

TOWN OF LINCOLN
ZONING BOARD OF ADJUSTMENT

APPLICANT: BICKNELL TRUST

LANDOWNER: NORMAN BICKNELL, TRUSTEE

**APPEAL OF SARAH LAIRD, ET AL. RE: APPROVAL OF BICKNELL TRUST
APPLICATION (NO. 21-011) FOR CONSTRUCTION OF A SEASONAL CAMP**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. BACKGROUND

On March 10, 2021, Applicant, Bicknell Trust¹, submitted an Application for Zoning Permit (No. 21-011) for a “seasonal camp – no plumbing – 1,386 sq. ft.” on property located at Elder Hill Road in Lincoln, Vermont (Parcel No. 19-07-02-03.000) (hereinafter “Bicknell Permit” or “Permit”). The Lincoln Zoning Administrator (“ZA”) granted the Permit on June 1, 2021, which is described on the Zoning Permit Notice “Z” as a “1386 sq. ft. Primitive cabin w/Porch”. On April 10, 2022, Marilyn Ganahl, Allison Graham, Stephanie Tuxill, Anne Lawrence, Edward Lafayette, Michael O’Connor, Kristi Lafayette, Sarah Farr, David Brynn, Jacquelyn Tuxill, Louise Rickard, Christine Fraioli, Alison Zimmer, Peg Sutlive, Dan Guy and Sarah Laird (collectively referred to as “Appellants”), filed an Application for Hearing before the Zoning Board of Adjustment (#22-028) with attached Notice of Appeal appealing the decision of the Zoning Administrator (hereinafter “App. No. 22-028”).² The reasons stated for the appeal as framed, in part, by the Appellants in April 10, 2022 correspondence accompanying the Notice of Appeal, are as follows:

- d) The applicable regulatory provisions. These are Ordinances §§ 331-335 (applying Part IV to Permitted Uses); §§ 411-413 (Viewshed Overlay Area, for many reasons); § 512 (Required Frontage/Access, because of erosive nature of

¹ Judicial notice is taken of the Landowner’s identity by virtue of the recorded deed by which the Landowner acquired title including the right of way to the Property. The titled owner of the subject property is Norman Bicknell, Trustee of Bicknell’s Lincoln Land Revocable Trust by Warranty Deed dated 9/10/19 recorded at Vol. 87, Page 780 of the Lincoln Land Records (hereinafter referred to as “Bicknell Trust”).

² Appellants Christine Fraioli, Sarah Laird, Alison Zimmer, Louise Rickard, Jacquelyn Tuxill, Peg Sutlive and Dan Guy are represented by James Dumont, Esq.

the access road); and possibly §§ 771-775 (Other Applications).

e) The relief requested. The development should be subject to conditions requiring compliance with the Viewshed Overlay Area standards, such as ensuring the structure and its windows are not visible to others in town, for example by reducing the structure's size, windows, and moving the building site much farther back to the edge of the wooded area.

f) The basis for the relief. The cited sections are intended to protect the viewshed of Lincoln, one of its greatest resources. The intent of the ordinance, with regard to permitted uses in the Viewshed Overlay Area, is to authorize imposition of conditions that will protect the viewshed.

On May 23, 2022, June 20, 2022, July 27, 2022 and August 10, 2022 the Lincoln Zoning Board of Adjustment (“ZBA”)³ convened properly warned public hearings (“Hearings”) at Burnham Hall in Lincoln, Vermont or via Zoom to consider the Bicknell Permit Appeal. A site visit was held on August 10, 2022. The ZBA held the hearing open and in recess until August 24, 2022 to allow for the further submission of documents, photographs, or other relevant information pertaining to the site visit held on August 10, 2022 at which time the hearing was concluded. A quorum of ZBA members were present during the Hearings, they being; Tommie Thompson, Serena Fox, Barry Olson, James Warnock, Patricia Waugh, Josiah Jackson, Nicole E. Lee, Harry Reynolds and Stephen Halnon.⁴

Attendees at one or all of the above-referenced hearings and/or site visit include: Ann Moreau-Kensek, former Zoning Administrator, Attorney James Dumont representing Jacquelyn Tuxill, Louise Rickard, Christine Fraioli, Alison Zimmer, Peg Sutlive, Dan Guy and Sarah Laird, Attorney David Cooper and Attorney Andrew Lechner representing Bicknell Trust, Attorney Benjamin Putnam, Town of Lincoln counsel. The following persons have been determined by

³ The Lincoln ZBA, as determined by the Lincoln Selectboard, consists of nine persons and one alternate. During the pendency of this appeal before the ZBA, the Lincoln Selectboard passed a resolution adopting a five member development review board. Under the resolution, the ZBA retains the jurisdiction to “complete all pending matters.”

⁴ ZBA Members who may have missed portions of the Hearings, have reviewed the audio transcripts of those portions of the Hearings for which they were absent. The entire record in this matter has been reviewed by the ZBA members. See 24 V.S.A. § 1208.

the ZBA to be interested parties in this appeal pursuant to 24 V.S.A. § 4465(b)⁵:

Marilyn Ganahl
830 Elder Hill Road
Lincoln, VT

Allison Graham
1930 Elder Hill Road
Lincoln, VT

Stephanie Tuxill
1490 Elder Hill Road
Lincoln, VT

Jacquelyn Tuxill
1490 Elder Hill Road
Lincoln, VT

Anne R. Lawrence
1941 Elder Hill Road
Lincoln, VT

Edward LaFayette
1941 Elder Hill Road
Lincoln, VT

Michael O'Connor
810 Elder Hill Road
Lincoln, VT

Sarah Farr
830 Elder Hill Road
Lincoln, VT

David Brynn
732 James Road
Lincoln, VT

Louise Rickard
1713 Elder Hill Road
Lincoln, VT

Christine Fraioli
379 N. Orchard N.
Lincoln, VT

Peg Sutlive
1777 Elder Hill Road
Lincoln, VT

Dan Guy
1777 Elder Hill Road
Lincoln, VT

Sarah Laird
925 Elder Hill Road
Lincoln, VT

Kudd Rood
86 Sugar Hill Road
Lincoln, VT

In addition, the ZBA finds that those persons who collectively signed the Notice of Appeal constitute a single interested party by petition pursuant to 24 V.S.A. § 4465(4).⁶ For a

⁵ Given that a primary issue in this matter relates to the impact of high elevation development on the side of Mount Abraham, the visibility of the proposed development over a wide area of Lincoln, the importance of Mount Abraham as one of Lincoln's most prominent natural features and resources as reflected in the Lincoln Town Plan 2018 at pp. 26-27, and the application of the Viewshed Overlay Area to this Permit, the ZBA concludes that each of the identified interested parties live in locations which have the potential to be within the line of sight and impacted by the purposed 2300' development along the westerly slope of Mount Abraham.

