for large events, he must submit such a plan at the trial before this Court. Id.

In all other respects, the Court denied Neighbors' summary judgment request as to Questions 2, 3, 5, 13, 14, and 15. The Court then directed the parties to prepare for trial.

The Court conducted an extensive site visit on June 14, 2022, to Applicant's properties and walked past the Neighbors' properties. Then, the Court conducted a merits hearing over two days on June 28 and 29, 2022. Thereafter, the parties requested an opportunity to submit post-trial memoranda, including proposed Findings of Fact and Conclusions of Law. Those filings were completed on Friday, August 12, 2022; this matter then went under advisement the following Monday: August 15, 2022. Other commitments delayed the Court's research and drafting of this Merits Decision. The Court offers its apology to the parties and their attorneys for its delay.

Neighbors are represented in this matter by Nicholas AE Low, Esq. Until just recently (including during the merits hearing) Applicant was represented by Christopher D. Roy, Esq.

Applicant is now represented by attorney Hans Huessy, Esq. The Town is represented by James F. Carroll, Esq.

Findings of Fact

Based upon the credible testimony and other evidence presented at trial, including that which was put into context by the site visit, the Court renders the following Findings of Fact, Conclusions of Law, Order, and the Judgment Order that accompanies this Merits Decision.

I. Appellants' and Applicant's Existing Properties

1. Applicant Jeffrey Nyewide ("Applicant") owns three adjoining parcels of land located off of Benson Road in the Town of Manchester, Vermont ("Town"). These properties are located in the easterly portion of Town, several miles south of the junction of Vermont Route 30 and U.S. Route 7. The properties are accessed from East Manchester Road, as that Road travels south from Vermont Route 30. Benson Road is accessed via Glen Road, which travels south from East Manchester Road.

2. Appellants Brian Benson and Susan Benson own and reside at a residentially developed parcel on the easterly side of the intersection of Glenn and Benson Roads. Appellants John Benson and Donna Benson own and live at the adjoining residentially developed parcel on the northerly side of Benson Road. These two parcels are roughly 500 feet from U.S. Route 7 and about 1,500 feet from the western-most portion of Applicant's developed property.

3. Appellant Mary Benson Herba owns undeveloped land on the northerly side of Benson Road, adjoining the easterly boundary of Applicant's properties. Ms. Benson's undeveloped property is partially depicted on the Exhibit 4 survey, described below.

4. Applicant's three parcels are depicted as of February 5, 2020. Ex. 4. As one travels to Applicant's properties on Benson Road, they first enter onto Applicant's smallest parcel, containing approximately 0.39 acres and identified as Parcel #2 on the Exhibit 4 survey. Parcel #2 is undeveloped, save for an area labeled "Dumpster Area." Adjacent to that parcel is an approximately 3.20 acre parcel, labeled as Parcel #3 on the Exhibit 4 survey. Parcel #3 is minimally developed, with a cottage and three "Weathering Buildings." These Weathering Buildings are home to a pre-existing falconry school. The common boundary between Parcels 2 and 3 marks the end of the public roadway known as Benson Road; the road continues with that same name, onto Applicant's properties as a private road.

5. Continuing easterly on the private portion of Benson Road, a traveler enters onto Applicant's main parcel, labeled as Parcel #1 on the Exhibit 4 survey. Parcel #1 contains approximately 50.01 acres and is developed with a trout pond, a spring house, a main farmhouse, a large renovated barn, a

garage, a tennis court, bee hives, and several smaller out and animal buildings. Parcel #1 also contains large pastures and large wooded areas. The northerly boundary of Parcel #1 partially follows along a meandering brook, known as Bourn Brook.[1] There are several existing trails and woods roads running throughout Parcel #1.

6. Applicant's three parcels are commonly known as the Bourn Brook Farm.

7. Given that the public portion of Benson Road ends at the common boundary of Applicant's Parcels 2 and 3, and that the terminus of the private portion of Benson Road ends within Applicant's Parcel 1, Benson Road experiences relatively light traffic.

8. Applicant's properties sit mainly in the Rural Agricultural Zoning District ("RA District"), with a small portion (about 1.34 acres, being at the far easterly portion) located in the Forest Conservation Zoning District. All proposed developments, including a proposed "Summit Outpost Pavilion," are in the RA District. See Ex. 39 (showing the proposed Master Site Plan).

9. The entire property sits in Zone B of the Aquifer Protection Overlay Zoning District. Some portions of the property also sit in the Flood Hazard Overlay Zoning District.

10. Applicant also owns a fourth parcel of land, located to the south and east of Applicant's Parcel #1. This fourth parcel contains approximately 16.58 acres of mostly wooded, undeveloped land that Applicant occasionally uses to harvest firewood. This fourth parcel is not part of Applicant's proposed project.

II. Applicant's Proposed Development

11. Applicant filed an amended application with the DRB on June 26, 2020, for conditional use and site plan approval to develop an "eco-resort" on his properties. Ex. 10 (Applicant's amended application).

12. Applicant has tentatively named his proposed project the "Green Mountain Reserve, an Eco Retreat at Bourn Brook Farm" (the "Resort").

13. A significant amount of the required infrastructure and Project components are already in place on the Property. The pre-existing improvements on the property will be incorporated into the new resort development. These existing on-site improvements include the following:

a) Access driveway from a town road (Benson Road) onto the property.

b) Completely renovated farmhouse, to be further renovated to host three guest rooms.

[1] On various reports, narratives, and other exhibits accepted into evidence, two variations on the spelling of the name of this brook are offered: "Boorn" and "Bourn" Brook. We have chosen to use the latter.

c) Completely renovated barn suitable for conferences and social gatherings.

d) Communal firepit/terrace

e) The Green Mountain Falconry School

f) Event tent pad site (50' x 100')

g) Garage/barn suitable for conversion to recreation use.

h) Outdoor garden space enclosed by stone walls suitable for gatherings.

i) Outdoor tennis court.

j) Emergency generator sized to power all existing structures.

k) Hiking trails, woods roads, and stone walls throughout the property.

l) Approximately 4,000 linear feet of frontage along Bourn Brook.

m) Combination of open pasture and woodlands with panoramic views to Mt. Equinox.

n) Connection to Lye Brook Falls Wilderness Reserve and the adjacent Green Mountain National Forest.

o) On-site apiary and honey processing.

p) On-site livestock pen with goats and chickens.

q) Water supply well and septic systems for existing structures.

r) New well (recently drilled) to serve the proposed new structures.

s) Sites for additional on-site septic systems for new structures (tested for suitable percolation and conformance with applicable state regulations).

14. Applicant's properties are approximately 2.2 miles to roundabout in downtown Manchester.

15. Proposed improvements to the property are relatively modest, particularly in light of the size of the combined parcels and the amount of pre-existing development.

16. Including the existing and proposed improvements, less than 5 acres of the approximately 54 acres on Applicant's combined parcels will be utilized for buildings and paved parking, vehicle access roads, and cart trails. The balance of 49 acres will remain as open and wooded spaces.

17. The proposed improvements include the following:

a) Interior renovations to the existing farmhouse will include a commercial kitchen, fine dining private restaurant, common areas, and three private guest rooms.

b) Interior renovations to existing barn will accommodate conference space and a small bar which would include up to 30 seats.

c) Renovations to existing garage/barn for outdoor recreational center/snack shack.

d) New access driveway, staff parking areas, and guest parking areas, all of which will be topped with pervious material suitable for the driving and parking of vehicles.

e) Grass parking area for special events parking.

f) Forty-three (43) one-bedroom mobile Camp Shelters of a "tiny house" design.

g) Sugarhouse/Educational Building (750 SF).

h) Pond Outpost Snack Shack (240 SF) and riverside yoga platform.

i) Covered trash management center with recycling and composting.

j) Greenhouse (240 SF) and outdoor organic garden adjacent to the farmhouse.

k) Storage & Maintenance Barn (1,460 SF).

l) Staff/Vendor Parking area (24 spaces)

m) Electric cart charging area.

n) Yard game pavilion (800 SF).

o) Another yard game area with croquet court, bocce court, and horseshoe pits.

p) Guest parking area (44 spaces)

q) Fenced dog run adjacent to guest parking area.

r) A new 4,500 square-foot Lodge Building, to provide areas for Guest Check-in Reception, a food & beverage area, kitchen, concierge, spa treatment rooms, restrooms, and an outdoor deck.

s) Communal firepit/terrace adjacent to Lodge Building.

t) Additional event tent pad (80' X 160')

u) Yoga/event pavilion (900 SF).

v) Water supply pumphouse (400 SF).Summit outpost pavilion (900 SF).

w) 8' wide gravel cart/walking paths throughout property.

x) Water supply system connected to new on-site well.

y) In-ground septic systems to serve new Lodge Building and Camp Shelters.

18. All the existing and proposed improvements are depicted on the site maps. See Exs. 5–8.

19. All utility lines and water and sewer lines will be installed underground to the Lodge Building and Camp Shelters.

20. Total proposed overnight occupancy for the completed redevelopment of the site is 43 double occupancy rooms/shelters and the three guest rooms in the renovated farmhouse, all of which could house up to 96 persons.

21. When guests arrive, they will be asked to park their vehicles in the visitor/guest parking areas and use electric carts to travel to their assigned Camp Shelters and other on-site accommodations. This practice will minimize vehicle emissions on site, preserve the pervious surfaces of the interior roadways, and thereby help reduce gas-powered engine emissions and erosion.

22. The Camp Shelters are to be built on a steel chassis with wheels and elevated peers, with no permanent foundations. The Shelters will be connected to water supply and septic system lines, as well as electrical power and other utilities.

23. Each shelter will contain about 500 square feet of interior living space, and will be elevated, with mulch spread on the ground beneath each shelter to assist with drainage and erosion protection.

