VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 57-8-20 Vtec

Wolcott SD Final Plat Denial

ENTRY REGARDING MOTION

Title: Motion to Strike
Filer: Claudine C. Safar
Filed Date: March 31, 2021
Response in opposition filed by James Wolcott on April 12, 2021.
Response in support filed by James W. Barlow on April 19, 2021.

The motion is **GRANTED in part and DENIED in part**.

James Wolcott (Applicant) appeals a decision of the Town of Cambridge (Town) Development Review Board (DRB) denying a final plat review for a 3-lot subdivision application (the Project) located at 19 Gallup Brook Lane (the Property).[1] Presently before the Court is Interested Persons David and Darby Herings' (together, the Herings) motion to strike all of Mr. Wolcott's Statement of Questions, pursuant to V.R.C.P. 12(f).[2] The Town joins in support of Herings' Motion to strike all of Mr. Wolcott's Statement of Questions.

Applicant is self-represented. The Town is represented by James W. Barlow, Esq. Interested person David Hering is represented by Claudine C. Safar, Esq.

[1] Applicant seeks to subdivide the Property into three lots consisting of 7.74 acres (Lot 1), 7.62 acres (Lot 2), and approximately 64 acres (Lot 3).

[2] We begin by noting that this Court has previously addressed Mr. Wolcott's motion to amend his Statement of Questions, where we concluded that the additional 14 proposed questions that Mr. Wolcott sought to add were outside the scope of *de novo* review and beyond this Court's jurisdiction to address. See Wolcott SD Final Plat Denial, No. 57-8-20 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2021) (Walsh, J.) (denying Mr. Wolcott's request to amend the Statement of Questions and deferring mediation). This decision, therefore, currently concerns the 85 listed Questions in Mr. Wolcott's Statement of Questions filed on August 10, 2020.

TheHerings and the Town argue that Applicant's 85 Questions listed in his Statement of Questions are either beyond the scope of this *de novo* appeal, as they do not directly pertain to whether Applicant is entitled to a subdivision permit, or incoherent. The Herings therefore move to strike all of Applicant's Questions in this appeal.[3] Applicant counters that these Questions are fundamental and intrinsic to this appeal as they address various elements of the project and its relation to the Town of Cambridge Subdivision Regulations (Subdivision Regulations).

Standard of Review

Pursuant to V.R.C.P. 12(f), a party may move to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The Supreme Court has emphasized that a "motion to strike is not designed as a mechanism for presenting disputes about law or fact." Watson v. Village at Northshore I Ass'n, Inc., No. 2013-451 2014 WL 3714662, at *2 (Vt. May 1, 2014) (unpublished mem.); see also In re Ring 85 Depot Street Conditional Use, No. 138-11-15 Vtec, slip op. at 1 n.1 (Vt. Super. Ct. Envtl. Div. July 3 6, 2016) (Walsh, J.) (stating that while a question may be beyond this Court's *de novo* jurisdiction, it still represents a claim to relief that appellee's motion sought to "strike" on substantive grounds). For this reason, we treat the Herings' motion to strike as a motion to dismiss for lack of subject matter jurisdiction under V.R.C.P. 12 (b)(1). See Suburban Propane, LP Cond. Use and Site Plan Application, No. 124-10-19 Vtec, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. Jun. 1, 2020) (Durkin, J.) (converting a motion to strike into a motion to dismiss); see also In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt Super Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.) (treating amotion to strike as a motion to dismiss).

When reviewing a motion to dismiss, pursuant to V.R.C.P. 12(b)(1), we accept all uncontroverted factual allegations as true and construe them in the light most favorable to the nonmoving party. See V.R.C.P. 12; see also V.R.E.C.P. 5(a)(2) (providing that Vermont Rules of Civil Procedure apply generally to this Court's proceedings); Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. Here, the nonmoving part is Applicant. When reviewing a motion to dismiss pursuant to V.R.C.P. 12(b)(6) for failure to state a claim, we take all well-pleaded factual allegations as true and "assume that the movant's contravening assertions are false." Alger v. Dep't of Labor & Industry, 2006 VT 115, ¶ 12, 181 Vt. 309 (citation omitted).

[3] The Herings note that Applicants' Question 1 presents a "possible exception" to The Town's motion to strike. See Interested Person David Hering's Motion to Strike filed on March 31, 2021, at 6.

The Herings argue in their motion that many of Applicant's Questions are irrelevant to the issues over which this Court has jurisdictional authority in this appeal, meaning that even if Applicant were to prevail on the factual issues presented, he still could not prevail in securing a claim upon which relief can be granted under V.R.C.P. 12(b)(6). A motion to dismiss for failure to state a claim may not be granted unless it is beyond doubt that there are no facts or circumstances that would entitle Applicant to relief. See Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1 (citation omitted). We note here that "[m]otions to dismiss for failure to state a claim are disfavored and should be rarely granted." Bock v. Gold, 2008 VT 81, ¶ 4 (noting that the threshold for surviving such a motion is extremely low).

