Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-050

JULY TERM, 2019

In re VTRE Investments, LLC, Conditional Use Duplex (Michael A. Seaberg*)	}	APPEALED FROM:
	}	
	}	Superior Court,
	}	Environmental Division
	}	
	}	DOCKET NO. 62-6-18 Vtec
		Trial Judge: Thomas S. Durkin

In the above-entitled cause, the Clerk will enter:

Mr. Seaberg appeals pro se from the Environmental Division's dismissal of his appeal for lack of standing. We reverse and remand for additional proceedings.

The record reflects the following. VTRE Investments, LLC, seeks to build a duplex on its property in Stowe. It submitted a conditional use application to the Town of Stowe Development Review Board (DRB). The DRB held two hearings on the application, one in April 2018 and a second in May 2018. It subsequently approved the application. Mr. Seaberg filed a notice of appeal to the Environmental Division in his personal capacity. VTRE moved to dismiss the appeal, arguing that Mr. Seaberg failed to participate in the DRB hearing in his personal capacity.

In considering VTRE's motion to dismiss, the Environmental Division viewed the factual allegations in the light most favorable to Mr. Seaberg, the nonmoving party. See Baird v. City of Burlington, 2016 VT 6, ¶ 11, 201 Vt. 112 ("We generally review de novo a dismissal for lack of standing, the same standard of review as that for lack of subject matter jurisdiction." (quotation and alterations omitted)); Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245 ("Dismissal for lack of subject matter jurisdiction under [V.R.C.P.] 12(b)(1) is reviewed de novo, with all uncontroverted factual allegations of the complaint accepted as true and construed in the light most favorable to the nonmoving party."). The court explained that standing to appeal was limited by statute and it must "strictly adhere" to the statutory requirements, even if individuals shared "closely related interests." In re Gulli, 174 Vt. 580, 582 n.* (2002) (mem.). By law, only "[a]n interested person who has participated in a municipal regulatory proceeding . . . may appeal a decision rendered in that proceeding . . . to the Environmental Division." 24 V.S.A. § 4471(a). "Participation in a local regulatory proceeding . . . consist[s] of offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding." Id.; see also id. § 4465(b)(3) (defining "interested person" in relevant part as "person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under [Chapter 117 of Title 24], who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality"). The court also noted that this was an on-the-record appeal. See id. § 4471(b).

Thus, it considered only the decision below, the parties' briefs, and the record made before the DRB. The court did not take new evidence or make its own factual determinations.

It was uncontested that Mr. Seaberg attended the April 2018 DRB hearing on VTRE's application and that he submitted both written and oral comments. VTRE asserted, however, that Mr. Seaberg submitted his comments in his capacity as a representative of Montchilly, Inc., the entity that owned the abutting property and operated a hotel there called the Northern Lights Lodge (NLL property). VTRE argued that because Mr. Seaberg failed to submit oral or written comments concerning his personal interests in the NLL property, he lacked standing to appeal in his individual capacity. Mr. Seaberg responded that he made his comments both as a representative of Montchilly, Inc., and as a resident of the NLL property. He thus argued that he had standing to appeal in his personal capacity as a resident of the NLL property.

The court reviewed the record below, including the written comments. It found that at no point during the public hearing, or in the written comments submitted on NLL letterhead, did Mr. Seaberg state that he lived on the NLL property or state that he was raising the same or similar concerns in his personal capacity as those he was raising with respect to his business. The court could identify only two times, within the same comment, that Mr. Seaberg referred to the NLL property as "my property." In all other instances, he used words like "we" and "our" to reference concerns regarding the pending application. The court found this language ambiguous at best and determined that it could not support the conclusion that Mr. Seaberg raised the relevant concerns in both capacities. The court reached the same conclusion with respect to Mr. Seaberg's use of the phrase "my." It emphasized that Mr. Seaberg's language must be viewed in context. He had submitted written comments on NLL letterhead and stated that he was attending the hearing to carry those comments forward. He testified to impacts to the business and hotel. Given his choice of terms, coupled with the absence of any impact to his personal interests as a resident of the NLL property, the court concluded that Mr. Seaberg had not presented his personal interests at the hearing. It therefore determined that Mr. Seaberg did not participate in the proceeding below in his personal capacity and it dismissed his appeal for lack of standing. This appeal followed.

Mr. Seaberg asserts that he has lived on the NLL property since 2010. He maintains that at the DRB hearing, he identified several issues that would clearly affect him as a resident, such as noise pollution and scaling concerns. He contends that he had no obligation to state that he was participating in his personal capacity at the hearing. Finally, Mr. Seaberg asserts that the Environmental Division should have reviewed the standing question de novo and considered the additional evidence he presented on this question.

We adhere to our normal standard of review in this case, but we do so mindful that the appeal to the Environmental Division was an on-the-record appeal. In such cases, the Environmental Division acts as an "appeals court," and its review is limited to the record developed below. See 24 V.S.A. § 4471(b); V.R.E.C.P. 5(h) (describing "on the record" appeals to Environmental Division). Given this, the question of whether Mr. Seaberg has standing must be determined based on the record developed before the DRB.

We conclude that the record, viewed in the light most favorable to Mr. Seaberg, supports his assertion that he voiced concerns about the project both as an individual living on the property and on behalf of the company, of which he is the president, that owns the property. While Mr. Seaberg submitted written comments on NLL letterhead, he signed into the hearing as an individual. He was recognized as "a neighbor" by a member of the DRB at the hearing, lending credence to his assertion before the Environmental Division that the DRB members, and presumably VTRE's representative as well, were aware that he lived on the abutting property. In

its decision, the DRB referred to Mr. Seaberg as an "adjacent property abutter." Given this and in light of the unique facts of this case, we construe Mr. Seaberg's use of "we" and "our" at the hearing to indicate that he was expressing both his personal concerns about the project as one who occupied the abutting property as well as the concerns of the company that owned the property. We thus conclude that Mr. Seaberg "participated" in the hearing in his personal capacity within the meaning of 24 V.S.A. § 4471(a) and that he has standing to pursue his appeal.

Reversed and remanded for additional proceedings.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice