



Battenkill River Permit Determination Appeal

DECISION ON THE MERITS

In this matter, Dean G. Siegel and Alexandra Ernst (Appellants) appeal a July 25, 2022 decision of the Arlington Zoning Board of Adjustment (ZBA) concluding that a cross structure (the Subject Object) located on neighboring property owned by Big Big, LLC (Appellee) did not constitute a “structure” pursuant to the Town of Arlington Zoning Bylaws (the Bylaws) and, therefore, did not require a zoning permit. Appellants assert that the Subject Object constitutes a structure requiring zoning review.

All of the parties before the court are self-represented; including, Appellants Dean G. Siegel and Alexandra Ernst, Appellee, Kirsten Dahlgren, doing business as Big Big, LLC, owner of the subject property, and Interested Party William G. Henry. The Town of Arlington did not appear before the Court.

On January 24, 2022, this Court held a single-day trial via the WebEx platform.

Statement of Questions

Appellants filed a two-Question Statement of Questions, which includes numerous subparts. The Questions for the Court’s review are:

1. Did the issuance of a letter of non-determination by the Arlington Land Use Administrator and subsequent denial of appeal of the appellants and interested parties by the Arlington Zoning Board of Adjustment in the case of a sixteen foot cross/structure constructed without a permit in the floodway of the Battenkill River at 5827 VT Route 313 W by Kirsten Dahlgren of Big Big on the Battenkill Kayak and Tubing LLC of Saratoga, NY contravene the requirements of the Town of Arlington Land Use Bylaws, including but not limited to:

- a. The determination by the Land Use Administrator (LUA) in her letter of nondetermination that the "pole/structures" rely on the definition of "structure" as defined by the Vermont State Flood Plain Manager ("walled and roofed"); however, the Arlington Bylaws definition of structure (as well as LUA's own reference to the object as a structure) is purposely much broader.
- b. The determination by the Zoning Board of Adjustment that the "object did not rise to the level of being determined a 'structure' by the board" is also not backed up by the definition of structure as defined in the bylaws.
- c. The Precedent of Law stipulation in the Flood Hazard section of the Arlington Bylaws states that "where the flood hazard regulation imposes a greater restriction, the provisions here shall take precedence."
- d. Development in the floodway is 'prohibited' unless subjected to study by a "registered professional engineer" showing that development will "not increase any risk to surrounding properties, facilities, or structures from erosion or flooding."
- e. Structures in the floodway must be shown to have been "designed to withstand anticipated flood loads and forces."
- f. As per the website of the business that installed the cross in the floodway, said cross, as well as the other two crosses constructed on the property, were intended to be used as signs for clients to locate the business along Rt. 313 in West Arlington, VT.
- g. Said business is located in the Rural District as defined by the bylaws. No permitted or conditional uses are listed for this type of business in the Rural District, nor has the business been permitted in any manner to operate in the Rural District.
- h. The established use of the cross as a sign constitutes a "change of use" of the property and is therefore considered development in the floodway requiring the aforementioned risk certification of a professional engineer.
- i. The definition of structure in the Bylaws specifically mentions a sign as a structure. As such, the structure/sign in the floodway would be considered an "accessory structure." Accessory structures are specifically prohibited from the floodway.
- j. The only structure specifically exempted within the definition of a sign in the Arlington Bylaws is for "the flag of any nation or state on a single pole."

k. The Permitted Uses in a Flood Hazard Areas section of the Arlington Bylaws defines and severely restricts the authority of the Land Use Administrator to issue permits within a Flood Hazard Area. Nothing in the bylaws give the LUA the ability to approve anything else in the Flood Hazard Area nor anything, for that matter, in a Floodway.

l. Application and review requirements were completely ignored as the structure was constructed without a permit.

m. Prior unpermitted development has been required to be presented for review and approval in the manner specified by the town bylaws.

n. The purpose of the Arlington Bylaws is written in accordance with the Arlington Town Plan which asserts authority to “prevent degradation of scenic values.”

