

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00115

Nakatomi Plaza CU/Site Plan Application

DECISION ON THE MERITS

Nakatomi Plaza, LLC (Applicant) seeks conditional use approval for a wooden enclosure integrated at the perimeter of an outdoor seating area at 39 Bridge Street (the Subject Property) in the Town of Richmond (Town). Applicant secured a previous approval from the Town's Development Review Board (DRB) for substantial renovations to the Subject Property which Applicant thought included the installation of the wooden enclosure. The Town's Zoning Administrator (ZA) requested that Applicant return to the Town for review and after-the-fact approval of the enclosure. Applicant filed a Site Plan and Conditional Use Approval application and the DRB approved the application with conditions. Vicentios Zachary (Appellant), a Trustee of the owner of abutting property located at 45 Bridge Street, appeals that decision to this Court.

Appellant is represented by William B. Towle, Esq. Applicant is represented by Christopher J. Nordle, Esq. The Town is represented by David W. Rugh, Esq.

Appellant raised eight Questions in the initial Statement of Questions, filed on December 1, 2021, when Appellant was self-represented. The Court reviewed the initial Statement of Questions with the parties at a hearing on October 17, 2022. At that time, Appellant was represented by Attorney Towle. During the October 17 hearing, the Court restated Question 4 on the record as follows:

4. Whether the as-built floor plan complies with the Town's regulation?

At this hearing, the Court also dismissed Question 5 and ordered Appellant file an Amended Statement of Questions before trial. On October 24, 2022, Appellant filed an

Amended Statement of Questions and updated Questions 1, 2, and 6 only. At the beginning of trial, Appellant withdrew Question 7.¹ The questions restated and remaining for trial are as follows:

1. Whether the as-built development, as referenced in the application, creates a surface water nuisance or condition which precludes a conditional use permit or such permit must be conditioned on the development not creating such nuisance or condition?

24 VSA 414.(3) Conditional uses.

(A)These general standards shall require that the proposed conditional use shall not result in an undue adverse effect on any of the following:....

(ii) The character of the area affected.

5.6. Conditional Use Review

5.6.1 General Standards - A proposed use shall not result in an undue adverse effect upon:

b) The character of the area affected.

5.6.2 Specific Standards - Conditional uses shall comply with the following specific standards:

i) Existing water supplies and the quality of ground and surface water resources shall not be adversely affected.

2. Whether the as-built development's construction of the seating area patio and structural fence is illegal in this zone as being two impermissible Accessory Structures and being within the setback?

5.10. Requirements for Specific Structures

5.10.1 Accessory Structure - An accessory structure includes any structure that is customarily incidental and subordinate to the principal structure or use on a lot, including but not limited to, *fences*, walls, barns, sheds, greenhouses, gazebos, *patios*, and free-standing garages. Accessory structures (except for non-structural fences and walls which mark property boundaries, or enclose portions of the property, and are less than 6 feet high) shall conform to the setbacks

¹ Appellant also withdrew Question 5, but that question had been previously dismissed.

established in the applicable Zoning District, unless a greater setback is required by these Zoning Regulations. Italics added.

Accessory Structures are not listed as a permissive use and Accessory Structures are not listed as a Conditional Use in this zone.

See: 3.10.1 Allowable Uses Upon Issuance of Zoning Permit by Administrative Officer

See: 3.10.2 Allowable Uses Upon Issuance of Conditional Use Approval.

3.10.5 Dimensional Limitations for Structures on Lots in the VD District

a) Height- shall be as in Section 4. 12 of these regulations.

b) Setback- All structures shall have zero (0) feet setbacks, except for a five (5) feet setback *for all structures on district boundaries*. All development is required to install and maintain a sidewalk to the public works standards on any and all public road frontage. Placement of the sidewalk and curb cuts or accesses to the property are subject to approval of the Highway Foreman. Italics added.

