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

Docket No. 21-ENV-00103

Brewster River Mountain Bike Club CU Application

ENTRY REGARDING MOTION

Motion: Motion for Summary Judgment (Motion #2)

Filer: Nicholas AE Low, attorney for Applicant Brewster River Mountain Bike Club

Filed Date: January 17, 2023

Appellants' Opposition to Brewster River Mountain Bike Club's Motion for Summary Judgment, filed by Attorney Jeremy S. Grant on February 16, 2023

Reply in Support of Motion for Summary Judgment, filed by Attorney Nicholas AE Low on March 3, 2023.

Motion: Motion for Summary Judgment (Motion #4)

Filer: Jeremy S. Grant, attorney for Appellants David Demarest and Jeff Moulton

Filed Date: February 7, 2023

BRMBC Opposition to Appellants' Motion for Summary Judgment, filed by Attorney Nicholas AE Low on March 9, 2023

Motion: Motion to Clarify Motion to Reconsider and Clarify (Motion #5)

Filer: Nicholas AE Low, attorney for Applicant Brewster River Mountain Bike Club

Filed Date: March 03, 2023

Appellant's Memorandum in Opposition to Appellee's Motion to Reconsider and Clarify (and Motion for Attorney's Fees), filed March 17, 2023, filed by Attorney for Appellant, Jeremy S. Grant

Reply in Support of Motion to Reconsider and Clarify, filed March 31, 20023, filed by Attorney for Applicant, Nicholas AE Low

Motion 2 is GRANTED in part and DENIED in part. Motion 4 is DENIED. Motion 5 is DENIED subject to the following CLARIFICATION. The motion for attorney's fees is DENIED.

This matter is before the Court on David Demarest and Jeff Moulton's (collectively "Appellants") appeal of a conditional use permit issued to Brewster River Mountain Bike Club ("BRMBC") for the construction of a bridge over Settlement Brook on certain property in Underhill, Vermont for recreational purposes. Presently before the Court are cross motions for summary judgment and Applicant's motion to reconsider or clarify the Court's January 31, 2023, Order on Appellants' Motion for Extension of Time. See In re Brewster River Mt. Bike Club CU Application, No. 21-ENV-00103 (Vt. Super. Ct. Envtl. Div. Jan. 31, 2023) (Durkin, J.) [hereinafter "January 31, 2023, Order"]. BRMBC moves for summary judgment on all Questions in Appellants' Statement of Questions. Appellants' move for partial summary judgment on Questions 3 through 5 and Question 10. Additionally, Applicant's ask the Court to reconsider or clarify the January 31, 2023, Order barring BRMBC "from presenting any testimony or other evidence that should have been disclosed during discovery, but was not." Id. Appellants oppose the motion to reconsider or clarify, and request attorney's fees incurred in responding to the Applicant's "[f]rivolous [m]otion." Appellants Mem. in Opp. to BRMBC's Mot. to Reconsider and Clarify at 16–17 (filed Mar. 17, 2023). In these proceedings, Attorney Nicholas AE Low represents BRMBC and Attorney Jeremy S. Grant represents Appellants.

Discussion

First, we address BRMBC's motion to reconsider or clarify, and Appellants' associated motion for attorney's fees. Second, we turn to the cross-motions for summary judgment. Because this Entry Order addresses multiple motions, each of which are subject to unique legal standards and relevant facts, the Court addresses each motion separately. In doing so, the Court sets forth the applicable legal standards, and any factual background or undisputed material facts relevant thereto, separately within this Discussion.

I. Motion to Reconsider or Clarify

In the Court's January 31, 2023 Order, the Court granted Appellants' motion for an extension of time to file any dispositive motions. Appellants' motion was predicated upon BRMBC's alleged delays in delivering and supplementing discovery responses, which made it difficult for Appellants to complete their motion. In the last sentence of Appellants' motion for

an extension, Appellant also asked the Court to enter an order requiring BRMBC to file supplemental discovery responses that comply with the Vermont Rules of Civil Procedure . . . ." Appellants' Mot. for Extension at 8 (filed Jan. 17, 2023).

