

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-00015

Elwell NOV Appeal

MERITS DECISION

This is an appeal of a February 1, 2023 decision by the Town of Warren Development Review Board (DRB) upholding zoning violations identified in an October 11, 2022 Notice of Violation (NOV or 2022 NOV) issued to Shane and Kelley Elwell (Landowners) for prohibited commercial uses and unpermitted driveway construction occurring on their property in Warren, Vermont, but estopping the Town Zoning Administrator from enforcing that aspect of the NOV addressing the commercial uses. George Abad (Appellant) appealed the DRB's decision to this Court on March 3, 2023. The Court held a one-day merits hearing via the Webex platform on October 4, 2024. The Court also conducted a site visit with the parties the day prior on October 3, 2024.¹

Landowners are represented by Attorney Christopher J. Nordle. Appellant is self-represented.

Statement of Questions

Appellant filed a four-Question Statement of Questions on March 24, 2023. On September 16, 2024, following a discussion with both parties, the Court dismissed Questions 2 and 3 of Appellant's Statement of Questions as inconsistent with the Court's de novo review. Elwell NOV Appeal, No. 23-ENV-00015, slip op at 1 (Vt. Super. Ct. Env'tl. Div. Sept. 16, 2024) (McLean, J.). This leaves the following two Questions presented for a final determination:

- (1) Does the storage and maintenance of equipment and vehicles for excavating purposes, storage and maintenance of large equipment and vehicles for logging and firewood processing, storing logs, splitting logs, and storing and handling inventory of split firewood

¹ As previously explained to the parties, the site visit and observations are not evidence, but rather are used to put the evidence presented during trial into context.

and road maintenance materials (as itemized in #2022-10-VOL Elwell) constitute a violation of the Town of Warren regulations Articles 2, 4, and 10 governing the land use in the Warren Alpine Village District?

- (2) Whether the Landowners can establish the five elements of estoppel?

Appellant's Statement of Questions (filed March 24, 2023; amended September 16, 2024).

Findings of Fact

1. Landowners Kelley and Shane Elwell own real property in Warren, Vermont, including a parcel located at 251 Doe Road, developed with a single-family residence (Parcel #417-050-000), and a parcel located off Buck/Fern Road that does not contain any permanent structures (Parcel #417-184-000) (collectively, the Property).

2. The Property is located in the Warren Alpine Village Residential District as designated by the Warren Land Use and Development Regulations, as last amended March 25, 2008 (the Regulations).

3. On October 11, 2022, the Warren Zoning Administrator, Ruth Robbins, issued a NOV to Landowners that identified the following two violations: (1) prohibited commercial uses on the Property and (2) unpermitted development (driveway construction) on steep slopes.²

4. The NOV does not specify what commercial operations were occurring on the Property at the time it was issued by the Zoning Administrator.³

5. Landowners appealed the NOV to the Warren Development Review Board (DRB), which issued a decision on February 1, 2023.

6. The DRB determined that Landowners had commenced driveway construction on steep slopes without a permit, and therefore affirmed the NOV with respect to the driveway construction.

7. The DRB also found that Landowners had conducted the following commercial uses/activities on their property: storage and maintenance of large equipment and vehicles for excavating purposes, storage and maintenance of large equipment and vehicles for logging and firewood processing, storing logs, splitting logs, and storing and handling inventory of split firewood.

8. The DRB concluded that the commercial uses violated the Regulations' prohibition on commercial uses in the Warren Alpine Village Residential District.

² Neither party moved for admission of the 2022 NOV and therefore it is not a part of the evidentiary record. Any factual findings regarding the NOV are purely for background context.

³ Among other things, the NOV appears statutorily deficient in failing to outline "the facts giving rise to the alleged [use] violation." 24 V.S.A. § 4451(a)(2)(B). Since the NOV is not a part of the evidentiary record, this is not an issue before the Court.

9. However, the DRB applied the doctrine of equitable estoppel to prevent the Town from enforcing the commercial use violations, reasoning that Landowners had detrimentally relied on statements made by a former Zoning Administrator who allegedly said they would not need a zoning permit to carry out their commercial operations.

