



Lemelson CU Appeal

DECISION

This is an on-the-record appeal by Boulder Spring Farm, LLC, Five Roads Stowe, LLC, and PBF, LLC (together, Appellants) with an additional appeal by Kevin D’Arcy (Mr. D’Arcy) of a conditional use permit approved by the Town of Stowe (Town) Development Review Board (DRB) issued to Anjeza and Rev. Emmanuel Lemelson (together, Applicants) for the change in use of a chapel on Applicants’ property located on Edson Hill Road, Stowe, Vermont (the Property) from an accessory use to a principal use.

In this matter, Appellants and Mr. D’Arcy are represented by Elizabeth A. Conolly, Esq. Applicants are represented by Christopher J. Nordle, Esq. The Town is represented by David W. Rugh, Esq. and Beriah C. Smith, Esq.

I. Motion to Dismiss Mr. D’Arcy

Prior to addressing the merits of the matter before the Court, the Court must address Applicants’ motion to dismiss Mr. D’Arcy for failure to participate in the below hearings. Mr. D’Arcy and Appellants oppose the motion.

Applicants’ motion challenges Mr. D’Arcy’s standing to appeal the DRB’s decision to this Court. A party’s standing is a question of subject matter jurisdiction. Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 8, 182 Vt. 234 (citations omitted). Thus, we review the pending motion under the standard of review afforded by V.R.C.P. 12(b)(1). In re Main St. Place, LLC, Nos. 120-7-10 Vtec, 191-11-10 Vtec, et al., slip op. at 2 (Vt. Super. Ct. Env’tl. Div. June 19, 2012) (Durkin, J.). As such, we accept as true all uncontroverted factual allegations and construe them in a light most favorable to the nonmoving party. Rheume v. Pallito, 2011 VT 72, ¶ 2 (mem.).

Pursuant to 10 V.S.A. § 8504(b)(1), “an interested person, as defined by 24 V.S.A. § 4465, who has participated as defined in 24 V.S.A. § 4471 in the municipal regulatory proceedings under [Chapter

117] may appeal to the Environmental Division an act or decision made under [Chapter 117]” by an appropriate municipal panel. Participation is defined as “offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding.” 24 V.S.A. § 4471(a).

It is not disputed that Mr. D’Arcy did not testify at the DRB’s hearing on the conditional use application before the Court. Instead, Mr. D’Arcy argues that because he participated in a separate but interrelated proceeding, in which Applicants seek to subdivide the Property into three lots, one of which would contain the at-issue chapel in the pending appeal, his participation was sufficient to appeal the conditional use decision.¹

Mr. D’Arcy’s participation in the subdivision proceeding is insufficient to afford him party status to appeal the conditional use decision. As set forth in the court’s May 2, 2024 Entry Order denying Appellants’ and Mr. D’Arcy’s request to supplement the record in this action, the subdivision and conditional use proceedings and underlying applications heard by the DRB and on appeal to this Court are separate proceedings. In re Lemelson CU Appeal, No. 23-ENV-00098 (Vt. Super. Ct. Envtl. Div. May 2, 2024) (Walsh, J.). The matters were not merged or heard in a procedurally concurrent manner. Id. at 3. Thus, participation in one of the proceedings cannot meet the participation requirement in the other.

Further, Mr. D’Arcy argues that he attended the videoconference in which the DRB discussed the conditional use application. While his attendance is not within the record, even viewing those facts in the light most favorable to him, attendance, without offering any testimony, evidence, or statement of concern, is not enough to satisfy the requirements of 24 V.S.A. § 4471(a).² Section 4471(a) requires that a party make such an offer to the municipal panel to have participated in the proceedings.

Thus, we conclude that Mr. D’Arcy did not participate below and cannot qualify as an interested person under 10 V.S.A. § 8504(b)(1).

Mr. D’Arcy asserts in opposing the motion that the Court should still allow him to participate in this appeal as an appellant under 10 V.S.A. § 8504(b)(2), specifically subsection (A) or (C), which

¹ An appeal by Appellants and Mr. D’Arcy is pending before the Court in Docket No. 23-ENV-00097. While the appeals concern Applicants’ property, generally, the appeals have not been formally coordinated and the issues and regulations applicable in each matter are distinct.