The Court declined to enter such an order, as Applicant and Appellants alike are always under such a duty to comply with the Rules of Civil Procedure. See January 31, 2023 Order; see also V.R.C.P. 26(c) ("A party who has responded to a request for discovery with a response is under a duty to supplement or correct the response in a timely manner . . . ."). However, the Court informed BRMBC that they would be "[barred] from presenting any testimony or other evidence that should have been disclosed during discovery, but was not." Id.

While the Court declines to reconsider its earlier order, the substantial briefing in support of and opposition to the motion to clarify make it clear that clarification is necessary.[1] The Court's intention was to caution BRMBC to the consequences of failing to supplement, which are described in V.R.C.P. 37(c)(1). Rule 37(c)(1) states that"[a] party that without substantial justification fails to supplement responses as required by Rule 26(e) is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." The Court intended its statement to be narrowly interpreted, as is consistent with V.R.C.P. 37(c)(1). This was shown through the January 31, 2023 Order's direct citation to Rule 37(c). See January 31, 2023 Order at 1. As consistent with the Rule, BRMBC (and Appellants) would not be permitted to use evidence at trial that they failed to disclose or supplement as required, unless such failure was harmless.

Further, we note that the parties are only under an obligation to disclose and supplement such discovery that is responsive to the requests and not otherwise protected from discovery by privilege or work-product. V.R.C.P. 26(b)(6) (noting the obligation to produce a privilege log of documents withheld as privileged but creating no reciprocal obligation to produce a log of "non-responsive" documents or answers to interrogatories withheld); see generally V.R.C.P. 33 (setting

[1] This is further supported by arguments Appellants espoused in their filings regarding the pending motions for summary judgment. See Resp. to BRMBC's Statement of Undisputed Material Facts at 4–6 (filed Feb. 16, 2023) (raising objections to evidence and testimony cited in Applicant's statement of undisputed material facts on the grounds that they're barred by the Court's January 31, 2023 Order).

forth rules to responding and objecting to interrogatories). As such, the only evidence or testimony that would be barred from use by a party is that which was directly responsive to a discovery request but withheld without demonstrating privilege. Thus, not all evidence that was not produced during discovery is prohibited from being a part of a trial or dispositive motion.

To better illustrate how the Court interprets this rule, the Court will use the request and response to "Interrogatory No. 3" in light of the evidence Appellants assert is now barred. Interrogatory No. 3 and its Response provide:

> 3. With regard to the BRMBC's decision to construct a bridge over Settlement Brook on the Property, please:
>
> . . .
>
> c. Describe whether the BRMBC explored any alternatives to building a bridge over Settlement Brook and if BRMBC did explore alternatives, please identify each alternative, state where each alternative was located, describe how BRMBC evaluated each alternative and the reason(s) BRMBC decided to construct the bridge over Settlement Brook instead of pursuing each alternative;
>
> d. Describe what, if any, steps BRMBC took to identify alternatives to the Project;
>
> e. For each alternative considered, state whether the alternative would be located on the Property and, if not located on the Property, for each alternative considered, describe its location and identify the owner(s) of the property where each alternative was to be located . . . .

Appellant's Ex. A (filed Mar. 17, 2023). In Response, BRMBC answered: "3.c Response: No alternatives explored when replacing existing bridge," "3.d Response: N/A," and "3.e Response: N/A . . . ." Id. Appellants now seek to exclude evidence or argument related to whether there was any "practical physical alternative" to building the bridge within the 100-foot set back of the brook. See Mot. to Reconsider or Clarify at 8 (referencing Appellant's Mot. for Summ. J. at 7–8 (filed Feb. 7, 2023)). This is not what Interrogatory No. 3 asks. Simply, whether there was a practical physical alternative is not responsive to whether BRMBC explored any alternatives, and

such testimony would not be excluded under V.R.C.P. 37(c) or by this Court's January 31, 2023 Order.[2]

As such, this Court's January 31, 2023 Order is to be interpreted in the context of the clear obligations and/or standards provided in Rule 37 and the rules relevant to discovery set forth in the Vermont Rules of Civil Procedure, not operating to exclude all unproduced evidence. To the extent that the parties require further clarification, the parties are encouraged to resolve those disputes before involving the Court. V.R.C.P. 26(h).