3.10.6 Other Requirements Applicable to Lots in the VD District

h) Additional Possible Conditions - The following site standards also may be required as a condition of Development Review Board approval

- Greater setback or screening requirements along the perimeter of the property
- Adequate pedestrian circulation
- Demonstration of the ability to properly develop, operate, and maintain development roads, utilities, driveways, parking, sidewalks, landscaping, and other conditions or standards impose

3. Whether the wall height of the "as built" structure should be allowed to remain in place when this existing height is in violation of the original permitted height?
4. Whether the as-built floor plan complies with the Town's regulation?
5. [Dismissed]
6. Does the as-built development, as referenced in the application, require additional screening to, among other things, replace the trees and vegetation taken down as part of the construction to protect the character of the neighborhood?

5.6. Conditional Use Review

5.6.1 General Standards - A proposed use shall not result in an undue adverse effect upon:

b) The character of the area affected.

3.10.6 Other Requirements Applicable to Lots in the VD District

h) Additional Possible Conditions - The following site standards also may be required as a condition of Development Review Board approval

- Greater setback or screening requirements along the perimeter of the property
- Adequate pedestrian circulation
- Demonstration of the ability to properly develop, operate, and maintain development roads, utilities, driveways, parking, sidewalks, landscaping, and other conditions or standards impose

7. [Withdrawn]

8. Whether the use of, or trespass on the property owned by TD Bank, and providing access to 45 Bridge Street by a deeded right of way, by the Big Spruce, its patrons, and/or its contractors or delivery drivers creates an impermissible hazard or nuisance for the residents and guests of 45 Bridge Street?

The Court conducted a one-day remote trial on October 26, 2022, using the WebEx platform. The Court conducted a site visit on October 28, 2022.

Findings of Fact

1. Nakatomi Plaza, LLC (Applicant) owns the 39 Bridge Street, Richmond, Vermont (the Subject Property).
2. The Subject Property contains a building that is approximately 150 years old.
3. The Subject Property has historically been used as a restaurant on the first floor and for commercial uses on the second floor.
4. Applicant purchased the Subject Property in the fall of 2019. Prior to this date, the Subject Property was dormant and in disrepair.
5. Appellant Vicentios Zachary is the Trustee of the Vicentios Zachary Revocable Living Trust (Trust).

6. The Trust is an owner of 45 Bridge Street (Appellant's Parcel).
7. The eastern boundary of the Subject Property abuts the western boundary of Appellant's Parcel.
8. Appellant's Parcel has no frontage on Bridge Street and is accessed over a non-exclusive easement (Easement or Right-of-Way (ROW)) over adjoining land at 23 Pleasant Street, owned by TD Bank.
9. The ROW runs adjacent to the southern boundary of the Subject Property.
10. This ROW is for vehicle passing and repassing only and does not include the right to park any vehicle, person or object at 23 Pleasant Street, or to block, damage or obstructed the "Paved Drive."
11. The north boundary of 23 Pleasant Street abuts the south boundary of the Subject Property.
12. There is one point along the ROW where all three parcels, the Subject Property, 23 Pleasant Street, and Appellant's property, come to a common point, referenced as the "triple point."
13. In September 2019, the Town's Planning Commission amended the Town of Richmond Zoning Regulations (the Regulations) and created the Village Downtown District (VD).
14. The VD District is unique.
15. Some of the unique characteristics of the VD District include the absence of certain setbacks and a higher allowable lot coverage (80%).
16. The Subject Property and 23 Pleasant Street are in the VD District.
17. Appellant's Parcel is in the Residential/Commercial District (RC).
18. The common border between the Appellant's Parcel and the Subject Property is a district boundary between the VD and RC districts.
19. In November 2019, Applicant sought Site Plan and Conditional Use (CU) review and approval of mixed uses of the Subject Property.
20. The November 2019 application sought approval of a restaurant on the first floor and three residential units and two office spaces on the second floor.
21. The restaurant renovation included relocating windows, reconfiguring the entrance from the Bridge Street side of the building to the south-facing side of the building, constructing a porch, replacing and extending the porch canopy along the south side of the building,