² It is for the same reason that Mr. D’Arcy’s assertion that he believed that “points raised by other participants adequately captured his concerns with the conditional use permit” is insufficient to conclude that he participated before the DRB. See Appellants’ Opposition to Motion to Dismiss Appellant D’Arcy at 1 (filed on Apr. 17, 2024). At no point did Mr. D’Arcy or Appellants announce their intentions of statements made on Appellants’ behalf to also be presented on Mr. D’Arcy’s behalf. It was incumbent upon them to do so if that was the intention.

allows an interested person to appeal notwithstanding the failure to participate in the proceedings below when, in relevant part, “there was a procedural defect that prevented . . . participating in the proceeding; . . . [or] some other condition exists that would result in manifest injustice if the person’s right to appeal was disallowed.” 10 V.S.A. § 8504(b)(2)(A), (C).

Pursuant to V.R.E.C.P. 5(b)(3), a notice of appeal “must specify the party or parties taking the appeal and the statutory provisions under which each party claims party status” Mr. D’Arcy’s notice of appeal does not contain any reference to § 8504(b)(2) and instead restates the applicable standards to appeal under § 8504(b)(1), which require participation. See Notice of Appeal (filed on October 4, 2023). An appellant claiming party status under any provision of § 8504(b)(2) “must assert that claim by motion filed not later than the deadline for filing a statement of questions on appeal.” V.R.E.C.P. 5(d)(2). No motion was filed. Thus, Mr. D’Arcy is precluded from claiming party status under § 8504(b)(2).

For these reasons, Applicants’ motion to dismiss Mr. D’Arcy is **GRANTED** and Mr. D’Arcy is **DISMISSED**.³

II. On-the-Record Merits

a. Standard of Review

In an on-the-record appeal, this 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. 176-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Env’tl. Div. Sept. 2, 2011) (Durkin, J.). This Court has no authority to consider new evidence. See In re Lawrence Site Plan Approval, No. 166-10-10 Vtec, slip op. at 1 (Vt. Super. Ct. Env’tl. Div. 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. Env’tl. Div. Aug. 13, 2014) (Walsh, J.). Further, this Court has no authority to make our own factual determinations and, 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. When the Court examines whether there is substantial evidence in the record, it does not assess the credibility of witness testimony or reweigh conflicting evidence in the record. Devers-Scott

³ In similar circumstances, a party dismissed as an appellant may qualify as an interested person. At this juncture, a party seeking to obtain such status would need to submit a motion to intervene. There is no such motion before the Court.

v. Office of Prof'l Regulation, 2007 VT 4, ¶ 6, 181 Vt. 248; In re Appeal of Leikert, 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)).

When reviewing the underlying legal conclusions, the Court does so without deference, unless such conclusions are within the DRB's area of expertise. Stowe Highlands, 2009 VT 76, ¶ 7.

Our review is further 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 on appeal with these legal standards in mind, and within the context of the legal issues preserved by Appellants' Statement of Questions.

b. Factual Background

Applicants own property having an address of 484 Edson Hill Road, Stowe, Vermont (the Property). The Property is approximately 28.11 acres and is improved by an existing single-family home and a family chapel (the “Chapel”). The Property is located within both the RR-2 and RR-5 districts as defined by the Town of Stowe Zoning Regulations (the Regulations). The relevant portion of the Property at issue in this appeal is within the RR-2 District. Appellants own property across Edson Hill Road from the Property.

In 2017, the Chapel was constructed after receiving zoning approval from the Town Zoning Administrator as an accessory use at the Property (the Accessory Use Permit). The Accessory Use Permit was not appealed by any party. The Chapel is used by Applicants and friends and family as a personal place of worship.

As constructed, the Chapel is accessed by a driveway and there is parking available for service attendants. The Chapel is 60 feet from the property boundary. The Chapel is 27 feet high as measured at the top of Chapel dome and not inclusive of the decorative cross on top of the dome. The Chapel is largely screened from view from Edson Hill Road by existing vegetation.