10. Neighboring landowner, George Abad, appealed the DRB's decision to this Court.⁴

Discussion

1. Burden of proof

At the close of Appellant's case-in-chief, Landowners moved for judgment on partial findings, pursuant to V.R.C.P. 52(c), arguing that Appellant failed to meet his burden of proving the existence of a zoning violation. Specifically, Landowners argued that Appellant did not elicit any testimony regarding the 2022 NOV and did not even seek to admit the NOV into the record. Additionally, Landowners argued that Appellant failed to connect any witness testimony to the specific findings and conclusions of the 2022 NOV. Lastly, Landowners suggested that Appellant's exhibits were not properly authenticated and that he failed to elicit testimony to give context to any of his photographic exhibits. Because of the unique posture of this appeal, the Court declined to grant Landowners' motion at that time, and instead asked Landowners to present their evidence on the issue of estoppel. See V.R.C.P. 52(c) (authorizing the court to "decline to render any judgment until the close of all the evidence."). While discussed with the parties at the final pretrial conference and during the trial, we reinforce again the parties' respective burdens of proof and the scope of this appeal.

The burden of proof carried by a party depends on the type of case and the issues raised therein. It is axiomatic that in a typical civil action, the plaintiff bears the initial burden of proving their claim by a preponderance of the evidence. In re Grievance of Muzzy, 141 Vt. 463, 472 (1982) (citing McCormick, Evidence § 355, at 853 (E. Cleary ed. 1972)); Livanovitch v. Livanovitch, 99 Vt. 327, 328 (1926). This standard is analogous to that applied in a State environmental enforcement action, where the agency citing a violation holds the initial burden of proving the violation. See 10 V.S.A. § 8013 ("The agency issuing the order shall have the burden of proof by a preponderance of the evidence."). Similarly, this Court has held that where a neighbor complains to the Zoning Administrator of alleged zoning violations, said neighbor bears the burden of proving the existence of the alleged violations. In re Transtar, LLC, No. 46-3-11 Vtec (Vt. Super. Ct. Envtl. Div. Sept. 15, 2011) (Durkin, J.).

⁴ The Landowners did not appeal or cross-appeal any aspect of the DRB's decision.

The scope of this Court’s review is guided by the Statement of Questions. In re Garen, 174 Vt. 151, 156 (2002). Appellant’s Question 1 asks whether the commercial uses listed in the DRB’s decision constitute a violation of the Regulations. In raising this Question, Appellant assumed the burden of proving the existence of the use violation.⁵

This action originates from a Notice of Violation issued in October 2022.⁶ Because this action originated with the 2022 NOV, Appellant bears the burden of proof regarding Landowners’ use of the Property as of the 2022 NOV. Essentially, Appellant is standing in the shoes of the Town, which did not appear in this matter, and must offer evidence to support the issuance of the 2022 NOV. Importantly, the Court is not concerned with whether the activities giving rise to the 2022 NOV exist at the date of trial in 2024. That inquiry would only be relevant to penalty calculations in a zoning enforcement action brought under 24 V.S.A. § 4451. See In re Jewell, 169 Vt. 604, 606 (1999) (explaining that for a continuing violation a municipality may sustain its burden of proof with evidence that “weave[s] a sufficient pattern of violations. . .”). Rather, Appellant must prove sufficient facts to demonstrate the existence of a violation which gave rise to the NOV in 2022. With this framework in mind, we turn to the evidence received at trial to determine whether Appellant satisfied his burden of proving the alleged violation.

2. Alleged violation

This Court has not been presented with sufficient evidence to uphold the 2022 NOV. All relevant testimony received at trial about Landowners’ commercial activities were based on what is occurring in 2024, rather than in 2022.⁷ For example, Appellant called the current Zoning Administrator, Ruth Robbins, as a witness, but only asked her a series of short questions, none of which established the facts which led her to issue the 2022 NOV. To demonstrate Appellant’s misunderstanding and failure to satisfy his burden of proof, the following exchange is the entirety of Appellant’s direct examination of Ms. Robbins:

⁵ The DRB concluded that Landowners’ commercial activities constituted a violation of the Regulations. Through his Question 1, Appellant appealed the DRB’s decision with respect to whether those same activities constitute a violation. Had Appellant not raised his Question 1, the existence of the violation would have been final and binding and there would be nothing to prove. However, in asking this Question, Appellant assumed the burden of proving the existence of the commercial use violation, as cited in the 2022 NOV.

⁶ The NOV indicates that Landowners’ commercial activities are in violation of Table 2.6 of the Regulations, which prohibits most commercial uses in the Alpine Village Residential District.

⁷ While it is certainly possible that evidence of current violations could be used as a basis to support a future Notice of Violation, such evidence cannot retroactively be used to prove a prior NOV.

Abad: Are you the present Zoning Administrator for the Town of Warren?

Robbins: Yes

Abad: Are you familiar with the Elwell's residence at 251 Doe Road in Warren Alpine Village?

Robbins: Yes

Abad: Are you familiar with the zoning of the Alpine Residential District in which the home 251 Doe Road resides?