- relocating stairs leading to the second floor from the west side to the east side of the building, and adding an outdoor seating area or patio.
22. The November 2019 application was approved in a January 22, 2020 DRB decision (the 2020 Decision).
 23. The 2020 Decision was not appealed.
 24. The size of the outdoor seating area was not defined in the November 2019 application or the 2020 Decision.
 25. After receiving this approval, Applicant began the process of renovating the Subject Property, including the installation of the wooden enclosure associated with the restaurant's outdoor seating area and at issue in this appeal.
 26. It was Applicant's belief that the wooden enclosure was approved by the 2020 Decision.
 27. As Applicant was carrying out the renovation work for the Subject Property, the Town's new ZA took issue with the installation of the wooden enclosure. The new ZA took the position that the enclosure was not a part of the 2020 Decision.
 28. At the direction of the ZA, Applicant filed a fence application for the enclosure on or about April 6, 2021.
 29. After further correspondence between Applicant and the Town, Applicant filed a June 29, 2021 Site Plan and CU application for the wooden enclosure. With the filing of this application, the fence application was moot.
 30. The project at issue in the June 29, 2021 Site Plan and CU application was specific and limited to the enclosure and did not seek to alter any other aspects of the Subject Property addressed by the 2020 Decision.
 31. The application before the Court is for conditional use approval and site plan approval of an addition to the principal structure (i.e., the wood enclosure) (the Project).
 32. The enclosure is connected to the principal structure.
 33. The enclosure runs directly along the south boundary of the Subject Property and 23 Pleasant Street in the approximate location of a prior chain link fence directly up to the triple point.
 34. The enclosure then turns north, reconnecting with the principal structure.

35. The northern portion of the enclosure is approximately 15 feet from the eastern boundary of the Subject Property, where it abuts the western boundary of the Appellant's Parcel.
36. Applicant is not seeking approval of a fence.
37. Applicant is not seeking approval of an accessory structure.
38. The application does not request review or consideration of any ground alteration, grading, stormwater issues, use or occupancy levels, alterations to the porch, porch roof, or patio, changes in vehicle patterns, customer traffic, loading, deliveries, or parking, nor does the application seek any use of the portion of Appellant's ROW over the neighboring 23 Pleasant Street.
39. Prior to the renovation of the Subject Property, the property had a line of trees and chain link fence along the ROW.
40. The line of trees acted as a visual buffer between the Subject Property and Appellant's Property.
41. Both Applicant and the Town of Richmond's Tree Warden had trees removed from the Subject Property as well as the surrounding properties following the issuance of the 2020 Decision.
42. These trees had Dutch Elm Disease.
43. One mature tree on the Subject Property in the area of the enclosure was retained as it was not diseased.
44. It is unclear whether any tree removal was necessary to construct the enclosure.
45. The enclosure is made of locally milled, unstained hemlock boards.
46. The boards measure 1 1/2 foot thick and 10 inches wide. They are stacked horizontally to an approximate height of 3 feet from grade at the Bridge Street Side of the Subject Property and gradually increase in height to approximately 8 feet from grade in the rear of the Subject Property.
47. The horizontal board are affixed to 5-inch hemlock posts spaced every 8 to 9 feet. The posts are affixed to the ground using helical piles, which are 6 feet long galvanized screws that are twisted into the ground with a flat top that the hemlock post is then screwed to.

48. The helical piles are used in the place of excavation or post hole drilling and result in less ground disturbance.
49. The hemlock posts are tied back to the main structure of the building with 2-inch by 8 inch hemlock boards.
50. The tie backs help to ensure that the enclosure will stay in a straight line over time allow for hanging lights to illuminate the outdoor dining space.
51. There is an exterior door built into the enclosure for emergency egress. This door is not proposed for use as access to the Subject Property in non-emergency situations.
52. Eventually, climbing ivy or grape vines will be grown on the enclosure to further enhance its sound and light mitigating properties.
53. The initial construction placed the enclosure over the common boundaries with both Appellant's Parcel and 23 Pleasant Street.
54. The enclosure has been reconstructed so it is now entirely on the Subject Property.
55. The Subject Property does not have a formal loading zone. The restaurant uses a door on the north side of the structure for shipping and receiving.
56. The Subject Property does not have any right to use the ROW and is not seeking any such right.
57. The enclosure is visible from Appellant's Parcel.
58. There is no vegetation presently screening the enclosure.
59. There is no stream, river, pond or lake in or around the Subject Property.