In reaching this conclusion, we must also **DENY** Appellants' motion for attorney's fees. The filings show that clarification of the January 31, 2023 Order was warranted for all parties, including the Court. As such, the motion was not frivolous. See Agency of Nat. Res. v. Lyndonville Sav. Bank & Tr. Co., 174 Vt. 498, 501 (2002) (discussing exceptions to the American Rule).

II. Cross-Motions for Summary Judgment

a. Legal Standard

"Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Samplid Enters., Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996); V.R.C.P. 56(a); V.R.E.C.P. 5. Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). Where "the moving party does not bear the burden of persuasion at trial," however, "it may satisfy its burden of production by indicating an absence of evidence in the record to support the nonmoving party's case." Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). Once the moving party has made that showing, the burden shifts to the non-moving party to demonstrate that there is a triable issue. Id. at 640. The party opposing a motion for summary judgment "cannot simply rely on mere allegations in

[2] It is also unclear whether Appellants' proffered assertion (i.e., that there must be no practical physical alternatives to the project) is relevant here, as the relevant ULUDR provision does not require such an assessment under their conditional use standards. Instead, the ULUDR requires that an applicant demonstrate "that there is no practical physical alternative *to clearing, filling or excavating* within the setback . . . ." ULUDR § 3.19.E.2. This addresses construction practices, not site location, per se. Thus, a review under this provision will require BRMBC to show, and this Court to consider, whether there are no practical alternatives to any "clearing, filling, and excavating" in the setback, to the extent that any occurred.

the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to a factfinder." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citations omitted); V.R.C.P. 56(e). For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary judgment," id., and give the nonmoving party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332. The evidence, on either side, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8, 208 Vt. 112. When considering cross-motions for summary judgment, such as the Court is presented with here, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5.

b. Statement of Questions

In the Environmental Division, the Statement of Questions provides notice to other parties and this Court of the issues to be determined within the case and limits the scope of the appeal. In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). Appellant's Statement of Questions presents the following 16 Questions for the Court's review:

> (1) Does the Underhill Road, Driveway & Trail Ordinance (the "Ordinance") apply to the Brewster River Mountain Bike Club's (the "Applicant") project to construct a bridge over Settlement Brook and related bike trail improvements (the "Project") on property owned by Nicole C.W. Ritchie & Elisabeth A. McIntee at 348 Irish Settlement Road in Underhill, Vermont (the "Property") because, in addition to seeking to build a bridge over Settlement Brook, the Applicant also seeks approval to substantially rebuild a road or driveway, as defined under that ordinance, providing direct or indirect access to or from a Town Highway, Fuller Road (Town Highway-26)?
>
> (2) Does Applicant's Project require a Highway Access Permit, as required under Section 6.5 of the Ordinance and § 3.2 of the Town of Underhill, Vt Unified Land Use & Development Regulations (the "Underhill ULUDR") because the Applicant seeks to create a new access to a Town Highway, Fuller Road (TH-26), and would include an alteration of a traveled way?

(3) Because the Applicant seeks conditional use approval to encroach into the 100 foot setback from Settlement Brook, by building a bridge over Settlement Brook and incorporating the old bridge, which is a structure or impervious surface, into its trail within 100 feet from Settlement Brook, has the Applicant sufficiently established, pursuant to the Underhill ULUDR § 3.19.E.2, that "there is no practical physical alternative to clearing, filling or excavating within the setback or buffer area" and that "any resulting undue adverse impacts to surface waters, wetlands, water quality and associated functions and values will be mitigated through erosion controls, plantings, protection of existing vegetation, and/or other generally accepted mitigation measures"?