⁶ It is noted that 15 of the 17 persons signing the Petition appealing the Permit have also qualified as interested

more complete list of those persons who attended one or more of the hearings and/or the site visit, see the List of Attendees posted on the Town of Lincoln website.

The following people provided sworn testimony at the Hearings or provided a written statement for consideration by the ZBA: Norman Bicknell, Rodney Bicknell, Christine Fraioli, Anne Moreau-Kensek, Louise Rickard, Jacquelyn Tuxill, Edward Lafayette, Dan Guy, Peg Sutlive, Sarah Laird and Kudd Rood.

II. THE RECORD

The following constitutes the record of documentary exhibits and written statements that were submitted and admitted into evidence during the Hearings⁷:

- Exhibit 1 Bicknell Public Records Request documentation.
- Exhibit 2 Bicknell Trust (Zoning Administrator’s File).
- Exhibit 3 Documentation submitted by David Cooper, Esq. #1-21.
- Exhibit 4 24 V.S.A. § 4415 submitted by David Copper, Esq.
- Exhibit 5 Sworn statement of Louise Rickard dated June 13, 2022.
- Exhibit 6 Letter submitted by David Cooper, Esq. to James Carroll, Esq. re “Untimely Appeal of Bicknell Zoning Permit // Proposed Site Visit” dated June 10, 2022.
- Exhibit 7 E-mail from James Dumont, Esq. to David Cooper, Esq. dated June 15, 2022 re site visit.
- Exhibit 8 E-mail from Dan Guy to ZBA Board Members dated June 17, 2022.
- Exhibit 9 Affidavit of Sarah Laird dated June 20, 2022.
- Exhibit 10 Petitions of Interested Person Status by Individual Landowners or Land Occupier – Christine Fraioli, Sarah Laird, Alison Zimmer, Louise Rickard, Jacquelyn Tuxill, Peg Sutlive and Dan Guy.
- Exhibit 11 Letter from Kudd (Roger) Rood to Town Officials dated July 12, 2022.
- Exhibit 12 Andrew Lechner, Esq.’s Post-Hearing Memo dated August 24, 2022 submitted

parties.

⁷ Exhibits 1 – 11 were admitted into evidence without objection at the hearing held on August 10, 2022. The ZBA hereby admits Exhibits 12 – 15 as either legal memoranda or evidence that is material to the issues raised in this appeal and is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. See 24 V.S.A. § 1206.

on behalf of Bicknell Trust and Norm Bicknell with diagram.

Exhibit 13 James Dumont, Esq.'s Post-Hearing Memo dated August 24, 2022 submitted on behalf of Christine Fraioli, Sarah Laird, Alison Zimmer, Louise Rickard, Jacquelyn Tuxill, Peg Sutlive and Dan Guy.

Exhibit 14 Photo of Bicknell Z sign taken in Spring of 2022 submitted by Louise Rickard.

Exhibit 15 Photo of Bicknell property taken in Spring of 2022 submitted by Louise Rickard.

Based upon the testimony of the witnesses appearing during the Hearings and the documents introduced into evidence, the ZBA hereby finds, concludes and orders as follows:

III. FINDINGS OF FACT

The Lincoln Zoning Board of Adjustment (“ZBA”) hereby finds the following Facts:

1. Norman K. Bicknell, as Trustee of the Bicknell’s Lincoln Land Revocable Trust and pursuant to the reservation of an enhanced life estate in Norman K. Bicknell as Grantor, is the owner of 113± acres of land designated as Parcel ID#19-07-02-03.000 (the “Property”).

2. An Application for Zoning Permit (No. 21-011) was filed by the Bicknell Trust seeking to construct a “seasonal camp – no plumbing” on the Property.

3. The Property is located off of, and accessed from, a class 3 section of Elder Hill Road in Lincoln, Vermont. From the terminus of Elder Hill Road (TH 19), a class 3 town highway, the Property is accessed by a private right-of-way, 50 feet in width, up a steep, narrow and unpaved travelled surface ending at the proposed site of construction.⁸

4. As approved by the ZA on June 1, 2021, the seasonal camp will be 1,386 sq. ft. in size.⁹ The Bicknell Permit as approved by the ZA contains the following notation:

Camp location is at 2,300 ft. Applicant sent Primitive Camp wastewater info from state. Camp is above the 1,800 ft. recommended in Town Plan and below

⁸ Judicial notice is hereby taken of a Warranty Deed from Keith Bicknell and Norman Bicknell to Robert and Barbara Walker dated 11/15/1972, recorded at B 28, P. 129 of the Lincoln Land Records for a description of the deeded 50’ right-of-way.

⁹ It is noted that the square footage as depicted on the “Proposed Camp Design” submitted by Bicknell calls for a 28’ by 40’ structure which corresponds to a seasonal camp which is 1,120 square feet. There is no direct evidence to explain the extra 266 square feet as approved, although it is noted that the structure as drawn on the “Proposed Camp Design” is not a perfect rectangle. See Finding 8, *infra*.

2,500 ft. for Act 250. Viewshed info. also sent to Applicant from zoning regs.

5. On or about March 25, 2021, the ZA sent Bicknell an e-mail seeking “something in writing from your engineer or site technician citing the rules with written evidence showing you are exempt, or something from Rick Oberkirch regarding your plans.”

