VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 22-ENV-00107

Bicknell Trust Zoning Permit	**Decision on Motions**

This matter is an appeal of a Town of Lincoln (Town) Zoning Board of Adjustment (ZBA) decision denying an application for a "seasonal camp – no plumbing – 1,386 sq ft" at property owned by Bicknell Trust (Applicant) located on Elder Hill Road in Lincoln (the Project). Applicant received a zoning permit for the Project on June 2, 2021. On April 11, 2022, Sara Laird, Dan Guy, Peg Sutlive, Jacquelyn Tuxill, Alison Zimmer, Louise Rickard, and Christine Fraioli (together, Neighbors) appealed the June 2, 2021 zoning permit to the ZBA. On October 6, 2022, the DRB revoked the zoning permit and denied the application. Applicant subsequently appealed that decision to this Court.

There are several motions presently before the Court. First, Applicant objects to Neighbors' interested party status in this appeal, effectively asking this Court to dismiss Neighbors for lack of standing. Neighbors oppose the motion. Second, in the alternative, Neighbors Laid, Tuxill, and Rickard move to intervene in this matter pursuant to V.R.C.P. 24(a). Applicant opposes this motion. Third, Neighbors respond to Applicant's Amended Statement of Questions, effectively moving to amend Applicant's Statement of Questions. Applicant opposes this motion. Fourth, Applicant moves for summary judgment. Neighbors oppose this motion. The Town has not submitted any filings relative to the pending motions.

Applicant is represented by David Cooper, Esq. and Paul Kuling, Esq. Neighbors are represented by James Dumont, Esq. The Town is represented by Benjamin Putnam, Esq.

Discussion[1]

First, we address the Applicant's opposition to Neighbors' party status, and the associated motion in the alternative to intervene filed by Neighbors Laird, Tuxill, and Rickard. Second, we address Neighbor's response to Applicant's Amended Statement of Questions, effectively a motion to amend the Appellant/Applicant's Statement of Questions. Finally, we address Applicant's motion for summary judgment.

I. Applicant's Objection to Neighbors' Party Status

Applicant objects to the interested person status of all Neighbors. In doing so, Applicant notes that standing is an aspect of this Court's subject matter jurisdiction. We therefore interpret Applicant's objection as one for dismissal pursuant to V.R.C.P. 12(b)(1).

Standing is a "necessary component to the court's subject matter jurisdiction." Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235. We evaluate a motion to dismiss for lack of standing under V.R.C.P. 12(b)(1) as motions to dismiss for lack of subject matter jurisdiction. See, e.g., Wool v. Off. of Pro. Regul., 2020 VT 44, ¶ 9, 212 Vt. 305. When a V.R.C.P. 12(b)(1) motion is before this Court, we accept as true all uncontroverted facts set out by the nonmovant and construe them in the light most favorable to him or her. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

Parties that qualify as interested persons under 24 V.S.A. § 4465(b) have standing to appear before this Court. Pursuant to § 4465(b)(3), individuals who do not own the subject property can participate in an appeal as an interested person if they: (1) own or occupy property in the "immediate neighborhood" of the subject property; (2) "can demonstrate a physical or environmental impact on [their] interest under the criteria reviewed"; and (3) allege that the municipal decision, "if confirmed," will not be in keeping with "the policies, purposes, or terms of the plan or bylaw of that municipality."

We begin with a threshold matter. Applicant's objection is made with respect to all 7 Neighbors. Neighbors, in their response, state: "Because Sarah Laird, Jacquelyn Tuxill and Louise

[1] Because this Decision addresses multiple motions, each of which are subject to unique legal standards and relevant facts, the Court addresses each motion separately. In doing so, the Court sets forth the applicable legal standards, and any factual background or undisputed material facts relevant thereto, separately within this Discussion.