24. The Camp Shelters will be mostly located in the wooded portions of Parcel #1 and sufficiently dispersed so as to provide guests with privacy and tranquility. The location of each Camp Shelter is depicted on Exhibits 5 through 8, inclusive. Applicant's proposed master site plan, admitted at trial as Exhibit 39, provides a detailed identification of the location of the individual camp shelters, as well as the other existing and proposed improvements to the site.

25. All proposed improvements conform to the setback minimums established in the Bylaws. See Ex. 39.

26. The Bylaws require a minimum of 69 parking spaces to support the existing and proposed site improvements. Applicant proposes 140 spaces to accommodate overnight guests, support staff, reception areas, restaurants, and other on-site activities. Id. These parking totals do not include the separate parking area for large events, detailed below at ¶ 34(e).

27. Applicant also plans for the Resort to host small daytime activities that attract members of the community not staying overnight at the Resort (such as yoga, beekeeping, maple sugaring, composting demonstrations or workshops, falconry school). During times when the Resort is not at full occupancy, lodge parking or farmhouse parking will be used for such events.

28. None of the Camp Shelters or other improvements will be located on steep slopes (regarded as lands with a natural pitch of more than twenty percent (20%). Some of the Camp Shelters will be located above or next to steeply sloped areas, so as to afford beautiful views of the surrounding areas. The areas of steep slopes, as well as the limits of disturbance, including during the construction phase of the project, are detailed in Exhibits 30 and 31.

29. The proposed camp shelters resemble what is commonly referred to as tiny houses. All camp shelters are proposed to be built on an elevated steel chassis with wheels and no permanent foundations; to be connected to power, other utilities, water supply and septic systems; and to have enclosed living areas. Standard shelters will have a full bathroom, sleeping area, sitting area, and small outdoor decks. Deluxe shelters will have the same plus a living space under an overhead canvas on a wood deck and an outdoor hot tub.

30. Applicant's proposed existing and new on-site road and trail features include a mix of gravel and pervious paved surfaces. Applicant's proposed parking and service areas will also include a mix of grass and pervious paved surfaces, thereby assisting in the reduction of possible stormwater runoff. Details of the pervious surfaces on roadways, cart trails, and parking areas are credibly depicted by Applicant's engineer in his report. Ex. 41.

31. In anticipation of the increased traffic to and from Applicant's property, Applicant has agreed to reimburse the Town for needed improvements to both Glenn Road and Benson Road. Those planned improvements are detailed in a Roadway Improvement Agreements entered into between Applicant and the Town. See Ex. 25.

32. The Roadway Improvement Agreement calls for the Town to complete the following roadway maintenance and improvements and for Applicant to reimburse the Town for the cost of these improvements:

1. Widening the existing portions of Glenn and Benson Road to 20 feet (existing widths now are about 16 feet wide).
2. Upgrading the existing, unpaved portion of the public section of Benson Road and then installing pervious pavement.
3. Modifying the existing 36" culvert that passes under Benson Road, install a new concrete headwall on the southern side of the Road, and replace the rip rap on the northern side of the Road with larger rectangular stones to create a headwall on the northern side of the Road.
4. Install approximately 165 feet of metal and steel guardrails along the northern shoulder of the roadway near a steep bank.

Ex. 25 at 1–2.

33. Applicant's engineers provided a stormwater management plan for inclusion with the amended application. This plan stated that the pervious pavement to be used "cannot take extremely heavy loads, large sand spreading in winter, or heavy salt use and continue [to] maintain its integrity and environmental friendliness." Applicant's engineer therefore recommends against such activities on anything but an occasional basis.

34. Prior to the conclusion of the DRB hearings, Applicant presented revisions to his proposed development plans in an effort to address concerns expressed by Neighbors and Town and State officials. Those revisions were included in the presentation to this Court and included the following:

a. Applicant shall reimburse the Town for the cost of widening and paving Glen Road and Benson Road and agreed that the to-be-reimbursed road work shall include (1) widening of the access road onto Applicant's property from 16 feet to 20 feet, and (2) paving.
b. Applicant add a new gravel pad for fire truck access to the dry hydrant adjacent to the trout pond.

c. The primary cart paths to the cabin sites will be widened from 6 feet to 10 feet, so as to ease access for emergency vehicles.

d. In response to Neighbors' expressed concerns, the shuttle drop-off/turnaround will not be expanded and will remain as it exists today.

e. In response to Neighbors' expressed concerns, the proposed event parking area has been reduced in size from a 100-space grass parking area to a 40-space grass parking area.

f. In response to Neighbors' expressed concerns, the guest parking area was shifted 5 feet further from the property line to meet the 20-foot setback.

g. In response to Neighbors expressed concerns, the Summit Outpost Shelter was reduced in size from 900 SF to 500 SF.

h. In response to concerns expressed by Neighbors and the DRB about lot coverage, the proposed new access drive, parking areas, and cart paths will all be constructed of pervious paving, thereby affording Applicant a 50% reduction in the calculation for lot coverage purposes.

i. In response to feedback from state ANR representatives and after confirmation of the river corridor setback, three proposed cabins, the yoga platform, and some of the proposed cart paths were relocated to be outside of the river corridor setback that was clarified by state officials during an on-site visit.

j. After locating and mapping the wetlands on the property, the access road, event parking area, staff parking area, and the storage/maintenance barn were slightly relocated to limit their impacts to any wetlands down to a small area of a Class III wetland and a small portion of the Class II wetland buffer. This was also to address a concern of the neighbors.

k. The proposed Lodge building was reduced in size from 6,000 SF to 3,600 SF.

l. The storage/maintenance barn was increased in size from 1,460 SF to 2,600 SF.

m. The proposed Sugar House and Snack Shack have been combined and renamed as the Pleissner Outpost Building.

n. A proposed sauna hut and four (4) housekeeping sheds have been added to the plan.

o. The seating for the fine dining restaurant to be in the existing farmhouse has been increased from 16 to 30 seats and is to be open to the public, as invited guests of the Eco Resort customers. The traffic analysis was updated accordingly.

p. Three of the six guest suites proposed in the existing farmhouse have been replaced with three additional modular cabins, bringing the cabin total to 46 units, and reducing the farmhouse guest room total to three rooms.

q. The event tent pad with a seating capacity of 400 people that was previously shown in the lower meadow near the proposed lodge building has been eliminated.

35. Applicant has secured the following necessary state approvals and permits for his proposed development:

a. None of the proposed improvements will encroach into any Class II (i.e.: protected) wetlands. A small portion, totaling 6,468 square feet of the buffer to a Class II wetland will be impacted by planned work to widen the roadways, relocate the falconry sheds, and install a fire truck

parking area (so that fire trucks may access water from the trout pond). These planned impacts upon the Class II wetland buffer were approved by the Vermont Agency of Natural Resources Department of Environmental Conservation. See Ex. 17 (Individual Wetlands Permit and Determination (DEC ID #RUJOO-0251), dated January 14, 2021).

b. Public Transient Non-Community Water System Source Permit (No. S-3748-19.0), approving the on-site water supply well and system for the project, was issued on February 2, 2021. See Ex. 19.

c. Applicant proposes to supply drinking water for and to treat wastewater from the proposed Resort via on-site systems. His proposed systems were approved by the Vermont Department of Environmental Conservation. See Ex. 20 (Wastewater System and Potable Water Supply Permit No. WW-8-0556-1).

d. Applicant's planned connection to water supply source wells, treatment processes, storage tanks and distribution lines required state approvals, which were granted by DEC when it issued Public Water System Construction Permit No. C-3748-20.0 on July 9, 2021. See Ex. 22.

e. There was concern that the planned roadway improvements, particularly replacement of the culvert and its headwall, would require a stream alteration permit. However, Applicant's engineer received confirmation that a stream alteration permit would not be necessary for the planned culvert and headwall improvements. See Ex. 21 (showing the e-mail confirmation from DEC).

f. Stormwater will be discharged on site from the planned rooftops and remaining impervious areas. Those detailed stormwater discharges were approved by DEC on September 20, 2021, and authorized under General Permit No. 3-9050. See Ex. 23.

g. Furthermore, anticipated stormwater discharges caused by the on-site construction activities of the planned improvements have been authorized and allowed, subject to multiple specific conditions, by DEC pursuant to Stormwater Discharge Permit No. 9118-INDC, issued on January 5, 2022. Ex. 24.

h. There was no credible testimony or other evidence that Applicant has failed to secure all of the state permits needed for his proposed project, other than an Act 250 state land use permit, which is currently under review.

36. As to stormwater runoff, Applicant's engineer provided credible analysis of the stormwater flows, both as the site currently exists and how stormwater will likely flow after all planned improvements are completed. Those expected stormwater flows are credibly detailed in several stormwater maps. Ex. 41 (detailing the existing conditions of the manner in which storm water flows on the site on page 1; and the manner in which stormwater is likely to flow on the site after all the planned improvements are completed on pages 2 through 5).

37. Based upon the credible evidence presented, we find that the flow of stormwater off this site, once all improvements are completed, will not increase when compared to the existing flows of stormwater.

38. Within the site, there is unlikely to be an increase of stormwater flows or soil erosion, save for the erosion that has naturally occurred on site within the banks of the Bourn Brook, especially during heavy storm events, such as Storm Ida of several years ago.

39. Applicant will rely upon the already existing natural vegetation to provide landscaped screening for the proposed improvements. The only additional landscaping proposed is near the new Lodge Building, and its Guest Arrival and Service areas. The new landscaping is detailed on Exhibit 8, which was prepared by Applicant's expert and details the new plantings, including of Green Mtn. Sugar Maples, White Ashes, Lilacs, Summer Sweet, and Blue Holly.