6. In response, Rick Oberkirch, Permit Specialist, Vermont Department of Environmental Conservation, sent correspondence referring to ANR Wastewater System and Potable Water Supply Rule Section 1-304(3) which provides the criteria for meeting the “primitive camp” exemption under the ANR Wastewater Rules which include 1) the use of an incinerating or composting toilet meeting ANR specifications, 2) no interior plumbing except for one sink with water, and 3) a lot with no other buildings or structures.¹⁰

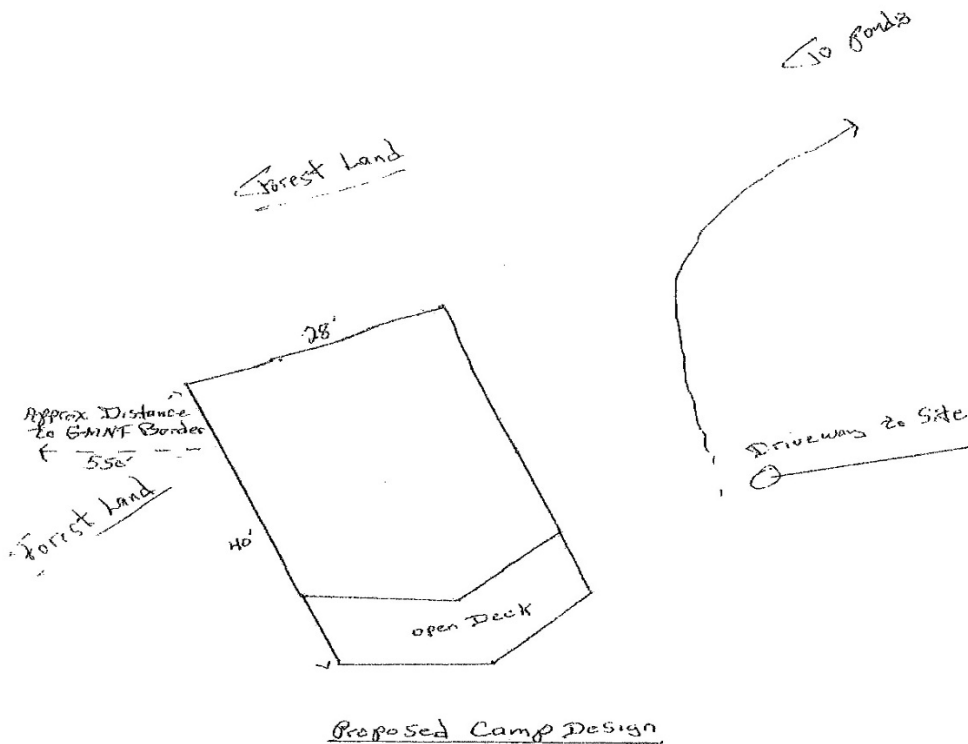
7. On June 1, 2021, the Lincoln ZA sent Bicknell an e-mail concerning “the siting of the cabin.”

Everyone who submits a building permit application needs to send in as part of that application a sketch of the site and where the building will go – “X” on a map is helpful but not sufficient. It doesn’t need to be an engineering plan, or even to scale. All you need to do is draw where the cabin will be on the site in relation to what is already there, the forest, etc. You don’t need to do an extensive narrative, but just say something like, the cabin will be sited at the tree line and won’t be visible from anywhere other than the site itself. Or whatever it is you plan to do. Please do look over the Viewshed information. Some of it will not matter for your cabin – but some of it will. When you have your drawing done (this should only take a few minutes) e-mail it to me, and I will put it with your application.

8. On or about June 1, 2021, Bicknell provided, by facsimile transmission, a “proposed camp design” substantially as depicted below.

¹⁰ Pursuant to ANR Wastewater System Potable Water Supply Rule § 1-304(3), there is an exemption from ANR rules for primitive camps provided the primitive camp is on a lot with no other buildings or structures and the primitive camp is on a lot with a single-family residence. Pursuant to Wastewater Rule Section 1-201(75),

Primitive camp means a living unit, the occupancy of which neither exceeds three consecutive weeks per calendar year nor exceeds a total of 60 days per calendar year, that has no interior plumbing except for one sink with water. Primitive camps may contain a composting or incinerating toilet that does not yield a liquid provided its contents are disposed of in compliance with Section 1-929.



9. On or about June 2, 2021, the ZA mailed the approved permit application with notation, see Finding 4, *supra*, to Bicknell, along with correspondence stating as follows:

Dear Norm,

Here is the paper copy of your approval permit application and the “Z” for you to post on site. The permit is good for two years, just in case you need that long, and is easily renewable if necessary.

At some point soon, I would like to come up and see the construction, and then when you’re done, we’ll set a time for me to come up to see the completed project. At that point, our regulations require that you apply for a Certificate of Compliance, which is the document that says you did what you set out to do. . . .

10. On 6/1/2021, the ZA issued to the Bicknell Trust, along with the approved application, a Zoning Permit “Z” notice for permit No. 21-011 off Elder Hill Road being described as a “1,386 sq. ft. primitive cabin with porch.” A pre-printed notation on the Zoning Permit “Z” states as follows:

This notice must be displayed on the subject premises in a clearly visible location from a public way. The notice may not be removed until after all pertinent construction has ceased.

11. On September 13, 2021, the ZA made a site visit to the Property and spoke with Bicknell. A discussion was had about moving the location of the cabin back 5 or 10 feet to the east. Concerns were expressed by Bicknell in connection with the soil and ledge conditions, which were not conducive to anchoring or placement of a seasonal camp. Discussions were also had about planting shrubs around the front of the porch area at the westerly end of the structure. There was also discussion about having no outdoor lights, and that the materials of the structure would be logs with a standing seam forest green roof to blend with the background.

12. To date, construction has consisted of the placement of inground footings and support pilings and the framing of the ground floor of the proposed seasonal structure.

13. Within several days of mailing Permit Notice “Z” to Bicknell on June 2, 2021, it was posted at approximately an elevation of 8’ from the base of a tree located at the construction site on the Property.

14. The posted “Z” notice has remained in that location from the date of posting through August 10, 2022, the date of the last public hearing in this matter.

15. On or about April 11, 2022, Sarah Laird, by and through her attorney, James Dumont, Esq., filed an Application for Hearing Before the Zoning Board of Adjustment (Application No. 22-028) enclosing and incorporating an attached Notice of Appeal seeking to appeal the Bicknell Permit issued on June 1, 2021. As stated in correspondence accompanying the Notice of Appeal, a request was being made that the ZBA hear the appeal “because the public notice that, by Vermont statute, was required to be posted along a public right of way, never was posted along a public right of way.

16. 24 V.S.A. § 4449(b) states:

Each permit issued under this section shall contain a statement of the period of time within which an appeal may be taken and shall require posting of a notice of permit on a form prescribed by the municipality within view from the public right of way most nearly adjacent to the subject property until the timeframe for appeal in section 4465 of this Title has passed.

