VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-00045

Brattleboro Common Sense for Kurt Daims NOV Appeal	MERITS DECISON

In this action, Kurt Daims and Brattleboro Common Sense, Inc. (BCS) appeal an April 10, 2023 decision of the Town of Brattleboro (Town) Development Review Board (DRB) upholding a notice of violation issued to Mr. Daims regarding the installation of recreational vehicles used as emergency shelters on his property located at 16 Washington Street, Brattleboro, Vermont (the Property) without a zoning permit (the NOV). Mr. Daims and BCS timely appealed the DRB's decision upholding the NOV to this Court.

In this matter, the Town is represented by Robert Fisher, Esq. Mr. Daims is self-represented. Neighbors Eric Stewart, Taylor Dunne, and Thomas Oxholm have each appeared as interested persons and are each individually self-represented. BCS initially appeared in this matter without an attorney representing it. Because BCS is an organizational party, the Court directed BCS to move for permission for representation by a non-lawyer, or alternatively, to retain representation. In a July 13, 2023 Entry Order, this Court denied the motion for representation by a non-lawyer as it failed to satisfy the requisite standards. See In re Brattleboro Common Sense for Kurt Daims, No. 23-ENV-00045 (Vt. Super. Ct. Envtl. Div. July 13, 2023) (Walsh, J.). In so doing, the Court stated that, should BCS seek to participate in this appeal as a party, it must hire an attorney. Id. No attorney has filed a notice of appearance on BCS' behalf.[1]

[1] Therefore, to the extent that Mr. Daims has signed filings for both himself and BCS, we decline to consider them as made on BCS' behalf. We note that, because the filings were signed jointly by Mr. Daims and BCS, we

Preliminary Issues

Prior to addressing the parties' briefs, we must address two preliminary motions. First, the Town moves to dismiss this matter on the grounds that Mr. Daims' brief was untimely. Second, Mr. Daims moves to reopen the evidence in this matter.

I. Motion to Dismiss

The Town moves to dismiss this appeal on the grounds that Mr. Daims' brief was not filed by July 12, 2023 as required by the Court's amended scheduling order. In support of its motion, the Town cites V.R.E.C.P. Rule 2(d)(1). This Rule states that the failure to attend a pretrial conference may result in sanctions on the non-appearing party, including the potential dismissal of the appeal. V.R.E.C.P. 2(d)(1). This Rule is specific to pre-trial conferences, not late filed briefs. In fact, it runs counter to the general rule that "[f]ailure of an appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal" and is instead grounds for action that the Court determines may be appropriate. V.R.E.C.P. 5(b)(1). While the Court may consider dismissal, see id., dismissal is not warranted here.

Here, this Court's amended scheduling order required Mr. Daims to file his brief by Wednesday, July 12, 2023. Mr. Daims represents that he attempted to file his brief on Odyssey but learned that the filing was rejected on July 13, 2023. He asserts that the brief was re-filed the same day and that he learned it was accepted on July 14, 2023. We conclude that this two-day delay in light of the fact that Mr. Daims is self-represented and he represents that the brief had been timely filed but rejected by the Odyssey E-Filing system on July 12, 2023 does not warrant dismissal of the matter. Thus, we **DENY** the Town's motion to dismiss the action.

consider the substance of the filings as they relate to Mr. Daims. Further, Mr. Daims is the Property's owner and the primary party as it relates to the NOV.

II. Motion to Reopen

Mr. Daims seeks to reopen evidence and allow the filing of new briefs and responses on the grounds that he has recently received documents that he asserts are relevant to his pending application.[2]

This Court is hearing this appeal "on the record." As such, our record in this case is limited to "the original papers filed with the municipal panel; any writings or exhibits considered by the panel in reaching the decision appealed from; and a written transcript of the proceedings, whether recorded electronically or stenographically, certified by the presided officer of the municipal panel as the full, true and correct record of the proceedings." V.R.E.C.P. 5(h)(1)(A). We are not authorized to consider evidence that is not in the record. In re Lawrence Site Plan Approval, No. 166-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. July 9, 2011 (Durkin, J.): In re Marble Dealership Realty LLC Site Plan Approval, No. 169-12-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Aug. 13, 2014) (Walsh, J.).