While this Court's review is generally limited to issues raised by an applicant's Statement of Questions,[4] the "[t]he literal phrasing of the question cannot practically be considered in isolation from the . . . action that prompted the appeal." In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190, 194. Moreover, we appreciate that Appellant is a self-represented litigant and view his Statement of Questions in light of our obligation to assure that he does not suffer an unfair disadvantage in this proceeding.[5] See Sandgate Sch. Dist, v. Cate, 2005 VT 88, ¶ 9, 178 Vt. 625 (noting that the court traditionally affords "wider leeway" to pro se litigants); see also In re Hawk's Nest South, LLP, No. 84-5-10 Vtec, slip op. at 5–7 (Vt. Super. Ct. Envtl. Div. Nov. 29, 2010) (Durkin, J.) (allowing leniency in analyzing legal issues incorporated in a pro se Appellants' statement of questions).

Discussion

This appeal is *de novo*. See 10 V.S.A. § 8504(h). Therefore, this Court will review the application for subdivision "as though no action whatever has been held prior thereto," and will apply the substantive standards that were applicable before the tribunal below. See Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) (quoting In re Poole, 136 Vt. 242, 245 (1978)); Trail v. Appeal of JO No. 2-233, No. 88-4-06 Vtec, slip op. at 5 (Vt. Envtl. Ct. Jan. 16, 2007) (Durkin, J.). By nature of *de novo* review, Court sits in the place

[4] Generally, the Statement of Questions serves the dual purposes of establishing the scope of an appeal and providing notice to the other parties, and this Court, of what issues are to be addressed during the litigation. See Reporter's Notes, V.R.E.C.P. 5(f); In re Joyce, 2018 VT 90, ¶ 15, 208 Vt. 226. A Statement of Questions has a "limited function" and "serves to focus, but cannot limit, the issues for the court." In re Estates of Allen, 2011 VT 95, ¶ 8, 190 Vt. 301 (quotation omitted).

[5] While the Court recognizes its important obligation to protect pro se litigants, such as Applicant in this case, from being the victim of unfair advantage, it is not this Court's responsibility to offer affirmative help to a pro se litigant. See Nevitt v. Nevitt, 155 Vt. 391, 401 (1990) (citing Olde & Co. v. Boudreau, 150 Vt. 321, 322 (1988)). Like all others, unrepresented litigants are bound by the ordinary rules of civil procedure. Vahlteich v Knott, 139 Vt. 588, 590–91 (1981).

of the DRB and renders new findings of fact and conclusions of law with no deference to the DRB's decision. See In re Green Peak Estates, 154 Vt. 363, 372 (1990).

In addition, the Environmental Division is a Court of limited jurisdiction. The scope of our subject matter jurisdiction and our review is confined to those issues the municipal panel below addressed or had the authority to address when considering the original application. See, e.g., In re Torres, 154 Vt. 233, 235 (1990) ("The reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broaden"); In re Maple Tree Place, 156 Vt. 494, 500 (1991) ("[I]t is beyond [the superior court's] role as an appellate tribunal, even under *de novo* review standard, to start addressing new issues never presented to the planning commission and on which interested persons have not spoken in the local process"). Thus, we may only address legal issues if they are within the scope of Applicant's subdivision application and the DRB had the authority to address them.

With the *de novo* standard of review and this Court's limited scope of jurisdiction in mind, we consider the questions raised in Applicant's Statement of Questions and the arguments raised in the Herings' motion.

I. Question 1

Applicant's Question 1 asks: "[a]re the provisions of Sections: 3.02(B)1a, 3.02(B)1c, 4.02(C)1, 4.03(B), 4.04, 4.05, 4.07(B)4a of the Subdivision Regulations [. . .] applicable to the Appellant's proposed subdivision?" TheHerings argue that Applicant's Question is beyond the legal issues within the scope of his 3-lot subdivision permit application. We disagree.

The scope of an appeal before this Court is defined by the powers of the municipal panel below, and thus this Court's review is limited by the substantive standards applicable, the Subdivision Regulations, in the proceeding before the DRB. 10 V.S.A. § 8504(h); V.R.E.C.P. 5(g); In re Torres, 154 Vt. 233, 235 (1990). Thus, this Court's task in this *de novo* appeal is to determine whether a given subdivision application complies with the applicable Subdivision Regulations. The question here, which addresses which provisions apply to the subject property, are within the scope of review and relevant. See Burton Corp. Site Work Approval, No. 15-2-20 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. June 25, 2021) (Durkin, J.) (addressing the scope of this Court's *de novo* review).

For these reasons, accepting all uncontroverted factual allegations as true and construe them in the light most favorable to the Applicant, we **DENY** the Herings' motion to dismiss and Question 1 remains before the Court on appeal.