In 2023, Applicants filed a Development Application with the Town Zoning Administrator. The application seeks approval to change the status of the Chapel from an accessory use to a primary use. Applicants separately and concurrently seek to create a 3-lot subdivision of the Property. See In re Lemelson Subdivision Appeal, No. 23-ENV-97. One of the proposed new lots would contain the

Chapel.⁴ The DRB held a public hearing on July 18, 2023. Appellants, through counsel, attended. The DRB issued a decision approving the application on August 1, 2023. This appeal followed.

c. Statement of Questions

Appellants raise 10 Questions in their Statement of Questions. They ask:

1. Whether the Stowe Development Review Board (herein after “DRB”) erred in finding that the existing chapel building meets the required sixty-foot (60’) front setback established by the RR2 District, as stated in Finding #3 of the Development Review Board decision #7140 issued August 1, 2023 (herein after “DRB Decision #7140”), which is an affirmative statement that is in direct conflict with condition (3)(b) of DRB Decision #7140?
2. Whether the DRB erred in their decision to issue an approval prior to confirmation that the chapel meets existing height and setback requirements given the evidence supplied at the hearing that indicated that the chapel was not built to the specifications submitted for the original administrative review?
3. Whether the DRB erred in referencing the existing chapel as a “accessory building or use” which is defined in Section 16.2 of the Town of Stowe Zoning Regulations Adopted May 23, 2022, effective June 12, 2022 (hereinafter “Zoning Regulations”) as “a building or use customarily incidental and subordinate to a principal building or use on the same lot, or on an adjoining lot under the same ownership”? . . .
4. Whether the DRB erred in finding that that the chapel, and its proposed change in use, meets landscaping and screening requirements pursuant to Section 3 .7(2)(B)(7) of the Zoning Regulations and more specifically 4.6 Specific Landscaping/Screening Standards of the Zoning Regulations referenced therein?
5. Whether the DRB’s failure to recognize that the original chapel was erroneously approved by the former Zoning Administrator through an administratively issued zoning permit, without proper Conditional Use Review, as required under Table 6.1 of the Zoning Regulations, created an inequitable and unbalanced review of the chapel under this current application?
6. Whether the DRB’s decision establishing the chapel as the principal use on the property results in limiting the further development of the parcel to only accessory uses as defined in Section 16.2 of the Zoning Regulations?
7. Whether the DRB erred by allowing two principal uses on one lot by approving the Applicant’s request for the chapel as the principal

⁴ The Court notes that in the subdivision matter, Applicants propose retaining a building site for a future single-family home on the proposed newly created lot that will also contain the Chapel. Approval of the construction of such a residence is not requested in that matter, nor is it requested in the pending appeal.

structure/use and approving the future construction of a 5-bedroom single-family residence on the same lot?

8. Whether the DRB erred in finding that Section 3.7(2)(A)(3) of the Zoning Regulations pertaining to the character of the area affected, could not be considered due to limitations on municipal review defined under 24 V.S.A. §4413?

9. Whether the DRB erred in finding that Section 3.7(2)(B)(1) of the Zoning Regulations — pertaining to undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas, could not be considered due to limitation on municipal review prescribed under 24 V.S.A. §4413?

10. Whether the DRB erred by not conditioning their approval to require the Applicant to reduce the reflective glare of the chapel dome, which conflicts with Conditional Use Criteria 3.7(2)(B)(1) of the Zoning Regulations and the purpose of the Rural Residential Districts as defined in Section 5.6(1)(A) of the Zoning Regulations?

Statement of Question (filed on September 20, 2023).

d. Discussion

Questions 3 and 5, related to the Accessory Use Permit and accessory nature of the Chapel, and Questions 8 and 9, related to the applicability of 24 V.S.A. § 4413(a), impact threshold issues related to the scope of the DRB’s review below and this issues before the Court on appeal. We therefore address these Questions first. The remaining Questions are addressed in order.

i. Questions 3 and 5: Import of Accessory Use Permit

Appellants’ Questions 3 and 5, as well as the bulk of their briefing on appeal, address the Accessory Use Permit issued for the Chapel.

“We strictly enforce the exclusivity of remedy provisions contained within [24 V.S.A.] § 4472 to require that all zoning contests go through the administrative and appellate review process in a timely fashion.” In re Ashline, 2003 VT 30, ¶ 10, 175 Vt. 203. The purpose of § 4472(d) is “the firm belief that there should, in fairness, come a time when the decisions of an administrative officer become final so that a person may proceed with assurance instead of peril.” Graves v. Town of Waitsfield, 130 Vt. 292, 295 (1972). As such § 4472 bars “any kind of collateral attack on a zoning decision that has not been properly appealed through mechanisms provided by the municipal planning and development statutes.” City of S. Burlington v. Dep’t of Corr., 171 Vt. 587, 588-89 (2000) (mem.). This includes zoning decisions that were *ultra vires* actions when entered into. Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 143 (1989).

