

Vermont Superior Court  
Environmental Division  
Environmental Division  
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Docket Number: 41-4-17 Vtec

Island Arts CU

March 23, 2018

Please see the enclosed DECISION ON THE MERITS AND JUDGMENT ORDER issued by Judge Thomas G. Walsh on 3/23/2018

Electronically signed on March 23, 2018 at 10:37 AM pursuant to V.R.E.F. 7(d).

A handwritten signature in cursive script, reading "Diane Chamberlin".

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Diane C. Chamberlin  
Assistant Clerk

STATE OF VERMONT

SUPERIOR COURT  
Environmental Division Unit

ENVIRONMENTAL DIVISION  
Docket No. 41-4-17 Vtec

Island Arts CU

DECISION ON THE MERITS

**Decision on the Merits**

The Champlain Island Celebration of the Arts, Inc. d/b/a “Island Arts” (Applicant) appeals a March 28, 2017 decision of the Town of North Hero Development Review Board (DRB) approving, with conditions, Island Arts’ application to renovate the historic Knight Barn for non-profit arts education and performances on a 6.1-acre parcel at 1127 U.S. Route 2 in the Town of North Hero, Vermont (Town).

In its Statement of Questions, Applicant asks whether the DRB improperly imposed conditions in its approval, including, but not limited to: (a) hours of operation; (b) definition of an “event” at the facility; (c) limitations on the size and number of “events”; (d) imposition of requirements for traffic control on US Route 2; and (e) imposition of requirements for traffic control on-site.

The Court completed a site visit on the morning of October 4, 2017, immediately followed by one day of trial at the Grand Isle Superior Court in Grand Isle, Vermont. During the Court’s deliberation of the evidence presented at trial and the parties’ post-trial briefs, the Court held a post-trial status conference and provided a weather report of potential modified conditions necessary to mitigate undue adverse impacts to the character of the area resulting from Island Arts’ application. The parties later requested that the evidence be reopened for a half-day merits hearing. An additional half-day trial was held on March 20, 2018 at the Costello Courthouse in Burlington. Appearing at the site visit and both days of trial were Liam L. Murphy, Esq. representing Applicants and Paul Gillies, Esq. representing the Town.

Based upon the evidence presented, including that which was put into context by the site visit, the Court renders the following Findings of Fact and Conclusions of Law.

## Findings of Fact

1. Applicant Island Arts is a nonprofit organization created in the 1980s that offers concerts, events, and courses to people in the Champlain Islands.
2. In the past the organization did not have a dedicated space for its activities, and it hosted activities at different venues in the Islands.
3. Applicant owns the land and premises at 1127 U.S. Route 2, North Hero, Vermont (the subject property).
4. Applicant sought a permit to renovate a barn on the property for non-profit arts education and performances, including concerts, movies, theater, barn dances, weddings, and fundraisers. Some of these activities are by and for Island Arts (e.g. classes and concerts), while others are private activities in which the facility will be rented out to raise money for the organization (e.g. weddings). As in the past, some of these events will be held later in the evenings to accommodate attendees' schedules.
5. The permit is subject to the North Hero Development Regulations, approved August 26, 2014 (the Regulations), and the North Hero Town Plan 2015, approved June 2, 2015.
6. The subject property is in the Rural Lands District. The property is approximately 6.1 acres with frontage on the west side of U.S. Route 2, which runs north-south and is the main thoroughway for traffic through North Hero. The property is forested in the back (to the west) and open along the road (to the east) and on the boundary lines with neighboring properties (to the north and south). A 50' x 60' barn on the subject property that is set back approximately 56 feet from the road has been extensively restored and, along with a planned addition, will be used as the primary space for Island Arts' activities. Island Arts will also build a stage on the west side of the barn to use for outdoor events.
7. The subject property has an existing curb cut off Route 2, from which a driveway leads around the south of the barn and then curves to the north. The driveway terminates in a grassy field to the northeast of the barn where applicant proposes parking for up to 85 vehicles.
8. The curb cut is shared with a driveway that turns south to Katherine Martell's residence, which is situated on the parcel south from and adjacent to the subject property.
9. The project has an approved wastewater system and potable water supply permit (WW-6-1373-2) using municipal water service and an on-site wastewater disposal system. The system is approved to serve 4 employees, 20 students, and up to 150 people for events.