(4) Under § 3.19.E.2 of the Underhill ULUDR, which permits encroachment within the 100-foot setback from Settlement Brook, upon a finding that "there is no practical physical alternative", should the Court consider whether Applicant can obtain access to its trails from the Property's existing driveway or whether Applicant can obtain access over a different property that will not adversely impair Settlement Brook, a surface water and associated buffer deemed a "significant natural, historic and scenic resource" under § 5.3.B.1.a.iv of the Underhill ULUDR?

(5) Because the Underhill ULUDR § 3.19.E.2 only permits "[p]aved or unpaved public paths, intended for public access and recreation, that are located outside of required riparian and wetland buffer", is any portion of the Applicant's unpaved public path or trail permitted to be located inside the required 100 foot setback from Settlement Brook and does Applicant's bridge, which cross over Settlement Brook by several feet, actually provide a "[p]ublic access point to surface waters"?

(6) Because Applicant seeks to use the old bridge that crossed Settlement Brook as part of the trail and the Applicant indicated that the old bridge would be located within the Fuller Road (TH-26) right of way, does the Project comply with 30-foot front setback for accessory structures in a Rural Residential District, as set forth under Article II, Table 2.4 of the Underhill ULUDR?

(7) Has Applicant established, in its application, the "[p]rovision . . . for adequate and safe onsite vehicular and pedestrian circulation" as required for site plan approval pursuant to § 5.3.B.4 of the Underhill ULUDR?

(8) Because Applicant's proposed bridge will adversely affect or impair Settlement Brook, a surface water and associated buffer deemed a "significant natural, historic and scenic resource" under § 5.3.B.1.a.iv of the Underhill ULUDR, should the Court require the submission of a stormwater management and erosion control plan to minimize surface runoff and erosion, protect water quality, and to avoid damage to downstream properties pursuant to § 5.3.B.8 of the Underhill ULUDR?

(9) Can Applicant establish that its Project will not result in an undue adverse effect on traffic on road and highways in the vicinity, and, in particular, can Applicant establish its Project will not result of the creation of unsafe conditions for motorists or pedestrians, pursuant to § 5.3.B.3 of the Underhill ULUDR?

(10) Did Applicant provide sufficient legal documentation in its application for the Court to determine that all required improvements, rights-of-way and easement, and other common lands or facilities will be installed and adequately maintained either by the Applicant or the landowners, as required under § 5.4.D.4 of the Underhill ULUDR?

(11) Can Applicant establish it is entitled to a variance from the setback requirement as it relates to the front property line because literal enforcement of the setback results in undue hardship when the hardship is created by the Applicant, which chose to build a bridge without a permit and without considering other reasonable and feasible alternatives, pursuant to § 5.5.C.2 the Underhill ULUDR?

(12) Is the existence of the Settlement Brook in close proximity to the right of way of both Fuller Road (TH-26) and Irish Settlement Road an "exceptional physical condition to the particular property and the unnecessary hardship is created by this peculiarity", as required under § 5.5.C.2 of the Underhill ULUDR, when the Property can be developed for trails by using the existing driveway on the Property that crosses Settlement Brook?

(13) Does the term "vehicle", as used in the Underhill ULUDR, include bicycles and other non-motorized forms of transportation, particularly in light of the fact that the Underhill ULUDR sometimes includes provisions that only apply to "motor vehicles", such as § 4.14, 3.12.B?