40. The existing and proposed landscaping will screen and shield the completed development from all of the neighboring properties.

41. The lighting fixtures already existing on the property will be retained, although many of the internal elements will be replaced to accommodate LED fixtures. Free-standing exterior lighting fixtures will be added near the existing and new structures, pathways, and some parking areas to assist with security and safety, as shown on the site maps. See Exs. 5–8. Specifications for the lighting fixtures are detailed in Applicant's Exhibit 43. All lighting fixtures will be shielded so that their illumination is downcast. No light source will cause "trespass" onto adjoining properties.

42. Parking accommodations will be added as depicted on the site plans. Parking totals for each parking location and type are detailed on the legend included in the overall site plan (Exhibits 5 and 39). Applicant's engineer correctly calculated that the Bylaws establish a minimum of needed parking spaces for all the accommodations proposed in the development to be 69 spaces. With the increases planned, Applicant proposes to have 140 parking spaces on site, not including the spare parking area for large events, cited in paragraph 32(e), above.

43. The proposed parking spaces will be adequate to accommodate the overnight guests, their visitors, and daytime visitors to the Resort for all but the major events proposed for the site (i.e.: weddings, commercial gatherings, and seminars). Events that are expected to encourage more than 150 visitors to the Resort will require off-site parking for such events. Applicant proposes to employ and pay for one or more shuttle services to and from public and private parking locations in and near the center of Manchester, such as various hotels (the Hampton Inn Hotel, the Taconic Hotel, and the Equinox Hotel and Resort) and public parking lots (the Elm Street, Depot Street, Memorial Ave. MEMS School, and Rec Center Parking Lots). See Ex. 35.

44. Applicant has not provided a specific agreement by which he may employ these private and public parking lots. Rather, he has relied upon the expectation that individuals who are not staying at

his Resort will either be staying at the other area hotels, which will allow for their guests to park their vehicles at the hotels, or for other individuals not staying overnight locally to use the area public parking facilities. Credible testimony (not contradicted by other trial testimony) convinced the Court that these public parking facilities have the capacity to accommodate the Eco Resorts guests on the limited times that large events are scheduled at the Eco Resort.

45. Once fully operational, the Resort will employ between 15 to 20 employees.

46. Applicant's engineer provided credible calculations for the estimated traffic that the Eco Resort will generate once it is fully operational by relying upon the established national ITE Trip Generation Manual, (9th Ed.) for specific types of land uses. The ITE code for a resort hotel (LUC 330) defines that land use as follows:

> Resort hotels are similar to hotels (LUC 310) in that they provide sleeping accommodations, restaurants, cocktail lounges, retail shops and guest services. The primary difference is that resort hotels cater to the tourist and vacation industry, often provided a wide variety of recreational facilities/programs like golf courses, tennis courts, beach access, or other amenities. Resort hotels are normally located in the suburban or outlying locations on larger sites than conventional hotels.

Ex. 34 at 1.

47. Based upon these established national estimates of projected traffic for a resort hotel, as well as Applicant's engineer's credible testimony, we find that the Eco Resort, once fully operational, will generate the following traffic during its normal operation (i.e.: not including large functions of 150 or more attendees, except on a limited basis, as noted in ¶ 55):

> AM Peak Hour = 23 Trip Ends
> PM Peak Hour = 27 Trip Ends
> Saturday Peak Hour = 27 Trip Ends[2] [3]

48. Distribution of whether these trips will be travelling in to or out of the Resort will approximately be spread equally between the morning and afternoon/evening hours.

49. The Vermont Agency of Transportation directs that a full traffic study is required when a proposed project is estimated to generate a peak hour of traffic of more than 75 trip ends, which this project is not expected to exceed. Thus, we conclude that a detailed traffic study is not warranted for review of this project, since its estimated traffic is so much lower than that VTrans standard.

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[2] A trip end is a single trip in or out, so a round trip would be two (2) trip ends.

[3] In their post-trial memoranda, Appellants referred to testimony in a separate proceeding concerning trip generation for the proposed project. We did not receive this contradictory testimony concerning traffic in this proceeding and therefore do not rely upon it.

50. When larger events do occur, on the schedule suggested by the DRB, Applicant will maintain a bus shuttle service to pick up and drop off attendees that are not staying on site at either other area hotels or resorts, or at identified public parking areas. See Ex. 35 ("Green Mountain Reserve Available Shuttle Pick-up Locations").

51. On October 15, 2020, the DRB issued a decision granting conditional use and site plan approval for the project. As part of this decision, the DRB imposed certain conditions on development. In re Benson Rd. Site Plan & Cond. Use Application, Findings of Fact and Conclusions of Law, Decision, & Order, No. 2020-05-034 (Town of Manchester Dev. Review Bd. Oct. 15, 2020) [hereinafter "the DRB Decision"]. A copy of the DRB Decision was admitted into evidence at trial as Exhibit 15.

52. Notably, the DRB limited dining in the restaurant to the project's lodging guests, and their invited off-site guests. The onsite restaurants will not be open to the general public. Id. at 11, ¶ 2.

53. Much discussion before and during the trial (as well, it appears, during the DRB hearing), involved calculating whether the proposed development would exceed the maximum lot coverage established in the Bylaws of 5%. Bylaws § 4.15. This calculation was made more complicated by the fact that Applicant's property was currently divided into three lots: Lot 1 (the lot on which most development is occurring, which contains approximately 50.01 acres); Lot 2 (which contains approximately 3.20 acres); and Lot #3 (which contains approximately 0.39 acres). To alleviate this confusion caused in the calculation of lot coverage, the DRB directed that "the three lots shall be merged by deed, in form and content approved by counsel for the Town at Applicant's expense, prior to any land development occurring on the Property." Id. at 11, ¶ 1. No party appealed this DRB condition; it has therefore become final.

54. At trial, the credible evidence revealed that, even with the benefit of Applicant's parcels being merged, and even with the 50% reduction credit for pervious surfaces when calculating lot coverage, the total lot coverage will exceed 5% of the total combined lands.

55. The DRB also placed limitations on the number of events the project could host, stratified by the number of attendees at each event. Thus, the DRB limited the project in its first two years of operation to a maximum of 6 events involving 93 to 150 attendees, a maximum of 6 events involving 150 to 300 attendees, and a maximum of two events with more than 300 attendees. The DRB required the Applicant to secure an event permit from the Town for events with more than 300 attendees. The DRB also required the Applicant to re-apply to the DRB after two years for permission to host events with a number of attendees exceeding the occupancy of the project's lodging (92 persons). Id. at 19,

¶¶ 3-4. Applicant has incorporated this event revision schedule into the application submitted to the Court at trial, but he has appealed the requirement that he reapply after two years to host events with numbers of attendees that exceed the occupancy of the Resort.

56. The DRB also required the Applicant to reduce a proposed overflow parking area meant primarily to accommodate event attendees not staying at the project's lodging from 77 spaces to 40 spaces. Id. at 20, ¶ 7. Applicant has incorporated this parking revision into the application submitted to the Court at trial.

57. The DRB required the Applicant to provide shuttle service to events exceeding 150 attendees for attendees not staying at the project. Id. at 11, ¶ 5.

58. The DRB required this shuttle service to pick up event attendees lodging off-site but locally from their respective lodgings and required the Applicant to secure an off-site parking lot from which this shuttle service would transport attendees not lodging locally. Applicant has incorporated this parking revision into the application submitted to the Court at trial. Id.

59. Neighbors appealed the DRB's decision to grant conditional use and site plan approval, alleging numerous infirmities with the application and/or Bylaws under which it was approved.

60. Applicant cross-appealed, contesting only the DRB's condition that he must re-apply after two years for permission to host events with attendees exceeding the occupancy of the project's lodging.

61. On September 8, 2020, Applicant also applied for an Act 250 permit for the project. On October 21, 2022, the District 8 Act 250 Environmental Commission issued its Findings of Fact, Conclusions of Law, and Order concerning Applicant's application for a state land use permit. Because the District Commission concluded that, with conditions, Applicant had shown that his proposed project conformed with the applicable Act 250 criteria, the Commission also issued the requested Act 250 Land Use Permit. Neighbors have filed an appeal to this Court from the District Commission Act 250 Decision and Permit. That appeal of the Act 250 Decision and Permit has been assigned Docket No. 22-ENV-00122. Applicant has not filed a cross-appeal in that separate proceeding.

Discussion

As with the vast majority of appeals filed with this Court, we consider this appeal on a *de novo* basis, hearing evidence anew at our trial, disregarding the evidence delivered to the DRB, and disregarding the decision that the DRB rendered. However, we limit our *de novo* our review to the legal issues raised by the appellants in their respective statements of questions. Given that the

Neighbors were the first to file an appeal from the DRB decision, we address their Questions first and will then turn our review to the single Question posed by Applicant.

I. Neighbors/Appellants' Statement of Questions.

Neighbors present 15 Questions in their Statement of Questions, filed on November 5, 2020. We address those Questions in turn.

1. *"Should the Application be denied because it does not comply with lot coverage standards of Ordinance § 4.15?"*[4]

As noted above, in our 2021 SJ Decision concerning Appellant Neighbors' pre-trial request that we grant summary judgment on most of the legal issues posed in their Statement of Questions, including Question 1, we concluded that for purposes of calculating lot coverage "that, as a matter of law, the footprints of the cabin shelters should be included in the proposed lot coverage calculation." Id. at 11. We further concluded that undevelopable land on this property is to be included in the lot coverage denominator and not the numerator, as suggested by Appellants. Lastly on this Question, we concluded that there remain genuine disputes of material fact that affect whether the tent pad should be counted in the lot coverage numerator and whether the areas paved with pervious materials should be allowed to be counted at 50% of their actual area. Id. at 5–11.