Robbins: Yes

Abad: Did you file a notice of violation to the Elwells on October 11, 2022 for commercial activities in a residential zone?

Robbins: Yes

Abad: Can you tell me if that complaint were to come up today at this present time would you file the same violation for commercial activities in a residential zone?

Robbins: Yes

Following this exchange, Landowners' attorney objected that the line of questioning had no relation to the original violation letter. The Court then explained to Appellant that he would need to focus his presentation of evidence on the 2022 Notice of Violation, not on what is occurring today. Despite this explanation, Appellant proceeded to ask the following three questions before ending his direct examination of Ms. Robbins.

Abad: Do the business activities that the Elwell's perform at 251 Doe Road meet the standards of a home-based business as defined by Article 4, Section 4.8 or that of an industry in Article 4, Section 49 of the Warren Alpine Village Zoning?

Robbins: No, it would not qualify as a home-based business or an industry in the alpine village residential district.

Abad: If this is occurring right now, would you cite them in violation of Article 4, Section 4.8 or Article 4, Section 49?

Robbins: If it was occurring today, yes I would.

Abad: Are you familiar with Article 2, Table 2.6, which prohibits commercial uses?

Robbins: Yes.

Abad: I believe that's all the questions I have for the zoning administrator.

Throughout the presentation of evidence, Appellant failed to draw any connection between commercial activities occurring on the Property and the 2022 NOV.⁸

Appellant's other witness, Glenn Acker, a neighboring landowner, testified generally that he has observed Landowners bringing fill material and log loads, as well as equipment, in and out of the Property, but Mr. Acker provided no specific contextual information which would allow the Court to attribute his testimony to the activities alleged in the 2022 NOV. With respect to exhibits, Mr. Acker's testimony only addressed Exhibits R and BB which are undisputed to be screenshots of Mr. Elwell's Facebook page.⁹ These two exhibits include photographs of equipment, yet Appellant never elicited testimony to lay a foundation for when, where, and by whom those photos were taken or that they are a fair and accurate representation of the Property. Without such foundational testimony, the Court is unable to attribute these photographs to Landowners' Property and the violations cited in the 2022 NOV.

Simply put, there is insufficient evidence in the record to prove the commercial use violations that were the subject the 2022 NOV. Appellant's case-in-chief failed to establish a connection between Landowners' use of the Property and the facts giving rise to the 2022 NOV. This is despite clear instructions from the Court as to how he should focus his presentation of evidence. Neither the Zoning Administrator nor Mr. Acker established the relevant facts through their testimony, nor did Appellant give any context to his proffered exhibits. For all these reasons, we conclude that Appellant failed to meet his burden of proving the existence of the commercial activities that were the subject of the 2022 NOV. This requires us to answer Appellant's Question 1 in the negative.

Because we conclude that Appellant failed to establish the existence of a violation, it is unnecessary for the Court to consider whether Landowners have demonstrated the elements of estoppel. Appellant's Question 4 regarding estoppel is hereby **MOOT**.

⁸ Appellant's continued misunderstanding of the violation he was required to prove is reflected in his Post Hearing Brief, wherein he emphasizes again that the "[c]urrent Zoning Administrator Ruth Robbins stated that knowing what she knows of the Elwells [sic] operation that she would issue a violation for running a commercial business." In other words, Appellant continues to focus on what is occurring on the property presently, and not on what was occurring at the time that the 2022 NOV issued.

⁹ The parties stipulated to the admission of Exhibits R and BB but only with respect to their authenticity. The stipulation was subject to the condition that Appellant would elicit witness testimony which would put these exhibits into context and explain their relevancy. Accordingly, those two exhibits were admitted into the record with the understanding that the Court will give them the weight they deserve. See V.R.E.C.P. 2(e) (affording discretion in the admission of evidence).

Conclusion

Based on the factual findings and legal conclusions above, we hereby conclude that Appellant failed to satisfy his burden of proving the commercial activities that were at issue in the 2022 NOV. Accordingly, we answer Question 1 in the negative. Because we conclude that there is insufficient evidence to support a violation, it is unnecessary to consider whether the Town should be estopped from enforcing the violation. Accordingly, Question 4 is **MOOT**.

The 2022 NOV is hereby **VACATED** with respect to the commercial use violation. The NOV still stands with respect to the driveway construction violation since that violation was not challenged by any party.

This completes the current proceedings before this Court. A Judgment Order accompanies this Merits Decision.

Electronically signed on October 25, 2024, pursuant to V.R.E.F. 9(d).

A handwritten signature in blue ink, appearing to read "Joseph S. McLean". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph S. McLean
Superior Court Judge
Environmental Division