STATE OF VERMONT

SUPERIOR COURT	ENVIRONMENTAL DIVISION Docket No. 15-2-16 Vtec
Confluence Behavioral Health LLC CU	DECISION ON CROSS-MOTIONS

Decision on Cross-motions for Summary Judgment

This is an appeal from the Town of Thetford Development Review Board's approval of a conditional use and site plan application for Confluence Behavioral Health, LLC to operate a therapeutic community residence. The matter is now before us on the parties' cross-motions for partial summary judgment.

Confluence Behavioral Health, LLC ("Confluence") is represented by Nathan H. Stearns, Esq. Appellants Jason and Deborah Albert, Frederic and Marjorie Thomas, Russell and Marjorie Cook, and Laurence E. Reeves III ("Appellants") are represented by Ronald A. Shems, Esq.

Background

The Town of Thetford Development Review Board ("DRB") approved Confluence's application for conditional use and site plan approvals to operate a therapeutic community residence on January 19, 2016. Appellants filed their notice of appeal with this Court on February 5, 2016. On February 23, 2016, they submitted a Statement of Questions which includes the following nine questions:

1. Whether the proposed use is a commercial use not allowed in the rural residential district.
2. Whether the proposed use is a "health care facility."
3. Whether the proposed use is "outdoor recreation."
4. Whether the proposed use is a non-conforming use.
5. Whether the prior non-conforming use ceased.
6. Whether the proposed use is equal to, or of greater conformity than the prior non-conforming use, assuming that the prior non-conforming use did not cease.
7. Whether the proposed use will result in an undue adverse effect on the character of the area affected.

8. Whether the proposed use complies with district standards.
9. Whether the proposed use complies with §§ 3.10 of the Town of Thetford Zoning Bylaw (on-site potable water and sewage systems), § 6.06(D)(4) (compliance with other requirements), and § 6.06(F)(6)–(7) (compliance with § 3.10, ground and surface water pollution), and other applicable potable water and wastewater requirements.

Confluence filed its motion for partial summary judgment on Questions 1, 2, 3, and part of Question 9 on July 25, 2016. Appellants filed their motion for summary judgment on Questions 1,2,3, 8, and 9 on the same day. Both parties filed responses and replies in opposition to and in support of, respectfully, the motions for summary judgment.

Confluence filed a response to Appellants' summary judgment motion on August 9, 2016. Appellants filed an opposition to Confluence's motion for summary judgment and reply to Confluence's August 9 filing on August 25. On the same day, Appellants also filed an objection to Confluence's statement of material facts and response to Appellants' statement of material facts. The final filing was in the form of a Rebuttal Memorandum, filed by Appellants on September 21, 2016. The pending matters became ripe for our consideration since the last of those filings.

Factual Background

Solely for the purposes of deciding the pending motions for summary judgment, we recite the following facts, which we understand to be undisputed unless otherwise noted.[1]

I. Procedural Background

1. Confluence submitted its application to the DRB for conditional use and site plan approval for a project (the "Project") to operate a therapeutic community residence licensed by the Vermont Department of Disabilities, Aging & Independent Living ("DAIL") at property located at 1646 Gove Hill Road, Thetford, Vermont. Ex. Conf-1 (copy of application).

2. The application requests conditional use and site plan approval for up to 48 clients and 37 staff to reside at the Project site at any one time.

[1] Appellants raised several objections to Confluence's Statement of Undisputed Material Facts and suggested that there are additional undisputed material facts that the Court should consider. Our itemization of the material facts below has been assembled to reflect our determinations on Appellants' objections and requested additions.

3. Confluence has applied to DAIL for a license to operate a therapeutic community residence. The application was filed in June of 2016. The application is pending. Confluence has agreed as a condition of its conditional use approval that it will obtain a license from DAIL prior to operation.

4. Confluence acknowledges that its proposed project must conform with applicable permitting requirements of the Vermont Department of Environmental Conservation for wastewater system and potable water supply permits, and any applicable DAIL regulations and licensing requirements.

5. On January 29, 2016, the DRB issued conditional use and site plan approval for the Project. Ex. Conf-2; Ex. D (copy of DRB approval).

Facilities and Infrastructure

6. The American Baptist Churches of Vermont and New Hampshire owns the Project site and intends to sell the Project site to Confluence, subject to Confluence's ability to obtain all necessary permits and approvals to authorize the Project on the Project site.

7. The Project site is an approximately 125-acre parcel on Gove Hill Road in Thetford, Vermont. The Project site is in the Rural Residential Zoning District (the "RR District") in the Town of Thetford. Ex. C (Town of Thetford Zoning Bylaws); Ex. E (Thetford Town Plan, adopted March 19, 2007, re-adopted May 14, 2012).

8. The Project site has wooded and open areas. Structures on the site include a 9,205 square foot, 19-room main house, three cabins, a pavilion, and two primitive shelters without plumbing which were historically used by summer campers and participants in the various retreats formerly run by the American Baptist Churches of Vermont and New Hampshire. Ex. Conf-6 (Project site plan).

9. The pavilion is an open-air structure with a roof but no walls. It has a fireplace and grill. The primitive shelters are in the same general area of the Project site as, and on opposite sides of, the pavilion. A fire pit is adjacent to the pavilion.

10. The main building and cabins 1 and 3 are clustered at the southern end of the 125-acre parcel.

11. Confluence will carry out some work on the main lodge, including painting, replacing hardware (toilets and sinks) and fixtures (doorknobs and lighting), and repairing floors, walls, and bathrooms.

II. Wastewater, Water Supply, and Sanitation

12. On June 6, 2016, the Department of Environmental Conservation issued a Wastewater System and Potable Water Supply Permit to Confluence, permit # WW-3-10922 ("the WW permit"). Ex. Conf-7 (copy of WW permit). Based on the existing water and wastewater systems in place at the Property, the WW permit limits the Project's capacity to no more than 18 persons (staff and clients) staying overnight, and six full daytime staff. The WW permit provides that "construction of additional nonexempt buildings, including commercial and residential buildings, is not allowed without prior review and approval by the Drinking Water and Groundwater Protection Division and such approval will not be granted unless the proposal conforms to the applicable laws and regulations."

