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

Docket No. 25-ENV-00025

46 Makalas Way ZA Permit Decision

ENTRY REGARDING MOTION

Motion: Motion to Dismiss

Filer: Brian P. Monaghan, Attorney for the Town of Thetford

Filed Date: July 1, 2025

Memorandum in Opposition to Motion to Dismiss, filed July 30, 2025 by Appellant Christopher Luce.

Reply in Support of Motion to Dismiss, filed August 13, 2025 by Attorney Monaghan.

The Motion is GRANTED.

This is an appeal of a Town of Thetford Development Review Board Decision, dated March 18, 2025, denying Chrisopher Luce's (Appellant) appeal of the Thetford Zoning Administrator's issuance of a zoning permit on May 12, 2022 (the 2022 Zoning Permit). Specifically, the 2022 Zoning Permit authorized the construction of a new residence with a driveway, garage, and breezeway for the property located at 46 Makalas Way, East Thetford, Vermont. The Town moves to dismiss this appeal as untimely.

Legal Standard

When reviewing a motion to dismiss for lack of subject matter jurisdiction, we accept the uncontroverted facts as true and construe them in the light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. "A court may consider evidence outside the pleadings in resolving a motion to dismiss for lack of subject matter jurisdiction." Vermont Hum. Rts. Comm'n v. Town of St. Johnsbury, 2024 VT 71, ¶ 6 (citing Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11).

Discussion

Pursuant to 24 V.S.A. §§ 4471 and 4472(a), the "exclusive remedy" for a party seeking to challenge a municipal act or decision, is to file a timely appeal in this Court. If an appeal is not taken, or is not taken in a timely manner, then the underlying act or decision becomes final and cannot be

contested "directly or indirectly" in subsequent proceedings. 24 V.S.A. § 4472(d); see also Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 142 (1989). Appeals to the Environmental Division from an act or decision of an appropriate municipal panel must be filed within 30 days of the decision "unless the court extends the time as provided in Rule 4 of the Vermont Rules of Appellate Procedure." V.R.E.C.P. 5(b)(1).

If an appeal is timely filed, our jurisdiction is then limited by the filing of the Statement of Questions. V.R.E.C.P. 5(f) ("The appellant may not raise any question on the appeal not presented in the statement as filed…."); In re LaBerge NOV, 2016 VT 99, ¶ 15, 203 Vt. 98 ("as a general rule the statement of questions defines the Environmental Division's jurisdiction on appeal."). A Statement of Questions must not be overly vague and must provide notice to the Court and parties of the issues on appeal. Champlain Parkway SW Discharge Permit, No. 76-7-18 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. April 29, 2019) (Durkin, J.); In re Couture Subdivision Permit, No. 53-4-14 Vtec, slip op. at 2–3 (Vt. Super. Ct. Envtl. Div. July 17, 2015) (Durkin, J.) (dismissing a question that did not reference any specific provisions, just the applicable regulations generally).

In reviewing Appellant's response to the Town's motion, as well as his Statement of Questions, it is abundantly clear that Appellant seeks to collaterally attack a Zoning Permit issued on May 12, 2022 (the 2022 Zoning Permit) by the Thetford Zoning Administrator and/or raise issues that are not within this Court's jurisdiction.

As a preliminary issue, we note that most of Appellant's twenty-five (25) Questions in his Statement of Questions reflect a misunderstanding of this Court's standard of review. With limited exceptions, not relevant here, we review appeals de novo. 10 V.S.A. § 8504(h). As such, we hear the case "as though no action whatever has been held prior thereto." Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989). Therefore, we generally do not consider the underlying decision of, or proceedings before, the municipal panel below, but "rather, we review the [case] 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.). Questions asking whether a Zoning Administrator or Development Review Board erred are not considered by the Court because we do not have the jurisdictional authority to assess the propriety of the decisions made below. Lancaster SD Application, No. 1-1-14 Vtec. slip op. at 4 (Vt. Super. Ct. Envtl. Div. Apr. 1, 2015) (Durkin, J.).

Here, Appellant's Questions primarily ask whether the Zoning Administrator or DRB erred/failed in their review of the 2022 Zoning Permit application in one way or another. As framed, this Court cannot answer those questions. They do not ask whether a current activity or application

complies with any specific provision of the Town's zoning regulations. Questions 1–4, 6–10, 12—14, 16—17, and 20—21 are, therefore, all improper in this regard.

Even if the Questions were properly phrased for a de novo review, they are deficient in various other ways. Most importantly, it is clear through the Questions, and Appellant's response to the Town's motion, that Appellant seeks to collaterally attack the merits of the 2022 Zoning Permit. In the introduction to his Statement of Questions, Appellant writes that "[m]ost of the questions center on whether… the ZA gathered enough and appropriate information to issue the 46 Makalas Way Zoning Permit." Appellant's Statement of Questions, filed April 25, 2025. Because the 2022 Zoning Permit was not appealed, it cannot be challenged directly or indirectly through a petition for enforcement. This includes issues such as whether the permit was based on sufficient information, or whether the application contained all the materials required by the regulations. Questions 1—9, 14, and 18 all seek to challenge final and binding aspects of the 2022 Zoning Permit. Accordingly, those Questions are **DISMISSED**.