10. Travelling from the south, traffic enters North Hero via a drawbridge on Route 2. Richard Malone, who serves on the Island Arts Board of Directors and lives in North Hero, testified that the drawbridge opens for ten minutes twice per hour, and that he has never seen more than 25–30 cars back up on Route 2 when the bridge is up.
11. Route 2 is used by cars, trucks, and tractors. It is busier in the summer, and experiences surges of traffic moving north when the drawbridge is raised and lowered to accommodate boat travel. Traffic is lighter in the evening, including in the summer.
12. Knight Point State Park is on the west side of Route 2 north of the drawbridge and south of the project site. The state-owned Park is used for weddings, music events, car shows, and Fourth of July fireworks. Some events involve hundreds of cars entering and exiting the Park. All events at the Park except the Fourth of July fireworks wind down by 8:30 p.m. The Park is a large parcel of land with no close neighbors.
13. South End Road turns west off Route 2 at a point north from Knight Point State Park and south from the subject property. The road leads to Camp Abenaki, which operates as a children’s summer camp, and Camp Ingalls, which is owned by the Town. Turnover at Camp Abenaki causes traffic on Route 2 to increase on summer weekends. Camp Ingalls serves as a venue for some events, primarily town-sponsored. These rarely continue after dark.
14. Shore Acres is a private facility about one mile north of the subject property on the east side of Route 2. Shore Acres is a restaurant and inn that hosts weddings, bands, reunions, and an annual air show. Guests may stay at the restaurant until after 9:00 p.m., and weddings and events may also continue until after 9:00 p.m. Hundreds of vehicles enter and exit the site at larger events. The use of Shore Acres predates the enactment of zoning regulation. Shore Acres is on a large parcel of land that isolates events from neighbors.
15. North Hero village is on Route 2 north of Shore Acres.
16. The area immediately surrounding the subject property is largely residential and agricultural. There are about five residences near the subject property, three of which are within sight of the barn.
17. Shirley Carlson owns a residence on land abutting the subject property to the north. At trial, Ms. Carlson expressed concern that noise from events in and around the barn in the evenings, from traffic, and from the noise and lights associated with people leaving events in the evening will negatively impact the use and enjoyment of her property. Ms. Carlson indicated that traffic noise on Route 2 is fairly minimal after 6:00–7:00 p.m.

18. Katherine Martell lives with her husband on property abutting the subject lot to the south. Ms. Martell's house is less than 100 yards from the Island Arts barn. At trial Ms. Martell testified that she shared the same concerns expressed by Ms. Carlson.
19. Kevin Kadish lives with his family on South End Road. Mr. Kadish's house is situated a few hundred yards to the west of the Island Arts barn, and the area between his house and the barn is forested.
20. Charles Bombard lives across Route 2 to the east of the subject property and has no concerns about Island Arts' proposal to host some late-night events.
21. The neighborhood, and the island generally, are usually quiet after 8:30 p.m. The only public event that creates significant traffic and noise after 8:30 p.m. during the summer is the Fourth of July fireworks at Knight Point State Park. The fireworks can be heard by those living near the subject property, as can the weekly Knight Park summer concerts, although the latter end shortly after 8:00 p.m. Other noise from Knight Point State Park, Camp Ingalls, Camp Abenaki, and Shore Acres is not audible in the area of the subject property.
22. Due to the configuration of the proposed driveway and parking area, noise and light from traffic entering and exiting the subject property would have a negative impact on Ms. Martell's and Ms. Carlson's homes, especially at night when the area is quiet.
23. A building at the corner of Route 2 and South End Road has at different times been operated as a general store, as a furniture store, and as an antique store. The building is currently unoccupied and is for rent as a commercial space.
24. Guests attend Island Arts events from around the region, including from Burlington. Some events must be held later in the evening to allow people to attend after the regular work day.
25. Requiring performances and concerts to start and end early, limiting audience numbers, and prohibiting performances from running for multiple days will reduce ticket sales and make it more difficult for Island Arts to book acts. This would in turn make it difficult or impossible for Island Arts to operate and fulfill its mission.
26. To make the venue attractive for potential acts, and to maximize attendance, weekend events ideally start at 7:30–8:00 p.m. and end by 10:00 p.m. and run for consecutive Friday and Saturday nights. A typical run would include Friday and Saturday night performances followed by a Sunday matinee.
27. The DRB granted Island Arts' permit application, with conditions.

28. The conditions Applicant seeks to challenge in this appeal include hours of operations, restrictions on events, and traffic-control requirements.