Appellants argue that by applying to change the Chapel’s use from accessory to principal, the DRB could and should have questioned the merits of the Accessory Use Permit, which Appellants now argue was issued in error. While the application subjects the Chapel to conditional use review regarding the change of use, it does not subject the Accessory Use Permit to attack. The Accessory Use Permit is final and binding on all parties, including the DRB and this Court. 24 V.S.A. § 4472(d). Thus, we answer Question 3, which addresses the DRB’s reference to the Chapel as an “accessory building or use” in the negative, as the Chapel is permitted as an accessory use and the DRB did not err in referring to it as such.

Question 5, however, is a collateral attack on the final Accessory Use Permit beyond the jurisdiction of this Court. While the Question as written attempts to relate to the application presently before the Court, Appellants’ briefing, particularly Section I of their principal brief, makes clear that they attempt to challenge the merits of the Accessory Use Permit and its process through this appeal. This is barred by § 4472(d). As such, Question 5, and any other challenge Appellant makes to the merits of the Accessory Use Permit, is outside the scope of this Court’s jurisdiction and the DRB’s jurisdiction below. Therefore Question 5 is **DISMISSED**.

ii. Questions 8 and 9: 24 V.S.A. § 4413

Appellants contend through Questions 8 and 9 that the DRB erred in declining to apply character of the area and aesthetic conditional use standards to the Chapel pursuant to 24 V.S.A. § 4413.

Section 4413 sets limitations on municipal bylaws. Specifically relevant here, “churches and other places of worship . . .”:

[M]ay be regulated only with respect to location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, and only to the extent that regulations do not have the effect of interfering with the intended functional use[.]

24 V.S.A. § 4413(a)(1).

The Court’s goal when interpreting a statute is to give effect to the intent of the Legislature. State v. Therrien, 2011 VT 120, ¶ 9, 191 Vt. 24. To ascertain legislative intent, we begin by looking at the plain language of the statute. Flint v. Dep’t of Labor, 2017 VT 89, ¶ 5, 205 Vt. 558.

First, Appellants challenge whether the Chapel, which is for personal private use and not open to the public, is subject to § 4413(a)(1). Appellants assertion is without any support and contrary to

the rules of statutory interpretation. It is not disputed that the Chapel is a “place of worship.” Instead, Appellants challenge the nature of its private use.

There is nothing within § 4413 that would provide that public places of worship would be subject to limited zoning review, but private places of worship would not. To adopt Appellants’ construction of § 4413(a) would be to violate “a well-settled principle of statutory construction that [courts] will not read words into a statute that are not there, ‘unless it is necessary in order to make [the statute] effective.’” State v. Hale, 2021 VT 18, ¶ 14 (quoting State v. Fuller, 163 Vt. 523, 528 (1995) (quotation omitted) (emphasis in original)). The Legislature omitted a distinction between public and private places of worship and, in so doing, indicated an intent that all places of worship, public or private, are subject to limited zoning review as set forth in § 4413(a). Thus, we conclude that the Chapel is subject to the provisions of § 4413(a).

Second, Appellants argue that the DRB erred in concluding that it could not conduct a character of the area analysis of the Chapel under Regulations § 3.7(2)(A)(3) or analyze its compliance with Regulations § 3.7(2)(B)(1), which addresses impacts on “scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas.” Regulations § 3.7(2)(B)(1). This Court has previously held that a character of the area analysis of a project subject to § 4413(a)(1) is limited to the review criteria listed within § 4413(a)(1). In re Waitsfield Well House CU Application, No. 49-4-12 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Jan. 18, 2013) (Durkin, J.).⁵ This conclusion would similarly apply in the context of § 3.7(2)(B)(1).