Conclusions of Law

1. Whether the as-built development, as referenced in the application, creates a surface water nuisance or condition which precludes a conditional use permit or such permit must be conditioned on the development not creating such nuisance or condition?

While the Question uses the phrase "surface water," there is no stream, river, pond or lake in or around the Subject Property. Based on Appellant's evidence presented at trial, and Appellant's counsel's explanation to the Court, we understand Appellant to take issue with, and pose this Question relating to, not "surface waters," such as existing streams, rivers, lakes, etc,

but instead stormwater, meaning surface waters resulting from precipitation and weather events, from the Subject Property.

Further, this Question is narrowly tailored to address the alleged stormwater impacts. There is nothing within the substance of this Question, either intrinsically or extrinsically, that reaches more common or general issue of whether the application complies with the character of the area generally, beyond the raised stormwater impacts. While our task is to consider issues intrinsic to a question before the Court, we must also maintain the focus of review fairly on Appellant's Statement of Question. In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 17, 204 Vt. 301 (citations omitted); *see also* In re Capitol Plaza 2-Lot Subdivision, Nos. 3-1-19 Vtec, 4-1-19 Vtec, slip op. at 5 (Vt. Envtl. Div. Feb. 4, 2020) ("Questions must be clear enough to give the Court and the other parties notice of the grounds on which the appellant's claim rest. . . . Both parties and the Court entitled to . . . know what issues to prepare for trial.") (internal citations and quotation omitted). If Appellant wished to challenge whether the Project complies with the general character of the area, beyond any alleged impacts related to stormwater, the question must allow for a such an interpretation. Without the Court taking this limited reading and review of the Question, Applicant lacked notice that this more general character of the area analysis is before the Court. . See Capitol Plaza 2-Lot Subdivision, Nos. 3-1-19 Vtec, 4-1-19 Vtec, slip op. at 5. As such, we consider Appellant's Question 1 as focusing on impacts related to stormwater only.

The Question is further limited by the bounds of the application before the Court. As the Project before the Court is limited to the enclosure, we must focus review of any stormwater concerns stemming from the enclosure alone and not related or otherwise attributed to the Subject Property more generally. A considerable amount of Appellant's stormwater evidence relates to stormwater coming off the roof and porch roof of the building of the Subject Property, as well as stormwater traveling down the ROW on 23 Pleasant Street. These physical elements are not before the Court in this matter. More specifically, the use and renovation of the Subject Property was approved by the DRB in the 2020 Decision which is final and binding on all parties and this Court. 24 VSA § 4472; Town of Pawlet v. Banyai, 2022 VT 4, ¶ 15 (holding that Courts "strictly enforce the exclusivity of remedy provisions contained

within § 4472 to require that all zoning contests go through the administrative and appellate review process in a timely fashion.”) (quoting *In re Ashline*, 2003 VT 30, ¶ 10, 175 Vt. 203). Therefore, the Court cannot consider any alleged stormwater impacts from these previously approved improvements.

Beyond the evidence presented outside of the scope of this Court’s review, Appellant provided no evidence differentiating the various stormwater sources in the area and specifically focused on stormwater Appellant asserts is generated by, or otherwise attributed to, the enclosure. Clearly, all the properties and their features in the Subject’s Property area contribute to stormwater and stormwater management issues. There is no evidence, however, before the Court establishing how the enclosure, the sole improvement before the Court in this matter, relates to stormwater issues that Appellant takes issue with in this appeal.

In addition to the evidentiary shortcoming, the Court fails to see how the Regulations require a review of stormwater in the context of this CU application, particularly with respect to a character of the area analysis, as directed by this Question. Applicant offers the following statutory and bylaw provisions and suggests that these provisions require a review of the Project’s impact on stormwater.

First, at a general level, Vermont statutory law sets forth how municipalities may regulate conditions uses. Title 24, Section 4414(3) states:(A) ...These general standards shall require that the proposed conditional use shall not result in an undue adverse effect on any of the following:....

(ii) The character of the area affected.