II. Questions 2–3

In Questions 2 and 3, Applicant appears to challenge the DRB's finding, listed on the Statement of Questions as "Count 1," that Applicant's subdivision application was incomplete pursuant to Subdivision Regulations § 3.02(B)1a, as "existing features including buildings; . . . existing foundations . . . located on Lot 3 are not shown." Applicant includes two questions addressing § 3.02(B)1a, which ask whether "a wheeled mobile structure" (1) constitutes a building or (2) is considered as having a foundation for purposes of the Subdivision Regulations. TheHerings challenge that Questions 2–3 are not relevant to whether the Project complies with Subdivision Regulations 3.02(B)1a and are therefore beyond the scope of this appeal.

Here, Applicant challenges what "features" are to be considered in a Subdivision Final Plat Review under the Subdivision Regulations. In essence, these questions ask how the buildings, structures, or features on the property should be classified for the pursuant to the Subdivision Regulations. Construing all facts in the light most favorable to the Applicant, these legal issues pertain to the Project and the application under review. We therefore **DENY** the Herings' motion to dismiss and Question 2 and 3 and Questions 2 and 3 remain before the Court on appeal.

III. Question 4

Applicant's Question 4 asks, "[d]id the DRB require in all prior Permit Applications that the Final Plat show the wheeled mobile structure that existed on the property?" The Herings argue that as this Question fails to address the regulatory basis for the DRB's denial of the subdivision application and is not within this Court's authority to address. Applicant argues that this Question is intrinsic to the appeal.

As stated above, in reviewing this appeal *de novo*, this Court reviews the application for subdivision "as though no action whatever has been held prior thereto." In re Poole, 136 Vt. 242, 245 (1978); see also State v. Madison, 163 Vt. 360, 368–69 (1985) (citing Black's Law Dictionary 392 (5th ed. 1979) (defining *de novo* review as trying a matter afresh "as if it had not been heard before and as if no decision had been previously rendered")). As this Court must hear evidence anew and make its own determination as to the merits of the application, any allegations of decisionmaker bias, improper procedure, or issues concerning the substantive propriety of the preceding decision by the DRB below are typically beyond this Court's scope of review. See, e.g., In re Sweet Bldg. Permit, No. 19-2-12 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jan. 25, 2013) (Walsh, J.); see also Burton, No. 15-2-20 Vtec at 10 (June 25, 2021). Therefore, absent due process violations, we do not consider alleged procedural defects in the

proceedings below. In re Pelkey Final Plat Major Subd., No. 172-12-12 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. July 26, 2013) (Durkin, J.) (citing Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989)); see also In re JLD Props. of St. Albans, LLC, 2011 VT 87, ¶¶ 10-13, 190 Vt. 259 (holding that all but the most "structural" procedural errors are cured by subsequent *de novo* review).

In this Question, Applicant appears to allege that the DRB engaged in inconsistent review or was biased in its review of subdivision applications.[6] While we recognize Applicant's concern, as this Court conducts its own independent evidentiary hearing in accordance with *de novo* review, this standard operates to cure all but the most "systemic" errors in the process below. See In re JLD Properties of St. Albans, LLC, 2011 VT 87, ¶¶ 10—14, 190 Vt. 259. Here, Applicant's Question purports to identify a potential procedural defect below, which is effectively cured by this Court's *de novo* review. See Hinesburg Hannaford Wetland Determination, No. 73-5-14 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2015) (Walsh, J.). As this Court is directed to apply the standards contained in the Subdivision Bylaws as though the DRB had not reviewed the application, the question of whether the DRB engaged in consistent review of prior applications is beyond the scope of this appeal. We therefore **GRANT** the Herings' motion to dismiss Question 4.

IV. Questions 5 (including Sub-Questions 6–11), 12 (including Sub-Questions 13–18), 19, and Question 20 (including sub-questions 21–24)

As an organizational note, Applicant's Questions 5 and 12 appear to state a general claim that includes subsequent numbered sub-questions. Namely, Question 5 operates as the preliminary statement that includes sub-questions 6–11 and Question 12 operates in the same way for sub-questions

[6] As a general rule, arguments founded upon generalized comparisons to how the DRB reviewed other similarly situated applicants or applications do not constitute a cognizable legal basis for arguing a DRB's review of the subdivision application on appeal is improper, unless Applicant intended to make a constitutional equal protection argument. See Down River Investments, LLC CU, No. 139-12-18 Vtec, slip op. at 10–11 (Vt. Super. Ct. Envtl. Div. May 6, 2021) (Durkin, J.) (citing In re Letourneau, 168 Vt. 539, 549 (1998) (regarding the required showing in an enforcement context as to selective treatment); see also In re Valois Airplane Storage Application, No. 254-11-07 Vtec, slip op. at 10–11 (Vt. Envtl. Ct. Sept. 23, 2008) (Wright, J.).

To the extent that this question raises an equal protection argument of selective enforcement, selective enforcement is an affirmative defense to an enforcement action. See Appeal of Lovell, No. 194-10-04 Vtec, slip op. at 6 (Vt. Envtl. Ct., Sept. 6, 2005) (Wright, J.). This is not an enforcement action. Therefore, this Question would not state a basis upon which this Court can grant relief in this appeal. See In re Cote NOV, No. 273-11-06 Vtec, slip op. at 2 (Vt. Envtl. Ct. Aug. 22, 2007) (Durkin, J.).