Rickard did not know about the permit until April of 2022, and because they are some of the persons most directly affected by this project, this memo (and the motion to intervene) will focus on these three neighbors." Mem. in Opp. to Interested Person Status at 1 (filed Feb. 27, 2023). Neighbors present no assertion that the remaining four Neighbors, Mr. Guy, Ms. Sutlive, Ms. Zimmer, and Ms. Fraioli (a) own or occupy property within the immediate neighborhood of the Project; (b) can demonstrate a physical or environmental impact on their interests; and (c) allege that the DRB's decision will be contrary to the policies, purposes, or terms of the Lincoln Town Plan or zoning bylaws. These Neighbors may not rely on Ms. Laird, Ms. Tuxill, and Ms. Rickard to establish their individual standing, nor can any standing Ms. Laird, Ms. Tuxill, and Ms. Rickard have in this matter confer standing on the remainder of the group. Because Neighbors have failed to raise any assertion that Mr. Guy, Ms. Sutlive, Ms. Zimmer, and Ms. Fraioli are entitled to interested person status under 24 V.S.A. § 4465(b)(3), they are **DISMISSED,** and we **GRANT IN PART** Applicant's motion as it relates to these Neighbors.[2]

Having reached this conclusion, we turn to the remaining Neighbors.[3] Ms. Rickard, Ms. Tuxill, and Ms. Laird live approximately 1 mile, slightly over 1 mile, and approximately 1.5 miles from the Project site, respectively. The Neighbors, however, allege that, due to the increased elevation from their properties to the Project site up Mount Abraham, they will be able to see the Project's cabin from their properties, either their homes or on other areas of their land, and when using Elder Hill Road for travel and recreation.

We begin with addressing Ms. Laird's standing in this matter. While we conclude that, for the reasons set forth below, Ms. Laird satisfies the third prong of § 4465(b)(3), we conclude that she fails the first and second prongs. The first elements of § 4465(b)(3) status are closely intertwined, "because to interpret 'immediately neighborhood,' the Court examines both the physical proximity of the [interested person's] property to the project site, as well as whether

[2] Because Mr. Guy, Ms. Sutlive, Ms. Zimmer, and Ms. Fraioli have been dismissed, the term "Neighbors" used herein, will refer to Neighbors Laird, Tuxill, and Rickard from this point on.

[3] We note that Neighbors' affidavits suffer from the same issue as with respect to the now-dismissed neighbors. This is because Ms. Tuxill and Ms. Laird's affidavits are the exact same with respect to the portions addressing impacts to their properties. See Affidavit of S. Laird, ¶¶ 9—12 with Affidavit of J. Tuxill, ¶¶ 5—8. This review clumps the Neighbors, and their alleged impacts, together to afford all standing. As discussed above, to the extent that the affidavits blur the lines between each party's respective impacts, this is in error, and we will address each Neighbor's standing separately.

the interested person] potentially could be affected by aspects of the project which have been preserved for review on appeal." In re UVM Certificate of Appropriateness, No. 90-7-12 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. Feb. 26, 2013) (Walsh, J.).

First, Ms. Laird lives a considerable distance away from the Project site. Ms. Laird offers that due to the increased elevation from her property to the Project site up Mount Abraham, she will be able to see the Project's cabin from her property. We note that, before ZBA, Ms. Laird testified that "[t]he Property [could not] be seen" from her land but that she could only see the Project site when she walks or drives on Elder Road. See ZBA Decision, ¶ 75 (filed on Oct. 28, 2022). On appeal, Ms. Laird states that she cannot see the cabin site from her home, but she can see it from other areas on her property and is able to see it from Elder Hill Road. See Neighbors' Statement of Additional Material Facts, ¶ E. While topography may be appropriate to consider in relation to a party's standing, as set forth below, we are required to interpret § 4465(b)(3) in a manner as to not "judicially expand the class of persons" whom the legislature has authorized to appeal such decisions. In re Verizon Wireless Barton Permit, 2010 VT 62, ¶ 7, 188 Vt. 262 (quoting Garzo v. Stowe Bd. of Adjustment, 144 Vt. 298, 302 (1984)). To allow Ms. Laird, living a considerable distance from the Project with a slim and conflicting allegation of impact to her interests, would be to expand the scope of people the Legislature authorized to appeal zoning decisions.[4] Thus, we conclude that Ms. Laird lacks standing to appear before this Court and must be **DISMISSED**.[5]

Next we consider standing of Ms. Rickard and Ms. Tuxill. Each live approximately 1 mile from the subject Property. While in many instances persons owning and/or residing at properties so far from a project site will be deemed not to be within the "immediate neighborhood" of a project, these Neighbors have alleged impacts at their properties in that they can see the Project from their properties. This is because of the unique topography of land between the Project site,

[4] To the extent that Ms. Laird alleges that she can view the Project from Elder Hill Road, this interest is not specific to her but an interested shared by the general public.