Thus, the DRB’s review of the Chapel’s conformance with Regulations §§ 3.7(2)(A)(3) or 3.7(2)(B)(1) is limited to the Chapel’s “location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lightening, landscaping, and screening requirements.” 24 V.S.A. § 4413. The DRB did not err by limiting its review to the enumerated regulations and declining to conduct a broader analysis of the character of the area as defined in Regulations § 3.7(2)(A)(3) and § 3.7(2)(B)(1). Accordingly, we answer Questions 8 and 9 in the negative.

⁵ The Court notes that Waitsfield Well House addressed a relevant bylaw provision that mirrored the language of § 4413(a) and the constraints those two provisions placed on the ability to review the character of the area affected by a proposed project. The Court’s analysis remains relevant here.

iii. Question 1

Question 1 asks whether the DRB erred in finding that the Chapel complies with the relevant 60-foot setback, which Appellants assert contradicts Condition 3(b) of the DRB's decision, which requires that Applicants provide confirmation that the setback is met. We conclude that it did not.

Question 1 first challenges the DRB's factual findings as it relates to the Chapel's conformance with the 60-foot setback, which the Court interprets as a challenge to the evidence supporting that conclusion. Again, 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. Devers-Scott, 2007 VT 4, ¶ 6; Leikert, No. 2004-213, slip op. at 2 (Vt. Nov. 2004) (unpublished mem.).

The relevant setback in the RR-2 District is 60 feet. Testimony by Applicants' representative before the DRB shows that the Chapel complies with this setback.⁶ The site plan filed in connection with the application further shows that the Chapel is outside of the setback.

Appellants incorrectly state that the transcript reflects a conclusion by the DRB that the record lacked substantial evidence to support the finding. By contrast, it demonstrates that Applicants testified that the building was in compliance with setback requirements and that the Chapel's site plan also demonstrated this fact, but that the DRB thought it prudent to condition the permit on a verification of setbacks. See Transcript at p. 12. The DRB then so conditioned. The record supports the DRB's finding that the Chapel meets the 60-foot setback requirement and nothing with Condition 3(b) contradicts or undermines that finding. As such, we answer Question 1 in the negative.

iv. Question 2

Question 2 is slightly confusing but appears to address whether there was sufficient evidence in the record to support the DRB's findings that the Chapel met applicable height requirements.

In the RR-2 District, the maximum building height is 28 feet. The DRB found that the Chapel would have a maximum height at the peak of the dome of 27 feet, not including the cross. This is based on testimony presented by Applicants' representative and elevation plans provided by Applicants. Inclusive of the cross, the Chapel appears to be above 28 feet. To the extent that Appellants argue that the DRB required more or different evidence to support its conclusion, the Court disagrees. The evidence provided by Applicants is sufficient for a reasonable person to accept as adequate to support the DRB's findings. Devers-Scott, 2007 VT 4, ¶ 6.

⁶ To the extent that Appellants assert that the Chapel was built in a manner inconsistent with the Accessory Use Permit, Appellants provide no legal basis for their contention that the change of use permit should not have been approved due to the Accessory Use Permit.

Appellants argue that the DRB failed to analyze whether the Chapel dome would qualify as a “church steeple” that would not be subject to the 28-foot height requirement pursuant to Regulations § 3.5(1) when it concluded that the Chapel met the height limitations.⁷ With respect to the Chapel dome, generally, the Court finds no error. The DRB found that the Chapel, inclusive of the dome, was below the height requirement. Whether the dome was exempt from the height requirement or not is therefore immaterial to the conclusion that the Chapel met the height limitation of the RR-2 District.

Appellants next argue that the cross should have been included within the calculation for the Chapel’s height.⁸ It is clear that the DRB concluded that the cross was not a part of the Chapel’s height. Not including the decorative cross in the height of the Chapel is consistent with Regulations § 3.5(1), which states that “church steeples . . . or similar structures” are not subject to the height limit.

When interpreting a zoning regulation, however, we apply the rules of statutory construction. In re Lathrop P’ship I, 2015 VT 49, ¶ 22, 199 Vt. 19 (citation omitted). We will “construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. Further, “because zoning ordinances ‘are in derogation of private property rights,’ they must be construed narrowly in favor of the property owner.” Lathrop P’ship I, 2015 VT at ¶ 29 (quoting In re Champlain Oil Co., 2014 VT 19, ¶ 2, 196 Vt. 29)). As such “we must resolve any ambiguity in favor of the landowner.” In re Confluence Behavioral Health, LLC, 2017 VT 112, n. 6, 206 Vt. 302.