2. Shouldn't the bylaws of the Town of Arlington be upheld and the structure removed from the floodway?

Appellants' Statement of Questions (filed Sept. 14, 2022).

Findings of Fact

1. Big Big LLC, who's agent is Kristen Dahlgren, owns a parcel of land located at 5827 VT Rte 313 W in the Town of Arlington (the Parcel).
2. The Parcel is in the Rural District Zoning District.
3. The Parcel is currently improved with a single-family residence and a barn.
4. The western boundary of the Parcel abuts the Battenkill River.
5. Portions of the Parcel are in the floodway of the Battenkill River.
6. In the spring of 2022, Appellee constructed and installed three crosses at the Parcel.
7. The cross at issue in this appeal is located along the Battenkill River (the Subject Object).
8. The other crosses are located along Route 313 and near the barn, respectively.
9. The Subject Object is constructed of untreated hemlock. See Appellee Ex. 2 (Photograph of Subject Object).
10. The Subject Object, in total 16 feet tall, with 4 feet of that buried in the ground. Therefore, the Subject Object is 12 feet tall, above ground. See Appellee Ex. 5 (Dimensions of Subject Object, B).
11. Horizontal rebar helps to secure the Subject Object into the ground.

12. There is a path allowing for ingress and egress to the Battenkill River in the immediate area of the Subject Object.
13. Due to the way the Subject Object is installed, it cannot be easily removed from the ground.
14. At the time the crosses were installed, Appellee referred to at least the two crosses not at issue here on the business' website to direct customers to the Parcel. Appellee's website has since been modified to no longer use the crosses as directionals.
15. The Subject Object is approximately 55 feet from the water's edge of the Batenkill River.
16. While Mr. Siegel testified that the Subject Object was within 50 feet of the top of bank of the Battenkill River, he had not measured the distance and no party provided sufficient evidence or testimony as to the measured distance between the Subject Object and the top of the bank.
17. The Subject Object is located within the floodway.
18. There has been no engineering opinion regarding the Subject Object and how it may be impacted during flooding and whether it is a hazard to downstream properties.
19. Appellee's agent installed the crosses in connection with her religious beliefs and the three crosses symbolize her "path" in relation to those beliefs.
20. There are other objects on surrounding properties close to the Battenkill River. These include at least a trellis, fences, agricultural equipment, and benches. See e.g. Appellee's Ex. 3, 14, 15, 19, and 20 (Photographs of objects along the Battenkill River).
21. Appellants own property downstream of the Parcel. Appellants' property abuts the Battenkill River.
22. Interested person Williams Henry owns property abutting both sides of the Battenkill River downstream and adjacent to the Parcel.
23. Mr. Henry served as the Arlington Zoning Administrator from 2015 to 2020.
24. Zoning in Arlington is governed by the Arlington Land Use (Zoning) Bylaw and Flood Hazard Areas Regulations, adopted August 28, 1973 (the Bylaws). Appellants' request is subject to the version of the Bylaws last amended on November 4, 2019.
25. The Bylaws were revised in 2019.

26. Mr. Henry testified that during the 2019 revisions, there was an effort to broadly define “structure,” in part intended to limit development within the floodway.

27. In the spring of 2022, Appellants submitted a letter to the Town of Arlington Zoning Administrator (Zoning Administrator) asking her to review the Subject Object and arguing that the crosses constituted a structure as defined by the Bylaws, requiring a zoning permit, and that the Subject Object constituted a structure within the floodplain, which required additional permitting review.

28. On or about June 16, 2022, the Zoning Administrator concluded that the Subject Object is not a “structure” under the National Flood Insurance Program and, therefore, not a “structure” for zoning purposes.

29. Appellants appealed that conclusion to the ZBA, arguing that (1) that the Subject Object is a structure; (2) that the Subject Object is a structure within a floodway requiring additional permit review; and (3) that the Subject Object, along with two other crosses on the Parcel, are “signs” for Appellee’s rafting business.