13. The WW permit governs only the wastewater systems serving the main building and cabins 1 and 3. Cabin 2 is not approved for connection to any existing wastewater disposal system, but building occupants are authorized to use other building facilities.

14. Confluence intends to start operating its Project using the existing wastewater system and water supply on the Property, subject to the limitations within the existing WW permit. Confluence represents that it will not exceed the participation limits in that permit until it applies for and receives an amendment to that WW permit to construct and install expanded or additional wastewater and potable water supply systems, so that it may increase its program size up to the limits represented in its application for conditional use and site plan approvals.

15. Confluence has not yet sought or obtained a permit for any outhouses or other forms of waste disposal or water supply on the Project site. Confluence has not yet sought or obtained a wastewater system and potable water supply permit for any designated campsites or primitive shelters on the Project Site.

16. Confluence has not yet sought or obtained a determination as to whether a wastewater system and potable water supply permit is required for designated campsites or primitive shelters on the Project site.

17. The primitive shelters, pavilion, and some areas suitable for tent camping are more than 400 feet from the main house and cabins that are subject to the WW permit.

18. The conditional use application makes no provision for the sanitary facilities to be used by participants and staff engaged in camping or agrarian activities.

III. The Program

19. The Project is a short-term residential wilderness therapy program designed to treat young adult males 18–28 years old. Confluence's program combines clinical therapeutic services with adventure-based wilderness therapy and agrarian living to help clients address mental health diagnoses and emotional, behavioral, and relational challenges.

20. The Project site will serve as a base for Confluence's program. During a client's stay in the program, approximately half of the client's time will be spent on the Project site, and the other half will be spent off-property with an assigned group participating in adventure-focused therapy-related wilderness activities.

21. Confluence's program is a combination of clinical interventions by licensed therapists and a highly structured, transformative living experience, centered around adventure-based activities and agrarian living. The treatment is interdisciplinary and supported by a team of professional providers. A licensed mental health therapist will oversee the therapeutic program, and act as the bridge between the experiential components and deeper clinical work. Individual, group, family, and experiential therapy sessions are interspersed throughout each week.

22. While on the Project site, clients will participate in individual and group therapy sessions, counselling, and peer support, all supervised by a licensed mental health professional. In addition, clients will be given assignments and readings to complete as part of their therapy. Clients will be assigned to live in a communal group and will participate in the daily responsibilities of communal, agrarian living, such as gardening and maple sugaring. Clients will also participate in adventure-focused wilderness therapy activities while on the Project site, and will engage in recreational activities such as hiking, snowshoeing, riding bikes, and cross-country skiing. The entire client experience while at Confluence is designed to work together as part of the therapeutic treatment. See Ex. Conf-3 ("Confluence Behavioral Health, LLC, Information for

Thetford Development Review Board, December 2015); Ex. Conf-4 (Confluence Policies and Procedures Manual); Ex. Conf-5 (Confluence participant handbook).

23. Participants accepted into the program will be assigned to groups of up to 12 participants. Each group will be assigned a primary therapist, who will be licensed to practice in the State of Vermont.

24. The application for conditional use and site plan approval provides for up to 48 clients and 37 staff to reside at the Project site at any one time. Within each participant group, Confluence will provide a 3:1 or 4:1 client-to-staff ratio.

25. The average length of stay in the program will be 9 to 12 weeks. The minimum stay will be 8 weeks.

26. Confluence's Project is not designed to serve exclusively local needs. While the program will be open to local residents, Confluence also serves a larger geographic area and will draw its clients from throughout the United States.

27. The Project will accept participant referrals from educational consultants who are members of the Independent Educational Consultant Association.

28. Applicants referred for participation in the program will be screened by a licensed therapist on Confluence's staff to ensure that the applicant is appropriate for the program.

29. The Project will not accept participants who are mandated to receive therapy by the courts or a governmental authority. The Project will not accept applicants who have any criminal sexual offenses, who are at risk of violence toward others or with violent histories, or who have a primary substance use disorder.

30. Participants and staff will sleep only in approved shelters. Day use or non-overnight use of the entire property for therapeutic group sessions, individual therapy sessions, and recreation may occur anywhere on the Project site.

31. In addition to sleeping in the main house and cabins, clients and staff may, from time to time, sleep in the shelters and in tents while on the Project site as part of Confluence's therapeutic programming.

32. The two primitive shelters and tents will be used for camping. The primitive shelters can each sleep up to 10 persons. Tents may be pitched at various spots on the Project site. The two

primitive shelters plus a tent site comprise three camping units. Four groups will be at different camp sites during peak days.

33. The Project will only accept voluntary participants, and participants will be able to leave the program at any time. If a client chooses to un-enroll from the program, return transportation to their home will be arranged.

34. While enrolled in the program, clients will not be permitted to leave the Project site unaccompanied by Confluence staff. Clients will not be allowed to travel to and from the Project site in their own vehicles.

35. Confluence will not provide services to any person that does not sleep and eat at the Project site as required by the Confluence Program.

36. Confluence will not provide medical services and is not a psychiatric hospital.

37. There will not be a doctor or other prescriber on staff. Staff will include a part-time nurse to oversee medication assistance for clients with any pre-existing prescriptions. Any medical needs, urgent or otherwise, will be handled through a local physician, urgent care facility, or hospital emergency department.

38. Confluence is a private pay provider and will not accept insurance of any kind, including Medicare/Medicaid.

Discussion

An interested person bringing a municipal appeal to this Court is entitled to a *de novo* trial. 24 V.S.A. § 4472(a).

We begin our analysis of the pending cross-motions for partial summary judgment by noting that this Court is directed to grant summary judgment to a party only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). In determining whether there is any dispute over a material fact, "we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted). "Further, the nonmoving party receives the benefit of all reasonable doubts and inferences." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted).