### Conclusions of Law

In this de novo appeal, we consider the application anew to determine whether it complies with the Regulations. We limit our review to those issues raised by the Appellant, here, Applicant, in its Statement of Questions and consider only the evidence presented to the Court, not the evidence that was presented to the DRB during the proceeding below. See Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1998) (“A de novo trial ‘is one where the case is heard as though no action whatever has been held prior thereto.’” (quoting In re Poole, 136 Vt. 242, 245 (1978))); In re Torres, 154 Vt. 233, 235 (1990) (stating that “[t]he reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broader”).

Applicant’s Statement of Questions raises several questions related to the conditions imposed on the approved conditional use permit, as follows:

1. Did the Development Review Board improperly impose conditions on its “approval” of the application of Island Arts expansion, including, but not limited to:
  - a. Hours of Operation;
  - b. Definition of an “event” at the facility;
  - c. Limitations on the size and number of “events”;
  - d. Imposition of requirements for traffic control on US Route 2; and
  - e. Imposition of requirements for traffic control on-site.

**I. Conditional Use Review: whether the project will have an undue adverse impact on traffic and on the character of the area**

The Property is in the Rural Lands District. See Zoning Map, Regulations p. 12. “Recreational facilities” and “Public or Semi-Public Facilities” in the Rural Lands District require conditional use approval. Regulations Table 5.1.

Under the Regulations, a proposed conditional use must:

[N]ot result in an undue adverse effect on . . . [t]he character of the neighborhood area, or district affected. The DRB shall consider the location, scale, type, density, and intensity of the proposed development in relation to the character of the area likely to be affected by the proposed development, as defined by the purpose(s) of the zoning district(s) within which the project is located (See Section 3.1) and specifically stated polices and standards of the North Hero Town Plan.

Id. § 6.1(E)(1)(b). Furthermore, the decisionmaker “shall consider the adequacy of circulation, parking, and loading facilities,” with “[p]articular consideration . . . given to the effect of noise, glare or odors on adjoining properties and state and town highways.” Id. § 6.1(E)(2)(b). The Regulations also require the decisionmaker to “consider the adequacy of landscaping and screening on the site.” Id. § 6.1(E)(2)(c).

In analyzing impact on the character of the area we consider character as defined in the zoning regulations and town plan—as directed here by Regulations § 6.1(E)(1)(b)—and also the character as defined by existing uses. See Rublee 246 White Birch Lane CU, No. 140-11-15 Vtec, slip op. at 7–10 (Vt. Super. Ct. Env'tl. Div. Aug. 23, 2016) (Walsh, J.). In determining whether a proposed use will have an undue adverse impact, we apply the two-step approach set out in the Quechee test: first, we look at whether the proposed use would have an adverse impact and, if so, we then determine whether that adverse impact would be undue. In re Times & Seasons, LLC, 2008 VT 7, ¶ 8, 183 Vt. 336; In re Grp. Five Investments CU Permit, 2014 VT 14, ¶ 14, 195 Vt. 625, overruled in part on other grounds by In re Confluence Behavioral Health, LLC, 2017 VT 112, ¶ 14 (Dec. 8, 2017).

The evidence presented at trial demonstrated that the area immediately surrounding the project lot is rural and residential. While there is a structure at the corner of South End Road and Route 2 that has been put to different commercial uses in the past, it is now vacant and for rent.

Route 2, as the main throughway for the Town, is used by cars, trucks, and tractors. It is busier in the summer, and experiences surges of traffic moving north when the drawbridge is raised and lowered to accommodate boat travel, and on summer weekends as campers arrive at and leave Camp Abenaki.

The area is largely quiet after 8:30 p.m. The main exception to this is the annual Fourth-of-July fireworks at Knight Point State Park, which are audible in the immediate area of the subject lot. Summer concerts at the Park can also be heard in the area, but those end by 8:30 p.m. The only other venue that may be in the “area” of the subject lot that hosts late-night events, Shore Acres, is on a large parcel that is sheltered from neighbors. Those living on properties adjacent to the subject property cannot hear, and do not appear to be impacted by, late-night events at Shore Acres.

The description of the Rural Lands District in the Regulations and Town Plan largely conforms with the area as it actually exists:

While farming is the primary use in this District, low density residential areas, as well as recreational, commercial and light industrial uses may be approved with careful review by the DRB. Development review shall focus on siting development to maintain the rural character of this District, which consists of open agricultural land with views of Lake Champlain, the Adirondacks and the Green Mountains.

Regulations § 3.1(A)(2); Town Plan at 38.