13–15. For the purpose of providing consistency with Applicant's Statement of Questions, we address the substance of Questions 5 and 12 as operative for their relative sub-questions.

In Applicant's Questions 5, 12, and 19,[7] Applicant asks, in part, whether the DRB "considered" how structures on the property were defined by the Subdivision Regulations. Generally, a "determination of the DRB's authority or the propriety of their conclusion is generally beyond the scope of our review." See 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.). Thus, to the extent in Applicant's Questions 5, 12, and 19 ask whether the DRB "considered" specific provisions of the Subdivision Regulations, is beyond this Court's scope of review. For this reason, the portion of these questions that seek to address how the DRB "considered" or arrived at particular findings or conclusions is dismissed.

These Questions, however, also address whether elements particular to the property are addressed or defined by different substantive provisions of the Subdivision Regulations. More specifically, these questions address whether an "abandoned unoccupied mobile structure" that is "repurposed for self-storage" is required to be disclosed for Subdivision Final Plat Review under the Subdivision Regulations. As these questions seek to determine whether the structures on the property are covered under or comply with subdivision criteria, we conclude that these questions are not beyond the scope of this appeal. For the reasons above, we **DENY in part** the Herings' motion to dismiss Questions 5–19 and direct the phrase "considered by the DRB" to be omitted from Questions 5, 12, and 19.

Applicant's Question 20 and associated sub-questions 21–24[8] ask whether the Subdivision Regulations define improvement, development, deferred lot, water and sewer, or residence. Here it

[7] The Questions are as follows:

> 5. I[s] an abandoned unoccupied mobile structure considered by the DRB, and codified In the bylaws or a provision of the bylaws, or defined in Subdivision Regulations Section V. D[efinitions], as . . . [Applicant's Sub-Questions 6–11 addressing different definitions].
>
> 12. I[s] an abandoned unoccupied mobile structure, repurposed for Appellant self-storage, considered by the DRB, and codified in the bylaws or a provision of a bylaw, or defined in Subdivision Regulations Section V. D[efinitions], as . . . [Applicant's Sub-Questions 13–18 addressing different definitions].
>
> 19. Does the DRB consider, and is it codified in a bylaw or a provision of a bylaw, that the repair, restoration, and preservation of an existing feature such as a spring or cabin constitutes an improvement or a development?

[8] The Questions are as follows:

> 20. Do the Cambridge Subdivision Regulations, effective March 20[,] 2017, define improvement?
>
> 21. define development?

appears that Applicant is seeking to challenge the scope of the Subdivision Regulations' applicability over components contained on the Property. For the same reasons discussed above and viewed in the light most favorable to the Applicant, we **DENY** the Herings' motion to dismiss Questions 20–24.

V. Questions 25–27

Applicant's Question 25 asks, "Do [the Subdivision Regulation definitions] take precedence over those of the State of Vermont as represented by the Department of Environmental Conservation and the Agency of Natural Resources and codified in their Rules & Regulations?" Here, Applicant provides no citation to a specific provision of the Subdivision Regulations or for the Agency of Natural Resources (ANR) and Department of Environmental Conservation (DEC) "Rules or Regulations" to guide this Court's interpretation of Applicant's Question. The Herings argue that Questions which reference ANR and DEC "Rules and Regulations" have no relevance in this appeal and are beyond the authority of the DRB and this Court to address. We agree.

This Court is limited in scope to the substantive standards applicable in the proceeding before the DRB. Indeed, our reach "is as broad as the powers of [the appropriate municipal panel], but it is not broader." See In re Torres, 154 Vt. 233, 235 (1990). Thus, "while this Court may take any action on an application that the DRB could have taken in the first instance, . . . a determination of the DRB's authority or the propriety of their conclusion is generally beyond the scope of our review." See 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.) (citing In re Freimour & Menard Conditional Use Permit, No. 59-4-11 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. June 6, 2012) (Durkin, J.). In this proceeding, the Court's scope is just a broad as that of the DRB below and is therefore limited to a consideration of whether the application complies with the Subdivision Regulations. As such, consideration of ANR's or DEC's "Rules and Regulations" are beyond the scope of this appeal. Thus, we **GRANT** the Herings' motion to dismiss Applicant's Question 25.

Applicant's Question 26 asks whether "the [DRB] D[ecision] basis 1-4 be voided as per [u]ltra [v]ires?" and Question 27 asks if "in Findings of Facts 14-16 Did the DRB fail to make adequate findings (S[ee] Potter v Town of Hartford) in its [denial] thus violating statutory requirements?"

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22. define deferred lot?

23. define water and sewer?

24. define residence?

As stated above, this Court's review is *de novo*. This means that this Court generally does not consider the previous decisions or proceedings below, including assessment of factual findings; "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.). In this proceeding, we hear evidence anew and "do not consider the propriety of the preceding decisions themselves. See Burton, No. 15-2-20 Vtec at 10 (June 25, 2021) (citing In re Bissig, No. 87-7-13 Vtec at 2 (Dec. 23, 2013)). By nature of *de novo* review, an assessment of whether the DRB's findings were adequate are unnecessarily duplicative of this Court's process and beyond the scope of this appeal. For these reasons we **GRANT** the Herings' motion to dismiss Applicant's Questions 26 and 27.

