

VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org



Docket Nos. 23-ENV-00097

Lemelson 3-Lot Subdivision Application

ENTRY ORDER

Title: Motion to Complete or Supplement the Record (Motion: 6)
Filer: Elizabeth Connolly, Esq.
Filed Date: March 22, 2024

Memorandum in Opposition filed by Christopher J. Nordle, attorney for Anjeza and Emmanuel Lemelson, on April 10, 2024.

Memorandum in Opposition filed by Joseph S. McClean, attorney for the Town of Stowe, on April 12, 2024.

Reply in Support of Motion filed by Elizabeth Conolly, Esq., attorney for PBF, LLC, Five Roads Stowe, LLC, and Kevin D'Arcy, on April 17, 2024.

The motion is DENIED.

This is an on-the-record appeal by PBF, LLC, Five Roads Stowe, LLC, and Kevin D'Arcy (together, Appellants) of a subdivision permit approved by the Town of Stowe Development Review Board (DRB) to Anjeza and Emmanuel Lemelson (Applicants) for a 3-lot subdivision of Applicants' property on Edson Woods Road, Stowe Vermont (the Property). Applicants have additionally sought and obtained conditional use approval related to the Property, and appeal of that approval is pending before the Court in Docket No. 23-ENV-00098 (the Conditional Use Application). Appellants presently move the Court to supplement the record in this matter with the transcript of the hearing before the DRB on the Conditional Use

Application and the subsequent decision on said application. The Town of Stowe (Town) and Applicants oppose the motion.¹

This Court hears 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.).

Applicants submitted two applications relative to the Property, one for subdivision approval and another for conditional use approval, to the Town. Each application was docketed separately by the Town. Each application received a separate application number. Each application was warned separately for separate hearings before the DRB and those hearings so occurred. The DRB then issued two separate decisions, each analyzing the application before it pursuant to wholly separate bylaws, the Town of Stowe Zoning Regulations and the Town of Stowe Subdivision Regulations. Each of these decisions were separately appealed to this Court in separate dockets. It is undisputed that the applications themselves are interrelated and concern the Property. There is no assertion, however, that the applications were ever merged or heard by the DRB in a procedurally concurrent manner that would allow the Court to receive identical records in both dockets. In fact, the procedural history shows that the applications were heard in a procedurally bifurcated manner.

¹ From this point forward, the Court’s Entry Order is functionally identical to one issued in the appeal of the Subdivision Application, Docket No. 23-ENV-00097. This is because the pending motion, and the facts giving rise to it, is similarly functionally identical to a motion filed in Docket No. 23-ENV-00097. The Court has considered the motion and arguments separately but reaches the same legal conclusion in both dockets. Because the matters have not been formally coordinated before the Court despite being interrelated, the Court believes it prudent to issue a separate Entry Order in each appeal.

Appellants functionally argue that because the two applications are interrelated, the hearings the DRB are a single proceeding such that the transcript for each hearing should be included in the record for both appeals. This is inconsistent with the procedural history of this case and the Court’s ability to hear cases.² Thus, the transcript and decision do not fall into the scope of the “written transcript of the proceedings” as defined by V.R.E.C.P. 5(h)(1)(A).

Appellants next argue that testimony was presented in the Conditional Use Application hearing that they seek to rely upon in this appeal. They argue that the DRB either did or should have relied upon such materials in issuing their decision presently on appeal such that supplementation is permissible. V.R.E.C.P. 5(h)(1)(A) defines the record as including “any writings or exhibits considered by the panel in reaching the decision appealed from.” This is, however, specific to documentary evidence. Appellants provide no understanding as to how this Court could interpret this provision as allowing the inclusion of the record, including a transcript of live testimony, of a completely different application and appeal as being a part of another proceeding’s record.³

Thus, supplementation is not warranted or allowable here. We note, however, that we are additionally guided to this conclusion by the scope of the Court’s review in an on the record appeal. Should Appellants seek to challenge the sufficiency of the record in this appeal to support the DRB’s conclusions, they are free to raise such arguments. The motion is **DENIED**.

Electronically signed this 2nd day of May 2024 pursuant to V.R.E.F. 9(D).



Thomas G. Walsh, Judge
Superior Court, Environmental Division

² Appellants note that appeals involving different types of zoning review are coordinated before the Court. This Court has the ability coordinate interrelated matters to promote efficient resolution of cases and avoid unnecessary costs and delay. See V.R.E.C.P. 2(b). We do not have the power to merge two appeals into one, even when those appeals involve the same project.

³ To the extent that Appellants cite to a case from Maine that functionally addresses the same principle as that set forth in V.R.E.C.P. Rule 5, we are guided by the specific rules of this Court.