30. On or about July 2, 2022, the ZBA concluded that the Subject Object was not a structure.

31. Appellants subsequently appealed that decision to this Court.

Conclusions of Law

Prior to addressing the substance of the appeal, we first address a threshold issue with respect to Appellants’ Statement of Questions.

This is a Court of limited jurisdiction. 4 V.S.A. §1001(b). With limited exceptions not relevant here, we review appeals de novo. 10 V.S.A. § 8504(h). As such, this Court hears the case “as though no action has been held prior thereto.” Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989). Therefore, we generally do not consider the underlying decision of, or proceedings before, the municipal panel below, “rather, we review the application anew as to the specific issues raised in the statement of questions.” In re Whiteyville Props. LLC, No. 179-12-11 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Dec. 13, 2012) (Durkin, J.). Because of this Court’s de novo trial process, questions related to the propriety of a municipality’s decision are outside the scope of this Court’s review. In re Bissig Subdivision Final Plat, No. 87-7-13 Vtec, slip

op. at 2 (Vt. Super. Ct. Envtl. Div. Dec. 23, 2013) (Durkin, J.); Moore 3-Lot Subdivision, No. 123-9-13 Vtec, slip op. at 6–7 (Vt. Super. Ct. Envtl. Div. July 28, 2014) (Walsh, J.).

Many of Appellants' Questions address the propriety of the Zoning Administrator's and ZBA's decisions regarding Appellants' request. This is outside the scope of this Court's jurisdiction. Further, while not all parts of the Statement of Questions ask "questions" in the traditional sense, each generally address a discrete issue such that all parties, and this Court, understand the issues on which Appellants seek adjudication. Because of this, we will interpret the Questions in this manner. See Town of Washington v. Emmons, 2007 VT 22, ¶ 7, 181 Vt. 586 (mem.) (noting prior cases in which a self-represented party "was taken advantage of by strict application" of court rules).

As such, we understand Appellants' to request consideration of four issues: (1) whether the Subject Object is a "structure," generally, pursuant to the Bylaws, requiring permitting (Question 1(a), (b), (m), and (n)), (2) whether the Subject Object is a "structure," specifically, within a floodway (Questions 1(c)—(e), (i), and (k)), (3) whether the Subject Object is a "sign" as defined by the Bylaws (Questions 1(f), (i), and (j)), and (4) whether the crosses resulted in a change of use of the Parcel (Question 1(g)—(h)).

I. Questions 1(g) and (h): Appellee's Business Use

Questions 1(g) and (h) state:

g. Said business is located in the Rural District as defined by the bylaws. No permitted or conditional uses are listed for this type of business in the Rural District, nor has the business been permitted in any manner to operate in the Rural District.

h. The established use of the cross as a sign constitutes a "change of use" of the property and is therefore considered development in the floodway requiring the aforementioned risk certification of a professional engineer.

These Questions address Appellee's business operations generally at the Parcel, including whether the business requires permitting both separate and apart from, and including, the Subject Object itself. This issue was not presented to the Town, either before the Zoning Administrator or the ZBA, relating to the present appeal. See Exhibit D (Appellant's June 27, 2022 Appeal to the ZBA). Thus, it is outside of this Court's review. See In re Transtar LLC,

No. 46-3-11 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. May 24, 2012) (Durkin, J.). While Appellee has not argued that Appellants' questions are outside our subject matter jurisdiction, the Court has the power (and duty) to raise its lack of subject matter jurisdiction sua sponte, regardless of how the issue comes to the Court's attention. In re G.R. Enters., Inc., No. 27-2-08 Vtec, slip op. at 2 (Vt. Envtl. Ct. May 12, 2008) (Wright, J.). For these reasons, Questions 1(g) and 1(h) are **DISMISSED**.

II. Whether the Subject Object is a Structure as Defined by the Bylaws

Questions 1(a)—(e), (i), (k), (m), and (n) all generally address whether the Subject Object is a “structure” as defined by the Bylaws and, should the Court conclude that it is, whether the Subject Object is permissible and/or requires specific permit review. Because these Questions present interrelated issues, we address them together.