The Regulations, in turn, mirror this statutory directive. Stating, that a conditional use “shall not result in an undue adverse effect upon . . . [t]he character of the area affected.” Regulations, § 5.6.1(b). Section 4414(3)(A)(ii) provides further guidance as to what constitutes the “character of the area,” stating such term is “*defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.*” 24 V.S.A. § 4414(3)(A)(ii) (emphasis added).

As this Court has written in In re Rublee 246 White Birch Lane CU:

We uniformly consider the character-of-the-area standard to mean that proposed conditional uses in the Town must harmonize with existing uses and with purpose statements in the town Bylaws and plan. The Town's Bylaws therefore require conditional uses to satisfy a two-prong test: if a proposed conditional use will have an undue adverse impact on either existing uses or a purpose statement, it will fail conditional use review.

No. 140-11-15 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Aug. 23, 2016) (Walsh, J.).

The Regulations express the following purpose for the VD District:

Purpose: The purpose of the Village Downtown Mixed-Use District is to provide a district that encompasses the existing village core area and supports employment, light industry, commercial enterprises, community gathering spaces, dense and affordable housing, and other compatible uses that bring value to the community and maintain Richmond's unique sense of place. It will also support the traditional village mixed use patterns with street/ground level commercial uses and upper floor residential uses.

There are 3 primary goals for this district:

1. Help improve the economic vitality of Richmond by attracting desirable new businesses to the site, creating jobs, and increasing municipal water and wastewater utility use.
2. Attract residents and visitors to our village center for community and commercial activities.
3. Increase the housing density, affordability, and diversity in order to support a vibrant and diverse population of Richmond residents.

Any development in this district shall enhance the overall village area and shall be compatible with the surrounding mix of residential, non-residential, and municipal uses. Any development proposal shall fit into the vision for Richmond as described in the Richmond Town Plan.

Regulations §3.10. We conclude that nothing within the Regulations relative to the character of the area analysis or the applicable purpose statement speaks to reviewing stormwater impacts within an analysis of the character of the area. Thus, there is no standard by which to guide any analysis, or to gauge compliance of any application, in this regard. See In re JAM Golf, LLC, 2008 VT 110, ¶ 17, 185 Vt. 201 (noting that "all ordinances are subject to the limits of our Constitution, and we will not enforce laws that are vague or those that delegate standardless

discretion to town zoning boards.”) (citation omitted). Therefore, the Court concludes that the Regulations’ character of the area conditional use standard does not include considerations related to stormwater.

Appellant also offers the following Regulations section as requiring review of stormwater impacts from a Project:

5.6.2 Specific Standards - Conditional uses shall comply with the following specific standards:

i) Existing water supplies and the quality of ground and surface water resources shall not be adversely affected.

Regulations § 5.6.2(i). First, Appellant has not shown how these provisions, separate from the Regulations’ character of the area provision, would be directly relevant to this Court’s character of the area analysis. Further, we read this provision as reviewing and protecting water supplies and the quality of ground and surface water, such as existing lakes, rivers, ponds, and the like. This is different than regulating stormwater, related to water runoff and surface waters resulting from precipitation. For instance, the Town of Stowe’s Bylaw Section 3.12(2)(A-E) states:

An adequate Stormwater drainage system must be continuously maintained to ensure that existing drainage patterns are not altered in a manner to cause an undue adverse impact on neighboring properties, town highways or surface waters.

4527 Mountain Road Permit 6521, No. 21-ENV-00098, slip op. (Vt. Super. Ct. Env’tl. Div. July 31, 2022) (Durkin, J.) (emphasis added).

The Regulations contain no such reference to an analysis relative to stormwater. This Court will not read one in. We therefore conclude that the Regulations do not regulate stormwater in the context of a conditional use application generally, and a character of the area analysis, specifically.

2. Whether the as-built development's construction of the seating area patio and structural fence is illegal in this zone as being two impermissible Accessory Structures and being within the setback?