There is no allegation that the documents Mr. Daims seeks to introduce were considered by the panel but were not properly admitted into evidence, and therefore, not a part of the record. See In re Grist Mill Horse Barn Redevelopment Plan, No. 205-9-08 Vtec, slip op. at 7 (Vt. Envtl. Ct. Apr. 13, 2010) (Durkin, J.) (nothing that the record includes "any writings or exhibits considered by the panel . . . ."). As such, we are not authorized to reopen the record in this appeal to allow Mr. Daims, or any party, to present evidence that was not presented to or considered by the DRB below. Thus, the motion is **DENIED**.

Background

Mr. Daims owns property located at 16 Washington Street, Brattleboro, Vermont (previously defined as the Property). The Property is improved by a residence. At some point in late 2022, Mr. Daims installed recreational vehicles on the Property. By the time that the NOV was issued, three vehicles were on the Property. The recreational vehicles are used as emergency shelters and people live in the recreational vehicles for various lengths of time. Mr. Daims did

[2] To the extent that this motion is made partially on behalf of BCS, for the reasons set forth above, we decline to consider it as made on BCS' behalf, because it was signed by Mr. Daims on behalf of BCS rather than a lawyer as required by this Court's previous ruling.

not receive a zoning permit for the recreational vehicles prior to placing them on the Property or their occupation as living spaces.

On February 1, 2023, the Town Zoning Administrator issued a notice of violation to Mr. Daims stating that the installation of the recreational vehicles was considered "land development," as that term is defined by the Town of Brattleboro Land Use Regulations (Regulations) and that their installation without a zoning permit constituted a violation of the Regulations (previously defined as the NOV). On February 14, 2023, Mr. Daims appealed the NOV to the DRB.

On April 5, 2023, the DRB held a duly warned special meeting and heard the appeal.[3] After an executive session, the DRB issued a decision denying the appeal and upholding the NOV on April 10, 2023. Mr. Daims and BCS timely appealed that decision to this Court.

Standard of Review

In an on-the-record appeal, the Court considers only the decision below, the record made before the municipal panel, and the briefs submitted by the parties. In re Saman ROW Approval, No. 179-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Sept. 2, 2011) (Durkin, J.). As set forth above, we have no authority to consider new evidence or make our own factual determinations. Instead, we review the municipal panel's factual findings to determine whether the decision below "explicitly and concisely restate[s] the underlying facts that support the decision." See 24 V.S.A. § 1209(a)—(b).

The Court will affirm factual findings only if they are supported by substantial evidence in the record below. *See* In re Stowe Highlands Resort PUD to PRD Application, 2009 VT 76, ¶ 76, 186 Vt. 568. In examining whether there is substantial evidence in the record, the Court does not assess the credibility of witness testimony or reweigh conflicting evidence in the record. *See* Devers-Scott v. Office of Prof'l Regulation, 2007 VT 4, ¶ 6, 181 Vt. 248; In re Appeal of Leikert,

[3] The parties submitted a video recording of the hearing in lieu of a transcript. The Court notes that this is not in compliance with V.R.A.P. 10(a)(2). No party has objected to this recording. Further, the Court is aware through other similar on-the-record appeals that it has become difficult, sometimes to the point of impossibility, for parties to find transcription services for municipal hearings. While a video recording in the present matter, which was for a single hearing under one hour with relatively few parties, is, as a practical matter, sufficient for the Court, it may not be the case in other matters. In addition, because Mr. Daims alleges impropriety at the hearing, addressed below, the recording was helpful for the Court to put this allegation into context.

No. 2004-213, slip op. at 2 (Vt. Nov. 2004) (unpublished mem.). The Court simply looks to whether the record below includes relevant evidence that "a reasonable person could accept . . . as adequate" support for the factual findings. Devers-Scott, 2007 VT 4, ¶ 6 (quoting Braun v. Bd. Of Dental Exam'rs, 167 Vt. 110, 114 (1997)).

The Court then reviews the DRB's legal conclusions without deference, unless such conclusions are within the DRB's area of expertise. Stowe Highlands, 2009 VT 76, ¶ 7.

Our review is additionally limited to those issues raised by an appellant in their statement of questions. *See* V.R.E.C.P. 5(f). Thus, we review the DRB's decision with these legal standards in mind, and within the context of the legal issues preserved by Mr. Daims through his Statement of Questions.