Here, the facts that are material to the challenged legal issues are undisputed; the matter is therefore ripe for summary judgment review.

I. Question 1: Whether the proposed use is a commercial use not allowed in the rural residential district.

Appellants contend that the proposed Project is a commercial use because it is a "for-profit enterprise and not a service or facility meant to serve area residents." Appellants' Mot. Summ. J. at 16. They further argue that the Project is a commercial use that is not allowed in the RR district per Section 2.01 and Table 2.1 of the Town of Thetford, Vermont, Zoning Bylaw ("Bylaw").

We note that the specific term set out in Question 1, "commercial use," is not used in the Bylaw. The Bylaw does, however, include three designations that could be considered "commercial uses": village commercial, roadside commercial, and commercial service. None of these are allowed in the RR District. Bylaw Table 2.1.

The proposed use here is clearly not village or roadside commercial, both of which entail the buying or selling of goods. We also conclude that the proposed Project is not a commercial service. The Bylaw defines "commercial service" as:

> [a]ny use of land or structures for the purpose of providing a service. Such uses include, but are not limited to, the following: real estate offices, hairdressers, repair shops, banks, law firms, engineering and software companies.

Bylaw Section 2.04(B). These examples are all retail businesses with storefronts or offices that call for customers to come in and out on a constant, daily basis for the performance of a specific, discrete retail service. The Project—a wilderness therapy program with a focus on outdoor activities and individual and group therapy provided to individuals staying for weeks or months at a time—is clearly different. Its activities are not contained in a storefront or office. It calls for a limited number of clients to be brought to the property, where they will stay for extended periods of time.

Although the Project is for-profit, and therefore has a commercial component, we cannot conclude that it is a "commercial" activity for zoning purposes. See In re Sardi, 170 Vt. 623, 624 (2000) (mem.) (explaining that zoning focuses primarily on the physical use of the land); In re Barefoot Act 250 Application, No. 46-4-12 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Nov. 13,

2013) (Durkin, J.) (just because a use is for-profit does not mean it is a commercial use for zoning purposes).

We also note that Bylaw Section 2.01(B), which contains general information about zoning districts, calls for "scattered commercial uses that are . . . dependent on natural resources" in the RR District. Insofar as the Project includes a commercial component, it is dependent on natural resources and therefore comports with this general guideline. Indeed, a number of uses that contain a commercial component are allowed in the RR District, such as farmer's market; outdoor recreation (including ski areas and youth camps); contractor's yard; restaurant, deli, take-away prepared food; bed and breakfast; auction yard; health care facility; veterinary clinic; kennel; and junkyard. Bylaw Table 2.1.

The use proposed here is not primarily commercial. While it has a commercial element, it does not fall into a prohibited category of commercial uses under the Bylaw; rather, it is in line with the general guideline allowing certain commercial uses. For this reason, we conclude that the undisputed material facts and applicable Bylaw provisions require us to answer Appellants' Question 1 in the negative. We therefore **deny** summary judgment to Appellants and **grant** summary judgment to Confluence on Appellants' Question 1.

II. Question 2: Whether the proposed use is a "health care facility."

Confluence argues that the proposed use qualifies as a "health care facility." Appellants argue that the proposed use is more in line with a community residence or group living facility, and as such is a type of residential use that is not allowed in the RR District. The parties' disagreement on this point turns on how the term "health care facility" is construed. Because the Bylaw does not provide a definition, we must turn to outside sources to define the term.

As with statutory construction, the "principal objective in interpreting . . . [municipal] ordinance language is to implement the intent of its drafters." In re Bove Demolition/Const. Application, 2015 VT 123, ¶ 8 (Oct. 9, 2015) (citation omitted).

Where a zoning regulation term is undefined—as is the case with "health care facility" here—we construe the term "according to [its] plain and ordinary meaning, giving effect to the whole and every part of the ordinance." In re Champlain Coll. Maple St. Dormitory, 2009 VT 55, ¶ 13, 186 Vt. 313 (quoting In re Stowe Club Highlands, 164 Vt. 272, 279 (1995)). In determining

plain meaning, courts may look to dictionary definitions, Pease v. Windsor Dev. Review Bd., 2011 VT 103, ¶ 17, 190 Vt. 639, or to statutory definitions, Sec'y, Vermont Agency of Nat. Res. v. Handy Family Enterprises, 163 Vt. 476, 483 (1995).

Because "zoning ordinances 'are in derogation of private property rights,'" In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 29, 199 Vt. 19 (quoting In re Champlain Oil Co., 2014 VT 19, ¶ 2, 196 Vt. 29), if, after this exercise, the plain language of the ordinance remains unclear, "any 'ambiguity is resolved in favor of the landowner.'" In re Tyler Self-Storage Unit Permits, 2011 VT 66, ¶ 16, 190 Vt. 132 (quoting In re Miserocchi, 170 Vt. 320, 324 (2000)).

a. The Zoning Bylaw

The Bylaw lists "health care facility" as an allowed conditional use in the RR District. While some permitted and conditional uses are defined in Bylaw Section 2.04(B), health care facility is not. The Bylaw also does not define any of the words or phrases that are contained in this term.

The Bylaw indicates elsewhere that no zoning approval is required for a "hospital." Bylaw Section 1.05(D). Because "health care facility" is listed in Bylaw Table 2.1 as a conditional use that does require zoning approval, "health care facility" must be defined as something different from a "hospital," as otherwise the terms would be redundant and "mere surplusage." Bove Demolition, 2015 VT 123, ¶ 13 ("We assume that the drafters intended each word of [a zoning] provision to have meaning; we avoid construing language of an ordinance as mere surplusage.") (citing In re Lunde, 166 Vt. 167, 171 (1997)).