The seating area is not before the Court. The seating area was approved in the 2020 Decision, which states “[t]he Richmond Development Review Board approves Application # 2019-126 for a Mixed-Use PUD for the addition of three dwelling units on the second level and outdoor seating at Parcel ID # BR0039, located at 39 Bridge Street...” The 2020 Decision was not appealed and, therefore, is final and binding on all parties and this Court. 24 V.S.A. § 4472. Further, the present application does not seek to alter the existence of the outdoor seating area that would warrant any consideration related to its existence. Thus, the application before the Court does not address any aspect of the seating area and the Court will not consider any alleged impacts from the seating area.²

The remainder of the Question seeks review of the “structural fence.” The application and evidence offered by Applicant during trial characterizes the application as one for an “enclosure” as an addition to the primary structure. Applicant does not seek approval as an accessory structure.

Accessory structures are addressed in Bylaw § 5.10 Requirements for Specific Structures, specifically § 5.10.1. An accessory structure includes any structure that is customarily incidental and subordinate to the principal structure or use on a lot, including but not limited to, fences, walls, barns, sheds, greenhouses, gazebos, patios, and free-standing garages. §5.10.1.

The enclosure is not incidental or subordinate to the restaurant, but rather attached to and integrated into the principal structure. In effect, the enclosure operates as an addition to the principal structure, as it ties to the structure to enclose the outdoor seating area. The enclosure is a feature of the outdoor seating area, which is an extension of the restaurant, one of the principal uses of the Subject Property. Thus, the Court concludes that the enclosure is not an accessory structure and cannot be reviewed as such.

² Further, to the extent that Appellant asserts that the outdoor seating area is somehow out of compliance with the 2020 Decision, that is a separate enforcement issue which is not before the Court in this application.

Next, we consider whether the enclosure complies with setback requirements. Regulations § 3.10.5, sets the following setback limits in the VD:

- b) ~~Setback~~ All structures shall have zero (0) feet setbacks, except for a five (5) feet setback for all structures on district boundaries.

The enclosure therefore may be upon the common boundary with other properties in the VD district. Regulations § 3.10.5. Additionally, the enclosure must be 5 feet from a district boundary. *Id.* Both the Subject Property and 23 Pleasant Street are in the VD district. The enclosure is located on the boundary with 23 Pleasant Street. There is further no dispute regarding the western edge of the enclosure with respect to VD setbacks. Thus, the Project complies with this setback requirement.

Appellant's Parcel is in the Residential/Commercial District (RC) and the property line represents the district boundary. Therefore, the eastern boundary of the Subject Property, which abuts the western boundary of Appellant's Parcel, is a district boundary requiring a 5-foot setback. *Id.* The enclosure is located approximately 15 feet from the eastern boundary of the Subject Property and the western boundary of the Appellant's parcel and this aspect complies with the Regulations.

There is one point long the ROW where all three parcels, the Subject Property, 23 Pleasant Street, and Appellant's property, come to a common point referenced as the "triple point." This triple point is approximately 15-feet from the rear or eastly common boundary of the Subject Property and Appellant's property. See Exhibit T. In the immediate area of the triple point, the enclosure's setback is zero along the boundary between the Subject Property and 23 Pleasant Street and from the triple point itself. The triple point represents a unique district boundary wherein the VD and RC Districts are separated not by traditional property line, but a minute "point" where three properties converge. A strict reading of the Regulations would require the enclosure to be constructed as an arc around this point maintaining the 5-foot minimum setback from the triple point which is part of the district boundary, then reconnecting where the enclosure is currently more than 15 feet from the rear boundary of the Subject Property. This would result in the enclosure stopping 5 feet prior to the triple point along the

boundary between the Subject Property and 23 Pleasant Street in a zoning district with a zero-foot setback for properties within the district.