Discussion

Mr. Daims, in his Statement of Questions, presents four issues that he wishes the Court to decide. They are as follows:

> 1. Void the Development Review Board's decision of April [10], 2023 on its merits.
> 2. Void the Development Review Board decision of April [10], 2023 on its procedural grounds.
> 3. Issue a summary judgment that Emergency Housing in Recreational Vehicles is not rental housing and not subject to state or local rental housing codes.
> 4. Instruct the Town of Brattleboro to permit emergency shelters using RVs as if in campsites or campsite-like spaces with enhanced facilities.

Statement of Questions, filed May 26, 2023.

We note that none of these Questions are in the form typical of a Statement of Questions. The Court reads the Questions to conform with the typical practice.

I. Questions 3 and 4

Question 3 asks that this Court conclude that the activities like that at issue in the NOV is not subject to state and local rental housing codes generally. Question 4 asks that this Court

generally conclude that projects similar to the activity at issue in this NOV appeal be permitted like campsites. Both Questions are outside the scope of this Court's subject matter jurisdiction.[4]

The standards applicable in this Court's on the record review limit the scope of our jurisdiction. See supra "Standard of Review."

Both Question 3 and Question 4 seeks an opinion from the Court regarding how the Town should permit the use of recreational vehicles as emergency shelters under the Regulations or other relevant codes. There is no allegation that the DRB could have issued such a general declaration as to how it would apply regulations to projects in the future. Such an opinion would be advisory and, therefore, not allowed. In re Snowstone, LLC Stormwater Discharge Authorization, 2021 VT 36, ¶ 28, 214 Vt. 587 ("Courts are not authorized to issue advisory opinions because they exceed the constitutional mandate to decide only actual cases and controversies."). Further, there has been no presentation as to the legal authority this Court would have to issue a similar advisory declaration in this appeal.

Thus, both Question 3 and 4 are outside the scope of this Court's subject matter jurisdiction and are therefore **DISMISSED**.

II. Question 1

Question 1 presents the crux of the dispute before the parties. While the Question is not drafted in a manner typical of the Court's practice, it effectively asks whether the DRB erred in upholding the NOV.

The noticed violation at the Property is the installation of recreational vehicles as living spaces absent a permit in violation of Regulations § 104. Regulations § 104.A states that "[a]ll land development in the Town of Brattleboro requires a zoning permit issued in accordance with [the Regulations] unless specifically exempted . . . ." Regulations § 104.A. It further includes that "[l]and development includes constructing, installing, reconstructing, converting, structurally altering, relocating or enlarging any building or structure; mining, excavating, filling, or grading land; or changing or extending the use of land or a structure." Regulations § 104. This definition

[4] We note that Mr. Daims does not substantively address these Questions in his brief. We are obligated, however, to include an analysis and determination of those matters raised in a Statement of Questions. In re LaBerge NOV, 2016 VT 99, ¶ 15, 203 Vt. 98 (citing In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190); see also In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 17, 204 Vt. 301. Therefore, we address these issues to the extent properly raised.

directly relates to 24 V.S.A. § 4303(10), which is the statutory definition of "structure.' See Regulations § 531.L(1) (defining "Land Development"). A "structure" is "an assembly of materials for occupancy or use." Regulations § 531.S(17). The Regulations' definition of structure references the statutory definition thereof, which mirrors the Regulations' definition, but includes "a building, mobile home or trailer, sign, wall, or fence." 24 V.S.A. § 4303(27).

Mr. Daims challenges the DRB's decision on the grounds that the recreational vehicles do not constitute "structures." He additionally challenges whether the recreational vehicles were "installed" because they were simply placed on the Property.

There is sufficient evidence in the record to support the DRB's conclusion that the recreational vehicles constituted a structure and their installation on the Property is land development that required a permit.

We begin with the DRB's conclusion with respect to whether the recreational vehicles are structures. The record evidence shows, and Mr. Daims agrees, that the recreational vehicles are occupied on the Property. Specifically, they are occupied as living quarters as emergency shelters. While Mr. Daims argues that he has not received rent for the occupancy,[5] the receipt of rent is not required for the recreational vehicles to constitute a structure. See Regulations § 531.S(17) (defining "structure" as "an assembly of materials for occupancy or use"); see also 24 V.S.A. § 4303(27) (defining "structure" as "an assembly of materials for occupancy or use, including a building, mobile home or trailer, sign, wall, or fence"). There is no legitimate dispute that the recreational vehicles are an "assembly of materials." Nor is there any legitimate dispute that the recreational vehicles are for occupancy. Thus, the evidence shows that the recreational vehicles are structures, as they are an assembly of materials for occupancy or use.[6]

[5] Neighbors heavily dispute whether Mr. Daims received rent for the occupancy, with testimony that rents were both received and not received presented. This Court does not reweigh evidence on appeal. In any event, the DRB's decision does not address the receipt of rent. This Court agrees that it is irrelevant for the pending appeal.