(14) If the Court finds that Applicant satisfies the requirements for a conditional use approval and variance for its Project, should the

> Court condition issuance of a permit on Applicant accepting additional conditions to adequately ensure protection of: (a) surface runoff, erosion, water quality, and necessary hydrologic functions of Settlement Brook, (b) motor vehicle traffic on Fuller Road (TH-26) since motorists will have limited visibility of bikers existing the bridge and entering the roadway, and (c) bikers existing the bridge, who will have limited visibility of motorists and others using Fuller Road?
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> (15) If Applicant's proposed development will permit cross-country skiing on a maintained trail network, should Applicant's Project be denied because it would constitute a Nordic Ski Facility, as defined under the Underhill ULUDR, which are not allowed uses in Residential Rural Districts pursuant to Article III, Table 2.4 of the ULUDR?
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> (16) Can Applicant obtain approval and a permit if Applicant already built the bridge on the Property before filing its application for a conditional use permit, when Section 10.1.A of the Underhill ULUDR provides that "[n]o land development . . . may commence . . . until all applicable municipal land use permits and approvals have been issued" and when Section 10.6.A provides that "the commencement . . . of any land development . . . that is not in conformance with the provisions of these regulations shall constitute a violation. All violations shall be pursued. Each day that a violation continues shall constitute a separate offense"?

Statement of Questions at 1–5 (filed Nov. 2, 2021).

c. Undisputed Material Facts[3]

[3] This determination of undisputed material facts is somewhat complicated by the parties' need for clarification of this Court's January 31, 2023 Decision. See January 31, 2023 Order; see also Mot. to Reconsider and Clarify at 1–9; see also Mem. in Opp. to Mot. to Reconsider and Clarify at 1–17; see also Reply Supp. Mot. to Reconsider and Clarify at 1–3; see Decision on Motion to Reconsider or Clarify at 2–4 (ruling on Motion to Reconsider). For the reasons set forth above, and during the summary judgment briefing period, it became apparent to the parties and the Court that there were differences in interpretation of this Court's January 31, 2023 Order. As a result of Appellants' broad interpretation of that Order, Appellants opposed BRMBC's motion by objecting to the admissibility of evidence used to support several of BRMBC's undisputed material facts, and framed its own argument for summary judgment on BRMBC being unable to meet its burden from the answers to their interrogatories. See, e.g., Appellants' SDMF, ¶¶ 10–12; see also Appellants' Mot. for Summ. J. at 1 ("In short, [BRMBC] cannot point to any evidence in the record to establish that it is entitled to conditional use approval . . . ."). The Court's interpretation of its Order, however, is much narrower, and, for the reasons set forth above, it would likely not exclude this evidence as it is not clear the evidence that Appellants seek to exclude was responsive to their discovery requests. The Court, however, cannot determine if Appellants would have produced different evidence or arguments to dispute BRMBC's SUMF if they had been operating under the Court's narrower intended interpretation

BRMBC filed its Statement of Undisputed Material Facts on January 17, 2023 ("BRMBC's SUMF"). Appellants filed their response to BRMBC's SUMF ("Appellants' SDMF") on February 16, 2023. Appellants also filed their own Statement of Undisputed Material Facts ("Appellants' SUMF") in support of its cross-motion for summary judgment on February 7, 2023. BRMBC filed its response to Appellants' SUMF ("BRMBC's SDMF") on March 9, 2023. The Court sets out the following facts for the sole purpose of deciding the pending motion, adopting those facts that are material to the resolution and undisputed or inadequately disputed, and eliminating those that are disputed, unsupported by admissible evidence, or immaterial to the resolution the Court reaches today. What follows is not a list of the Court's factual findings, since findings of fact may only be announced after a merits hearing. See Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) ("It is not the function of the trial court to find facts on a motion for summary judgment").

1. On June 24, 2021, BRMBC applied for after-the-fact conditional use approval and a variance for an already completed project.

2. The permit was for the replacement of a bridge over Settlement Brook at 348 Irish Settlement Road in Underhill ("the Property"). There was a pre-existing bridge on the Property in the same location as the replacement bridge.

3. In addition to the bridge, the site plan submitted with the application also shows a ramp and boardwalk near the bridge, but the parties dispute whether these are part of the application/project ("the Project").