17. As further stated in Application No. 22-028 and accompany correspondence:

The notice was posted on the Bicknell property but not along any public right of way. As a result, we were unaware that a permit had been issued, unaware that the notice had been posted and unable to appeal. Last week we obtained a copy of the permit. Therefore we are appealing immediately.

18. Also attached to the Application for Hearing Before the Zoning Board of Adjustment was an attached Notice of Appeal to Lincoln Zoning Board of Adjustment re Bicknell Trust Permit issued 6/1/2021, Application 21-011 stating as follows:

The undersigned persons hereby appeal to the Lincoln Zoning Board of Adjustment the permit issued on June 1, 2021 to the Bicknell Trust. Application 21-011. We each allege that if the permit notice had been posted on a public right-of-way, we would have appealed at that time, and that we will be harmed from the land use changes sought in the application.

19. The Notice of Appeal was signed by the following individuals:¹¹

Marilyn Ganahl
830 Elder Hill Road
Lincoln, VT

Allison Graham
1930 Elder Hill Road
Lincoln, VT

Stephanie Tuxill
1490 Elder Hill Road
Lincoln, VT

Jacquelyn Tuxill
1490 Elder Hill Road
Lincoln, VT

Anne R. Lawrence
1941 Elder Hill Road
Lincoln, VT

Edward LaFayette
1941 Elder Hill Road
Lincoln, VT

Michael O'Connor
810 Elder Hill Road

Kristi LaFayette
613 Quaker Street

¹¹ By subsequent Petition for Interested Person Status by Individual Landowner or Land Occupier, James Dumont, Esq., as attorney for Jacquelyn Tuxill, submitted a petition stating as follows:

I, Jacquelyn Tuxill residing at 1490 Elder Hill Road, in Lincoln, VT, seek interested person status in the proceedings pertaining to the zoning permit requested by the Bicknell Trust, in its application No. 21-011, because: (1) I live in the immediate neighborhood of the Bicknell Trust property that is the subject of the application; (2) I can demonstrate that granting the requested permit, without appropriate conditions, will cause a physical or environmental impact on me and/or my land; and (3) I believe that granting the permit without appropriate conditions will not be in accord with the policies, purposes, or terms of the town plan and zoning bylaws.

Identical Petitions were also submitted on behalf of Louise Rickard, Alison Zimmer, Sarah Laird and Christine Fraioli.

Lincoln, VT

Sarah Farr
830 Elder Hill Road
Lincoln, VT

Louise Rickard
1713 Elder Hill Road
Lincoln, VT

Alison Zimmer
456 Browns Road
Lincoln, VT

Dan Guy
1777 Elder Hill Road
Lincoln, VT

Lincoln, VT

David Brynn
732 James Road
Lincoln, VT

Christine Fraioli
379 N. Orchard N.
Lincoln, VT

Peg Sutlive
1777 Elder Hill Road
Lincoln, VT

Sarah Laird
925 Elder Hill Road
Lincoln, VT

20. Under the Lincoln Zoning Regulations (“LZR”), the Property is located within the Outlying District LZR Section 330. A permitted use within the Outlying District is “single-family dwelling”. LZR Section 332.1. Pursuant to LZR Section 334, minimum area dimensions and setbacks are as follows:

Minimum Lot Size: 5 acres,

Number of Units: 1 unit,

Front yard setback from edge of right of way: 30 feet,

Rear and side yard setbacks: 30 feet,

Stream and river setbacks: 45 feet,

All streams and maximum building heights: 35 feet.

21. The Property is not located within a flood hazard area pursuant to LZR 401.2 or the River Overlay Area pursuant to LZR Section 421.2.

22. The Property is located within the Viewshed Overlay Area pursuant to LZR 410 which provides, “[a]ll land in the Town of Lincoln is subject to [the Viewshed Overlay Area] requirement.”

23. Pursuant to the Lincoln Town Plan adopted February 6, 2018 at page 27, one of

the planning goals specified in the Plan is to:

Limit development above 1,800 feet elevation and require conditional use review by the Zoning Board of Adjustment of all development above that elevation to ensure that buildings located above 1,800 feet do not adversely affect sensitive natural resources or views of the town's ridgelines.

24. The ZA determined, after review of elevation mapping, and the ZBA finds, that the site of Bicknell's proposed primitive cabin would be located at 2,300 feet.

25. The ZA provided Bicknell with LZR Viewshed Overlay Area information and discussed with Bicknell taking steps to make the cabin as "least visible as possible."

26. Zoning Permits are posted upon issuance at the Town Office in the Zoning and Planning area near or at "the filing cabinet." The date of posting at the Town Office for the Bicknell Permit was, at the latest, June 2, 2021.

27. The Permit was posted at the Town Office for at least a 6-month period.

28. The Lincoln Town Office is the only location at which zoning permits are publicly posted upon issuance other than the landowner's posting of the "Z" notice.

29. As of June 2, 2021, the Lincoln Town Office where the Permit was posted was open to the public only "by appointment" due to COVID precautions.

30. During a site visit in September of 2021, the ZA and Bicknell discussed her suggestion of moving the cabin back as far as possible from the edge of the clearing. Bicknell's response was that there were site constraints for locating the structure further to the east.

31. Appellant Dan Guy called the ZA in the summer of 2021 regarding construction at the site. The ZA informed him that it was being addressed.

32. The ZA cannot recall the exact date that Dan Guy called, but it was in June of 2021.

33. Bicknell submitted the Permit Application on March 10, 2021, and the Permit was issued on June 1, 2021. The permit notice "Z" was received by Bicknell on June 2, 2021 and

was posted on-site immediately.

34. Bicknell testified that he has moved the frame of the house as far east as possible based on surface water and anchoring conditions at the site.

35. Bicknell took the Viewshed Overlay criteria into consideration when planning for the siting of the primitive cabin.

36. Construction materials for the cabin were received on November 1, 2021, in a field adjacent to Elder Hill Road which has been identified by Bicknell as being historically known as the “Old Ball Field.”

37. It then took 3 days to move the construction material up to the site from where the materials had been deposited on the “Old Ball Field” adjacent to Elder Hill Road

38. In referring to his hand-drawn sketch, *see* Finding #8 *supra*, the driveway as depicted was intended by Bicknell to represent the access road to the site.

39. Bicknell has sited the seasonal camp 122’ back from the edge of the overlook clearing or “ridge”. As stated in Bicknell’s post hearing memorandum at Exhibit 12, p. 4, the primitive structure will be “as near the existing rear wood line as “practicable given site conditions.”