[6] We note that this conclusion is further supported by § 4303(27), which identifies mobile homes or trailers as constituting structures. Both mobile homes and trailers are akin to recreational vehicles. Further, Mr. Daims classifies the recreational vehicles as "emergency shelters." The Regulations include a definition for "other specialized residential structures" which include "[o]ther types of structures intended for habitation such as . . . single-room occupancies, homeless shelters, emergency shelters, or other structurally converted building." See Regulations § 521. Thus, the Regulations classify emergency shelters as a form of "residential structure."

We next address the DRB's conclusion that the recreational vehicles were "installed" on the Property. The evidence supports the conclusion that they were. The vehicles were not simply parked on the Property for storage during periods of non-use. Instead, the recreational vehicles were put on the Property for the purpose of serving as an emergency shelter for people to live in. There is further evidence in the record showing that there were improvements made to make the recreational vehicles suit the use as living space. Mr. Daims argues that the vehicles lack a foundation such that they cannot have been installed on the Property. He does not, however, point to any provision of the Regulations requiring a foundation or other site work for a structure to be "installed."

Based on this evidence, we affirm the DRB's conclusion that the recreational vehicles on the Property constitute "land development" as that term is defined by the Regulations such that their installation required a zoning permit.

III. Question 2

Finally, we turn to Question 2, which requests that this Court void the DRB's decision on procedural grounds. We note that Mr. Daims does not challenge any notice procedures related to the issuance of the NOV or the public notice related to the hearing. Instead, Mr. Daims seeks to challenge the validity of the decision based on an alleged conflict of interest of DRB Chair Maya Hasegawa and the general decorum of the hearing stemming from that alleged conflict as well as the failure to add BCS as a party to the NOV. Neither argument presents grounds to overturn the decision.

"A fair trial before an impartial decisionmaker is a basic requirement of due process, applicable to administrative agencies as well as to the courts." Agency of Nat. Res. V. Upper Valley Reg'l Landfill Corp., 167 Vt. 228, 234—35 (1997). The Vermont Supreme Court has held that municipal hearings, "like any quasi-judicial administrative proceeding, must faithfully observe the rudiments of fair play." In re Bassett, 147 Vt. 359, 362 (1986) (quotation omitted). "Thus, it is settled that 'due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.'" In re JLD Props. of St. Albans, LLC, 2011 VT 87, ¶ 6, 190 Vt. 259 (quoting Schweiker v. McClure, 456 U.S. 188, 195 (1982)) (additional citation omitted). This includes municipalities. Id.

Even so, allegations of partiality do not always rise to the level of bias. As the Court wrote in JLD Props.:

> It is equally settled that "[a]ll questions" regarding a decisionmaker's impartiality do not necessarily "involve [issues of] constitutional validity." Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927); see also Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948) (observing that "most matters relating to judicial qualification [do] not rise to a constitutional level"). Indeed, as the United States Supreme Court has observed, opinions formed by a decisionmaker "on the basis of facts introduced or events occurring in the course ... of prior proceedings ... do not constitute a basis" for disqualification "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); see also Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976) (holding that disqualification of decisionmaker is not compelled by "[m]ere familiarity with the facts of a case" through prior proceedings). Nor is an administrative decisionmaker necessarily disqualified as a matter of law even where he or she "has taken a position ... in public, on a policy issue related to the dispute, in the absence of a showing that he [or she] is not capable of judging a particular controversy fairly on the basis of its own circumstances." Hortonville, 426 U.S. at 493, 96 S.Ct. 2308 (quotation omitted).

2011 VT 87 at ¶ 7.

In support of his argument that Chair Hasegawa was conflicted in this matter Mr. Daims cites to his recollection of an interaction between him and the Chair in 2012 in which he recalls the following:

> I had called on Ms. Hasegawa in our capacity as members of town meeting. We had never met or spoken before. As she approached me in front of her house, I attempted to introduce myself, and she snapped "I know who you are!" . . . After a hestitat[ion] I said polite words like "Then I will not waste your time[,]" and walked away.