VI. Questions 29–39 under the "Residences" heading

Applicant's Questions 29–39[9] under Applicant's heading "Residences" raise issues concerning procedural review applied by the DRB in the proceeding below.[10] These questions concern the evidence

[9] The Questions are as follows:

> 29. Did the DRB provide any evidence that the so-called residences were residences as the Laws of the State of VT defines them?
>
> 30. In presenting evidence should not the DRB follow the VT Superior Court's "rules of evidence"? Subdivision Regulations Section 203 D4a
>
> 31. Are those Rules not governed by the minimum (& stated, Section 203D4a) Standard of "reasonably prudent"?
>
> 32. Does reasonably prudent also mean with care, diligence, and assiduity?
>
> 33. Did the DRB meet any minimum standard in Its Findings of Facts 14—16 of "reasonably prudent"?
>
> 34. Does the DRB not have a statutory duty to apply the Subdivision Regulations with the utmost care, diligence, and assiduity?
>
> 35. ls not the Administrative Officer charged (Section 2.01 E) with administering these regulations [literally]?
>
> 36. Is not the DRB subject to the same standard?
>
> 37. Has not the DRB, in [denial] of [p]ermit, acted beyond their authority?
>
> 38. Is not such an action, [ultra vires], and a failure to act with reasonable Prudence?
>
> 39. How did the DRB arrive at the decision that characterizes an abandoned uninhabited mobile structure as a residence?

[10] Applicant's Question 28 does not pose a singular question, but instead states that it is a "Restatement of [Applicant's] questions 1-27 above." This Court has already addressed Questions 1-27 above.

relied upon by the DRB (Questions 29),[11] the DRB's grounds for its findings of fact (Questions 30–36) and the DRB's authority to deny the permit (Questions 37–39). The Herings argue that these questions seek to question whether the DRB applied improper procedural standards, which are cured by this Court's *de novo* review. We agree.

As stated above, by operation of *de novo* review, what evidence was relied upon, the process by which it was interpreted and the propriety of that interpretation before the DRB below is beyond our scope of review. See In re Bissig, No. 87-7-13 Vtec, slip op. at 2 (Dec. 23, 2013). For this reason, this Court is unable make a determination as to the DRB's authority or to review the propriety of the DRB's findings. Id.; In re Sweet Bldg. Permit, No. 19-2-12 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Jan. 25, 2013) (Walsh, J.) (noting that "this Court does not typically review the actions taken by the [tribunal] below"); Moore 3-Lot Subdivision, No. 123-9-13 Vtec, slip op. at 6–7 (Vt. Super. Ct. Envtl. Div. July 28, 2014) (Walsh, J.) (noting that "the accuracy or adequacy" of evidence submitted to the DRB is "not relevant and [is] outside the scope of [the] appeal").

Additionally, none of the alleged procedural defects are the type of fundamental structural errors that can not be cured by *de novo* review. See Hinesburg Hannaford Wetland Determination, No. 73-5-14 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2015) (Walsh, J.); see also In re JLD Props, of St. Albans, LLC, 2011 VT 87, ¶¶ 10-13, 190 Vt. 259 (holding that a decisionmaker's personal bias and participation in the DRB process below was cured by *de novo* review). Here, Applicant alleges an error in the trial process itself rather than a defect affecting the framework within which the trial proceeds. See id. (citing Johnson v. United States, 520 U.S. 461, 468 (1997)). Indeed, to the extent that Applicant has concerns with the rules of evidentiary process or admissibility in this proceeding, rather than the DRB proceeding below, Applicant may raise those arguments through appropriate motion practice or through objections at trial.

As this Court has no authority to undertake such a review of the DRB's findings and we review Applicant's application anew, we **GRANT** the Herings' motion to Dismiss Applicant's Questions 29–39.

[11] To the extent Applicant is concerned about the use of evidence before this Court on appeal, the Statement of Questions is not the proper mechanism to raise those concerns. Applicant is free to challenge the admissibility of evidence through appropriate motion practice or by raising appropriate objections at trial.

VII. Questions 41–47 under the "Improvement/Development" Heading

Applicant's Questions 41–44[12] appear to concern the ANR's recent investigation of the Property, whether the restoration or preservation of an existing spring and cabin constituted a violation of ANR Rules (Question 41 and 42), and the Subdivision Regulations' scope concerning potable water and wastewater (Question 44).[13] The Herings argue that these questions primarily concern ANR Rules, which were not considered by the DRB below, and are irrelevant to the pending subdivision appeal.