40. The proposed structure will not be “highlighted against the sky when viewed from roads or neighboring lands.”

41. Bicknell has cleared brush from the site. Based on the testimony, the ZBA finds that trees were previously cleared from the site in years past.

42. The primitive cabin will be earth tone in color, red cedar logs and wood finish trim with a forest green standing seam roof.

43. Bicknell posted the Permit “Z” Notice on the Property per the written instructions provided by the ZA.

44. Bicknell ordered and received materials approximately 2 months after the ZA site

visit on September 13, 2021.

45. Photographs of the building materials while located at the Old Ball Field location adjacent to TH 19 (Elder Hill Road) in the fall of 2021 are depicted as part of Exhibit 3.

46. Bicknell will not be using the primitive camp as his year-round or permanent residence.

47. The floor plan of the primitive camp will be 1,386 square feet. The primitive camp will be used as a hunting camp.

48. The primitive camp will not be able to be accessed by vehicle in the winter due to the limitations of the existing right of way access.

49. The height of the proposed seasonal camp will be 23' to 25' above existing grade.

50. Town Highway 19 (Elder Hill Road) ends just east of the Old Ball Field where the construction materials were delivered in November of 2021.

51. From the end of Elder Hill Road (TH 19) to the boundary of the Property is approximately a mile.

52. The construction site is approximately 550± feet from the closest, or north, boundary of the Property.

53. Before reaching the Property, the private right of way goes through a 100-acre parcel that is privately owned by a third party.

54. Interested party Louise Rickard lives near the Old Ball Field on Elder Hill Road.

55. Interested party Jacquelyn Tuxill stated that she has owned her property since 1990, and that her relationship and view of Mt. Abraham is of utmost importance to her and her property.

56. Jacquelyn Tuxill saw the building materials located at the ball field site when they were delivered in the fall of 2021.

57. Jacquelyn Tuxill stated that she has known that construction was proposed for the

site location for a long time and was visible to her when she used the old Battell Trail.

58. Interested party Sarah Laird went to the site shortly after noticing that construction was underway in March of 2022.

59. Interested party Dan Guy has testified to his concern that he thinks the camp will be seen from many places in Lincoln which will have an impact on the town, although he does not expect it will be seen from his house.

60. Interested party Dan Guy seeks the imposition of a condition requiring that all brush along the southerly and westerly portion of the clearing be allowed to return to its natural state.

61. Dan Guy referenced that shutters should be installed on the south-facing windows and closed when the camp is not in use. He has concerns about lights being on at night for at least 2 months out of the year.

62. Interested party Jacquelyn Tuxill said that she treasures the view from the Old Ball Field adjacent to Elder Hill Road. Ms. Tuxill had conversations with Marilyn Ganahl in connection with her observations about construction on the site.

63. Jacquelyn Tuxill said that she was able to see the materials when she looked up at the site sometime in 2021.

64. Interested party Dan Guy was home the day the cabin materials were delivered to the Old Ball Field in the fall of 2021.

65. On the day he observed the materials being delivered, he called the ZA inquiring about the issuance of a permit.

66. Interested party Peg Sutlive testified about her understanding that, due to elevation limitations in the LZR, a building permit or construction permit would never be issued for the Bicknell site.

67. Interested party Louise Rickard saw materials delivered on the Old Ball Field and

was upset. She believes it was October of 2021, but it could have been November 2021.

68. Louise Rickard testified that the camp will be on the hillside and will be seen from properties located on Elder Hill.

69. Interested party Ed LaFayette lives at the end of Elder Hill and has concerns about who will be fixing damage to the property in the surrounding area when it occurs.

70. The altitude at which the primitive camp is to be constructed is 2,300 feet.

71. From the vantage point of property owned by interested party Louise Rickard, the site of the proposed construction is clearly visible from her property.

72. In October of 2021, Louise Rickard “came home from work to see a crew of people on the Old Ball Field, which borders my property, unloading and hauling a log cabin kit up to the intended building site. . . .” “Not knowing much about zoning laws at the time, I assumed it was a done deal. I felt sad and defeated.”

73.

“Standing on the platform that they’ve built for the structure, which will be about the first- floor level, I can clearly see my [Louise Rickard’s] driveway and homestead. What they are after, which I assume is the view from the site, leaves it so that no amount of remediation with non-glare windows and plantings of bushes and trees will fully mitigate its visual impact for me or many in the town.”

74. The elevation of the proposed structure and the anticipated work will expose the structure to the view of Dan Guy’s property.

75. The Property cannot be seen from Sarah Laird’s land, but she sees it daily as she drives or walks to and from her land. The construction is in close proximity to her land which is located at 925 Elder Hill Road, Lincoln. Ms. Laird often drives and walks along Elder Hill Road and would have been in a position to see the permit notice “Z” had it been properly posted on a public right of way nearest the Bicknell Trust Property in 2021.

76. In 2022, Sarah Laird learned “that a zoning permit had been issued to the Bicknell Trust, so I tried to obtain a copy. I sought a copy from the town. I did not obtain a copy until

Monday, April 4, 2022.”

77. Sarah Laird has observed that “the foundation is located significantly west of the location shown on the application, and in a more visible location than the location shown in the application.”

78. The “Proposed Camp Design” as submitted by Bicknell as a supplement to his Permit Application does appear to depict a “Driveway to Site” that is proportionately drawn further to the west of the “open deck” than would appear on the ground. The “Proposed Camp Design” as submitted is without any reference to scale or proportion and is not useful in gauging any exact location at which the structure was intended or required to be constructed.

79. The primitive structure has the potential to be within Kudd Rood’s view from his property located on Sugar Hill Road.

80. The seasonal camp as proposed is a single-story structure, 28 feet in width and 40’ in length with a side wall of 10 feet 8 inches in height with a peak of 9 feet, 4 inches above the sidewalls resulting in an 8/12 roof pitch and a total height to the peak of the structure of 20± feet from the foundation and 23’ to 25’ in height from existing grade.

81. The Permit Notice “Z” remains posted at the site location as placed by Bicknell shortly after June 2, 2021.

IV. CONCLUSIONS OF LAW

Based upon the above stated Findings of Fact, the Lincoln ZBA hereby concludes as follows:

1. Timeliness of Appeal

A. As an initial matter, the ZBA will address whether this appeal initiated by Application for Hearing Before Zoning Board of Adjustment dated April 11, 2022 is jurisdictionally before the ZBA based upon an Application for Zoning Permit that was granted on June 1, 2021.