4. The replacement bridge is a part of an existing multi-use trail network, generally extending on both sides of Irish Settlement Road. The parties dispute whether the original bridge was part of that network.

5. The multi-use trail that the bridge is part of is used by the general public for walking, running, dog walking, biking, and cross-country skiing.

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of the Order. As such, the Court is cautious in its evaluation of disputes, and gives Appellants the benefit of reasonable doubts and inferences for demonstrating disputes for purposes of this summary judgment motion.

6. The trail is not groomed or otherwise maintained for cross-country skiing, and BRMBC does not promote the trail for skiing.

7. BRMBC made the decision to build the bridge "to allow for foot and bike traffic to continue to cross Settlement Brook" and one goal is to connect "a network of multi-use trails located on private property."

8. The replaced bridge allows "users to cross Settlement Brook and reach Fuller Road, which allows for connectivity to other trails south of Fuller Road."

9. BRMBC completed construction of the bridge on May 2, 2021, before it submitted its Application to the Underhill Development Review Board ("DRB"). There has been some suggestion that BRMBC members did not believe that a permit for the replacement bridge was required. While this fact does not materially impact our legal analysis, we note that there is no suggestion that BRMBC's avoidance of its permit obligation was purposeful.

d. **Discussion**

I. BRMBC Motion for Summary Judgment

BRMBC moves for summary judgment on all 16 Questions of Appellants' Statement of Questions. In support of its motion, BRMBC primarily argues that the bridge subject to this appeal is not subject to zoning because it is not a "structure" as that term is defined in the Town of Underhill Unified Land Use and Development Regulations ("ULUDR") because "[c]ertain recreational uses of private property plainly fall outside the rudiments of zoning." In re Scheiber, 168 Vt. 534, 538 (1998) ("The primary purpose of zoning is to manage municipal and regional growth and development in an organized fashion, not to regulate the incidental recreational activities of private property owners."). In the alternative, BRMBC moves for summary judgment on Questions 1 through 16 on the basis that the undisputed material facts demonstrate that they are entitled to judgment as a matter of law. Appellants oppose the motion, arguing that this bridge is a structure under the ULUDR, and the type of land development expressly contemplated by the delegating statutes and the ULUDR. Additionally, Appellants argue that BRMBC is not the owner of the underlying property here, and therefore cannot argue that this bridge is the type of recreational use not subject to zoning, because it was not built by the private property owner "in [their] own yard for the use and enjoyment of [themselves], [their] family and friends . . . ."

Scheiber, 168 Vt. at 538 (quoting City of New Orleans v. Estrade, 8 So.2d 536, 537 (1942)). In response to BRMBC's motion in the alternative, Appellant argues that BRMBC has failed to meet their burden of demonstrating that they are entitled to judgment as a matter of law.

In reviewing BRMBC's motion for summary judgment, the Court will accept as true the allegations made by Appellants in opposing summary judgment, Mylan Labs., Inc., 2004 VT 15, ¶ 15, and give the Appellants the benefit of all reasonable doubts and inferences, Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5. In so doing, the Court finds that there remain genuine disputes of material fact such that summary judgment would be inappropriate at this time. Particularly, when giving Appellants the benefits of all reasonable doubles and inferences, the parties dispute the scope of the Project and what features are contemplated under the permit application. From this dispute, the Court cannot determine several key issues, such as where the project is within the setback distances or whether there were practical physical alternatives to clearing, filling, or excavating within those setbacks. See Statement of Questions, ¶¶ 3–6, 8, and 11–12. Additionally, the Court concludes that many of the pure legal issues contained in the Questions are best resolved in conjunction with resolution of disputed facts and factual questions through the merits process. Id. ¶¶ 1–2, 7–10, and 13. For example, Question 13 asks whether the term "vehicle," as used in the Underhill ULUDR, includes bicycles and other non-motorized forms of transportation: a pure question of law. State v. Therrien, 2011 VT 120, ¶ 9, 191 Vt. 24 ("The interpretation of a statute is a question of law . . . ."). We note that resolution of this Question may have impacts for the scope and interpretation of other pending Questions, specifically Questions 1, 2, 7, 9, and 14(b). While the Court has not been presented with citation to any ULUDR provision that would authorize or require the Court to conclude that bicycles are "vehicles," as that term is used in the ULUDR, we recognize that there may be extrinsic evidence not presently before the Court that would assist in addressing this legal issue.[4] We therefore