Appellant's Questions 10, 11, 20, 21, and 22 reference a driveway permit issued by the Town in October 2023 (the 2023 Driveway Permit). These Questions similarly seek to collaterally attack the unappealed Driveway Permit. Any questions about the Town's authority to issue such a permit needed to be raised in a timely appeal of that permit. Appellant cannot now seek to challenge any aspects of the 2023 Driveway Permit (including, without limitation, the culvert sizing), which are now final and binding.[1] Additionally, the 2023 Driveway Permit appears to have been issued by the Town of Thetford Selectboard pursuant to its authority under 19 V.S.A. § 1111, and not under a zoning bylaw adopted pursuant to 24 V.S.A. Chapter 117. Therefore, this Court has no jurisdiction over the Driveway Permit or issues arising thereunder. See 4 V.S.A. § 34 (listing the statutes which this Court has jurisdiction over). Upon further review of the Zoning Bylaws, there are no provisions dealing with driveways and culverts. Accordingly, Questions 10, 11, 20, 21, and 22 are outside this Court's jurisdiction and are **DISMISSED**.

Appellant's Questions 12, 13, 15, and 16 ask generally whether the ZA and DRB have provided "proper oversight" over the Property and whether they have failed to "inspect and determine" whether zoning violations exist. These Questions are overly broad and fail to reference any specific alleged zoning violations for this Court to consider. The Zoning Administrator has a legal duty to take action to "prevent, restrain, correct, or abate" zoning violations. 24 V.S.A. § 4452. Appellant's

[1] Also, Question 11 is a run-on sentence phrased as a Question, but it does not appear to ask anything for this Court to answer.

Questions 12, 13, 15, and 16 simply seek a restatement of that law without referencing any alleged zoning violations. Accordingly, Questions 12, 13, 15, and 16 are **DISMISSED**.

Question 17 asks whether a digital recording of the DRB's hearing would be admissible evidence to demonstrate that the ZA was not meeting their duties and obligations. As explained above, this Court reviews appeals de novo and is not concerned with what happened before the DRB or what a ZA may or may not have done with an application. Accordingly, Question 17 is **DISMISSED**.

Question 19 asks "how do abutting landowners report or respond to developments that seem not to conform to zoning bylaws." This question seeks an impermissible advisory opinion as well as legal advice from the Court. See In re Snowstone LLC Stormwater Discharge Authorization, 2021 VT 36, ¶ 28, 214 Vt. 587 (explaining the prohibition against advisory opinions). This Court cannot give a party legal advice and instead can only answer whether an actual activity is in violation of the Bylaws. Accordingly, Question 19 is **DISMISSED**.

Finally, Appellant's Questions 23 through 25 ask generally about septic mounds and their impacts on wetlands. All of these Questions, as phrased, seek impermissible advisory opinions. For example, Question 23 asks whether the placement of a septic mound, generally, poses a danger of contamination to Vermont's surface water. The Question does not ask whether the septic mound on the 46 Makalas Way property complies with any specific provision of the Bylaws. Question 24 asks, generally, whether the landowner must "follow literally" the septic designer's septic design plan without approval for modifications from the Vermont Agency of Natural Resources (ANR). This is an appeal from a DRB decision upholding the ZA's determination that no violation of the 2022 Zoning Permit has occurred. Neither the DRB, nor this Court, are authorized to review and generally opine regarding ANR's authority over modifications to the wastewater system. Lastly, Question 25 asks whether the Town has the authority, generally, "to order setbacks of a septic mound from a traveled way." Again, our job is not to answer questions about a Town's authority to administer its regulations, but to determine de novo whether there is a violation of its regulations. Thus, Question 25 seeks an advisory opinion which this Court cannot answer.

Furthermore, any challenges to the location of the septic/wastewater mound are a collateral attack on the 2022 Zoning Permit because issues regarding location should have been raised in an appeal of that permit. The application associated with that permit contained a hand drawn sketch plan which identified a general location for the wastewater disposal system. Because the permit only identified a general location for the system, which does not contain setback distances, this Court would

be unable to even determine whether the project as built complies with the 2022 Zoning Permit. If Appellant had concerns regarding the location of the wastewater system, his opportunity to raise those concerns was through an appeal of the 2022 Zoning Permit. Because that permit was not appealed, Appellant cannot now challenge the location of the septic mound. For all these reasons Questions 23, 24 and 25 are **DISMISSED**.

Conclusion

For the foregoing reasons, we conclude that this Court lacks jurisdiction over the entirety of Appellant's Statement of Questions. The majority of the Questions seek to collaterally attack final and binding aspects of the 2022 Zoning Permit. The remaining Questions are overly broad and seek impermissible advisory opinions from the Court. Accordingly, we hereby **DISMISS** Questions 1 through 25 of Appellant's Statement of Questions, which leaves this Court with no proper issues to adjudicate. Accordingly, the appeal in its entirety is **DISMISSED**.

This concludes the matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed on August 19, 2025, pursuant to V.R.E.F. 9(d).

Joseph S. McLean
Superior Court Judge
Environmental Division