B. Pursuant to 24 V.S.A. § 4465(a),

An interested party may appeal any decision or act taken by the administrative officer in any municipality by filing a notice of appeal with the secretary of the board of adjustment or development review board of that municipality or with the clerk of that municipality if no such secretary has been elected. This notice of appeal must be filed within 15 days of the date of that decision or act and a copy of the notice of appeal shall be filed with the administrative officer.

C. The ZBA concludes that the Notice of Appeal was filed on April 10, 2022 which is 313 days after the issuance of the Permit and 298 days after the date upon which the Notice of Appeal “must be filed” pursuant to 24 V.S.A. § 4465(a). *See also* LZR at §741 (“an appeal taken with respect to an act or decision of the zoning administrator must be filed within 15 days of such act or decision.”).

D. The right to appeal from an act of the administrative officer as referenced above constitutes the exclusive remedy of interested persons “with respect to any decision or act taken, or any failure to act, under this chapter or with respect to any one or more of the provisions of any plan or bylaw. . . .” 24 V.S.A. § 4472. “The failure to effect a timely appeal extinguishes subject matter jurisdiction.” *Harvey v. Town of Waitsfield*, 137 Vt. 80, 82 (1979). “The absence of a timely appeal prevents the [ZBA] or the Court from considering the merits of an appeal, even if the administrative officer issued a permit in error or without the statutory or regulatory authority to do so.” *In re Feely Construction Permits Nos. 19687 & 21006*, 2010 Vt. Env'tl. LEXIS 16, *17-18. *See also Levy v. Town of St. Albans Zoning Bd. of Adjustment*, 152 Vt. 139, 143, 564 A.2d 1361, 1364 (1989).

E. Based upon its jurisdictional limitations in considering the merits of untimely appeals from decisions made by the ZA, the ZBA has no jurisdiction to consider the pending appeal but for, and unless there exists, extenuating circumstances of constitutional proportion that justifies setting aside the application of the statutory exclusivity remedy set forth in 24 V.S.A. § 4472.

F. “[I]f it is determined that the notices of permit were not properly posted, the Court would then need to analyze - based on further filings by the parties - the issue of ‘whether due process or fundamental administrative fairness requires that a party deprived of notice of a zoning permit be allowed to contest the permit, notwithstanding the strong policy interests in finality.’” *In re Feely Construction Permits Nos. 19687 & 21006*, 2010 Vt. Envtl. LEXIS 16, *19 (citing *In re Hignite*, 2003 VT 111, P. 8, 176 Vt. 562 (mem)).

G. “A prospective appellant who fails to receive either constructive notice or actual notice of the issuance of a permit may be justified in filing a late appeal of that permit to the municipal panel, based on principles of due process. That is, ‘an elementary and fundamental requirement of due process of any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *In re Benning Accessory Use Permit*, 2010 Vt. Envtl. LEXIS 12 at *18 (citing *Town of Randolph v. Est. of White*, 166 Vt. 280, 283, 693 A.2d 694, 696 (1997) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950)).

H. “[P]rocedural due process comes into play when an individual has life, liberty, or property at stake in a proceeding.” *In re Petition of Conservation Law Foundation*, 2018 VT 42, P 28, 207 Vt. 309, 323. “The first question, then, is whether, by virtue of state law or rules, landowners have a constitutionally protected interest with respect to [land development] on adjoining or nearby land. . . . [T]he constitutional dimension of the rights of landowners with respect to permitting on adjoining properties depends upon the legal framework applicable to the permitting scheme in question.” *In re New Cingular Wireless PCS, LLC*, 2012 VT 46, P 14, 192 Vt. 20, 26.

I. “Even assuming, as we have elsewhere held, that constructive rather than personal notice is sufficient, . . . the question remains whether due process or fundamental administrative

fairness requires that a party deprived of notice of a zoning permit be allowed to contest the permit, notwithstanding the strong policy interests in finality.” *In re Hignite*, 2003 VT 111, P 8, 176 Vt. 562.

J. In looking at the “legal framework” applicable to the permitting scheme found in Vermont’s Municipal & Regional Planning Act, it is the specific owners and occupiers of “property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter who can demonstrate a physical or environmental impact on the person’s interest under the criteria reviewed,” who are conferred a protected right of appeal. The right of appeal is not premised on the “general good” but on the interests of individual owners and occupiers of “neighboring” lands suffering physical or environmental impact. Further, it is self-evident that the obligation to post “a notice of permit on a form prescribed by the municipality within view from the public right-of-way most nearly adjacent to the subject property,” 24 V.S.A. § 4449(b), was directed at providing personal notice to those living in the “neighborhood” that a land development permit has been issued and of the necessity of filing a timely appeal.

K. In deciding whether “fundamental administrative fairness requires that a party deprived of notice of a zoning permit be allowed to contest the permit,” *see In re Hignite*, 2003 VT 111, ¶8, 176 Vt. 562 (mem), the facts in this appeal raise several concerns about the fundamental fairness of the permit posting provided here. First, it is undisputed that the notice posted by the landowner occurred on the Property itself which was located on a tree approximately 8 feet above its base in close proximity to the seasonal camp under construction. This location is approximately a mile from the endpoint of Elder Hill Road, the nearest public right-of-way. As posted, the Permit Notice “Z” required an interested party to traverse a distance of approximately 1 mile across private land to observe the Permit Notice “Z” up a steep one lane private right-of-way to the location of the construction site. The ZBA concludes that Notice

Permit “Z” was not posted in literal compliance with 24 V.S.A. § 4449(b) and was further placed in a location that was not reasonably calculated to be seen by interested persons within a 15 day appeal period.

L. The ZBA also concludes, however, that Bicknell, as the Applicant, did post the permit on the Property, where it remains to this day, in compliance with written instructions provided to him by the ZA and in compliance with at least one interpretation of the form posting instructions provided in the notice of permit “Z” itself.

M. Notwithstanding the conflicting instructions provided to the Applicant in connection with the posting requirements, and in fairness to the interested parties, the ZBA concludes that this manner of notification was ineffective to constructively or actually provide Appellants timely notice of an obligation to appeal the issuance of the permit within a 15 day period.¹²

N. The Permit and Notice of Permit “Z” was posted at the Lincoln Town Office in literal compliance with 24 V.S.A. § 4449(b)(2) which requires that,

Within 3 days following the issuance of a permit, the administrative officer shall:

...