As stated above, the scope of an appeal is defined by the powers of the tribunal below, and thus Court is limited in scope to the substantive standards applicable in the proceeding before the DRB. 10 V.S.A. § 8504(h); V.R.E.C.P. 5(g); In re Torres, 154 Vt. 233, 235 (1990). Here, the DRB's review of the application was limited to the Subdivision Regulations. If the DRB was without authority to address the legal issues presented by Applicant's Questions, this Court is also without authority to do so. It is beyond the scope of this Court to address ANR Rules and any violations thereof as this appeal is limited to whether the application complies with substantive provisions of the Subdivision Regulations. See Couture Subdivision Permit, No. 53-4-14 Vtec, slip op. at 4–6 (Vt. Super. Ct. Envtl. Div. Feb. 23, 2015) (Durkin, J.). Thus, any challenge to compliance with ANR Rules must be raised before that Agency and beyond the scope of this appeal.

Here, the DRB below conducted a Final Plat Review, which concerned subdivision review criteria requiring lots to provide access consistent with the Town of Cambridge Highway Standards Ordinance; have some potential use; and include water systems, driveway and road design, and water disposal. See Subdivision Regulations 4.02–4.05, 4.07. Concerning Question 44, the Subdivision Regulations require that these existing improvements or systems be depicted within the application and evidence of

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[12] The Questions are as follows:

> 41. Is the repair, restoration, and preservation of existing features such as a spring or cabin a violation of ANR Rules?
>
> 42. Did not ANR do a thorough investigation on June 30, 2020[,] and found no violations?
>
> 43. Did not DEC Regional Engineer Carl Fuller confirm on July 28, 2020[,] that the repair, restoration, preservation of an existing spring and cabin were NOT a violation of ANR Rules?
>
> 44. Does not the Town of Cambridge Subdivision Regulations explicitly defer to the State of Vermont in all matters pertaining to potable water and wastewater, including spring wells, dug wells, drilled wells etc[.] and wastewater design, location, installation, failure, and best fix and all enforcement of violations as well as the definition of conditions requiring a wastewater permit?

[13] Applicant's Question 40 does not pose a singular question, but instead states that it is a "Restatement of [Applicant's] questions 1-31 above." This Court has already addressed Questions 1-31 above.

conformance with state regulations and standards be shown, but do not contain provisions that otherwise regulate the location, suitability, repair, or preservation of potable water or wastewater systems.[14] See Subdivision Regulations 4.04 and 4.05. Any assessment of ANR Rules, therefore, is not before this Court as a criterion relevant to Applicant's subdivision application and is beyond the scope of this appeal. For this reason we **GRANT** the Herings' motion to dismiss Questions 41–44.

Applicant's Questions 45–47[15] address how DRB determined what constituted an improvement, whether the DRB sufficiently indicated how the findings were determined, and to what degree the DRB must consider the Department of Environmental Conservation's (DEC) project review sheet. As these matters concern the process and propriety of the DRB's decision below, these issues are cured upon *de novo* review before this Court. We therefore **GRANT** the Herings' motion to dismiss Applicant's Questions 45–47.

VIII. Questions 49–65 under the "Repurposed Cabin" Heading

Applicant's Questions 49–53[16] concern whether the lot is improved or unimproved (Question 49), installation of a potable water supply or wastewater system (Questions 50-51), and the relevance of ANR

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[14] The authority to regulate wastewater systems lies exclusively with ANR. See 10 V.S.A. § 1976(b) (superseding municipal ordinances and zoning bylaws that regulate wastewater systems).

[15] The Questions are as follows:

> 45. How did the DRB arrive at its Decision of Denial when it is not within their authority to determine that the repair, restoration, preservation of an existing feature such as a spring or cabin violates the definition of deferred lot and constitutes an improvement?
>
> 46. ls it not by the terms of 24 VSA 4470(a) the DRB DECISION shall include findings of fact but that "If the requirement of findings has ANY meaning, it is to convey that not only a result, but also an indication of how the result was arrived at." (Punderson v Town of Chittenden).?
>
> 47. Should not, therefore, the DRB consider the plan as outlined in detail in the Appellant's cover letter to the DRB which incorporates the DEC Project Review Sheet as a reasonable template for conditional approval of Permit?

[16] The Questions are as follows:

> 49. Isn't the governing language of determining whether a lot is unimproved or Improved, ANR Rules Subchapter 3, 1-304, 4A: "[. . .] if the use or useful occupancy Of that structure or building will require the installation of or connection to a potable Water supply or wastewater system [. . .]".
>
> 50. Has the Appellant constructed a building or structure whose "use or useful Occupancy" "will require the installation of or connection to a potable water Supply or wastewater system"?
>
> 51. ls the repurposing of a preexisting cabin for Appellant self-storage which will Not require the installation of or connection to a potable water supply or waste-[w]ater system for use or useful occupancy (other than self-storage, as indicated ln the DEC Project Review Sheet) a violation of ANR Rules?

