



Zoning Permit #2025-46-ZP Appeal Dismissal

DECISION ON MOTION TO DISMISS

Title: Motion to Dismiss Questions 2 and 4 (Motion: #3)

Filer: Shane Elwell and Kelly Elwell, pro se

Date: August 6, 2026

Opposition to Motion to Dismiss, filed August 21, 2026, by George Abad, Pro Se

The motion is GRANTED.

This matter involves an appeal by George Abad (Appellant) of the Town of Warren (Town) Development Review Board (DRB)'s decision upholding a zoning permit for construction of a single-family home off Fern Road (Parcel ID #417184), Warren, Vermont (the Property). Applicants Shane and Kelly Elwell (Applicants), who are self-represented, have moved to dismiss Questions 2 and 4 of Appellant's Statement of Questions. Appellant, who is also self-represented, opposes the motion.

On April 17, 2026, Appellant filed a four-question Statement of Questions with the Court. Question 2 asks: "Did the Warren DRB rule 'there is no current violation on the property' without investigating or receiving evidence as to the violation of Warren regulations Article 4.8, Sec A, 1-7 Home Based Business (Home Occupation, Cottage Industry)?" Similarly, Question 4 asks: "Is Shane Elwell in violation of Warren regulations Article 4.8, Sec A, 1-7 Home Based Businesses (Home Occupation, Cottage Industry)?"

During a status conference on August 3, 2026, the Court explained that neither it, nor the DRB, have jurisdiction over questions related to zoning violations that have not first been addressed by the Town's zoning administrator. Accordingly, the Court stated it would entertain a motion to dismiss Questions 2 and 4 should the Applicant(s) choose to file one.¹ Applicants subsequently filed the instant motion, arguing that the Court lacked subject matter jurisdiction over Questions 2 and 4. In response, Appellant, while acknowledging that "this appeal concerns the issuance of Zoning Permit No. 2025-46-ZP," states that Questions 2 and 4 "pertain directly to the complaint that was presented to the Zoning Enforcement Officer ... at the time the complaint was filed" and that "those questions concern the operation of an excavating and firewood-processing business on the property that, at the

¹ Following the August 3, 2026 status conference, Kelly Elwell entered an appearance in this matter, joining her husband, Shane Elwell, as an Applicant/Appellee before the Court.

time of the complaint and appeal, was alleged to be operating without the required zoning approval and permits.” Opposition at 1. Appellant argues that these issues are relevant to the appeal and “were intended to identify and address zoning violations and circumstances that formed the basis for the complaint to the ZA and subsequent appeal.” Id.

Except in the case of an on-the-record appeal under V.R.E.C.P. 5(h), all questions of law or fact as to which review is available before this Court are revolved by trial de novo. V.R.E.C.P. 5(g). In such a de novo appeal, our role is to apply “the substantive standards that were applicable before the tribunal appealed from.” Id.; 10 V.S.A. § 8504(h). We are directed to apply those standards anew, “as though no prior action had been taken.” In re: Gizmo Realty/VKR Assocs., Docket No. 199-9-07 Vtec, slip op. at 4 (Vt. Env'tl. Ct. Apr. 30, 2008) (Durkin, J.) (quoting In re: Unified Buddhist Church, Inc. Indirect Discharge Permit, Docket No. 253-10-06 Vtec, slip op. at 4 (Vt. Env'tl. Ct. July 31, 2007) (Wright, J.); In re: Miller Conditional Use Application, Docket No. 59-3-07 Vtec, slip op. at 6 (Vt. Env'tl. Ct. Nov. 5, 2007) (Durkin, J.)). In the context of this appeal, because we are directed to apply the standards contained in the Warren Land Use and Development Regulations (Regulations) as if the DRB had not acted on this appeal, the question of how the DRB ruled, or what the DRB did or did not do to investigate the alleged violation(s) is beyond the scope of this appeal. In other words, it is irrelevant in the context of this de novo proceeding what was said by or before the DRB or whether the DRB ruled a particular way without investigating or receiving evidence regarding the alleged violation(s).² Therefore, we DISMISS Question 2 as not applicable to the issues that we will address in this de novo proceeding.³

Question 4 asks whether Mr. Elwell is in violation of Warren’s Regulations regarding Home Based Businesses.⁴ While that may be a relevant issue for consideration by the Zoning Administrator, it is not directly relevant to the permit issued by the Town for a single-family residence on the Property absent some direct link between permitting and enforcement in the applicable Regulations. Stated differently, because the Court will apply the standards in the Warren Land Use and Development Regulations anew, we will only consider prior violations if the Regulations so require or allow. See In re: Irish Construction Application, No. 44-3-08 Vtec, slip op. at 6 (Vt. Env'tl. Ct. Sept. 9, 2008) (Durkin, J.). In his response to the Motion to Dismiss, Appellant argues that the alleged violations are relevant to the permit, but he fails to identify any provision of the Regulations that would require the Zoning Administrator, or this Court on appeal, to determine whether a violation exists as a prerequisite to permit issuance. Certainly, a zoning violation may exist independently from permitting and may be enforced even where the permit functionally cures the violation, but without a regulatory

² Appellant’s responsive filing indicates a desire to present video evidence of what occurred before the DRB to the Court during trial, but for the same reasons discussed above such evidence is irrelevant and inadmissible.

³ We again note that it is generally not the role of the DRB to investigate alleged zoning violations—that is typically the responsibility of the Zoning Administrator in the first instance.

⁴ As noted above, the pending matter arises from the Town’s issuance of a zoning permit to Applicants to construct a single-family residence on the Property. Based on discussion during the August 3, 2026 status conference, the Court understands that the single-family dwelling has already been constructed on the Property. Therefore, it is not clear to the Court whether the commercial use violations alleged by Appellant are continuing or only occurred in the past. We also put aside, for the purposes of this discussion, that: (1) in Docket No. 23-ENV-00015, a case involving these same parties and the same Property, the Court ruled that Appellant failed to establish the existence of a violation for commercial use of the Property (i.e., storage of large vehicles and equipment for excavating and firewood processing) and therefore we vacated a 2022 NOV issued by the Town (and that decision was not appealed) and (2) the Town has not commenced a new zoning enforcement action alleging commercial use violations.

provision that ties the two issues (permitting and enforcement) together, there is no basis to deny a permit simply because a violation may exist on the Property. See Application of Carrier, 155 Vt. 152, 161 (noting in parenthetical that another Court's refusal to grant a conditional use permit based on a violation of a prior permit "improperly transformed zoning application proceedings into an enforcement process.") Appellant has not directed us to any such provision. We therefore also DISMISS Question 4 as not applicable to the issues that we will address in this *de novo* proceeding.

For the foregoing reasons, we GRANT Applicants' Motion to Dismiss Questions 2 and 4. A merits hearing on the remaining questions (Questions 1 and 3) has been set for September 25, 2026, and the Court will convene a final pretrial conference on September 14, 2026 to discuss the presentation of evidence at trial.

Electronically signed on August 26, 2026, pursuant to V.R.E.F. 9(d).

A handwritten signature in blue ink, appearing to read "Joseph S. McLean", with a stylized flourish at the end.

Joseph S. McLean
Superior Court Judge
Environmental Division