(2) post a copy of the permit in at least one public place in the municipality until the expiration of 15 days from the date of issuance of the permit.

24 V.S.A. § 4449(b)(2).

O. The facts indicate that a notice of the permit was posted at the Lincoln Town Office in the vicinity of a filing cabinet, normally open and available to the public as required by the literal statutory demands. The posting of the Permit in this particular location was, due to COVID restrictions, within a restricted area of the Town Office requiring persons wishing to

¹² It is also noted that the Notice of Permit “Z” failed to provide “the period of time within which an appeal may be taken. . . .” 24 V.S.A. § 4449(b).

gain access to the Town Office to schedule an appointment to view the posted zoning permits. In combination with the limited viewability of the noticed permit “Z” located on the Property, the ZBA concludes that the Permit as noticed was not reasonably situated or calculated to provide interested parties with knowledge of the Permit’s existence in the first instance and the limited right to appeal that permit to the ZBA.¹³

P. Based on the above, the ZBA concludes that, in the final analysis, the minimal posting requirements of 24 V.S.A. § 4449(b) were not reasonably met and the interested parties should have an opportunity to appeal the issuance of the Permit and the determination of the ZA’s issuance of the Permit dated June 1, 2021 on the merits.

2. Application of Outlying District Regulations and LZR §330, *et seq.*

Q. Based on the Application for Zoning Permit (Application #21-011), the ZBA is able to conclude that the ZA granted the Application for the building of a seasonal camp – no plumbing – 1,386 sq. ft. based on a determination that the proposed use involved a permitted use within the Outlying District in which the Property is located.

R. Pursuant to LZR §501,

LZR §501. PERMITS REQUIRED

No land or building development may commence, nor shall any existing structure or use be extended or substantially changed, except as noted below, unless a Zoning Permit shall have been duly issued by the Zoning Administrator, as provided for in Section 4449 of the Act.

The ZBA concludes that a zoning permit is required for the construction of the seasonal camp as proposed in Application #21-011 and that the Permit as issued involves the construction of a “building or other structure” as defined by LZR §800 (Definition of Development).

¹³ The ZBA recognizes that some of the Appellants have acknowledged their awareness of building materials arriving at the Old Ball Field in the Fall of 2021 which occurred on or shortly after November 1, 2021. *See* Finding 36. While this might impute some degree of actual notice that construction was pending on the Property, any duty to inquire arising at that point was already well past the expiration of the fifteen day appeal period and after Bicknell had already purchased the construction materials. Further, at least one of the interested parties has testified that she had no knowledge of the permit until April of 2022 which resulted in Application #22-028 dated April 11, 2022.

S. Pursuant to LZR §506,

The Zoning Administrator will issue a permit for a development that conforms to the dimensions and specifications listed in the District Regulations (Article III). . .

.

T. The development as proposed by Bicknell meets all of the minimum area dimensions and setbacks required in the Outlying District in which the Property is located as specified in LZR §334.¹⁴

U. The development proposed by Bicknell was considered by the ZA as a “single-family dwelling” as referenced in LZR §332.1, which is a permitted use within the Outlying District.

V. The proposed seasonal camp – no plumbing – 1,386 sq. ft. can be fairly and reasonably interpreted as including the proposed development as that term is defined in LZR §800 as being a “[d]etached building use[d] as living quarters by one family.” Pursuant to LZR §800, “family” is defined as “[o]ne or more persons living, sleeping, cooking, and eating on the same premises as a single housekeeping unit.”

W. While the term “living quarters” is not defined in the LZR, the ZBA concludes that the proposed “seasonal camp – no plumbing” is proposed for use as a “living quarters” by persons who meet the definition of “family” as defined in LZR §800. The LZR does not otherwise distinguish between those dwellings which could be considered as camps or primitive structures for seasonal use for hunting or other recreational purposes and those dwellings which are intended for residency and year round occupancy. Given that camps, primitive structures or other seasonal use living quarters are not defined or referenced within the LZR as distinct or separate uses in any of the four zoning districts created in the LZR, the term “single-family dwellings” is reasonably interpreted as including those dwellings intended for seasonal as well as

¹⁴ It is noted that there is no front yard setback to apply in this situation given that access is provided by a private right-of-way of considerable length.

year-round residential occupancy by a family.

3. Application of the Viewshed Overlay Area Regulations Pursuant to LZR §410 et. seq.

X. As stated in LZR §411 “[a]ll land in the Town of Lincoln is subject to” review as part of the Viewshed Overlay Area. *See* LZR §411.1.

Y. As part of the review process, applicants are required to “supply the zoning administrator with a narrative and a sketch of a landscape plan.” LZR §412.

Z. “The narrative and sketch landscaping plan will demonstrate how the applicants have considered and addressed the following criteria: (1) siting . . . , (2) clearing . . . , (3) lighting and reflectiveness. . . .” LZR §412.

AA. Each of the three criteria under LZR §412 have multiple sub-criteria that are to be addressed in the narrative and sketch plan to demonstrate the applicant’s consideration of viewshed criteria including, but not limited to, avoiding ridgelines (by setting structure back from the edges of ridges), locating structures “at the edge of existing wood lines”, siting structures “to blend into the landscape”, “limit[ing] the extent of clearing and ridgeline disturbance necessary to accommodate the structures”, minimizing clearing by selectively cutting small trees, limiting the amount of exterior lighting or obtrusive glare, and requiring all building lighting to be cut off or shielded and targeted. LZR §§412.1 – 412.3.

BB. Overlay districts are permissible types of land use regulations specifically enabled by statute. Overlay districts

may be created to supplement or modify the zoning requirements otherwise applicable in underlying districts in order to provide supplementary provisions for areas such as shorelands, foot plains, aquifer and source protection areas, ridgelines and scenic features, highway intersections, by-pass, and interchange areas, or other features described in § 4411 of this title.

24 V.S.A. § 4414(2).

CC. Lincoln has created such a Viewshed Overlay Area,

to help preserve the communal views in Lincoln both generally and as specifically identified on page 9 of the Lincoln Town Plan.¹⁵ It is intended to encourage applicants to engage in the thoughtful siting of their houses or other structures prior to seeking any permits from either the zoning administrator or the appropriate municipal panel prior to conditional use, site plan or subdivision review. None of the criteria below are meant to be applied as mandatory requirements on an individual basis. However, when viewed cumulatively, they are intended to preserve communal views by promoting best practices to guide the applicant and the appropriate municipal panel. It will not prohibit building on a property; but may impose restrictions on where and/or how structures are sited. . .