Nothing presented during the trial caused us to question these preliminary, pre-trial determinations. We therefore incorporate here those conclusions into our merits decision.

Lastly, while we initially concluded that we must leave for trial the question of whether we should consider Applicant's three lots separately or in combination, for purposes of calculating lot coverage, we note that the DRB included as a condition of its approval a requirement that Applicant merge his three lots into one lot "by deed, in form and content approved by counsel for the Town at Applicant's expense, prior to any land development occurring on the Property." DRB Decision at p. 19, ¶ 1. There was no challenge presented at trial to this condition. It has therefore become final and will be included in any final approval that is rendered.

Our next step would be to render conclusions concerning the percentage of Applicant's combined lots that have been covered by development. We note that the applicable Bylaw provisions

[4] At trial, two versions of the Town of Manchester Land Use and Development Ordinance were offered and admitted at trial: Exhibit 13 represents the Ordinance that came into effect on June 19, 2018. These are the regulatory provisions that were in effect at the time that Applicant filed his completed Application with the DRB and are therefore the provisions that govern this application. ("Bylaws"). We refer to those provisions as the Bylaws. Exhibit 14 are the regulatory provisions that came into effect by amendments on May 5, 2020, and thereafter. They were admitted into evidence for reference purposes only.

(Bylaw § 4.15) restrict development within this zoning district to no more than 5% of the total lot, or a total of no more than one acre of development per parcel. See Ex. 13 at 58. This question became particularly intriguing because various calculations presented at trial, including after a credit allowed under the Bylaws for pervious surfaces, such as Applicant will employ on his roadways, walking and cart paths, established totals of just under and just over 5% lot coverage.

We are relieved of determining his development's exact lot coverage because Applicant concedes in his post-trial briefing that the total developed area on his combined parcel will be in excess of one acre; in fact, it will total nearly three acres of developed land. Applicant's Proposed Findings of Fact and Conclusions of Law at 5 (filed on July 29, 2022). Further, Applicant concedes that, even with the 50% credit afforded for pervious surfaces (but not including the areas under the elevated cabins and the concrete tent pad), Applicant's lot coverage total will be just over 5%, specifically at 5.02%. Id. at 5–6; see Ex. 32, Site Area Tabulation Sheet. Appellants convincedly showed that once the tent pad and areas under the elevated cabins are included, and with other omissions added in, the total square footage of developed area increased from 117,163 square feet to 178,110 square feet. This increased the developed area, after the 50% credit for pervious surfaces, from about 2.63 acres to over 4 acres.

For all these reasons, we conclude that the answer to Appellant's Question 1 must be that Applicant's development, as proposed, will not satisfy the lot coverage maximums established by Bylaws § 4.15. It does not flow from this conclusion, however, that the pending application must be denied (as Appellants suggest), since the Bylaws provide for certain waivers, including a waiver to the lot coverage maximum, if certain conditions are met. We therefore turn to Appellants' Question 2, which poses the question of whether Applicant's project as proposed is entitled to a waiver.

2. *"Should Applicant's lot coverage waiver request be denied pursuant to Ordinance § 3.6?"*

In their pre-trial motion, Appellant Neighbors contested Applicant's ability to receive a waiver to the maximum lot coverage requirement by both challenging the constitutionality of the Bylaw waiver provisions and by challenging whether Applicant satisfies those specific waiver provisions. By our 2021 SJ Decision, we declined to adopt Applicant's claim that Bylaws § 3.6 is unconstitutional and left to the trial the determination of whether Applicant has satisfied the specific waiver provisions. 2021 SJ Decision at 14. We therefore now turn our analysis to those waiver provisions.

Bylaws § 3.6.1 enables the DRB to "grant waivers that authorize an adjustment to a dimensional standard of this ordinance." Bylaws § 3.6.1(1). Waivers are allowed where a proposed project does not comply with the dimensional standards, provided certain criteria are satisfied. While

this provision provides certain restrictions, none are applicable here. Bylaws § 3.6.1(3)–(5). Further, it is undisputed that Applicant has satisfied the application and waiver request requirements of § 3.6.2. We therefore turn to the six criteria listed in Figure 3-1 that are applicable to Applicant's waiver requests. See Bylaws § 3.6.2(4) (requiring a waiver applicant to respond "to each of the criteria that the [DRB] will use to decide whether to approve the waiver (see Figure 3-1)."). Figure 3-1 provides that, to qualify for a waiver, the project must satisfy waiver review criteria 1–5, and 7. See Bylaws, Fig. 3-1.

a) Criteria 1: "The proposed land development will not alter the essential character of the area or district in which the property is located."

There can be no doubt that Applicant proposes a significant project for his property. But the nature of his development is such that it will bring about only minimal, occasional, and relatively minor impacts to the essential character of this neighborhood. There will be no improvements that will be observable from the Neighbors' or other adjoining properties. Even when the cabins and other facilities are fully occupied, we are not convinced that the Resort activities will not impact or even be observable from other properties in the neighborhood. Because of this, we conclude that this proposed development will not alter the essential character of the area or district.

However, larger events—such as weddings, corporate gatherings, and similar functions—will bring more than 92 guests to Applicant's property. The DRB had similar concerns, and that is why they limited these larger functions. Applicant has accepted the DRB concerns and has incorporated the DRB's following conditions into his proposed project:

> In the first two years of operation, the resort shall host a maximum of 6 events per year that involve 93 to 150 attendees. In the first two years of operation the resort shall host a maximum of 6 events involving 150 to 300 attendees. Only two events may exceed 300 attendees in the first two years of operation. The events exceeding 300 attendees shall secure an event permit from the Town of Manchester.

DRB Decision at 19, ¶ 3.

Similarly, the DRB conditioned its approval upon the Applicant providing shuttle services when hosting events exceeding 150 attendees, so that attendees who are not lodging at the Resort may travel to and from the Resort without having to use their individual vehicles to attend such events. The shuttle transports are to be scheduled to and from area facilities where registered attendees are lodged. For events attracting attendees not lodging locally, the Resort will identify off-site parking areas from which to transport event attendees. Id. at 19, ¶ 5. Applicant has agreed to provide this shuttle service and has incorporated it into his amended application.

In addition, the DRB conditioned the operation of the Resort to limit the noise it generated to 60 dB during the daytime and 45 dB during the nighttime, as read at the property boundaries. Applicant must employ a sound engineer to check that sound settings are adequate to maintain these limits given prevailing weather conditions for all events hosted by the Resort. Id. at 20, ¶ 14. Applicant has incorporated these noise limiting conditions in his amended application.

These conditions that Applicant has now incorporated into his amended application will diminish the Resort's possible impacts to a level we regard as much lower than that which would alter the essential character of the neighborhood. The number of large events will be minimal, totaling no more than eight each year and likely far fewer than the other facilities that host similar events within just a few miles of this neighborhood. The shuttle service for larger events will reduce the numbers of individual passenger vehicles that travel to and from the Resort. The cap on noises emanating from the Resort will reduce or eliminate its noise impacts from beyond its borders.

We conclude that in our analysis of this specific criteria, it is important to note that the Bylaws expressly contemplate developments within the RA district such as that proposed by Applicant. Uses such as inns, resorts, recreation equipment rental, catering or commercial kitchens, composting facilities, museums, event facilities, outdoor recreation, campgrounds, and summer camps are all authorized as conditional uses within the RA District. See Bylaw § 4.14 (use table). Notably, given the size of the Property, a residential subdivision maximizing the number of lots would likely create more traffic than the Project as proposed.

For all these reasons, we conclude that Applicant's project, as presented, will not alter the essential character of the neighborhood.

b) Criteria 2: "The proposed land development will not substantially or permanently impair the lawful use or development of adjacent property."

No evidence was presented at trial suggesting that the project would impair the use of adjoining properties. In their post-trial briefing, it appears that even Appellants agree that this condition is not relevant to our analysis of Applicant's requested waiver. See Appellants' Proposed Findings of Fact and Conclusions of Law, filed on August 2, 2022, at 11–12. We therefore conclude that the project as proposed will not substantially or permanently impair the lawful use or development of adjacent property.

c) Criteria 3: "The proposed land development will not be detrimental to public health, safety or welfare."

First, it is undisputed that the project contemplates several elements that will protect the public health, safety, and welfare. The project requires that the Applicant make several improvements to the public portion of Benson Road to improve safety for its travelers. On the property, the project will widen the road enough for emergency vehicles to easily be able to access necessary areas of the property. The project complies with the State's wetland rules, moving structures to further limit possible impacts to wetlands. The project includes the installation of a fire truck parking area (so that fire trucks may access water from the trout pond). The project is designed to limit or eliminate light and noise trespass onto adjoining properties. For larger events, the project will organize a shuttle service to limit traffic to and from Applicant's property. The project has the appropriate Water System Source Permit, Ex. 19, and State approved on-site wastewater treatment and water supply permit, Ex. 20, to protect the area's drinking water supplies. Further, no evidence was presented at trial that the proposed improvements would be detrimental to the continued reasonable use of the property, or, for that matter, to the continued reasonable use of the adjoining properties. Thus, from the uncontested evidence provided by the Applicant, the Court concludes that the Project will not be detrimental to the public health, safety, or welfare.

d) Criteria 4: "The proposed land development is beneficial or necessary for the continued reasonable use of the property."

We first note that this legal criteria is similar to one of the criteria we review for zoning variance requests, with one important distinction: we are tasked here with determining whether Applicant's project is either "*beneficial or* necessary for the reasonable use of the property." Bylaws, Figure 3-1(d) (emphasis added). Thus, while here, a waiver may be permitted if the proposed development is "beneficial," variance review limits our analysis to whether the proposed development is "necessary." We therefore focus our analysis on whether the proposed development is beneficial for the continued use of the property.

