

VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
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Docket No. 21-ENV-00105

267 Summer Point CU Appeal

ENTRY REGARDING MOTIONS

Title: Motion to Restrain/Enjoin Applicant (Motion #2)

Filer: Appellant Jeffrey C. Tweedy, a self-represented litigant

Filed Date: May 16, 2022

Memorandum in Opposition filed on May 24, 2022, by Kevin L. Kite, attorney for the Town of Ferrisburgh

Title: Motion to Dismiss or Limit Revised Questions (Motion #3)

Filer: Kevin L. Kite, attorney for the Town of Ferrisburgh

Filed Date: May 19, 2022

Response filed on July 5, 2022, by Appellant Jeffrey C. Tweedy

Reply to Memo in Opposition filed on July 12, 2022, by Attorney Kite

Title: Motion to Dismiss for Lack of Jurisdiction (Motion #6)

Filer: Kevin L. Kite, attorney for the Town of Ferrisburgh

Filed Date: August 2, 2022

Memorandum in Opposition filed on August 10, 2022, by Appellant Jeffrey C. Tweedy, a self-represented litigant

Reply to Memo in Opposition filed on August 11, 2022, by Attorney Kite

Motion #6 is GRANTED. Motions #2 and #3 are MOOT.

Appellant Jeffrey Tweedy, representing himself, initiated this appeal from a decision issued by the Town of Ferrisburgh's Zoning Board of Adjustment ("ZBA") on September 17, 2021, which granted Applicant Clara Comeau's conditional use application for a 20-foot by 12-foot deck on the Property. While Applicant only requested permission for the deck in her application, the ZBA also discussed the presence of campers on the Property in the decision ("ZBA Decision") and placed limits on the number of campers and number of days each camper could park on the Property in the conditions of approval.

In the first of the pending motions (Motion #2), Appellant Jeffrey Tweedy seeks to have the Court enjoin Applicant from moving a camper onto the lot she owns at 267 Summer Point in the Town of Ferrisburgh, VT, as she has done seasonally in prior years. The Town of Ferrisburgh (the “Town”), represented by Attorney Kite, opposes Appellant’s Motion to Enjoin and has filed a Motion to Dismiss or Limit Appellant’s Revised Statement of Questions (Motion #3). Applicant has entered an appearance in this matter but did not submit briefing on the pending motions.

The Court does not reach the merits of Motion #2 or Motion #3 in this Order because we find it necessary to grant the Town’s Motion to Dismiss for Lack of Jurisdiction (Motion #6) based on the record before us. Our decision on Motion #6 renders the other two motions moot.

In Motion #6, the Town argues that the Court does not have jurisdiction over this appeal because Appellant did not file the Notice of Appeal within the 30-day period provided by Rule 5(b)(1) of the Vermont Rules of Environmental Court Proceedings for bringing appeals. On a motion to dismiss for lack of subject-matter jurisdiction, pursuant to V.R.C.P. 12(b)(1), the Court accepts all uncontroverted factual allegations as true for the purposes of the motion and construes them in the light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. The Court can also consider evidence outside the pleadings when resolving this type of motion. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11.

In order for this Court to have jurisdiction over an appeal, the appellant must file a notice of appeal within 30 days of the issuance of the final decision under appeal. V.R.E.C.P. 5(b)(1); In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 13, 206 Vt. 559 (“the appeal period is triggered by the date of the decision, not the date of notice”). Here, the parties agree that the ZBA issued its final decision on Ms. Comeau’s application on September 17, 2021. Thirty days after September 17 was October 17, which was a Sunday. When the last day of the appeal period falls on a weekend or a legal holiday, the time continues to run until the end of the next day the Court is open. V.R.C.P. 6(a). Consequently, the deadline to file an appeal from the ZBA Decision was Monday, October 18, 2021.