The decorative cross is substantially similar to a church steeple. A “steeple” is “a tall structure usually having a small spire at the top and surmounting a church tower.” Merriam-Webster Online (“Steeple”) (available at <https://www.merriam-webster.com/dictionary/steeple>). The decorative cross here is even more specific adornment to the Chapel as it surmounts the Chapel’s dome. Further, to the extent there is ambiguity within § 3.5(1), it must be resolved in favor of Applicants. Confluence Behavioral Health, LLC, 2017 VT at n. 6. Thus, the DRB properly disregarded the decorative cross from the measurement of the Chapel.

Finally, to the extent this Question asks whether the DRB erred in concluding that the Chapel met the height requirement due to discrepancies between the present application and the Accessory Use Permit application. The Chapel’s compliance with the terms of the Accessory Use Permit is not

⁷ The Court notes that this issue is not explicitly raised within any of Appellants’ Questions. To the extent, however, that it, is intrinsic to any Question, the Court addresses it.

⁸ Appellants have not adequately briefed this issue but, to the extent it is raised in their challenge to the Chapel dome’s height, we address it.

before this Court in this appeal and Appellants provide no legal basis for their contention that the change of use permit should not have been approved due to the Accessory Use Permit. Further, the documents cited by Appellants demonstrate that the Chapel, inclusive of the dome but exclusive of the decorative cross, is 27 feet 11 inches and therefore below the 28-foot height limitation in the RR-2 District. Appellants present no basis to conclude that this discrepancy necessitate the denial of the present application.

Thus, the Court answers Question 2 in the negative.

v. Question 4

Question 4 addresses the DRB's conclusions with respect to Regulations §§ 3.7(2)(B)(7) and § 4.6, which address landscaping and screening. Specifically, Appellants assert that the DRB should not have approved the conditional use permit absent a landscaping plan.

Applicants did not provide a separate landscaping plan with their application. Pursuant to Regulations § 3.8(2)(3), a landscaping plan is to show details “of all new plantings proposed” and other landscaping elements and “when appropriate” may be included within a site plan. Applicants provided a site plan for the Chapel in connection with the application showing existing and proposed tree lines. Applicants do not propose new plantings and, therefore, the landscaping plan was not required. The proposed landscaping, which largely includes the retainment of existing vegetation between Edson Hill Road and the Chapel and other existing vegetation and trees on the Property are depicted on the site plan. Regulations § 3.8(2)(3) specifically states that this information may be provided on a site plan “where appropriate.” It is appropriate here where Applicants do not propose new plantings and/or landscaping elements but instead propose to retain the existing landscaping and vegetation. Thus, the DRB's failure to require Applicants to provide a separate landscaping plan was not in error.

To the extent that this Question addresses the sufficiency of the screening provided, the Court concludes that the DRB's findings that the Chapel is adequately screened is supported by substantial evidence and uphold its conclusions of law. While Appellants repeatedly asserted that the Chapel is visible from Edson Hill Road and their properties, the DRB received photographs showing that the Chapel is heavily screened by the existing vegetation between Edson Hill Road and the Chapel. This was consistent with testimony provided as to the Chapel's screening by existing vegetation. The existing vegetation is proposed to remain. The Court does not reweigh credibility in an on-the-record appeal and finds there is substantial evidence in the record to support the DRB's finding that the Chapel was adequately screened. We therefore answer Question 4 in the negative.

vi. Questions 6

Question 6 addresses whether future development on the Property is limited if the Chapel is a principal use on the Property. This Question seeks an advisory opinion outside the scope of this Court's jurisdiction.

“Courts are not authorized to issue advisory opinions because they exceed the constitutional mandate to decide only actual cases and controversies.” In re Snowstone, LLC Stormwater Discharge Authorization, 2021 VT 36, ¶ 28. As such, issues presented on appeal “must be a necessary part of the final disposition of the case to which it pertains.” Baker v. Town of Goshen, 169 Vt. 145, 151—52 (1999) (citing Wood v. Wood, 135 Vt. 119, 121 (1977)).