The project, as proposed, would continue the reasonable use of the property, which we conclude is beneficial for its continued use. Again, the project involves numerous uses expressly authorized as conditional uses within the RA District. The Project, as an eco-resort, will provide positive learning experiences for its guests and community members, a venue for a limited number of special events that will benefit the property and the general community of Manchester. As such, the Project as proposed will not only benefit the land and the land owner, but also benefit the community.

Thus, the Court concludes that the Project is beneficial for the continued reasonable use of the property. Further, as discussed above, no evidence was presented at trial that the proposed improvements would be detrimental to the continued reasonable use of the property, or, for that matter, the continued reasonable use of the adjoining properties. We therefore conclude that the proposed project would be beneficial for the continued reasonable use of the property.

e) Criteria 5: "The applicant is proposing adequate mitigation of any dimensional encroachment through design, screening or other remedy."

We first note that Applicant's proposed project conforms to all setback requirements, save only for the minor encroachment into the unregulated Class III wetland and the Class II wetland buffer. Applicant has endeavored in his project design to maintain existing natural and manmade features on the property. Interior drives frequently follow the paths of existing drives, woods roads, and trails. The elevated cabins are positioned primarily in the woods in a manner minimizing or eliminating the potential impact on adjoining properties and, for that matter, on the site itself. For the most part, no one will be able to see any of the development on the property from adjoining land without actively seeking out a vantage point to do so. Applicant has secured all necessary environmental permits protecting water and other natural resources. Further, Applicant has reduced the proposed dimensions of some of the improvements to the property to limit the lot coverage, and will install pervious surfaces to mitigate the effects of its roads, event areas, trails, and parking areas. We therefore conclude that Applicant is proposing adequate mitigation of any dimensional encroachment through design, screening or other remedy.

f) Criteria 7: "The applicant is proposing the least deviation possible from these regulations that will afford relief."

Applicant has proposed unique improvements to his property that minimize the impacts upon neighboring properties. As noted above, Applicant could have likely reconfigured his proposed development to no longer need to request a waiver from the lot coverage maximums established in the Bylaws. But such alternate proposals would likely have brought more significant impacts to this neighborhood. Instead, Applicant has sought an alternative design to his proposed development that will be more in keeping with the natural and environmental setting of his property and his neighborhood. We commend Applicant for these efforts.

Given that Applicant has chosen the more environmentally and characteristically sensitive route for his development, the waiver he requests is a relatively minor deviation from the lot coverage maximums established in the Bylaws. Having walked Applicant's property, we were provided context for what Applicant has proposed. We cannot imagine describing Applicant's property, even after the

proposed improvements are completed, as in any way compact or dense. We therefore conclude that the waiver Applicant is requesting is the least deviation possible to afford relief for the environmentally sensitive development that Applicant proposes.

For all these reasons, we conclude that Applicant has satisfied the applicable criteria contained in Figure 3.1 and all other requirements of Bylaws § 3.6. We therefore conclude that Applicant's project, as proposed, is entitled to and should receive a waiver from the lot coverage limitations for the RA District, as detailed in Bylaws § 4.15. In light of this waiver approval, we answer Appellants' Question 2 from their Statement of Questions in the negative.

3. *Should the Application be denied because it does not comply with wastewater requirements of Ordinance § 5.2.6(1)*

Bylaws § 5.2.6(1) requires that "[a]ll new development must be connected to the Town of Manchester sewer system. All sewer lines must be constructed in conformance with applicable public works standards." We addressed the legal issues posed by Neighbors in their Question 3 in some detail in our 2021 SJ Decision. See 2020 SJ Decision at 14–18. In that decision, as at the DRB, it was initially difficult to reconcile the apparent conflicts between the Bylaw provisions that govern disposal of wastewater in the Aquifer Protection Overlay Zoning District ("the APO District") with this particular Bylaw requirement. Id.; cf. DRB Decision & Order, ¶ 42. We requested further briefing and now reconcile that conflict today.

Here, Applicant has proposed using an on-site wastewater treatment system to fulfill all of the project's wastewater treatment needs. While wastewater system permitting is generally governed by state law, these systems may be considered in the context of municipal land use review as well. Even though recent revisions to the Bylaws appeared to require new developments anywhere in the APO District to hook up to central wastewater treatment systems, the DRB concluded that it had the authority to allow on-site wastewater treatment systems in APO District Zone B (which is where Applicant's property is located), and to impose conditions to ensure those systems satisfied all state and federal permits and water protection precautions. Appellants challenged this DRB determination in their Question 3.

In our 2021 SJ Decision, we concluded that the DRB interpretation on this point was reasonable and supported by our own independent analysis. 2021 SJ Decision at 17 (concluding that Applicant and DRB's interpretation is appropriate, as it reduces surplusage, is in keeping with the expressed legislative purposes for creating the APO, and interprets ambiguities in favor of the landowner). As such, we denied summary judgment to the Appellant on this issue. However, we

requested that the parties provide further briefing at trial on this issue for the Court to weigh this legal dispute with the relevant material facts. Id. at 18 (requesting briefing regarding "whether the DRB has previously or since interpreted these provisions or related provisions in the Bylaws.").

At trial, Applicant presented the Court with a further revision to the Bylaws (adopted in 2022), demonstrating that the Town had, in fact, not only since interpreted these provisions consistent with the Court's and DRB's analysis here, but has also since revised the applicable provisions governing the APO District that allowed for on-site wastewater treatment systems for new developments to eliminate the prior ambiguity. Cf. Ex. 14 (2022 Amended Bylaws). Appellants offered no contradicting testimony, other evidence, or exhibits. The amended Bylaws reflect the intended meaning as found by the DRB of allowing on-site systems in the entirety of the APO District.

Applicant has also applied for and received approval for its on-site wastewater treatment system from the ANR Department of Environmental Conservation. DEC's Wastewater System and Potable Supply Permit was admitted at trial as Exhibit 20.

For all these reasons, we conclude the opposite of the foundational premise of Appellants' Question 3: Applicant's proposed on-site wastewater treatment system complies with Bylaws § 5.2.6(1) and that Applicant has secured approval of his proposed systems from the appropriate state permitting agency. We therefore answer Appellants' Question 3 in the negative.

4. *Should the Application be denied because it does not comply with grading and fill requirements of Ordinance § 6.14?*

Appellants assert that Applicant's own exhibits show that some of Applicant's proposed improvements will occur within a Class III wetland and within the buffer to a Class II wetland. Applicant does not dispute this point. Bylaw § 6.14.2 provides as follows:

> **Waterways or Wetlands.** Excavation and fill is prohibited within surface waters, wetlands and any required setbacks to surface waters or wetlands except:
>
> (1) The proposed activity may proceed under state approval and permitting provided the landowner submits such approval and permit to the Zoning Administrator.
>
> (2) A landowner may remove up to 50 cubic yards of material per year for noncommercial private use after securing a permit from the Zoning Administrator. However, only up to 10 cubic yards per year may be removed from the Batten Kill or West Branch of the Batten Kill, which were designated as Outstanding Resource Waters by the Vermont Water Resources Board in 1991

Bylaws § 6.14.2.

Much of Appellants' argument here relies upon the somewhat ambiguous definition of what constitutes "wetlands" that are governed by these excavation and fill restrictions. The Bylaw definition references the distinction in applicable state laws and regulations between Class I and Class II wetlands, which are regulated by the state, and Class III wetlands, which are often considered insignificant and not warranting regulatory protections. 10 V.S.A. § 902. However, the Bylaws definition for "wetlands" appears to suggest that even Class III wetlands are governed by Bylaws § 6.14.2. Bylaws § 13.24 at 158–59 (distinguishing Class I, Class II, and both regulated and unregulated Class III wetlands within the definition of "wetland").

However, the definitional provisions provide that "[u]nregulated Class 3 wetlands do not serve the [wildlife habitat, water quality, or flood prevention] functions in a meaningful way, typically due to small size, isolation from other wetlands and hydrological features, or past land use practices that have altered the hydrology of the area (e.g., agricultural drainage ditches, tiles)." Id. at 159. Considering this language, it is not clear that the drafters of these Bylaw provisions intended for the Bylaws to regulate unregulated Class III wetlands beyond the regulation provided by state law.

We need not wrestle with that question, however, because § 6.14.1 provides that the "proposed activity may proceed under state approval and permitting provided the landowner submits such approval and permit to the Zoning Administrator." Bylaws § 6.14.1(1). Here, Applicant provided the Court with the DEC approval to encroach into the Class II buffer and Class III wetlands for the purpose of completing the required roadway and fire truck turn around improvements, pursuant to the DEC approvals, all of which were received and submitted to the Zoning Administrator as well. See Ex. 17 (DEC Individual Wetland Permit and Determination, DEC ID #RU00-0215 (issued Jan. 14, 2021)).

Appellants assert that the DEC permit does not detail the specific wetlands work that the Permit approved, and that since Applicant did not offer his application for the DEC permit into evidence, the Court should conclude that the Permit does not provide enough specificity. See Appellants' Am. Proposed Findings of Fact and Conclusions of Law at 14–16 (filed Aug. 22, 2022). We are not persuaded, however, as we find that Applicant did exactly what Bylaws § 6.14.1 required: he submitted the DEC wetlands approval to the Zoning Administrator. Further, Applicant provided the Court with detailed site plans, Exs. 5–8; detailed profiles of the pervious pavements to be installed onto the improved roadways, cart paths, and parking areas, Ex. 33; his master plan composite, Ex. 39; and DEC approvals of his stormwater plans, Ex. 41–42. Appellants offered no witness testimony or other evidence on this question.