Requiring such a configuration of the enclosure would be absurd or irrational. The Court avoids interpretation and application of municipal bylaws that leads to absurd or irrational results. Bergeron v. Boyle, 2003 VT 89, ¶ 11 N.1, 176 Vt. 78. Requiring a 5-foot arc around the area of the triple point would not provide any meaningful benefit to Appellant's property as this area is considerably more than 15 feet from Appellant's house and would further detract from the Regulations' provision allowing for a zero-foot setback between property boundaries within in the VD District. While Appellant asserted this setback requirement at trial, Appellant did not provide any evidence as to how requiring the arc at the corner of the enclosure at the triple point would be of benefit to Appellant or to property owners with similar "triple points" located on their properties. Further, Appellant has offered no understanding of how such an arc would be consistent with the zero-foot setback allowable along boundaries within the VD, such as the boundary between the Subject Property and 23 Pleasant Street, especially because the enclosure is 15 feet from the common boundary in all other locations.

We therefore conclude that the enclosure complies with setback requirements.

3. Whether the wall height of the "as built" structure should be allowed to remain in place when this existing height is in Violation of the original permitted height.

Appellant asserts through this Question that the enclosure's height violates the original permitted height, presumably in reference in the 2020 Decision. The parties, however, beginning with the Town, have presented the perspective that the enclosure was specifically not a part of the 2020 Decision. It is this exact perspective that predicated the application and appeal presently before the Court – that enclosure was not included in the 2020 Decision and underlying application. Applicant, by filing the application presently before the Court, presumably consents to this perspective, at least in part. The Court concludes that this Question, to the extent that it presents the enclosure as being approved or a part of the 2020 Decision, inaccurately represents the application before the Court.

To the extent that Appellant, in his post-trial briefing, asserts that the enclosure is a “fence” that it is in violation of the Regulations 6-foot height restriction relative to fences, Appellant again miscasts the Application before the Court. At the Town’s direction, the application before the Court is for Site Plan and Conditional Use review of the enclosure as an addition to the building. This is consistent with the Court’s conclusion above. The application is not reviewed as a fence, and therefore, the enclosure is not subject to the fence height limitation.³

Further, to the extent that this Question seeks to address generally the enclosures compliance applicable height requirements, the Court concludes that the enclosure so complies.

Heights of buildings and structures within the VD District is established by § 4.12.1. Regulations § 3.10.5.⁴ Section 4.12.1 establishes that the height of a building or structure in the district shall not exceed 35 feet. Thus, with a maximum height of approximately 8 or 9 feet, the enclosure’s height complies with the Regulations.

4. Whether the as-built floor plan complies with the Town’s regulation.

The Project on appeal is limited to the enclosure. As concluded in this decision, the Project complies with setbacks and height limitations. The Court is not aware of, nor has Appellant directed the Court to, any additional provision of the Regulations relating to the “floor plan” of the enclosure. Thus, we conclude that the “as-built floor plan” of the enclosure complies with the Regulations.

³ At the ZA’s direction, Applicant first filed a fence application. After further consideration of the enclosure, the ZA requested a CU and Site Plan application be filed instead. Applicant subsequently filed such an application. The filing of the CU and Site Plan application mooted the fence application.

6. Does the as-built development, as referenced in the application, require additional screening to, among other things, replace the trees and vegetation taken down as part of the construction to protect the character of the neighborhood?

The evidence before the Court shows that prior to the renovations approved in the 2020 Decision, the Subject Property had significant vegetation east of the building and along the ROW. Appellant testified that this vegetation served to screen Appellant's property from the Subject Property and the street scape generally. Most of the trees surrounding the building were removed around the time of building renovations in 2020 and 2021.

Applicant testified that both Applicant and the Town of Richmond's Tree Warden removed trees from the Subject Property and the surrounding properties. These trees had Dutch Elm Disease. One mature tree on Applicant's property in the area of the enclosure was retained as it was not diseased. It is unclear whether any tree removal was necessary to construct the enclosure.

Screening, however, relative to the enclosure specifically, is addressed by Regulations § 3.10.6, which states:

[N]o Zoning Permit may be issued for Land Development in the VD District unless the Land Development meets the following requirements:

...

h) Additional Possible Conditions - The following site standards also may be required as a condition of Development Review Board approval

- Greater setback or screening requirements along the perimeter of the property

Additionally, Regulations § 5.5.3 requires:

b) Landscaping and Screening - Conditions and safeguards with respect to landscaping and screening, including, but not limited to:

- ii. Provision of a buffer zone that shall include vegetative screening to conceal outdoor storage or display areas, parking lots, or loading areas, or other outdoor commercial or industrial uses from neighboring residences.