We conclude that because this rural area is largely quiet after 8:30 p.m., the light and noise associated with late-night events will not be keeping with, and would have an undue adverse impact on, the character of the area. We also conclude that allowing an unlimited number of larger-scale events would have an undue adverse impact on the character of the area. The impact would be most intense on the abutting properties to the north and south, especially from headlights and noise of vehicles leaving events at night.

## **II. Whether approval for the proposed use can be conditioned to mitigate adverse impacts**

These conclusions are not fatal to the application. If a project is anticipated to have an undue adverse effect on the character of the area, the decision-making body can still grant conditional use approval with conditions designed to mitigate that impact. *Id.* §§ 6.1(E)(2) and (F); see also 24 V.S.A. § 4464(b)(2). We conclude that the adverse impacts identified here can be appropriately mitigated by setting hours of operation, limiting larger events, and requiring traffic-control measures.

### **1. Hours of Operation**

The Regulations grant the DRB (and thus the Court in this appeal) the power to impose reasonable conditions on the hours of operation of a conditional use site. Regulations § 6.1(F)(5).

At trial, Applicant and the Town agreed that an 8:00 a.m. opening time would be acceptable. The parties have been unable, however, to agree on an acceptable closing time. The uncontroverted evidence established that the area is quiet after 8:30 p.m., and that events at the property after that time would have an undue adverse impact on the area, particularly on the immediate neighbors. The Town and neighbors advocate for an earlier closing time to mitigate this impact.

At the same time, Island Arts presented evidence that a later closing time is necessary to accommodate a functional arts venue.

We conclude that restricting hours of operation is an appropriate way to mitigate undue adverse impact in this case. To reduce impact, operating hours will be restricted as follows:

- The facility may be open from 8:00 a.m. to 8:30 p.m. or sunset, whichever is later.



- From October to April, the facility may remain open for indoor events until 10:00 p.m. no more than two nights per calendar month. These two nights are limited to a consecutive Friday and Saturday on a single weekend.
- From May to September, the facility may remain open for indoor events until 10:00 p.m. no more than four nights per calendar month. These four nights are limited to consecutive Fridays and Saturdays on two weekends.
- All events taking place later than 8:30 p.m. must be inside and the doors and windows of the subject barn must be closed.
- All vehicles must exit the property before the relevant closing time.

## **2. Limitations on the size and number of events**

The purpose of conditional use review is to require compliance with standards addressing the impact of proposed land uses on adjacent properties, the neighborhood or district in which the project is located, and the community at large. Regulations § 6.1(B). The Town argues that a limitation on the number of events, based on the number of attendees, is reasonable to mitigate impact on the area.

The evidence introduced at trial shows that the proposed use will allow parking for up to 85 vehicles, and a wastewater and water supply permit that allows up to 150 visitors.

We agree that the undue impact will increase as events are more heavily attended, particularly in the evening. It is therefore appropriate to mitigate impact by restricting the number and size of events. Events will therefore be restricted as follows:

- An “event” is a planned activity where visitors or guests are expected to arrive and depart at defined times.
- Each calendar month the facility may host no more than: two events with 60 to 100 visitors or guests, and two events with 100 to 150 visitors or guests.
- There is no limit on the number of events with fewer than 60 visitors and guests.

## **3. Traffic**

The DRB must consider the projected impact of traffic on roads and highways in the vicinity. Regulation § 6.1(E)(1)(c). The Regulations specifically allow the DRB to impose conditions to ensure safety of vehicular circulation on and off site. Id. § 6.1(E)(2)(a)–(b).

At trial, the parties agreed to the following Traffic conditions:

- At least one on-site parking lot attendant will direct parking.

- “EVENT AHEAD” signs will be placed on Route 2 to the north and south of the curb cut.
- Driveway and pedestrian paths on site will be clearly marked.

#### **4. Screening**

Condition 6 of the DRB approval requires Island Arts to install “densely planted evergreen hedge[s]” at the south boundary line to the west of the Martell driveway and extending west for 150', along the eastern border of the parking area, and along the north property line for the entire distance of the parking area.

While Island Arts did not expressly appeal this condition, it falls within the broad scope of Question 1, which asks whether the conditions imposed by the DRB are proper.

Traffic entering and leaving the site will have an undue adverse impact on Ms. Martell’s and Ms. Carlson’s homes. Screening on the northern and southern property lines will ameliorate this impact. We therefore maintain Condition 6 as imposed by the DRB, with the additional requirement that the northern and southern hedges shall be a minimum of 5–6 feet tall, with plantings spaced as appropriate to create a solid vegetated screen, prior to Island Arts holding any events.