Based on the plain meaning of these terms, we conclude that a hospital is a type of health care facility that is exempted from zoning approval, and that "health care facility" must at least be defined more broadly than "hospital." Apart from this, the Bylaw does not shed any light on what may qualify as a health care facility. Appellants would have us apply a narrower definition to the term, so narrow as to exclude Confluence's proposed program. We note, however, that the Bylaw is also silent on what does not constitute a health care facility. We therefore reject Appellants' assertion that the express terms of the Bylaw can be interpreted as rejecting Confluence's proposed project from the conditionally permitted use of "health care facility."

b. The DRB Interpretation

Confluence argues that we should defer to the DRB's interpretation, which concluded that the proposed use qualifies as a health care facility. The interpretation by an appropriate municipal panel of its own zoning regulations can have some import in our analysis. In re Duncan, 155 Vt. 402, 408 (1990) ("we have consistently held that 'absent compelling indication of error, we will sustain the interpretation of a statute by the administrative body responsible for its execution.") (citation omitted). However, as noted above, municipal zoning decisions are appealed to the Environmental Division *de novo*. 24 V.S.A. § 4472(a). We therefore do not defer to the municipal panel's interpretation of a zoning term when that determination is itself the subject of an appeal. The exception to this rule is where the municipal panel has established a pattern of consistent interpretation. In re Korbet, 2005 VT 7, ¶ 10, 178 Vt. 459; 38 Thasha Lane Dev. Water & Sewer Fees Denial, No. 136-9-14 Vtec, slip op. at 4–5 (Vt. Super. Ct. Envtl. Div. Aug. 28, 2015) (Walsh, J.). Here, there is no evidence presented of a repeated or consistent interpretation by the DRB of this term. We therefore give no deference to the DRB's decision below on this point.

c. Dictionary Definitions

Turning to the most common dictionary definitions, Confluence cites dictionary definitions that define health care facility broadly as a place where physical and mental health care is provided, while Appellants cite more narrow definitions describing a health care facility as a place where medicine is practiced, ranging from small clinics and doctor's offices to urgent care centers and hospitals with emergency rooms and trauma centers. Again, Appellants assert that applicable dictionary definitions require a narrow definition of the term, so narrow as to exclude Confluence's proposed programs from being identified as a health care facility. Given that we are left to search for the common interpretation of the term, we are at a loss to find a common definition of the term that is as narrow as Appellants advocate.

Taking "facility" as a place where health care is provided, we consider the following definitions of "health care": "the prevention, treatment, and management of illness and the preservation of well-being through the services offered by the medical and allied health professions" (Webster's II New College Dictionary 522 (3d ed. 2005)); "the field concerned with

the maintenance or restoration of the health of the body or mind" (Random House, Inc., http://www.dictionary.com/browse/healthcare); "efforts made to maintain or restore health especially by trained and licensed professionals" (Merriam-Webster.com, https://www.merriam-webster.com/dictionary/health care).

While these dictionary definitions suggest that "health care" may be more strictly defined as care provided by doctors and psychiatrists, (e.g. "especially by trained and licensed professionals"; "services offered by the medical . . . professions"), they also leave room for less-strictly defined health programs (e.g. "preservation of well-being"; "services offered by the . . . allied health professions"; "maintenance or restoration of the health of the body or mind"). The definitions therefore encompass a spectrum of activities.

Confluence describes its program as:

> a short-term residential wilderness therapy program designed to treat young adult males 18–28 years old. Confluence's program combines clinical therapeutic services with adventure-based wilderness therapy and agrarian living to help clients address mental health diagnoses and emotional, behavioral, and relational challenges.
>
> . . .
>
> clients will participate in individual and group therapy sessions, counselling, and peer support, all supervised by a licensed mental health professional. In addition, clients will be given assignments and readings to complete as part of their therapy. Clients will be assigned to live in a communal group and will participate in the daily responsibilities of communal, agrarian living such as gardening and maple sugaring. Clients will also participate in adventure-focused wilderness therapy activities while on the Project site, and will engage in recreational activities such as hiking, snowshoeing, riding bikes, and cross-country skiing. The entire client experience while at Confluence is designed to work together as part of the therapeutic treatment.

Factual Background ¶¶ 19, 22.

Although the program is not necessarily an example of the strictest construction of health care (such as medical doctors performing surgery), we conclude that the activities described here certainly fall within the spectrum set out in the dictionary definitions above. We therefore conclude that the cited references, including those referenced by Appellants, present a description of "health care facility" that does not exclude the programs that Confluences proposes for the project.

d. Statutory Definitions

Confluence submits that statutory definitions support the conclusion that the proposed use qualifies as a health care facility. Appellants also cite to statutory definitions, particularly from other jurisdictions. Those extra-judicial definitions appear to be outside of the context of land use regulation, particularly regulation that is established by the Thetford Bylaw. We therefore conclude that the statutory definitions from other states that Appellants offer are of little help to our analysis.

The definitions offered within Vermont statutes begin with a Health Care Administration statute defining health care facilities as:

> all institutions, whether public or private, proprietary or nonprofit, which offer diagnosis, treatment, inpatient, or ambulatory care to two or more unrelated persons, and the buildings in which those services are offered. The term shall not apply to any facility operated by religious groups relying solely on spiritual means through prayer or healing, but includes all institutions included in subdivision 9432(8) of this title, except Health Maintenance Organizations.

18 V.S.A. § 9402(6).

Section 9432(8) goes on to define "health care facility" as:

> all persons or institutions, including mobile facilities, whether public or private, proprietary or not for profit, which offer diagnosis, treatment, inpatient, or ambulatory care to two or more unrelated persons, and the buildings in which those services are offered. The term shall not apply to any institution operated by religious groups relying solely on spiritual means through prayer for healing, but shall include but is not limited to:
>
> (A) hospitals, including general hospitals, mental hospitals, chronic disease facilities, birthing centers, maternity hospitals, and psychiatric facilities including any hospital conducted, maintained, or operated by the state of Vermont, or its subdivisions, or a duly authorized agency thereof;
>
> (B) nursing homes, health maintenance organizations, home health agencies, outpatient diagnostic or therapy programs, kidney disease treatment centers, mental health agencies or centers, diagnostic imaging facilities, independent diagnostic laboratories, cardiac catheterization laboratories, radiation therapy facilities, or any inpatient or ambulatory surgical, diagnostic, or treatment center.