For all these reasons, we conclude that Applicant has provided sufficient evidence, none of which was substantively contested, that his proposed project complies with the grading and fill requirements of Bylaws § 6.14. We therefore answer Appellant's Question 4 in the negative.

5. *Should the Application be denied because it proposes development on undevelopable land in violation of Ordinance § 6.23?*

Neighbors claim that a portion of the eastern side of the property contains slopes of more than 20% grade. Under the Bylaws, land of such steep slopes is "undevelopable" regardless of what is otherwise permitted in an underlying district. Bylaws §§ 6.23.2, 6.23.3(1). Neighbors further suggest that Applicant's site plan shows that some development will occur on lands that are over a 20% grade. Applicant disputes Neighbors' claims and asserts that none of his proposed development will be located on lands in excess of a 20% grade. Applicant suggests that Appellants are misinterpreting both the site plans and the Bylaw requirements. For the reasons stated below, we concur with Applicant.

Applicant's property, given that it is a relatively large parcel, varies widely between relatively level areas of land to areas that gently slope in many areas, especially on the eastern part of his property. Applicant's engineer created two site maps, which demonstrate that the development and disturbance will not occur on these steeper slopes. See Ex. 30 (depicting the overall existing conditions of the total property, including an analysis of the slopes existing on the property); see also Ex. 31 (depicting the limits of construction disturbance on that same slope analysis). Appellants offered no exhibits, testimony, or other evidence to contradict Applicant's slope analysis presentation. As such, these exhibits convince the Court that, as proposed, Applicant's planned improvements will not occur on lands of greater slopes than 20 %.

Much of the parties' dispute on this legal topic centers around how we should measure slopes. Any area's slope will vary, due to the lengths of area used in the numerator and denominator in the slope analysis. But we need not engage in this varying analysis, since the Bylaws provide an answer for us: Bylaws § 6.23 provides that its purpose is to "[p]revent development of lands susceptible to environmental, property, or infrastructure damage" Bylaws § 6.23.1, and that one method of accomplishing this goal is to prohibit development on "undevelopable land," Bylaws § 6.23.2, which the Bylaws define, in part, as "[l]and with a natural slope greater than 20%, *as measured over the proposed area of development in horizontal linear feet*." Bylaws § 6.23.3(1) (emphasis added). Appellants assert that Applicant is reading the Bylaws too broadly, justifying a calculation that broadly defines the term "area of development" as encompassing Applicant's entire developed area. We disagree. It is apparent that

Applicant is reading this phrase much more narrowly as the disturbed area for individual development components. Because we adopt Applicant's interpretation of the phrase "area of development," we conclude that the undisputed and credible evidence is that the development that Applicant proposes does not encroach onto lands of slopes of over 20%, as measured within the area to be developed. Cf. In re Champlain Oil Co. Conditional Use Application, 2014 VT 19, ¶ 2, 196 Vt. 29 ("[L]and use regulations are in derogation of private property rights and must be construed narrowly in favor of the landowner."). We therefore conclude that Applicant's project, as proposed, conforms to Bylaws § 6.23. Because we reach this conclusion, we must answer Appellants' Question 5 in the negative.

6. *Should the Application be denied because it fails to comply with the water resource protection standards of Ordinance § 6.25?*

The purpose of Bylaws § 6.25 "to protect and enhance the overall quality, natural function and ecological health of the town's surface waters and wetlands by mitigating the impact of development on these surface water features." Bylaws § 6.25.1. To accomplish this purpose, the Bylaws provide, with some limited exceptions, that no development should occur within the designated water resources setback areas. For the RA District, where Applicant's property is located, the water resources setback area is a minimum of 50 feet from the top of a stream bank or water course to the area of proposed development. Bylaw § 4.15 at 58 ("Dimensional Standards Table" denoting a water resource protection setback of no less than 50 feet in the RA District). Any development within that setback area is subject to various limitations. Bylaw §§ 6.25.3–5.

The Project's site plans demarcate the various water resources setbacks, showing the 50-foot river corridor setback delineated and no new areas of disturbance proposed within that setback area. See Exs. 6–8. Appellants did not present any evidence contrary to this demarcation. As such, we find that Applicant does not propose development within any water resources protection setback.

We therefore conclude that the answer to Appellants' Question 6 is that the project satisfies the requirements of Bylaws § 6.25 regarding water resource protection, and thus should not be denied on that basis.

7. *Should the Application be denied because it does not comply with noise standards of Ordinance § 9.3.1*

Section 9.3.1 sets forth the following requirement regarding noise impacts from proposed land development:

> Unless otherwise approved by the Development Review Board, noise emanating off site must not be distinct from the background sound level beyond the property line, and must not interfere with the reasonable use and enjoyment of other properties. If proposed land

> use and development is deemed likely to have noise impacts, the Development Review Board may:
>
> (1) Require the applicant to submit an acoustical analysis of sound generation on the site prepared by a qualified professional.
>
> (2) Require acoustical site design strategies, and acoustical architectural design strategies to manage noise generated on the site.

The noise standard of Bylaws § 9.3.1 is somewhat unique municipal noise regulation. While we cannot recall having ever applied a noise standard such as this, given that the initial regulation requires that noises emanating from new development "must not be distinct from the background sound level beyond the property line," we doubt that the increased activity at the falconry school, or children or dogs brought onto the improved property would meet a strict reading of this standard.

Assessing noise and its impacts can be a complex and confusing endeavor. See, e.g., In re JSCL, LLC Cond. Use Permit Appeal, No. 127-10+-174 Vtec, Merits Decision After Remand at 3–12; 19–29 (Vt. Super Ct. Envtl. Div. Dec. 8, 2022) (Durkin, J.). Thankfully, the Bylaw drafters here chose to allow a permit applicant to suggest a manner in which noise from a new development may be most accurately measured.

Applicant does not dispute that outdoor events on the Property will utilize amplified music and that that the music and other event noises will likely be audible beyond the boundaries of the Property. During the proceedings below, the DRB approached this issue by limiting the number of large events, and by limiting the sound levels allowed from the project. See DRB Decision and Order at 19, ¶¶ 3, 14. Regarding the number of events, the DRB limited the project to a maximum of 6 events per year that involve 93 to 150 attendees; a maximum of 6 events per year that involve 150 to 300 attendees; and a maximum of 2 events per year that involve more than 300 attendees. Id. at ¶ 3. Regarding noise, the DRB limited sound levels generated by the Project to 60 dB at the boundary lines during daytime hours (i.e., between 8:00 a.m. and 11:00 p.m.), and to 45 dB at the boundary lines during nighttime hours (i.e., between 11:00 p.m. and 8:00 a.m.). Id. at ¶ 14. The DRB also required that Applicant employ a sound engineer to ensure compliance with these noise standards. Id. In addition, the sound system would be under the exclusive control of the Resort itself, not the organizers of the event. Id. Applicant has not challenged these sound-related conditions imposed by the DRB and has incorporated them into his Amended Application.

The Court concludes that these conditions will adequately mitigate the Project's noise impacts and will prevent the impairment of the reasonable use and enjoyment of other properties in the area, including the Appellants' properties. We therefore conclude that the answer to Appellants' Question

7 is that the project satisfies the requirements of Bylaws § 9.3.1 regarding noises that could be generated from the proposed project. We therefore also conclude that the application should not be denied on that basis.

8. *Should the Application be denied because it does not comply with energy conservation requirements of Ordinance § 9.3.13?*

Bylaws § 9.3.13 provides that projects "shall reflect principles of energy conservation and incorporate the best available technology that is economically justified." To that end, the project is designed so that all buildings will meet or exceed the Vermont Commercial Building Energy Standards, which was reported at trial to currently be the second most stringent energy codes in the country, behind only those established for California. All the buildings on Applicant's property, including the elevated cabins, will utilize air-to-air heat pumps for both heating and cooling. Finally, LED lighting fixtures, downcast so as not to provide direct view of the illumination source, will be utilized throughout the project. See Ex. 43 (exterior LED light fixture).

We therefore conclude that the answer to Appellants' Question 8 is that the project satisfies the energy conservation standards of Bylaws § 9.3.13 and thus should not be denied on that basis.

9. *Should the Application be denied because it does not comply with the landscaping requirements of Ordinance § 9.4?*

Questions about the project's proposed landscaping are somewhat misleading because the site is already developed, including with manicured landscaped open areas, gardens, and existing landscaping surrounding the farmhouse, trout pond, and renovated barns. Applicant has pledged to maintain this existing landscaping, and to add additional landscaping around the proposed new buildings, including the Lodge building and guest reception areas. We review Appellant's Question 9 and the applicable Bylaw standards in light of the existing landscaping and the proposed improvements.

Bylaws § 9.4 sets forth various landscape-related review criteria. Since the project was expressly designed with the goal of maintaining existing tree cover and landscaping, is located in a rural area, and is not viewable by others until they enter the property, we conclude that many of these Bylaw provisions are not applicable to this project. See, e.g., Bylaws § 9.4.1(1) ("Enhance the appearance of the built environment as viewed from public vantage point.").

Some formal landscaping is proposed in the vicinity of the new Lodge building and its approach. See Ex. 8 (site plan). This landscape plan was designed by Applicant's architect, a licensed professional that this Bylaw provision authorizes to prepare landscape plans. See Bylaws § 9.4.3(1).

As designed, the project uses much of the property's natural greenscaping to accomplish the goals of the landscaping provision, adding to the landscaping minimally as necessary. Appellants did not provide any testimony that contradicted the Applicant's evidence that the landscape plan satisfies the intent in this provision. As such, we conclude that the existing landscaping and planned improvements as proposed by Applicant satisfy the requirements of the Ordinance. We therefore conclude that the answer to Appellants' Question 9 is that the project satisfies the landscape standards of Bylaws § 9.4, and thus should not be denied on that basis.