The Court finds that Appellant’s Notice of Appeal was filed one day after the end of the appeal period, on October 19, 2021, as that is the date listed on the official date-stamp at the top of the Notice of Appeal document. The Court’s general practice is to date-stamp documents on the day of receipt. Appellant has not given the Court any reason to find that we received the notice of appeal prior to October 19, 2021.¹

In response to the Town’s motion, Appellant states that he mailed the Notice of Appeal at some point prior to October 15, 2021, leaving what he believed should have been enough time for the U.S. Postal Service to deliver it by the end of the appeal period. Assertions about the date he sent the Notice of Appeal have no bearing on its timeliness, however. Our jurisdiction over this appeal depends on *receipt* of the notice of appeal by the last day of the appeal period. *See* Reporter’s Notes, V.R.E.C.P. 5(b)(1) (“the date of receipt by the court . . . determines whether the 30-day filing deadline

¹ Appellant may file a motion to reconsider under V.R.C.P. 59 if there are facts not currently in the record that demonstrate receipt of the Notice of Appeal within the appeal period. *See Old Lantern Non-Conforming Use*, No. 154-12-15 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Sep. 13, 2017) (Durkin, J.) (explaining the grounds for reconsideration, which include the presentation of “newly discovered or previously unavailable evidence”).

has been met”). *See also*, In re Jericho Market Act 250, No. 1-1-16 Vtec, slip. op. at 1 (Vt. Super. Ct. Env’tl. Div. Mar. 2, 2016) (Walsh, J.) (“a notice of appeal is considered filed on the date it is received and not the date it is mailed”); Banyai Zoning Permit Appeal, No. 21-ENV-00084 Vtec, slip op. at 3 (Vt. Super. Ct. Env’tl. Div. Oct. 13, 2021) (Durkin, J.) (same).

Appellant bore the responsibility of ensuring that the Court received the Notice of Appeal on or before October 18, 2021, regardless of any delays the U.S. Postal Service may have been experiencing. Nor does Appellant’s “travel schedule” provide grounds for entertaining his request that the Notice of Appeal be “deemed” to be received on October 15, 2021, as he asks in the “Annex” attached to the Notice of Appeal. If Appellant did not leave enough time to send the Notice of Appeal by mail, or did not trust the timeliness of that method of delivery, he could have pursued other means of ensuring that the Court received the Notice within the appeal period.

The jurisdictional nature of the 30-day appeal period means that we are also bound by the timeline and have very little discretion to extend it. *See In re Gulli*, 174 Vt. 580, 583 (2002) (“[f]ailure to file a timely notice of appeal brought under [24 V.S.A.] § 4471 deprives the environmental court of jurisdiction over that appeal”). The Court may only allow an untimely appeal in the limited circumstances expressly set out by statute. *See Banyai Zoning Permit Appeal*, No. 21-ENV-00084 Vtec, slip op. at 3 (Vt. Super. Ct. Env’tl. Div. Oct. 13, 2021) (Durkin, J.) (“we are unable to provide more extensions than our rules explicitly allow”). While V.R.E.C.P. 5(b)(1) allows extensions to the appeal period as provided by V.R.A.P. 4, the Court cannot apply the exceptions under that rule to this matter.

Appellant did not move to reopen or extend the appeal period under V.R.A.P. 4(c) or 4(d), and the time for doing so has now passed. *See* V.R.A.P. 4(c) – (d) (setting time limits for both). Further, V.R.A.P. 4(c) permits reopening the time to file based on lack of notice, which Appellant has not alleged. Under V.R.A.P. 4(d), even if we construed Applicant’s request in the Annex to the Notice of Appeal to be a motion for an extension of time, a generous interpretation even considering the leeway traditionally afforded to *pro se* litigants, he has not shown the “excusable neglect or good cause” that the rule requires. V.R.A.P. 4(d)(1)(B). Appellant’s travel schedule does not create good cause for missing the filing deadline, and “ignorance of the law or inattention to detail rarely constitutes excusable neglect.” *See Capitol Plaza Act 250*, No. 59-5-19, slip op. at 2 (Vt. Super. Ct. Env’tl. Div. Aug. 01, 2019) (Walsh, J.), (citing *In re Lund*, 2004 VT 55, ¶¶ 5 - 6, 177 Vt. 465).

Appellant failed to file the Notice of Appeal within the appeal period set by V.R.E.C.P. 5(b)(1). We consequently lack subject-matter jurisdiction over this appeal and must **GRANT** the Town’s Motion #6. As a result of this decision, Motion #2 filed by Appellant and Motion #3 filed by the Town are **MOOT**. A Judgment Order disposing of this appeal accompanies this Order.

Electronically signed August 29, pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized, with the first name "Tom" and last name "Walsh" written in a cursive-like script.

Thomas G. Walsh, Judge
Superior Court, Environmental Division