This Court has “an independent obligation to determine whether subject matter jurisdiction exists.” In re Charron 13-Lot PUD Preliminary Plat, No. 24-3-19 Vtec, slip op. at 1 n.1 (Vt. Super. Ct. Envtl. Div. June 7, 2009) (Durkin, J.) (quoting Argbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006)). As such, this Court may sua sponte dismiss Questions under V.R.C.P. Rule 12(b)(1) for lack of subject matter jurisdiction. See In re Town Highway 26, Town of Underhill, No. 2014-386, 2015 WL 2383677, at 2 (Vt. May 14, 2015) (unpublished mem.); see also Gould v. Town of Monkton, 2016 VT 84, ¶ 6, 202 Vt. 535.

Before the Court is a conditional use application to convert the Chapel from an accessory use on the Property to a principle use on the Property. The Court is limited in its jurisdiction to that issue and application. The DRB could not have issued a decision as to the scope of future development or applications not before it, nor can this Court on appeal. As such, Question 6 requests an impermissible advisory opinion and it is **DISMISSED**.

vii. Question 7

Question 7 asks whether the DRB erred in allowing two principal uses on one lot by granting the permit to change the use of the Chapel “and approving the future construction of a 5-bedroom single-family residence on the same lot[.]” Statement of Questions (filed on Sept. 20, 2023).

In the decision on appeal, the DRB did not approve the future construction of a residence on the same lot as the Chapel. While in a separate action for subdivision of the Property, the Town approved the subdivision, which identified a future proposed house site on the same new lot as the Chapel, that was not before the DRB in the change of use application and the DRB did not decide the issue Appellants challenge through Question 7. Thus, the DRB did not err as challenged by Appellants through this Question and we answer Question 7 in the negative.

Alternatively, to the extent that this Question seeks a ruling from this Court that it would be in error in another appeal or application to seek two principal uses on a lot that contains the Chapel, the Question seeks an advisory opinion which, for those reasons set forth above with respect to Question 6, is outside the scope of this Court's jurisdiction.⁹

viii. Question 10

Question 10 asks whether the DRB erred by not conditioning the approval on Applicant reducing reflective glare from the Chapel dome under Regulations § 3.7(2)(B)(1) and § 5.6(1)(A).

Section 3.7(2)(B)(1) addresses a conditional use application's impact on "scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas." As set forth above, 24 V.S.A. § 4413(a) limits review of the Chapel to its "location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, and only to the extent that regulations do not have the effect of interfering with the intended functional use." As set forth above, the Chapel's compliance with § 3.7(2)(B)(1) may only be addressed within the limited scope of § 4413(a). Waitsfield Well House CU Application, No. 49-4-12 Vtec, slip op. at 4 (Jan. 18, 2013) (Durkin, J.).

The DRB found that the Chapel was adequately screened by existing vegetation and landscaping and that it could not more fully address Regulations § 3.7(2)(B)(1) under § 4413(a). For the reasons set forth above with respect to Question 4, we conclude that the DRB's finding that the Chapel was adequately screened by existing vegetation and landscaping is supported by substantial evidence in the record. In their reply brief Appellants assert that the DRB could have, and should have, considered requiring the Chapel dome to be painted to mitigate aesthetic impacts. Appellant presents no basis within the context of § 4413(a) to require this additional condition on the Chapel under the Regulations in light of the supported finding that the Chapel was adequately screened from view. Thus, we conclude that the DRB did not err in failing to require additional conditions regarding the Chapel dome. Accordingly, we answer Question 10 in the negative.

Conclusion

For the foregoing reasons, we conclude that Mr. D'Arcy failed to participate in the proceedings before the DRB and is therefore not entitled to appeal its decision to this Court. He is therefore **DISMISSED**. We conclude that the DRB's findings are supported by substantial evidence in the

⁹ Because the Court dismisses Question 6 and concludes Question 7 does not address a conclusion before the Court, the parties' dispute with respect to whether the Property's compliance with density standards were properly raised in this appeal is irrelevant.

record. Further, we conclude that Appellants' Questions 5 and 6 are **DISMISSED** as outside the scope of this Court's jurisdiction. All other Questions are answered in the negative and the DRB's decision is **AFFIRMED**.

This concludes the matter before the Court. A Judgment Order accompanies this Decision. Electronically signed this 1st day of November 2024 pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, slightly stylized font.

Thomas G. Walsh, Judge
Superior Court, Environmental Division