18 V.S.A. § 9432(8).

Confluence notes that many Vermont state agency regulations have adopted the definition of "health care facility" set out in § 9432(8). E.g. Division of Health Care Administration,

Rule 18, Code of Vt. Rules 4-5-18:2 (WL); Green Mountain Care Board, Rule 4, Code of Vt. Rules 4-7-4:4.100 (WL); Department of Health, Rule 11, Code of Vt. Rules 12-5-11:3 (WL); Worker's Compensation and Safety, Rule 2, Code of Vt. Rules 13-4-2:40.0010 (WL).

Confluence points to the following to demonstrate that the proposed use is as a "health care facility" as set out in statutes: the proposed use will provide mental health care to its clients at the Project site; clients are referred to the program to help address mental health issues, emotional, behavioral, and relational challenges; clients are screened by a licensed therapist on Confluence's staff to ensure they are appropriate for the program; Confluence will provide mental health care to clients through individual and group therapy sessions with a licensed mental health professional, combined with adventure-based wilderness therapy and communal agrarian living that are clinically designed to work together as part of a therapeutic treatment.

We conclude that the use proposed here qualifies as a program that provides treatment to two or more unrelated persons, under 18 V.S.A. § 9402(6), and as a therapy program, under 18 V.S.A. § 9432(8)(B). We therefore conclude that the applicable Vermont statutory definitions of "health care facility" include the programs to be offered by Confluence. More important to our analysis, we find no basis within these statutory definitions for excluding the Confluence programs from what these statutory descriptions describe.

e. DAIL Definitions and Treatment

Confluence goes on to note that it expects to be licensed by DAIL, which requires it to qualify as a "long-term care facilit[y] in which medical, nursing, or other care is rendered." 33 V.S.A. § 7101 (setting out the policy of 33 V.S.A. Chapter 71, "Regulation of Long-Term Care Facilities"); § 504(a) (directing DAIL to administer 33 V.S.A. Chapter 71). These facilities include "therapeutic community residence[s]." 33 V.S.A. §§ 7102(2). A "therapeutic community residence" is defined as:

> a place, however named, excluding hospitals as defined by statute, which provides, for profit or otherwise, transitional individualized treatment to three or more residents with major life adjustment problems, such as alcoholism, drug abuse, psychiatric disability, or delinquency.

33 V.S.A. §§ 7102(11).

Confluence argues this definition encompasses the proposed Project, and is per se, under § 7101, a facility where "medical, nursing, or other care is rendered," and that this makes it a health care facility.

In addition, the DAIL website includes "therapeutic community residences" on a list of different types of regulated "health care facilities." DAIL Division of Licensing and Protection, http://dlp.vermont.gov/other (last visited Jan. 20, 2017).

Confluence argues that the proposed use meets the DAIL statutory definition of "therapeutic community residence" because it will provide mental health treatment to three or more unrelated persons to help them address mental health diagnoses, emotional, behavioral, and relational challenges. In addition, the conditional use approval is conditioned on Confluence obtaining a DAIL license.

Appellants, analyzing a list of DAIL licensed therapeutic community residences provided by Confluence to the DRB, note that none of the licensed facilities located in other Vermont towns are permitted as health care facilities or clinics. Appellants' Mot. Summ. J. Appendix B. Appellants argue that the "therapeutic community residence" proposed by Confluence is more akin to a group residential facility than a health care facility because DAIL licensing rules focus on residential living arrangements, because Confluence uses the term "residential" to refer to its own program, and because it does not provide medical or psychiatric services.

As noted below, the drafters of the Bylaw chose not to create a specific group residential use in its list of permitted or conditional uses in any zoning district. The drafters also chose not to include a provision excluding all uses not explicitly provided for in the Bylaw.[2] While other municipalities might classify uses similar to that proposed here under a group residential facility use, that does not preclude a "health care facility" zoning designation in Thetford for the uses proposed here.

We therefore conclude that the proposed use is within the definition of therapeutic community residence as set out in 33 V.S.A. §§ 7102(11), and that definition in turn falls into a general definition of health care facility.

[2] Appellants argue elsewhere that Bylaw Section 1.04(Q) is intended to exclude all uses not expressly provided for. Appellants' Mot. Summ. J. at 16–17. We read this provision, however, not as excluding uses not mentioned in the Bylaw, but as allowing certain de minimus uses. See Bylaw Section 1.04(Q).

f. The Town Plan

In addition to the above sources, we look to the Town of Thetford Town Plan ("Town Plan"). A town plan "can aid in interpreting an ambiguous zoning provision." In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 22 n.4, 199 Vt. 19 (citing Kalakowski v. John A. Russell Corp., 137 Vt. 219, 225–26 (1979)).

Appellants point to various parts of the Town Plan to support their argument that the proposed use is a residential use, including Chapter I—Land Use, Chapter III—Utilities, Facilities, and Service, and Chapter IX—Housing. Ex. E.

The Land Use and Housing chapters both have the following "Recommended Polic[y]":

> Consider adding specific ordinances: . . . Residential institutions such as homes for the aged, rest homes, extended care facilities, convalescent homes, elderly housing projects and similar types of group living accommodations should be permitted as conditional uses, rather than permitted uses, close to community facilities and services in the village residential and community business zones.

Ex. E at 14, 67–68. Notably, and despite this recommendation in the Town Plan, the drafters of the Bylaw chose not to create specific ordinances addressing "residential institutions."

Meanwhile, the introduction to Chapter III includes the following statement:

> Community services include health, safety and educational services and programs that serve the town's residents. They are generally administered by a town department or nonprofit organization, but may include private operations
>
> . . .
>
> The extent and adequacy of community utilities, facilities and services, whether publicly or privately operated, play an important role by contributing to the general welfare of residents and the quality of life in Town and by attracting certain types of development to the community.