Bylaws § 8.4(1) states that “[n]o structure, or part thereof, shall be created [or] erected . . . without a permit issued by the Land Use Administrator. No permit may be issued by the Land Use Administrator except in conformance with the Bylaws.” Specific to areas along shorelines and in floodways, Bylaws § 7.10(1) provides that “no structure shall be placed . . . within a distance of fifty (5) feet from the shoreline of any . . . stream . . . except with the approval of the Zoning Board of Adjustment.” For floodways, Bylaws § 7.12(7)(a) states that, provided that they do not reduce the flood carrying capacity of the at-issue stream, “new residential or non-residential structures . . . [and] accessory structures” are permissible within flood hazard areas, provided a permit is received.

The Bylaws define “structure” as “[a]n assembly of materials for occupancy or use including, but not limited to, a building, mobile home or manufactured home, driveway, trailer, storage container or tank, sign, wall, or fence.” Bylaws, Appendix A (“Structure”). A “sign” is “[a]ny structure, wall display, device or representation designed or used to advertise or call attention to or direct a person to a business, association, profession, commodity product, institution, service, entertainment, person, place or thing, or activity.” Bylaws, Appendix A (“Sign”). Further, a “building” includes “any structure more than eight feet high; excluding an electric light, utility pole, highway or railroad bridge, or flagpole.” Bylaws, Appendix A (“Building”). Finally, accessory structures are defined as structures that are “(1) detached from

and clearly incidental and subordinate to the principal use of or structure on a lot; (2) located on the same lot as the principal structure or use; and (3) clearly and customarily related to the principal structure or use. For residential uses these include but may not be limited to garages, garden and tool sheds, and playhouses.” Bylaws, Appendix A (“Accessory Structure”).

When interpreting a zoning ordinance, we apply the rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, we “construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” Id. (citations omitted). If there is no plain meaning, we will “attempt to discern the intent from other sources without being limited by an isolated sentence.” In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). In construing statutory or ordinance language, our paramount goal is to implement the intent of its drafters. Morin v. Essex Optical/The Hartford, 2005 VT 15, ¶ 7, 178 Vt. 29. We will therefore “adopt a construction that implements the ordinance’s legislative purpose and, in any event, will apply common sense.” In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578; see also In re Bierke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49, 195 Vt. 586 (1986)) (“Our goal in interpreting [a zoning regulation], like a statute, ‘is to give effect to the legislative intent.’”). Finally, because zoning regulations limit common law property rights, we resolve any uncertainty in favor of the property owner. Bierke Zoning Permit Denial, 2014 VT 13, ¶ 22. With these provisions of interpretation in mind, we turn to the applicable regulatory and statutory provisions.

First, the definition of “structure” is not based in the definition provided in the National Flood Plain Insurance Program/Department of Environmental Conservation. Nor do the Bylaw provisions related to structures within flood hazard areas address this alternative definition. While this definition may be relevant under the Flood Plain Insurance Program, and while the interpretation of that definition may have some relevance to an understanding of structures within the floodplain, it is not controlling to the extent that this action presented under the Bylaws.

Having reached this conclusion, we turn to the specific definition of “structure.” The Bylaws definition of structure is inclusive, rather than restrictive. See In re Grp. Five Invs. CU Permit, 2014 VT 14, ¶ 24, 195 Vt. 625 (interpreting a zoning bylaw including term “but not be

limited to”) *overruled on other grounds* In re Confluence Behavioral Health, LLC, 2017 VT 112, 206 Vt. 302. This means that an object may constitute a “structure” as defined by the Bylaws even if the object is not of a type specifically listed within the definition of “structure,” provided that the object fits within the provided definition.

The Subject Object constitutes as structure as defined by the Bylaws. The Subject Object is constructed with hemlock wood and rebar. See Appellants’ Ex. Y (Photograph of Subject Object); Appellee’s Exs. 2 (Photograph of Subject Object) and 5 (Dimensions of Subject Object). The Subject Object is an assembly of materials on the Parcel for Appellee’s use.