[5] We note that we are further guided to this conclusion by the types of additional notice received in the 10 months between the initial permit being issued and the appeal. Ms. Rickard and Ms. Tuxill both saw materials delivered for the Project, see ZBA Decision ¶¶ 56, 67 and building materials at the Project site, id. at ¶¶ 63, 72. Ms. Laird alleges no other such indication of the Project even though construction was underway. While not dispositive, this stark contrast provides a further understanding that Ms. Laird is not within the immediate neighborhood of the Project.

located on the side of Mount Abraham, and these Neighbors' properties, located on an elevated plateau below the Project site. These Neighbors have also alleged that they have been able to see the construction of the cabin. In the context of a 12(b)(1) motion to dismiss, we are obligated to construe facts in a light most favorable to Neighbors. Based on the unique topography and the allegation that these Neighbors can see the Project from their properties, we conclude that Neighbors are within the immediate neighborhood of the Project and have demonstrated a physical or environmental impact under the criteria reviewed here. Thus, they have satisfied the first two prongs of 24 V.S.A. § 4453(b)(3).

We turn now to the final prong of § 4465(b)(3), which requires that an interested person allege that the municipal decision, "if confirmed," will not be in keeping with "the policies, purposes, or terms of the plan or bylaw of that municipality." Neighbors assert that the DRB's decision is not in accord with the Town zoning bylaws because they disagree with the classification of the Project as a single-family dwelling and misapplication of standards relative to the applicable overlay district.[6] Thus, we conclude that Neighbors have satisfied the third prong of § 4465(b)(3).

For these reasons, we conclude that Neighbors Tuxill and Rickard have interested person status in this appeal. Therefore, Applicant's objection with respect to these Neighbors is **DENIED**. Having reached this conclusion, Neighbors Tuxill and Rickard's motion to intervene is **MOOT**.

II. Motion to Intervene

Having dismissed Ms. Laird as an interested person in this matter, we address the motion to intervene pursuant to V.R.C.P. 24(a)(2) as it relates to her alone.

V.R.C.P. 24(a)(2) allows for intervention by a party:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[6] We note, specifically with respect to Neighbor's allegation relative to the Project's classification as a single-family dwelling, that Neighbors are not appellants in this matter. Neighbors have not raised this issue in their own Statement of Questions as cross-appellants, nor, for the reasons set forth below, is the issue before the Court within Applicant's Statement of Questions. Section 4465(b)(3) requires only an allegation that the appealed decision is not in accordance with Town plan or bylaws. Thus, even though Neighbors have not raised these issues for adjudication through a Statement of Questions on a cross-appeal, the allegation is sufficient to confer interested person status.

We conclude that Ms. Laird does not constitute an intervenor of right under V.R.C.P. 24(a)(2). First, for the reasons set forth above, Ms. Laird has not proffered an alleged interest conferring her standing. For the same reason, we conclude she lacks an interest in the Property sufficient to afford her intervenor status here. This is because of the large distance between her home and the Project. There is inconsistent evidence of whether see the cabin from her home, and the main source of contention she has raised is based on her ability to see the cabin from a public road. Thus, while she has asserted some alleged interest in the Property, it is tenuous and general. Second, while we conclude she may not intervene here, to the extent she has any interest in this Project that is specific to her, such interest is adequately represented by Ms. Tuxill and Ms. Rickard. The parties have presented the same arguments for the alleged deficiencies in this Project on appeal in order to protect their respective interests, each of which are largely overlapping. We therefore conclude that Ms. Laird's may not intervene in this matter and **DENY** the motion to intervene with respect to Ms. Laird.