Ex. E at 21.

Focusing on the Chapter I and IX language referring to "group living accommodations" as "residential," and the Chapter III language indicating that health services serve the local population, Appellants argue that the proposed use "is not a health facility because it is a form of group living accommodations." Appellants' Mot. Summ. J. at 13. Appellants also cite a 2016 Draft Town Plan to support their argument. However, since this draft Town Plan has not yet been considered and adopted by the Town voters or legislative body, we decline to rely upon it in our analysis here.

We first note that the Town Plan does not define "health care facility," nor does it specify that a "group living accommodation" is different from a health care facility or cannot also act as a health care facility. The Town Plan is, in fact, extremely vague regarding health care, and sheds no light on what a "health care facility" might or might not be. Because of this, we are unable to conclude that the proposed Project would not qualify as a health care facility as contemplated by the Town Plan.

The Town Plan suggests allowing "homes for the aged, rest homes, extended care facilities, convalescent homes, elderly housing projects and similar types of group living accommodations" as conditional uses. However, the Bylaw does not define the terms "group living accommodation" or "residential institution" use. The "recommended policy" set out in Town Plan Chapters I and IX calling for specific ordinances for residential institutions was not acted on in drafting the Bylaw. Because the Bylaw has no such provisions, one must assume that the Bylaw drafters considered and chose not to follow this this recommendation. See In re Howard Center Renovation Permit, No. 12-1-13 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Nov. 12, 2013) (Walsh, J.) (explaining that a municipality could have created more specific and restrictive zoning regulations regarding different medical uses, but chose not to). Absent such designations being adopted within the Bylaw, we conclude that "health care facility" might therefore be the most appropriate use category for all of Confluence's proposed uses.[3]

Finally, the 2016 Draft Town Plan is not useful in determining what the Bylaw drafters intended, because the Bylaw was adopted in 2011 and the Draft Plan was adopted a number of years later, after Confluence submitted its application. We therefore conclude that the Draft Town Plan has no governing weight over Confluence's proposed project now before this Court.[4]

We therefore find little in the Town Plan to support Appellants' argument to define health care facility in a more limited manner.

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[3] Confluence further points to DAIL definitions to show that its proposed use here is different from these types of "group living accommodations." Under DAIL, a "therapeutic community residence" is a shorter-term facility providing individualized treatment for alcoholism, drug abuse, mental illness, or delinquency, while a "residential care facility," such as a nursing home, provides room, board, and personal care during a longer period of stay.

[4] The Town Plan was adopted on March 19, 2007, and then re-adopted, apparently without any changes, on May 14, 2012. Ex. E, at ii, 1–5.

g. Zoning Definitions from Other Vermont Municipalities

Appellants point to how other Vermont municipalities define "health care facility" in arguing for a narrower definition. Appellants' Mot. Summ. J. Appendix A (listing zoning definitions from different municipalities).

Appellants cite the Windsor zoning ordinances, which define "health care facility" as a "clinic, hospital, sanitarium or nursing home used by the medical profession for treatment and care of humans." Town of Windsor, Vermont Zoning Ordinance at § 3.17. Appellants also cite the Town of Fairhaven's definition, which is: "any establishment where human patients are examined and treated by doctors or dentists but not hospitalized overnight," and the Town of Chester's definition: "[a] facility, whether public or private, principally engaged in providing health care services and the treatment of mental or physical conditions, such as a medical clinic, doctor's office or physical rehabilitation centers."

Appellants add that some municipalities with broader definitions, including the Towns of Barton and Stowe, also have separate definitions, and permit requirements, for therapeutic community residences and group living accommodations.

In response, Confluence points to municipalities with broader definitions that presumably would allow the use proposed here. For example, they look to the Town of Chester's definition, which includes "a facility . . . principally engaged in providing health care services and the treatment of mental . . . conditions." Confluence also cites the Town of Ludlow's definition: "a facility or institution, whether private or public, principally engaged in providing services for health maintenance, diagnosis, and treatment, which may have equipment, facilities, and staff to provide 24 hour care"; and Springfield's definition: "facilities for the provision of health care services including but not limited to hospitals, nursing homes, medical laboratories, etc."

Neither party cites any legal precedent suggesting what weight, if any, the definition of a term by one municipality should carry when interpreting the same term in another municipality's regulations. Confluence does note, however, that there is no evidence that the Bylaw drafters were aware of other municipalities' ordinances when they drafted their Bylaw. Because there is no evidence that the Bylaw drafters were aware of, or were influenced by, the bylaws of other municipalities, those bylaws carry little to no weight in our analysis.

Looking at these other bylaws, however, we can nevertheless conclude that the term "health care facility" can be broadly or narrowly defined. If anything, the comparison with other municipalities demonstrates that the Town of Thetford could have defined the term, either narrowly or broadly, but chose not to do so.

h. Vermont Supreme Court Interpretations

We are aware of at least one case in which the Vermont Supreme Court held that a "therapeutic community residence" was "being used for a health . . . purpose." Fletcher Farm, Inc. v. Town of Cavendish, 137 Vt. 582, 585 (1979). We find some additional support from this ruling that the proposed uses here may be defined as a health care facility.

i. Conclusion

Considering that dictionary and statutory definitions of "health care facility" may be broad enough to encompass the proposed Project; that the Bylaw drafters chose not to define the term; that the drafters chose not to include an ordinance for residential treatment facilities; and that ambiguous terms must be resolved in favor of the landowner applying for a land use permit; we conclude that the proposed use qualifies as a health care facility under the Bylaw. We therefore answer Appellants' Question 2 in the positive, and **deny** Appellants' and **grant** Confluence's summary judgment motion regarding Question 2.