[4] See, e.g., Underhill ULUDR, Art. IX ("**Recreation, Outdoor**: A facility for outdoor recreation, including but not limited to a stadium, tennis courts, athletic fields, golf courses, swimming pools, and trails for hiking, horseback riding, bicycling, snowmobiling, and cross-country skiing; except for such facilities which are accessory to an approved educational facility or a residential use, or are otherwise exempted from these regulations under Section 10.2."

conclude that resolution of this determination will be best addressed at trial in consideration of the factual disputes contain in Questions 1, 2, 7, 9, and 14(b). As such, the Court **DENIES** summary judgment to BRMBC on Questions 1 through 14.

Despite the minimal undisputed material facts, the Court does conclude that it can issue summary judgment in BRMBC's favor on Questions 15 and 16. Question 16 is a pure question of law, asking whether Applicant can obtain a permit for an already built bridge on the Property. See Statement of Questions, ¶ 16 (directing the Court to § 10.1.A of the Underhill ULUDR, which provides "[n]o land development . . . may commence . . . until all applicable municipal land use permits and approvals have been issued"). The Court routinely allows after-the-fact permit applications. See, e.g. In re Appeal of David Jackson, No. 43-2-00 Vtec, slip op. at 1–2 (Vt. Envtl. Ct. May 22, 2000) (Wright, J.) ("In any event, even if a notice of violation or an enforcement action is pending, that fact does not preclude an applicant from apply for approval of a structure as-built."); see also In re Cumberland Farms, Inc., 151 Vt. 59, 60 (1989) (considering an after-the-fact variance permit application). Appellants produce no argument in opposition to summary judgment on this Question. In fact, we believe that Appellants have misinterpreted ULUDR § 10.1.A. It prohibits "development" without a permit, but does not expressly prohibit an after-the-fact permit application, and the Court will not read one in to the ordinance. The lack of any express prohibition, alongside the common practice of allowing such permits to reconcile such violations, warrants summary judgment for Applicant on Question 16.

Precedent before this Court and the Vermont Supreme Court clearly contemplate an applicant seeking an after-the-fact permit for an as-built structure. The Court may review this permit application, despite the after-the-fact nature of the application. The fact that the development proposed in an application has already been completed does not factor into the consideration of the application, other than to provide a 100-scale model of what the application seeks to authorize and whether it conforms to the ordinance. The Court therefore answers Question 16 in the affirmative, and **GRANTS** summary judgment to BRMBC and **DISMISSES** Question 16.

Finally, even with the minimal undisputed material facts before the Court, the Court can also render summary judgment on Question 15. While it is undisputed that the permit

application contemplates the replacement of a bridge over Settlement Brook, the parties dispute whether the project should also include review of a ramp and boardwalk near the bridge. However, regardless of whether our review is just of the bridge or the bridge, ramp, and boardwalk, we cannot conclude that the Project should be characterized as a "Nordic Ski Facility." The Underhill ULUDR defines "Nordic Ski Facility" as

> An area *and* facility *developed for* cross-country and backcountry skiing and snowshoeing on a maintained trail network, which may also include associated ticketing, parking, ski equipment sales and rentals, ski instruction, safety, patrol, snowmaking and trail maintenance facilities, and warming hut facilities to be accessed primarily by ski trails or service roads.