LZR §411.1.

DD. The policies set forth in the Lincoln Town Plan and the view corridors referenced above are clearly stated with the intent of protecting viewshed corridors, and particularly those in excess of 1,800 feet, to help preserve the communal and neighboring views in Lincoln from the effects of a land development existing along its ridgelines and, in particular, on Mt. Abraham, its most prominent natural feature. Under LZR §412, the applicant was charged with the responsibility to supply the ZA with a narrative and a sketch of a landscape plan so that the ZA could properly assess all of the criteria needed to review and condition any approval of the zoning permit knowing of the sensitivity of development along the western slope of Mt. Abraham above 1,800'. A narrative and sketch plan should have been a particularly important component of any permit review and consideration prior to approval by the ZA.

EE. The ZBA concludes, notwithstanding Bicknell's testimony, that there exists insufficient clarity in connection with the location of the seasonal camp structure both as submitted in the "Proposed Camp Design" and as the structure exists on the ground to allow for

¹⁵ As indicated, LZR §411.1 refers to Page 9 of the Lincoln Town Plan in effect on March 1, 2011; the date of the LZR's adoption. Since then, the Town of Lincoln revised and updated its Town Plan on February 6, 2018. Under the new Town Plan, the viewsheds to be protected are now referenced at Lincoln Town Plan 2018, pages 26- 27 as follows:

Ripton Road from Bristol Notch going northeast to West Hill, Elder Hill Road looking south, York Hill Road looking northeast, West Hill Road looking northeast, Downingsville Road looking southeast from Moody Road to Waterworks Road and Quaker Street and Lincoln Gap looking west.

proper review under the criteria set forth in LZR §§412.1 – 412.3 given the lack of any specific evidence or information as to the exact location of the camp from the edge of the ridge and the westerly edge of the clearing in which it sits and given the lack of any clarity with regard to the site limitations referenced by the Applicant along the easterly edge of the clearing.

FF. Further, the absence of a narrative and a sketch of a landscape plan, both at the initial application phase of the Permit and after hearing, leaves an absence of verified information from which the ZBA may independently apply the LZR §§412.1 - 413.3 criteria to assess or reach a “cumulative determination of whether best practices have been employed in this permit approval “to preserve communal views” or those of the interested parties. The Permit, as issued, supplies no assessment of, or even acknowledgment of, the LZR §412 criteria and there is a total absence of any conditions of permit approval that might implement and assure that the Viewshed Overlay Area criteria have been in any way incorporated into the Permit as issued. Further, any assurances as to the location, size and height of the seasonal camp are not supplied with enough specifics based on a landscape or site plan to meet the Applicant’s ultimate burden of persuasion on appeal to the ZBA from a decision of the ZA by way of presenting “additional persuasive evidence or argument” that the Permit provides for best practices in preserving Lincoln’s and the interested parties’ communal views. *See* LZR §§504.2 – 504.7. *See also, Burton Corp. Site Work Approval*, 2021 Vt. Super. LEXIS 142, *24 (Vt. Sup. Ct., Env. Div. 2021)(“[P]roject opponents always bear a burden of persuasion to rebut the applicant’s initial showing of compliance with the applicable zoning regulations. If the opponents satisfy that burden, the application will be denied unless the applicant presents additional persuasive evidence or argument.”). In this case, the ZBA concludes that the Appellants have demonstrated that Bicknell’s initial showing in his Application was insufficient to address the Viewshed Overlay criteria in LZR §412 and that additional information supplied by Bicknell on appeal was also insufficient to address that criteria.

GG. The ZBA is also mindful that approval of the Permit as an initial matter may have required the approval of the Planning Commission given that there is no evidence from which an affirmative conclusion can be reached that the proposed land development has “either frontage on a public road or public waters. . . .” LZR §512. It is noted that land development may be permitted under these circumstances, but only with “the approval of the Planning Commission” and “by a permanent easement or right-of-way at least 20 feet in width.” LZR §512.

HH. The ZBA concludes that, based on the record, it is unable to determine that the Permit as issued satisfies the application requirements and criteria set forth in LZR §512 and therefore concludes that the Permit Application #21-011 should not have been granted.

IX. ORDER AND DECISION

Based on the above stated Findings and Conclusions, a majority of the Lincoln ZBA hereby decides the following:

A. Fundamental fairness requires that Application #22-028 be heard on the merits by the ZBA.


B. Bicknell Application #21-011 as presented, constitutes a permitted single-family dwelling meeting all applicable area, dimension and setback requirements as listed in LZR §334.

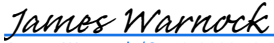
C. Bicknell Application #21-011 as presented fails to meet the Viewshed Overlay Area application requirements of LZR §512 and is denied in that there is insufficient information and evidence in the record upon which to adequately assess and apply the Viewshed Overlay criteria as specified in LZR §412. The decision of the Lincoln ZA is reversed and Application No. 21-011 is denied as framed.

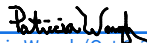
Dated at Lincoln, Vermont this 6th day of October, 2022.


ZBA MEMBERS:

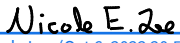

Tommie Thompson (Oct 6, 2022 17:12 EDT)
Tommie Thompson, Chair

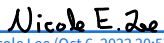

Serena Fox (Oct 6, 2022 16:46 EDT)
Serena Fox



James Warnock (Oct 6, 2022 18:03 EDT)
James Warnock

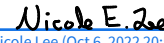

Patricia Waugh (Oct 6, 2022 16:10 EDT)
Patricia Waugh


Josiah Jackson (Oct 6, 2022 16:04 EDT)
Josiah Jackson


Nicole Lee (Oct 6, 2022 20:57 EDT)
Nicole E. Lee on behalf of Barry Olson
As to Conclusions B


Nicole Lee (Oct 6, 2022 20:57 EDT)
Nicole E. Lee
As to Conclusions B


Harrison Reynolds (Oct 7, 2022 08:45 EDT)
Harry Reynolds
As to Conclusions B


Nicole Lee (Oct 6, 2022 20:57 EDT)
Nicole E. Lee on behalf of Stephen Halnon
As to Conclusions A&B