The Bylaws’ definition of “building” additionally supports this conclusion. The Bylaws, in defining a “building,” state that “structures” over eight feet would constitute a building. Bylaws, Appendix A (“Building”). It then specifically excludes certain structures from this definition. Id. The Bylaws state that electric lights, utility poles and flagpoles are structures over eight feet that would not constitute a building. See id. The Subject Object is similar to these enumerated structures. It is a tall cross, consisting of a single hemlock post, running perpendicular to the to the ground, and another hemlock post bisecting the main post. This is not substantially dissimilar to a utility pole or flagpole, which generally consist of grounded posts, and which could contain posts radiating from the central pole.¹ The Bylaws contemplate that such assembly of materials would constitute a “structure.”

Further, the Subject Object measures approximately 12 feet above-ground, with an additional 4 feet buried under ground. See Appellee’s Ex. 2. The Subject Object, therefore, constitutes a “building” as defined by the Bylaws, because it is a structure measuring over 8 feet high.

We next turn to whether the Subject Object constitutes a “sign” and, therefore, is a “structure” as defined by the Bylaws. While we reach the above conclusion that the Subject Object is a “structure” independent of it’s potential to also be a “sign,” we address this issue to

¹ We note that, unlike the Bylaws definition of “structure” which is inclusive, the Bylaws definition of “buildings” is exclusive relative to structures over eight feet tall not constituting a “building.” Compare Bylaws, Appendix A (“Building”) (“[a]ny structure more than eight feet high; excluding an electric light, utility pole, highway or railroad bridge, or flagpole.”) with Bylaws Appendix A (“Structure”) (“An assembly of material for occupancy or use including, but not limited to . . .”).

the extent that a “sign” would implicate additional standards or review. See Bylaws § 7.9. We conclude that the Subject Object is not a sign. While the other crosses may have been once used as directional signs on the Property, and displayed on Appellee’s website as such, the Subject Object was not indicated as being a directional sign. We have also received testimony that the crosses were not designed to be used in relation to Appellee’s business. To the extent that the crosses were, at one point, used to call attention to Appellee’s businesses, they are no longer used as directional signs for Appellee’s business. We therefore conclude that the Subject Object is not a “sign” as defined by the Bylaws.

Having reached this conclusion, however, we cannot conclude that the structure must be removed. Bylaws §§ 7.10, 7.12(7) and 8.4 contemplate that structures may be permitted, either pursuant to a general zoning permit, or a conditional use permit.² The ZBA, having concluded that the Subject Object does not constitute a structure in response to Appellants’ request, has not considered an application of these provisions to the Subject Object. This Court, therefore, cannot rule on this matter and the question of whether the structure may be permitted under the Bylaws without an application before it. Therefore, Appellants’ Questions 1(c) through (e), (i) through (n), and Question 2 cannot be reviewed at this time.

For the reasons set forth above, the Bylaws contemplate that many “structures” may exist and may be constructed pursuant to the Bylaws. We conclude that the Subject Object conforms with the Bylaws’ definition and is a structure.

Conclusion

For the reasons set forth herein, we conclude that the Subject Object constitutes a “structure” as defined by the Bylaws. In reaching this result, we conclude that the Subject Object does not presently constitute a “sign,” specifically, but instead qualifies as a “structure” generally and independently. Considering this conclusion, we cannot reach any further analysis at this time. This matter is therefore, concluded so that the Town and Appellee may

² This includes permitting “accessory structures.” The Town did not address whether the Subject Object would constitute an “accessory structure” that would be permitted in a flood hazard area. See Bylaws § 7.12(7)(a)(2).

move forward with any application or permit review that may be required in light of the conclusions herein. We further dismissed Appellants' Questions 1(g) and (h) as outside the scope of the Court's subject matter jurisdiction.

This concludes the matter. A Judgment Order is issued concurrently.

Electronically signed March 14, 2023 pursuant to V.R.E.F. 9(D).

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

Thomas G. Walsh, Judge
Superior Court, Environmental Division