Appellant's Parcel has a clear view of the enclosure. As such, and based on Regulations § 3.10.6 and § 5.5.3, the Court concludes that any approval of the enclosure should be conditioned on the requiring Applicant to plant vegetation at the rear of the building and the east side of the enclosure. This vegetation, which may include trees, bushes or other vining vegetation, is intended to buffer or soften the visual experience from Appellant's Parcel looking toward the Subject Property, the enclosure, and the municipal lot. At the time of their planting, these plantings are not required to screen or block views in total, however, the vegetation may mature into this effect over time. The planting shall be accomplished as soon as possible in the spring of 2023.

8. Whether the use of, or trespass on the property owned by TD Bank, and providing access to 45 Bridge Street by deeded right of way, by The Big Spruce, its patrons, and/or its contractors or delivery drivers creates an impermissible hazard or nuisance for the residents and guests of 45 Bridge Street.

Appellant's property is benefited by a non-exclusive easement 15-foot wide over 23 Pleasant Street (adjacent to the Subject Property) for vehicle passing and repassing only, and does not include the right to park any vehicle, person or object at 23 Pleasant Street, or to block, damage or obstructed the "Paved Drive." By the terms of this easement, it is presumed that others will use the non-exclusive easement.

The Environmental Division has limited and specific jurisdiction and private property rights are not within our jurisdiction, but rather lie within the Civil Division. See In re Woodstock Cmty. Tr. & Hous. Vt. PRD, 2012 VT 87, ¶¶ 40, 41, 192 Vt. 474 ("[T]he Environmental Division does not have jurisdiction to determine private property rights."); Nordlund v. Van Nostrand, 2011 VT 79, ¶ 13, 190 Vt. 188 (confirming that this Court can evaluate a right-of-way's compliance with municipal regulations, but not its scope); Blanche S. Marsh Inter Vivos Tr. v. McGillvray, 2013 VT 6, ¶¶ 19-22, 193 Vt. 320. If Appellant seeks to pursue a private property right, that needs to be taken up within the Civil Division.

The Application before the Court does not seek approval to use the ROW. Further, Appellant has not offered any Regulations provision regulating hazards and nuisances relating

to the evidence offered on the use and experience within the ROW. As such, we conclude that the application does not create any impacts relative to the ROW.⁵

Conclusion

The Court concludes that the application complies with Conditional Use and Site Plan review criteria relative to the enclosure, with the condition that Applicant plant vegetation at the rear of the building and the east side of the enclosure to buffer the visual experience from Appellant's property looking towards the Subject Property, the enclosure, and the municipal lot. At the time of their planting, these plantings are not required to screen or block views in total, however, the vegetation may mature into this effect over time. The planting shall be accomplished as soon as possible in the spring of 2023. In reaching this result, we conclude that the Town's Regulations conditional use standards do not regulate stormwater, particularly with respect to the character of the area standards. Nor do the Regulations regulate hazards and nuisances relating to the use and experience within Appellant's ROW over 23 Pleasant Street. We conclude that the enclosure is not incidental or subordinate to the restaurant but rather attached to and integrated into the principal structure. The enclosure is a feature of the building's outdoor seating area. As such, the enclosure is not an accessory structure and not reviewed as such. We conclude that the enclosure complies with applicable setback requirements. As the enclosure has a maximum height of 8 or 9 feet, the enclosure complies with the Regulations height limitations and we conclude that the "as-built floor plan" of the enclosure complies with the Regulations.

⁵ During trial, as a measure to improve neighborhood relations, Applicant offered to post no parking signs on the enclosure. This Court is not conditioning the Project on the requirement that such signs being posted. If this is carried out, however, the signs must comply with any relevant Regulations provisions relative to signage.

This matter is remanded to the Town of Richmond for any required permitting in conformance with this decision. This concludes the matter. A Judgment Order is issued concurrently.

Electronically signed January 3, 2023 pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, slightly slanted style.

Thomas G. Walsh, Judge
Superior Court, Environmental Division