BRMBC Ex. 7 [hereinafter "ULUDR"] (emphasis added). The undisputed material facts demonstrate this this is not an "area and facility developed for cross-country" skiing or other snow sports. It is undisputed that BRMBC will not maintain the trails or the bridge for cross-country skiing, will not promote cross-country skiing or snow sports on the trails, and that any cross-country skiing is at best an incidental use of the bridge. The fact that it might be used by cross-country skiers occasionally does not make it a "Nordic Ski Facility." If the Court were to adopt that interpretation of the term "Nordic Ski Facility," every trail, sidewalk, and town road in Vermont would be a Nordic ski facility following a snowstorm. Simply put, just because someone can cross-country ski in an area does not, by that fact alone, result in the area being defined as a "Nordic Ski Facility."

Appellants did not respond to BRMBC's arguments on this Question in its motion or opposition. Accordingly, the Court concludes that the undisputed material facts entitle BRMBC to summary judgment as a matter of law on Question 16. Accordingly, the Court **GRANTS** BRMBC summary judgment on questions 15 and **DISMISSES** that Question.

II. Appellants' Motion for Partial Summary Judgment

In Appellants' cross-motion for summary judgment, Appellants move for judgment on Questions 3 through 5, and Question 10 on the grounds that BRMBC does not have evidence in the record to support its case. Specifically, Appellants argue that BRMBC cannot demonstrate that (1) there was "no practical physical alternative" to building the bridge within the 100-foot

setback, and (2) it has a legal interest in the Property and as a result is not an Applicant entitled to apply for the permit. In response to Appellants' arguments, BRMBC argues (1) that Appellants proffered interpretation of ULUDR § 3.19.E.2 is absurd and that BRMBC has demonstrated evidence in the record that would entitle them to summary judgment on the setback issues pursuant its more reasonable interpretation of the bylaws, and (2) that permit applicants are not required to own the land on which the proposed use takes place, as held in Devonwood Investors, LLC 75 Cherry Street, No. 39-4-17 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. June 22, 2017) (Walsh, J.) ("A permit applicant need not own the land on which the proposed use takes place. Nothing in the state zoning law requires the applicant to also be the landowner.").

In reviewing Appellants' motion for summary judgment, the Court will accept as true the allegations made by BRMBC in opposing summary judgment, Mylan Labs., Inc., 2004 VT 15, ¶ 15, and give the BRMBC the benefit of all reasonable doubts and inferences, Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5. In so reviewing, the Court finds that, when giving BRMBC the benefit of all reasonable doubts and inferences, BRMBC has produced plausible evidence and legal theories to survive summary judgment. See BRMBC Opp. to Appellant's Mot. for Summ. J at 1–5. Accordingly, the Court **DECLINES** to enter judgment for the Appellants on Questions 3 through 5 and Question 10.

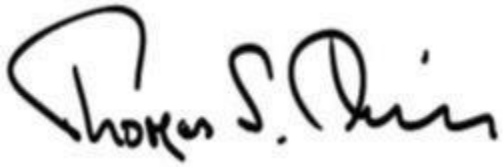
Conclusion

For the reasons discussed above, the Court **DECLINES** to reconsider its January 31, 2023 Order. However, while the Court declines to reconsider its earlier order, the Court clarified the decision to make clear that its January 31, 2023 Order did not extend beyond what is contemplated in Rule 37(c). As such, BRMBC's motion to clarify and reconsider is **GRANTED IN PART** and **DENIED IN PART**. With regards to the cross-motions for summary judgment, the Court **DENIES** Appellants' motion for partial summary judgment, and **GRANTS IN PART** BRMBC's motion for summary judgment on Questions 15 and 16 and **DISMISSES** those Questions and **DENIES IN PART** as to the remainder of the Statement of Questions.

The Court will set the matter for a status conference. Parties are to come to that conference prepared with estimates on the time needed for a merits hearing on the remaining factual and legal issues.

So Ordered.

Electronically signed at Newfane, Vermont on Monday, June 5, 2023, pursuant to V.R.E.F. 9(d).



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