III. Question 3: Whether the proposed use is "outdoor recreation."

The Bylaw defines "outdoor recreation" as:

> Any use of land or structures for the provision of outdoor recreational services where the primary use is outside. Such uses include, but are not limited to, the following: downhill or cross-country ski area, tennis court, youth camp, hunting lodge, shooting range and miniature or standard golf course.

Bylaw Section 2.04(B).

As noted above, we consider the actual use and impact when defining a proposed zoning use. Sardi, 170 Vt. at 624.

We previously addressed this principle in Barefoot, No. 46-4-12 Vtec, slip op. at 5 (Nov. 13, 2013). In that case, we held that a wilderness therapy program in which participants engaged in camping and hiking could be considered "outdoor recreation" under the common definition of

that term, because hiking and camping are commonly understood to be "outdoor recreation." Id.

Confluence's program involves clients sleeping in the structures on the Project site and using the property to participate in therapy sessions. The program will also require clients to engage in recreational activities including hiking, snowshoeing, biking, and cross-country skiing, and agricultural activities such as gardening and maple sugaring. These recreational and agrarian activities are also common at youth camps, which are among the specific examples of "outdoor recreation" set out in the Bylaw. Section 2.04(B). Cross-country skiing is a specific activity listed in the same definition. Id. This Court has also considered "hiking" to qualify as "outdoor recreation." Barefoot, No. 46-4-12 Vtec, slip op. at 5 (Nov. 13, 2013).

While the proposed activities fall into "outdoor recreation" use, the facts now before the Court are not sufficient to determine whether the "primary use is outside." For example, Factual Background ¶ 22, above, states:

> While on the Project site, clients will participate in individual and group therapy sessions, counselling, and peer support, all supervised by with a licensed mental health professional. In addition, clients will be given assignments and readings to complete as part of their therapy. Clients will be assigned to live in a communal group and will participate in the daily responsibilities of communal, agrarian living such as gardening and maple sugaring. Clients will also participate in adventure-focused wilderness therapy activities while on the Project site, and will engage in recreational activities such as hiking, snowshoeing, riding bikes, and cross-country skiing.

It is not clear from this, and other descriptions of the program, whether clients will spend the majority of their time on the Project site outdoors.

Because neither party has presented sufficient facts for us to determine that they are "entitled to judgment as a matter of law," both motions for summary judgment as to Question 3 are **denied** and we therefore conclude that this issue must await trial to be resolved. V.R.C.P. 56(a). As the parties prepare for trial on this issue, we ask that they prepare to argue the appropriateness of the proposed project being defined as or including two separate uses.

IV. Question 8: Whether the proposed use complies with district standards.

Appellants also move for summary judgment on Question 8. While not entirely clear from their pleadings, we assume this motion relies on the argument that the proposed use is not a

health care facility or outdoor recreation, but rather is a commercial use and a residential facility and, as such, it is not allowed in the RR District. As noted above, we have rendered an opposite determination on the issue of whether the proposed use may qualify as a health care facility. We therefore **DENY** Appellants' motion for summary judgment as to Question 8.

V. Question 9: Whether the proposed use complies with Sections 3.10 of the Thetford Zoning Bylaw (on-site potable water and sewage systems), 6.06(D)(4) (compliance with other requirements), and 6.06(F)(6)–(7) (compliance with § 3.10, ground and surface water pollution), and other applicable potable water and wastewater requirements.

Question 9 is primarily concerned with whether the Project will comply with potable water and wastewater requirements. Appellants move for summary judgment on the entirety of Question 9. Confluence moves for summary judgment on the parts of Question 9 that ask whether the proposed use complies with Bylaw Sections 3.10 and 6.06(F)(6).

a. Section 3.10

Bylaw Section 3.10 reads as follows:

> For development that will include a wastewater or potable water supply system, no construction may be initiated under a zoning permit unless and until a wastewater or potable water supply permit is issued by the Agency of Natural Resources under 10 V.S.A. chapter 64.

Appellants argue that Confluence's plans to update the main lodge with paint, new hardware and fixtures, and to improve floors, walls, and bathrooms, constitutes "construction" under Section 3.10. They note that the Bylaw defines "construction" as "reconstruction, conversion, relocation, alteration or enlargement of any building or structure." Bylaw Sections 8.02, 7.03(F)(2).

At this point we do not need to determine whether the proposed activities constitute construction. The issue before use is whether Confluence should be granted a conditional use permit for the Project. Section 3.10 is silent regarding the issuance of conditional use permits, and has no requirement that a wastewater and potable water supply permit must be issued before conditional use approval is granted.[5] See In re Asia Minor Hotel/Resort/Spa, No. 124-9-

[5] Although it is therefore a moot point, we note that Confluence does have a wastewater and potable water supply permit for the Project, albeit one that does not support the full number of clients and staff that Confluence eventually wishes to have on the project site. Confluence has pledged to not exceed the student and staff numbers in their current wastewater permit, unless and until they receive an expanded wastewater permit.

12 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jun. 4, 2012) (Durkin, J.) (dismissing question asking whether wastewater permit is prerequisite for zoning permit where the applicable ordinance did not require a wastewater permit as a prerequisite for zoning approval).

We note that 24 V.S.A. § 4414(13)(A) allows municipalities to prohibit the initiation of construction until a wastewater and water supply permit is issued, or to condition the issuance of a permit on the issuance of a wastewater and water supply permit. Here, the Bylaw does the former, but not the latter; there is no provision in the Bylaw that would condition the issuance of conditional use approval on the issuance of a wastewater and potable water supply permit. Because Confluence has not yet applied for or received a zoning or building permit under the Bylaw, we conclude that Appellants' critique of whether a wastewater and water supply permit must first issue is premature, since the only application pending before this Court is one for conditional use and site plan approval.