Appellant Brief at 6 (filed on July 12, 2023).

Mr. Daims recalls being insulted by the exchange and alleges, without any support, that the Chair held "some sort of grudge" from this exchange that influenced her at the hearing. Id. While Mr. Daims may have felt that the exchange was impolite, there is no supporting evidence

that this brief exchange influenced Chair Hasegawa at the hearing nor is there any other allegation supporting a finding that Chair Hasegawa had any conflict of interest in this matter, let alone a conflict that would result in overturning the DRB's decision.[7] Thus, we conclude that the alleged conflict of interest is not grounds to overturn the DRB's decision.

Further, Mr. Daims takes issue with the fact that the DRB limited the scope of the testimony at the hearing. He states that the limitation was solely allowing testimony about whether there was a permit for the recreational vehicles. While this was discussed at length, it was not the sole focus of the hearing, which included, most relevant here, discussions of the vehicles' usage on the Property. To the extent that the DRB sought to exclude testimony irrelevant to the appeal, such an exclusion is not a procedural violation requiring the overturning of the DRB decision as it simply narrowed the hearing to only relevant issues before the DRB.[8] Additionally, Mr. Daims points to no relevant testimony that he was prohibited from raising at the hearing.

Finally, the DRB's decision is not void for failure to consider BCS as a party to the alleged violation. Mr. Daims argues that BCS owns the recreational vehicles and is the party operating the emergency shelter. It is undisputed, however, that Mr. Daims owns the subject property and

[7] This is further supported by the conclusion that, for the reasons set forth above, the evidence before the DRB supports the DRB's conclusion that the recreational vehicles constituted "land development" under the Regulations requiring a zoning permit. Additionally, all other present members of the DRB voted to uphold the NOV. Finally, we note that at no point during the hearing did Mr. Daims raise concerns about the Chair's impartiality.

[8] To the extent that Mr. Daims argues that the length of time he was able to speak uninterrupted presents grounds to overturn the DRB's decision, we disagree. Mr. Daims requested to, and did, present his appeal in what he referred to as an "interrogation" format. See Hearing Recording. In this form, Mr. Daims asked specific questions of the Town Zoning Administrator and DRB to which they responded. Some of these responses resulted in follow up questions or a back-and-forth exchange between Mr. Daims and the other party or parties. Mr. Daims did not give the DRB a narrative presentation on his behalf as to the basis of his appeal. It appears that a large reason for the fragmented nature of Mr. Daims' testimony and the alleged interruptions is due to the style he chose to present his appeal as opposed to any particular action by the DRB.

Additionally, to the extent that Mr. Daims argues that inflammatory comments made by others towards him, and the DRB's initial failure to prohibit these remarks, were procedural violations warranting overturning the decision, we also disagree. Mr. Daims has presented no understanding as to how the substance of these comments presents a legal basis for overturning the decision. Further, Chair Hasegawa limited at least one neighbors' testimony when she determined the comments were not appropriate for the forum and retroactively apologized to Mr. Daims about any earlier instance where comments made by a neighbor similarly inappropriate. See Hearing Recording. Additionally, Mr. Daims presents no evidence that these comments influenced the DRB's decision. In this context, we decline to conclude that any inflammatory comments made by neighboring property owners warrant overturning the DRB's conclusion.

has allowed the recreational vehicles to be installed and used thereon. Thus, the Town did not commit a procedural error warranting voiding the DRB's decision because it failed to add BCS to the NOV.

Conclusion

For the foregoing reasons, the Court concludes that the DRB's factual findings are supported by substantial evidence in the record below. Furthermore, we conclude that the DRB's conclusions of law are supported by its findings of facts. Further, in reviewing the DRB's conclusions of law, we conclude that the DRB did not err in concluding that the installation of the recreational vehicles at the Property constituted "land development" under the Regulations requiring a zoning permit and that the failure to obtain a permit prior to the installation constituted a zoning violation. We further conclude that there were no procedural violations before the DRB that warrant this Court overturning the DRB's decision. Thus, we **AFFIRM** the DRB's decision. In reaching this conclusion, we **DISMISS** Mr. Daims' Questions 3 and 4 as outside the scope of the Court's jurisdiction.

This concludes the matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed this 19th day of September 2023 pursuant to V.R.E.F. 9(D)

Thomas G. Walsh, Judge
Superior Court, Environmental Division