10. Should the Application be denied because it does not comply with lighting standards of Ordinance § 9.5.3?

Bylaws § 9.5 establishes certain outdoor lighting standards. Section 9.5.3 specifically offers several standards which contemplate the lighting plan, including those lights output, sources, shielding, aiming, distribution uniformity, trespass at boarders, and timing. Here, the project proposes to retain the existing exterior lighting, after having converted the lighting elements to LED. The project also proposes various free-standing exterior LED lights for purposes of security and safety at locations around the property. Exs. 5–8. The lights are designed to be downcast and placed in a matter to eliminate trespass on other properties. Appellants provided no evidence disputing the Project's compliance with these lighting standards. Given this uncontested evidence, we conclude that the proposed lighting complies with the standards set forth in Section 9.5.3.

We therefore conclude that the answer to Appellants' Question 10 is that the project satisfies the outdoor lighting standards of Bylaws § 9.5.3, and thus the application should not be denied on that basis.

11. "Should the Application be denied because it does not comply with parking requirements of Ordinance § 9.6?"

Appellants' first general assertion is that Applicant's proposed project fails to satisfy the minimum parking requirements of Bylaws § 9.6. Because Applicant's proposed project has several different components, we address Appellants' challenge in the context of each of applicant's project components.

Applicant's engineer correctly calculates that the Bylaws require a minimum of 69 parking spaces for the day-to day planned uses for the project. See Bylaws, Figure 9-3; see Ex. 5. In fact, Applicant proposes the following parking spaces for those uses:

Overflow event parking:	40 spaces
Falconry school:	3 spaces
Staff/vendor parking:	36 spaces
Farmhouse parking:	15 spaces
ADA shelter parking:	2 spaces
Guest parking:	44 spaces (including ADA compliant spaces)
Total:	**140 spaces**

See Ex. 5 (parking tabulation shown on site plan).

Thus, Applicant has proposed providing more parking spaces for the day-to day planned uses for the project than the minimum required by Bylaws § 9.6.

Appellants suggest that Applicant's parking plan is deficient because it does not specifically provide for separate, additional parking for the two on-site restaurants: one in the farmhouse with a 30-seat occupancy and the second in the proposed Lodge Building with a 60-seat occupancy. However, Appellants fail to acknowledge that the restaurants will primarily be serving the Resort's overnight guests—i.e., guests that will already be allotted spaces in the guest parking area. While Applicant has proposed that his overnight guests will be allowed to invite non-guests to dinner at the restaurants, we expect that those dinner guests will be in the minority. Further, since Applicant is providing 71 parking spaces over the minimum required under the Bylaws, we cannot conclude that the parking will be insufficient.

Applicant also plans for the Resort to host small daytime activities that attract members of the community not staying overnight at the Resort (such as yoga, beekeeping, maple sugaring, composting demonstrations or workshops, falconry school, etc.). During times when the Resort is not at full occupancy, lodge parking or farmhouse parking could be used for such events. Presumably, such activities would not be scheduled to coincide with larger events, and the 36-space staff and vendor parking area could also be used by participants of these activities if the Resort is at capacity for overnight guests.

However, even if the activities coincide with the larger events, the Project includes overflow parking solely for larger events, as well as the shuttle service, for these events. Further, as noted above, the DRB decided that larger events at the Resort would be limited as follow:

> In the first two years of operation, the resort shall host a maximum of 6 events per year that involve 93 to 150 attendees. In the first two years of operation the resort shall host a maximum of 6 events involving 150 to 300 attendees. Only two events may exceed 300 attendees in the first two years of operation. The events exceeding 300 attendees shall secure an event permit from the Town of Manchester.

DRB Decision at 19, ¶ 3. Applicant has accepted the DRB limitations on the occurrence of larger events and has incorporated its terms into his amended application.

Applicant has also reduced the project's overflow event parking to 40 spaces, consistent with the direction of the DRB. See DRB Decision and Order at 15, ¶ 65. The DRB stated as follows:

> An overflow parking area of 77 spaces is proposed for special events. This is proposed to be a grass area in the woods adjacent to the perimeter drive. This will require clearing of approximately one-half acre of woodland. Presumably this overflow parking is meant for events that exceed Resort capacity with up to 150 participants. Events with more than 150 participants are proposed to be accommodated by a shuttle service, maintained by Applicant, to prevent the need for additional onsite parking.
>
> It is unlikely that every person attending an event over Resort capacity will drive to the site alone for events of between 92 and 150 attendees. Even if they did, that would only require 58 parking spaces. At least some of these could be accommodated in the staff/vendor parking lot adjacent to the proposed maintenance building, assuming that these relatively smaller events will not require the vendor and staff levels that larger events with shuttle service would need. The DRB concludes that the overflow parking area should be reduced in size to provide no more than 40 spaces.

Id.

In order to diminish the need for on-site parking for the small number of larger events exceeding 150 guests (a total of eight events each year), the project would be served by a shuttle bus operation. During his testimony, Applicant's expert explained that the number and frequency of shuttle buses for these larger events would be tailored for the particular event, with passenger shuttle pick-ups taking place at designated area hotels or nearby municipal parking lots. See Ex. 35 (showing map of Property, nearby hotels and public parking lots, and the connecting road network). The Resort would control and manage the shuttle operation itself to ensure proper operation, working with appropriate event organizers to plan and execute the shuttle operation for each event.

Given that the off-site parking will be needed on a limited number of events each year (8 events in total per year exceeding 150 attendees), the Resort's off-site needs will occur much less frequently than a development which would have off-site parking needs every day of the year. Thus, the off-site shuttle service that Applicant proposes is more tailored to when the need will actually arise.

Larger events, such as larger weddings and corporate gatherings, may encourage many more attendees than what the Resort can accommodate as overnight guests. Thus, many attendees at these events will seek out overnight accommodations at other area hotels and resorts. Applicant's plan is

to have a shuttle service that provides these off-site guests with transportation to and from their hotels and other resorts. This shuttle plan will significantly reduce the number of individual vehicles that seek to park at Applicant's Resort during these larger events. Because some large event guests may live locally or only visit the area for the day, Applicant's shuttle service will also provide service to and from area nearby public parking areas.

For all these reasons, we conclude that Applicant's parking plans, including the shuttle Applicant will maintain for off-site parking during larger events, complies with the parking requirements of Bylaws § 9.6, and thus the application should not be denied on that basis.

12. Should the Application be denied because it does not comply with conditional use requirements of Ordinance § 3.3.3 and 24 V.S.A. § 4414(3)?

This proposed project, classified as a resort use in the RA District, requires conditional use approval under the applicable Bylaw provisions. Section 3.3.3 of the Bylaws set forth the conditional use review criteria. While Appellants' Question 12 is stated as a broad challenge to the project's conformance with the conditional use criteria, Appellants only assert that the project fails to satisfy two of the five conditional use criteria: that the Project would have (1) an undue adverse effect upon the "character of the area affected," Bylaws § 3.3.3(2); and (2) an undue adverse effect upon the "traffic on roads and highways in the vicinity," Bylaws § 3.3.3(3). We therefore limit the scope of our review to those two sufficiently challenged criteria.[5]

a. Character of the Area Affected.

With reference to Question 2 and the lot coverage waiver discussed above, the Court was required to determine whether the Project would alter the essential character of the area or district within which it is located. The Court concluded that the Project would not alter the essential character of the area. For the same reasons, the Court concludes that the project will not have an undue adverse effect upon the character of the area affected. See above at 17–18.

As noted previously, all development proposed as part of the project is located within the RA District. The primary existing structures on the property, along with both wooded areas and meadows, will be retained and incorporated into the project. The elevated cabins will be constructed on piers primarily in the forest along existing woods roads, and the adjoining lands are predominantly wooded

[5] The DRB addressed all five of the conditional use criteria in its review of the project. See DRB Decision at 3–11. We therefore regard the DRB's Findings and Conclusions that the proposed project will not cause an undue adverse effect upon (1) the capacity of existing or planned community facilities to accommodate the project; (4) conformance with other municipal regulations, and (5) the utilization of renewal energy resources to be uncontested, and therefore final.

and undeveloped. As such, Applicant's proposed project was designed to not affect the character of the area. No evidence was presented that any new development proposed as part of the project will be viewable from Appellants' land. As discussed above, limits on the numbers of larger events and the sound levels of amplified music will reduce the impact of the project on the surrounding area.

Importantly, as the Court previously recognized, the Bylaws expressly contemplate development such as that proposed by Applicant within the RA District. Uses such as inns, resorts, recreation equipment rental, catering or commercial kitchens, composting facilities, museums, event facilities, outdoor recreation, campgrounds, and summer camps are all authorized as conditional uses within the RA District. See Bylaws § 4.14 (use table). As such, these uses are all contemplated as conditionally consistent with the character of the area.

Finally, the project's design is deliberately meant to minimize its visual impacts on adjoining land, and its footprint on the property itself. The Project will retain most of the existing structures, meadows, woods, roads, and trails. New structures will be positioned in ways that minimize their visual and environmental impact both on-site and off-site. Larger events generating potential noise and traffic impacts off premises are expressly limited in order to minimize their overall impact on the environment and character of the area. We therefore conclude that the project will not have an undue adverse effect on the character of the area affected.

b. Traffic

Applicant's and Appellants' parcels are all located on Benson Road, which diverges from Glen Road with its terminus being roughly a half mile away where it enters Applicant's property. Benson Road provides the only route in and out for vehicular access to Applicant's and Appellants' Properties. See Ex. 2.