#### **Conclusion**

For the reasons detailed above, we **GRANT** Applicant’s conditional use approval for the proposed renovation of the Knight Barn at 1127 U.S. Route 2 in the Town of North Hero, Vermont. In reaching this conclusion we impose the following modified conditions to mitigate the proposed project’s undue adverse impact to the character of the area and traffic. In imposing these conditions, we **STRIKE** conditions 4 and 5(a)–(d) that are set out in the DRB’s March 28, 2017 decision. All other conditions of that decision remain in full force and effect.

**1. Hours of operation:**

- a. Hours of operation are from 8:00 a.m. to 8:30 p.m. or sunset, whichever is later.
- b. From October to April, the facility may remain open for indoor events until 10:00 p.m. no more than two nights per calendar month. Those two nights are limited to a consecutive Friday and Saturday on a single weekend.
- c. From May to September, the facility may remain open until 10:00 p.m. for indoor events no more than four nights per calendar month. Those four nights are limited to consecutive Fridays and Saturdays on two weekends.
- d. All events taking place later than 8:30 p.m. must be inside and the doors and windows of the subject barn must be closed.
- e. All vehicles must exit the property before the relevant closing time.

**2. Event Conditions:**

- a. An “event” is a planned activity where visitors or guests are expected to arrive and depart at defined times.
- b. Each calendar month the facility may host no more than:
  - i. two events with 60 to 100 visitors or guests, and
  - ii. two events with 100 to 150 visitors or guests.
- c. There is no limit on the number of events with fewer than 60 visitors and guests.

**3. Traffic:**

- a. At least one on-site parking lot attendant will direct parking.
- b. “EVENT AHEAD” signs will be placed on Route 2 to the north and south of the curb cut.
- c. Driveway and pedestrian paths on site will be clearly marked.

**4. Screening:**

- a. Condition 6 as imposed by the DRB will remain in effect, with the addition that the northern and southern hedges shall be a minimum of 5–6 feet tall, with plantings spaced as appropriate to create a solid vegetated screen, prior to Island Arts holding any events.

A Judgment Order accompanies this Decision. This completes the current proceedings before this Court.

Electronically signed on March 22, 2018 at 04:19 PM pursuant to V.R.E.F. 7(d).



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Thomas G. Walsh, Judge  
Superior Court, Environmental Division

STATE OF VERMONT

SUPERIOR COURT  
Environmental Division Unit

ENVIRONMENTAL DIVISION  
Docket No. 41-4-17 Vtec

Island Arts CU

JUDGEMENT ORDER

The Champlain Island Celebration of the Arts, Inc. d/b/a “Island Arts” (Applicant) appeals a March 28, 2017 decision of the Town of North Hero Development Review Board (DRB) approving, with conditions, Island Arts’ application to renovate the historic Knight Barn for non-profit arts education and performances on a 6.1-acre parcel at 1127 U.S. Route 2 in the Town of North Hero, Vermont (Town).

For the reasons set out in the accompanying Decision on the Merits, the application is **GRANTED**. In reaching this conclusion we impose the following modified conditions to mitigate the proposed project’s undue adverse impact to the character of the area and traffic. In imposing these conditions, we **STRIKE** conditions 4 and 5(a)–(d) that are set out in the DRB’s March 28, 2017 decision. All other conditions of that decision remain in full force and effect.

**1. Hours of operation:**

- a. Hours of operation are from 8:00 a.m. to 8:30 p.m. or sunset, whichever is later.
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**1. Event Conditions:**

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- b. Each calendar month the facility may host no more than:
  - i. two events with 60 to 100 visitors or guests, and
  - ii. two events with 100 to 150 visitors or guests.
- c. There is no limit on the number of events with fewer than 60 visitors and guests.

**2. Traffic:**

- a. At least one on-site parking lot attendant will direct parking.
- b. "EVENT AHEAD" signs will be placed on Route 2 to the north and south of the curb cut.
- c. Driveway and pedestrian paths on site will be clearly marked.

**3. Screening:**

- a. Condition 6 as imposed by the DRB will remain in effect, with the addition that the northern and southern hedges shall be a minimum of 5–6 feet tall, with plantings spaced as appropriate to create a solid vegetated screen, prior to Island Arts holding any events.

This completes the current proceedings before the Court.

Electronically signed on March 22, 2018 at 04:22 PM pursuant to V.R.E.F. 7(d).



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Thomas G. Walsh, Judge  
Superior Court, Environmental Division