We can therefore answer the first part of Question 9, regarding compliance with Section 3.10, in the affirmative, **grant** summary judgment to Confluence on this point and **deny** summary judgment to Appellants on that same point.

b. Section 6.06(F)(6)

Section 6.06 provides guidelines for Conditional Use Review. Section 6.06(F)(6) reads, in pertinent part:

> In permitting a conditional use, the Development Review Board may impose, in addition to the standards expressly specified by these regulations, other conditions it finds necessary to implement the purposes of these regulations. These conditions include, but may not be limited to, the following:
>
> . . .
>
> Requiring compliance with performance standards in Section 3.10.

Appellants argue that reading Section 606(F)(6) to simply require compliance with 3.10 is not a reasonable interpretation, because that would make 606(F)(6) redundant and mere surplusage. Instead, Appellants contend that the requirement to comply with performance standards set out in Section 3.10 requires compliance with wastewater and potable water supply standards set out in 10 V.S.A. chapter 64.

We read Section 606(F)(6) as a reminder of the requirements set out in Section 3.10, and in that sense, recognize that it contains some redundancy. However, Section 606(F)(6) also gives the DRB the additional option to condition the permit on continued compliance with Section 3.10. Section 606(F)(6) ("the [DRB] may impose . . . other conditions it finds necessary"). This part of Section 606(F)(6) does not repeat anything in Section 3.10, and is therefore not redundant, or mere surplusage.

We do not find it reasonable to interpret Section 606(F)(6) to require the Town to ensure that the conditional use permittee comply with the entire set of standards set out in 10 V.S.A. chapter 64. We reach this conclusion because the Agency of Natural Resources ("ANR") is responsible for ensuring compliance with those statutory provisions, including by issuing wastewater and water supply permits. 10 V.S.A. § 1973 (authorizing ANR to issue wastewater and potable water supply permits); 10 V.S.A. §1978 (authorizing ANR to adopt rules, including for monitoring compliance with wastewater and potable supply standards); see also 10 V.S.A. § 1971(2) ("[i]t is the purpose of this chapter to . . . eliminate duplicative or unnecessary permitting requirements through the consolidation of existing authorities and, where appropriate, the use of permits by rule").

Looking again to 24 V.S.A. § 4414(13)(A), the legislature has not granted municipalities authority to directly monitor compliance with 10 V.S.A. chapter 64. Pursuant to this statute, they may only do so indirectly by requiring a permittee or permit applicant to obtain a wastewater and potable water supply permit before a permit may be issued, or before construction may begin. While there is a statute that allows ANR to delegate some authority set out in 10 V.S.A. chapter 64 to municipalities, there is no indication that ANR has done so here. 10 V.S.A. § 1976.

For these reasons, we **grant** Confluence's motion for summary judgment regarding the part of Question 9 that raises the question of conformance with Section 6.06(F)(6) and **deny** summary judgment to Appellants on the same point.

c. Section 6.06(F)(7)

Section 6.06(F)(7) allows the DRB to impose conditions to ensure "the proposed use will not result in the pollution of ground or surface waters or the injection of toxic or hazardous waste into ground waters." This is discretionary; the DRB is not required to impose such conditions.

Appellants make no argument in their pleadings specific to Section 606(F)(7). Because they have failed to set out any reason why they should be granted summary judgment on this part of Question 9, Appellants' motion for summary judgment on the part of Question 9 that raises Section 606(F)(7) is **denied**.

d. Section 6.06(D)(4)

Section 6.06(D)(4) is a catchall provision requiring the DRB to consider "whether the proposed development complies with all ordinances, bylaws, and regulations in effect at the time of application, including other applicable provisions of this bylaw, other municipal permit and/or approval conditions (e.g., subdivision, highway access)."

Appellants argue that Confluence's permit application cannot comply with Section 6.06(D)(4) if it does not also comply with Section 3.10. Because we conclude that the permit application does comply with Section 3.10, we see no grounds in Section 6.06(D)(4) to enter summary judgment in Appellants' favor. Appellants' motion for summary judgment on the part of Question 9 that is premised Section 606(D)(4) is therefore **denied**.

Conclusion

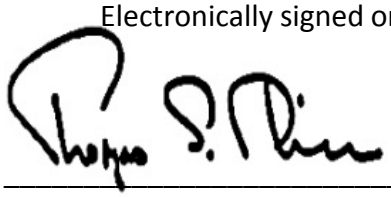
For all the reasons detailed above, we conclude that Confluence is entitled to summary judgment as to Appellants' Questions 1 and 2 by concluding that the Bylaw does not define Confluence's proposed therapeutic community residence as a "commercial use" and that the Bylaw, as presently drafted, allows for its proposed programs to fit within the term "health care facility", which is identified as a use conditionally allowed in the RR District. For these same reasons, we deny Appellants' request for summary judgment on Questions 1 and 2.

We have not received sufficient facts to determine whether the wilderness therapy and agrarian living portions of Confluence's proposed programs fit within the Bylaw definition of an "outdoor recreation" use and therefore leave Appellants' Question 3 for resolution at trial.

We deny Appellants' request for summary judgment as to their Question 8, given that we have concluded that Confluence's proposed project may be regarded as a health care facility. Lastly, we deny Appellants' request for summary judgment as to the entirety of their Question 9, but grant Confluence summary judgment on the portions of Question 9 that ask whether Confluence's proposed project conforms to Bylaw §§ 3.10 and 6.06(F)(6).

Our determinations here leave to be resolved at trial Questions 3 through 8 and the portion of Question 9 that challenges the conformance with Bylaw §§ 6.06(D)(4) and 6.06(F)(7). We therefore direct that the Parties prepare for trial on those remaining legal issues. By no later than **Wednesday, February 1, 2017**, the parties are directed to provide the Court with a list of the days that they, their attorneys, and witnesses would be unavailable for trial during the months of March and April, 2017. The Court will thereafter endeavor to set the matter for trial at the Windsor County Superior Court. The parties are also directed to advise the Court by February 1, 2017 whether they believe that more than one day will be needed to fully litigate the remaining factual and legal issues.

Electronically signed on January 23, 2017 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



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Thomas S. Durkin, Judge
Environmental Division