Benson Road is a graveled, Class 3 town highway maintained by the Town. The current width of the traveled road surface is approximately sixteen feet. The boundaries of the municipal right-of-way, however, are 1.5 rods to each side of the road's centerline for a total width of 3 rods (or 49.5 feet). Id. Pursuant to the Roadway Improvement Agreement discussed in more detailed below, improvements would be made to Benson Road. See Ex. 25 (Roadway Improvement Agreement).

As set forth in the project's Traffic Summary, the project involves 43 double occupancy cabins, three double occupancy guest rooms in the farmhouse, and a staff of 15-20 employees. Ex. 34. Under the ITE Trip Generation Manual, 9th edition, applying these figures to a resort hotel use generates the following estimated trip ends to and from the property (with roughly half traveling to the Property and half from the property):

AM Peak Hour: 23 trip ends
PM Peak Hour: 27 trip ends
Saturday peak hour: 27 trip ends

The State of Vermont Agency of Transportation does not require a full traffic study to be produced for a project, unless a proposed project would generate more than 75 peak hour trip ends. As such, for a project with relatively small trip end estimates, like Applicant's, a full traffic study is not required. As discussed above, larger events with more than 150 attendees would involve the use of shuttle buses, thereby minimizing the additional traffic impact during the small number of larger events each year (no more than 8 events attracting more than 150 attendees).

Over the last several years, there has only been one reported motor vehicle accident on Glen Road/Benson Road. It occurred in September 2017 and was a single vehicle accident where a speeding vehicle left Benson Road. Ex. 40.

In order to enhance the safety of Benson Road, Applicant and the Town entered into a Roadway Improvement Agreement on June 23, 2021. Ex. 25. Before the project can be completed, this Agreement requires the width of Benson Road to be increased to 20 feet, which is the typical travel lane width for Class 3 roads in the Town. The Road would then be paved, and a wider culvert would be installed underneath the road near Ms. Herba's lot with a new headwall. A 165-foot guardrail would also be installed. Finally, the intersection between Benson Road/Glen Road/Lye Brook Falls Road would be modified so that the intersection is at 90 degrees. All work would occur within the three-rod municipal right-of-way.

Given the expected traffic to be generated by the project, the plans for a shuttle bus system during the limited number of larger events, and improvements to Benson Road, we conclude that the project would not result in an undue adverse effect upon traffic on roads and highways in the vicinity.

We therefore conclude that, in response to Appellants' Question 12, the project would not result in an undue adverse effect on either the character of the area or traffic on roads in the vicinity under Bylaws § 3.3.3. Coupled with the unchallenged findings and conclusions rendered by the DRB, we conclude that the proposed project complies with the conditional use criteria and thus should not be denied on this basis.

13. *Is the inclusion of "Resort" as a conditional use in the RA district in Ordinance § 4.14 invalid because it fails to conform with the Town Plan pursuant to 24 V.S.A. §§ 4401 and 4410?*

In our 2021 SJ Decision, we concluded that the inclusion of a "resort" use in the RA District did not violate the Town's municipal plan. See 2021 SJ Decision at 21–22. Nothing revealed in our trial convinced the Court to change its assessment on this legal point. We therefore answer Appellants'

Question 13 by stating that "resort" uses were properly included as permissible conditional uses within the RA District, and that such inclusion does not violate the applicable provisions to the Town Plan.

14. *Should the Application be denied because it proposes either a "hotel or motel," neither of which is a permitted or conditional use in the RA or FC district under Ordinance § 4.14?*

As previously noted, the project's concept is focused on creating an eco-friendly, experiential, and educational retreat utilizing the existing natural and recreational assets on the property and in the surrounding area. The project will provide guests the opportunity to connect with nature and the community in a unique and unconventional format. In addition, the project will also host events such as weddings, corporate retreats, cultural gatherings, and business conferences.

As the Court concluded in its 2021 SJ Decision, the project as proposed falls within the definition of a "resort" under the Ordinance. Id. at 22–24; Bylaws § 4.14 ("Use of one or more structures to provide short-term accommodations for transient guests where the primary attraction is recreational amenities or activities. It may also include accessory uses such as food services, recreational services, convention hosting, laundry services, etc."). The various accessory uses contemplated as part of the project's eclectic operations are all consistent with the accessory uses expressly authorized by this definition. We therefore conclude that the answer to Question 14 is that the project would fall within the definition of a "resort," is authorized as a conditional use within the RA District and is not a legitimate basis for denial of the application.

15. *Should the Application be denied because Resorts cannot be used to host weddings or concerts under Ordinance § 4.14?*

As a threshold matter, it should be noted that Applicant is not proposing that the project host concerts with amplified music. Instead, any amplified music contemplated as part of the project would be associated with events such as weddings, conferences, or cultural gatherings.

Regarding the conduct of weddings on the property, it is commonly understood that the hosting of weddings is within the scope of events that regularly occur at "resorts" across Vermont. The definition of "resort" in the Bylaws expressly contemplates "accessory uses such as food services . . . [and] convention hosting," each of which entail the same types of impacts and activities as weddings. Bylaws § 4.14. It is axiomatic that "[r]estrictions on the free use of real property are to be narrowly construed." In re Jenness & Berrie, 2008 VT 117, ¶ 16, 185 Vt. 16; Champlain Oil Co. Conditional Use Application, 2014 VT 19, ¶ 2 ("[L]and use regulations are in derogation of private property rights and must be construed narrowly in favor of the landowner."). Therefore, we conclude

that the Court may review the use of the property for weddings under its more generalized conditional use and zoning review of the project under the Bylaws. See Bylaws § 4.1.4(E)(2)(b) & (c).

We further conclude that, in response to Appellants' Question 15, as a "resort," the project may host weddings as an accessory use subject to conditional use review. Our review of the project's compliance with the Bylaws' conditional use standards is detailed above in response to Appellants' Question 12.

Having answered all of Appellants inquiries in their Statement of Questions in the negative, we conclude that none of the challenges presented by Appellants warrant denial of the pending application.

II. Applicant's Statement of Questions

Applicant presents a single challenge in his Statement of Questions: whether the requirement contained in the DRB's condition 4 that Applicant must reapply for new DRB approval if he wishes to continue hosting events with numbers of attendees that exceed the occupancy of the Resort. See DRB Decision at 19 ¶ 4.

Ostensibly, it would appear that the DRB was motivated to include this Condition 4 because of the uniqueness of Applicant's project, particularly the uncertainty of the impacts that could result from the larger events that he proposes. While we understand this DRB motivation, we are at loss to understand how such a temporary permit and resulting need to re-apply for DRB approval is contemplated or authorized by the Bylaws. We have scanned both the DRB decision and the Bylaws, but have been unable to locate a provision that authorizes such a unique and unprecedented condition.

The Vermont Supreme court addressed this very issue in the context of Act 250 in In re Treetop Development Co., 2016 VT 20, 201 Vt. 532. See also In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, 206 Vt. 118. In Treetop, the Supreme Court ruled that issuance of a land use permit in the first instance requires findings that all pertinent criteria have been satisfied by the permittee's application and supporting evidence. Consequently, it is improper to retain jurisdiction over the matter after issuance of the permit in order to allow further amendments as needed to ensure future compliance.

The logic of Treetop applies with equal strength in the context of municipal zoning. If a zoning applicant satisfies the various regulatory criteria such that a municipal permit should be issued, it is improper to require future submissions regarding the same development and activities that were approved in the first instance. As was noted during trial, an obligation to reapply further creates a substantial level of uncertainty impeding operation of the Resort. Events are frequently scheduled far

in advance. The requirement of an intervening re-application (including the appellate rights that would flow from any such proceedings) would make it impossible to commit to potential patrons, given the level of uncertainty created by the re-application requirement.

For the reasons stated above, this Court has concluded that the project, as proposed, satisfies all requirements of the Bylaws. We therefore conclude, in response to Applicant's sole Question submitted in his cross-appeal, that it would be improper to impose a permit condition requiring future re-application as a prerequisite for approval of the Project at this time. We therefore strike Condition 4 from the DRB approval and will revise Condition 3 to allow for continued use of the property after two years.

Conclusion

For all the reasons stated above, we conclude that Applicant's project as proposed conforms with all applicable Bylaw provisions, subject to the conditions imposed by the DRB, with the exception of the following revisions to Conditions 3 and 4:

Condition 3 shall be revised as follows:

> The Resort is authorized to host a maximum of 6 events per year that involve 93 to 150 attendees. Further, the Resort is allowed to host a maximum of 6 events per year involving 150 to 300 attendees. Only two events per year may exceed 300 attendees. The events exceeding 300 attendees shall secure an event permit from the Town of Manchester. No deviation from this larger event schedule is authorized unless and until Applicant applies for and receives a permit from the DRB to increase the number of larger events.

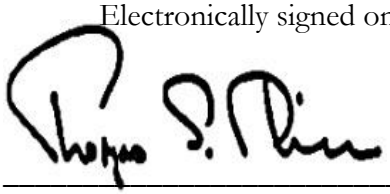
Condition 4 is hereby revised as follows:

> Nothing in Condition 3 forecloses Applicants from subsequently seeking an amendment for the allowable numbers of events that exceed the attendee maximums stated in Condition 3, above. Such amendment request may only be allowed after a public hearing and approval by the DRB, based upon a determination that such amendment conforms with the then-existing Bylaws.

In all other respects we hereby **APPROVE** the application as presented subject to the conditions imposed by the DRB, as revised above. The proceeding is hereby **REMANDED** to the Town of Manchester to complete the ministerial acts of issuing a permit in conformance with this Decision, the accompanying Judgment Order, and the unappealed provisions of the DRB Decision.

This completes our current review of these proceedings.

Electronically signed on March 2, 2023, at Brattleboro, Vermont pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division