Rules in a subdivision appeal (Questions 52-32).[17] As stated above during our analysis of Applicant's Questions 41–44, it is beyond the scope of this Court to address substantive application of ANR Rules concerning potable water supplies or wastewater systems as this appeal is limited to assessing the application's compliance with the Subdivision Regulations. The authority to regulate potable water supplies and wastewater systems rests with ANR. 10 V.S.A. § 1976(b). Therefore, any discussion of whether an occupancy requires installation or connection to a potable water system is outside this Court's jurisdiction and should be raised before ANR. Similarly, Questions 64 and 65[18] appear to ask whether the Town has brought enforcement actions for "over 30" violations concerning potable water and wastewater. As ANR has exclusive authority to regulate wastewater systems, these questions are also beyond the scope of this subdivision appeal. For this reason, we **GRANT** the Herings' motion to dismiss Questions 49–53 and 64–65.

Applicant's Questions 54–62[19] ask whether DRB sufficiently explained its factual findings (Question 54), engaged in the "utmost diligence" in determining factual findings, adequately considered

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52. Do DRB Subdivision Regulations take precedence over ANR Rules?

53. Did not the DRB exceed their authority in determining that Lot 3 is an improved Lot?

[17] Applicant's Question 48 does not pose a singular question, but instead states that it is a "Restatement of [Applicant's] questions 1-47 above." Similarly, Applicant's Question 61 states that it is a "Restatement of Question 47 above" and Question 63 states that it is a "Restatement of Question 44." This Court has already addressed Questions 1-47 above.

[18] Questions 64 asks "Has not the Town of Cambridge . . . knowledge of over 30 structures, RVs, campers, And the like, that are in violation of the Laws of the State of Vermont as they apply [t]o occupancy and duration of occupancy, as these relate to potable water and Wastewater?" and Question 65 asks whether "any action been brought by the Town to cure those violations?"

[19] The Questions are as follows:

54. ls the DRB Finding of Fact that Lot 3 is an improved lot adequate to ascertain how [i]t was arrived at?

55. Does not such a Finding of Fact require the utmost diligence?

56 ls it not the duty of each member of the DRB to exercise such diligence?

57. Did the DRB. in its Finding of Fact that Lot 3 is an improved lot, exercise such [d]ue diligence?

58. Does that due diligence not require careful review and consideration of the letter [a]nd limitations of the Subdivision Regulations' bylaws and provisions of those bylaws?

59. Does that due diligence not require careful review of ANR Rules?

60. Did the DRB not arrive at a decision that contradicts ANR investigation and DEC opinion?

61. Restatement of question 47 above.

62. Restatement of question 1 above. Are not citation of Subdivision Regulations. Does not such a Finding of Fact require the utmost diligence?

ANR Rules (Questions 55–60), and whether the DRB's conclusions were overly broad (Question 62). Similar to this Court's analysis of Applicant's Questions 29–39, as these questions challenge the DRB's process and propriety of factual findings below, these issues are cured upon *de novo* review before this Court. We therefore **GRANT** the Herings' motion to dismiss Questions 54–62.

IX. Questions 67–85 under the "Findings of Fact 14-16" Heading

Applicant's Questions 67 and 82–84[20] concern the DEC's project review sheet as a "reasonable" basis for subdivision approval (Question 67 and 82) and the compliance of the Property with ANR Rules and the "Laws of the State of Vermont" (Question 83 and 84). This Court is tasked with review of the subdivision application; the DEC project proposal review sheet is therefore not before us. It is beyond the scope of this Court's jurisdiction to opine as to whether the DEC's project review sheet is reasonable basis for subdivision approval. Such a determination would be considered an advisory opinion and is beyond this Court's jurisdiction. See In re Lathrop Limited Partnership, No. 122-7-04 Vtec, slip op. at 9–10 (Vt. Super. Ct. Apr. 12, 2011) (Durkin, J.); In re Appeal of 232511 Invs., Ltd., 179 Vt. 409, 2006 VT 27, ¶ 19. For this reason we **GRANT** the Herings' motion to Dismiss Questions 67 and 82.

In consideration of Questions 83 and 84, as discussed above, this appeal is limited to a determination of whether the application complies with the Subdivision Regulations. Therefore, a determination of whether the application is consistent with ANR's Rules and any investigation or assessment of violation conducted by ANR are beyond the scope of this particular proceeding. We therefore **GRANT** the Herings' motion to dismiss Applicant's Questions 83 and 84.

Applicant's Questions 68–82 and 85[21] address the method by which the DRB determined the location of "buildings" on the Property and whether the buildings were "inhabited" or used for residential

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[20] The Questions are as follows:

> 67. #14; Does not the DEC Project Review Sheet propose a comprehensive plan with a Stated timeline for compliance?
>
> 82. ls not the DEC plan, by contrast, a reasonable plan?
>
> 83. ls not Lot 3 in full compliance with the Laws of the State of Vermont, as embodied in ANR Rules?
>
> 84. Do not those Laws super[s]ede any bylaw or a provision of a bylaw of the Town [o]f Cambridge Subdivision Regulations?

[21] The Questions are as follows:

> 68. #15; Did the DRB determine type & specific location of that type of the "several" "Buildings"?
>
> 69. Did each member personally visit each site?

purposes (Questions 68–73). These questions also challenge the sufficiency of the DRB's conclusions and findings without citation (Question 74–78); ask whether the DRB's decision was unreasonable (Questions 80–81); and concern whether the DRB should have concluded that a conditional permit as more "reasonable" than a permit denial. As this Court's jurisdiction is *de novo*, this Court is charged with the responsibility of assessing the credibility and weight to be afforded any evidence presented in the upcoming *de novo* hearing. See 10 V.S.A. § 8504(h); 24 V.S.A. § 4470a. Therefore, to the extent that these Questions challenge the weight afforded to the evidence or sufficiency of the DRB findings, the Questions are unnecessarily duplicative of the Court's process in *a de novo* hearing. See In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.) (dismissing a question because it was unnecessarily duplicative); see also In re Union Bank, No. 299-12-06 Vtec, slip op. at 3 n. 4 (Vt. Envtl. Ct. Dec. 5, 2007) (Durkin, J.) (noting that in a *de novo* appeal "whether the municipal panel below erred is immaterial to our review").

To the extent that these Questions challenge the DRB's application and interpretation of the Subdivision Regulations, *de novo* review requires us to evaluate the meaning of the ordinance independently. In re Poole, 136 Vt. 242, 245 (1978); see Burris Zoning Permit Denial, No. 150-11-17 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Oct. 12, 2018) (Walsh, J.). For these reasons we **GRANT** the Herings' motion to dismiss Applicant's Questions 68–82 and 85 as beyond the scope of this appeal and unnecessarily duplicative of the *de novo* process.

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70. #16; How did the DRB determine that a particular structure at a particular variable Site was "inhabited"?

71. Was "used for year round residential purposes"?

72. Was "located on various sites"?

73. Was "a rented site"?

74. Does the citation of Section 4.04 without reference to paragraph have any meaning as a basis for Denial?

75. As a Finding of Fact?

76. Does the citation of Section 4.05 without reference to paragraph have any meaning as

77. A basis for Denial?

78. As a Finding of Fact?

79. Did the DRB perform its statutory duty of due diligence regarding Lot 3?

80. Restatement of question 46 above. ls not the DRB's Denial speculative, arbitrary, and unreasonable?

81. ls not the DRB's Denial, based on the stated "Findings of Facts" [ultra vires]?

85. Would not a conditional approval of permit by the DRB have been the most reasonably [p]rudent way forward for all parties involved?

Conclusion

For the reasons addressed above, we **GRANT in part** the Herings' motion and dismiss Questions 4 and 25–85. The issues raised in these questions are outside the scope of this *de novo* appeal and this Court's jurisdiction. Furthermore, We **DENY in part** the Herings' motion concerning Questions 1–3 and 5–24, which remain before the Court.

In the interest of providing clarification, the Court reiterates below the remaining Questions on appeal. The Questions have been formatted and renumbered for concision and ease of the Court.

The revised 11 questions remaining before the Court are as follows:

1. Question 1: "Are the provisions of Sections: 3.02(B)1a, 3.02(B)1c, 4.02(C)1, 4.03(B), 4.04, 4.05, 4.07(B)4a of the Subdivision Regulations of the Town and Village of Cambridge ("Subdivision Regulations") effective date March 20, 2017, applicable to the Appellant's proposed subdivision?"
2. Question 2: "Does [. . .] section [3.02(b)(1)(a) of the Subdivision Regulations] name wheeled mobile structures, such as RVs, campers, or the like as a building?"
3. Question 3: "Does [. . .] section [3.02(b)(1)(a) of the Subdivision Regulations] consider wheeled mobile structures as having a foundation?"
4. Revised Question 5 and sub-questions (Questions 6–11)]: Is an abandoned unoccupied mobile structure codified in the bylaws or a provision of the bylaws, or defined in Subdivision Regulations Section V. Definitions as . . .
    a. A rented site
    b. A residence
    c. To require water and sewer
    d. To require Legal access as per Town of Cambridge Highway Standards Ordinance
    e. An improvement
    f. A development
5. Revised Question 12 and sub-questions (Questions 13–18): Is an abandoned unoccupied mobile structure, repurposed for Appellant self-storage, codified in the bylaws or a provision of the bylaws, or defined in Subdivision Regulations Section V. Definitions as . . .
    a. A rented site
    b. A residence
    c. To require water and sewer
    d. To require Legal access as per Town of Cambridge Highway Standards Ordinance
    e. An improvement
    f. A development

6. Revised Question 19: Is it codified in a bylaw or a provision of a bylaw, that the repair, restoration, and preservation of an existing feature such as a spring or cabin constitutes an improvement or a development?
7. Question 20: "Do the Cambridge Subdivision Regulations [. . .] define improvement?"
8. Question 21: "Do the Cambridge Subdivision Regulations [. . .] define development?"
9. Question 22: "Do the Cambridge Subdivision Regulations [. . .] define deferred lot?"
10. Question 23: "Do the Cambridge Subdivision Regulations [. . .] define water and sewer?"
11. Question 24: "Do the Cambridge Subdivision Regulations [. . .] define residence?"

Electronically Signed: 8/11/2021 2:36 PM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division