III. Neighbors' Response to Applicant's Amended Statement of Questions

On December 12, 2022, this Court held a status conference in this matter. At this time, the Court informed Applicant's attorneys that Questions 6 and 8 were overly broad as written.[7] The Court granted Applicant leave to file an amended Statement of Questions either specifying Questions 6 and 8 or deleting them by January 27, 2023. Applicant deleted Questions 6 and 8 from its Statement of Questions. See Applicant's Am. Statement of Questions (filed Jan. 27, 2023) [hereinafter Amended Statement of Questions].

Applicant was specifically granted leave to amend its Statement of Questions at the December 12, 2022 status conference due to Questions 6 and 8. Thus, to the extent that Neighbors assert that the "motion to amend" Applicant's Statement of Questions has not been granted, no such motion was made or required because the Court ordered Applicant to amend its Questions, which Applicant timely did when it filed the Amended Statement of Questions on January 27, 2023.

[7] Question 6 and 8, as initially filed, asked "6. Does the Project otherwise comply with the Zoning Regulations" and "8. Is Bicknell entitled to the Permit for the Project?"

On February 27, 2023, Neighbors filed a "Response to Motion to Amend Statement of Questions – With Additional Replacement Question" in which Neighbors respond to the Amended Statement of Questions by requesting that this Court input an additional Question that they would like the Court to address.[8] Neighbors are not cross-appellants and they have failed to file a timely cross-appeal and associated Statement of Questions. See V.R.E.C.P. 5(f).[9] Neighbors point to no authority that would allow this Court to input a question that a non-appealing party seeks adjudication of into a properly filed Statement of Questions submitted by an appealing party. Thus, Neighbor's request to amend the Amended Statement of Questions to input "Question 10" is **DENIED**.

IV. Applicant's Motion for Summary Judgment

a. Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); V.R.E.C.P. 5. The nonmoving party "receives the benefit of all reasonable doubts and inferences." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. For the purposes of the motion, the Court "will accept as true all allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." Id. As such, a party opposing a motion for summary judgment "cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to the factfinder." Id. (citing Gore v. Green Mtn. Lakes, Inc., 140 Vt. 262, 266 (1981); V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)).

[8] We note that, even assuming arguendo, there was a motion to amend before the Court, Neighbor's filing would be untimely. See V.R.C.P. Rule 7 ("A memorandum filed in opposition to any nondispositive motion must be filed not more than 14 days after service of the motion, unless otherwise ordered by the court."). Neighbors filing was submitted 31 days after Applicant filed the Amended Statement of Questions.

[9] This is true even if the Court were to consider the date of the filing of the Amended Statement of Questions as triggering a new 14-day period by this Neighbors could have filed a cross-appeal to raise issues they believed were not included in the Amended Statement of Questions.

We further note that, at the December 12, 2022 hearing, Neighbors' attorney stated that, should Applicant rephrase or delete Questions such that issues Neighbors' sought adjudication on were no longer before the Court they would seek to cross-appeal. When the Amended Statement of Questions was filed, however, and these Questions were deleted, no cross-appeal was filed.

b. Undisputed Material Facts

Prior to addressing the undisputed material facts, we note that Neighbors assert that we must deny the pending motion because they require additional discovery pursuant to V.R.C.P. 56(d). Rule 56(d) requires an affidavit showing that "for specified reasons, it cannot present facts essential to justify its opposition . . . ." In such an affidavit, counsel for Neighbors attests that:

> If the Court is unable to conclude as a matter of law that the appeal was timely based on these facts, then pretrial discovery is necessary in order for me to demonstrate that the appeal was timely. I need to obtain documents and take depositions to prove these facts. I also need to obtain documents and take depositions to address the factual criteria of "manifest injustice" or excusable neglect.

Aff. Dumont, ¶ 4.

These are not grounds to deny the motion. Neighbors have not identified any information that they need that is not within their possession with reasonable diligence. Ultimately, the Court's adjudication of timeliness of Neighbors' appeal is based on their own knowledge and actions. Thus, discovery would not be needed to provide this information to the Court. Effectively, Neighbors ask the Court to review the pending motion and, if we rule in Applicant's favor and conclude that the appeal is untimely, that they should be afforded more time to provide more evidence in the hopes of this Court altering the ruling. For the reasons set forth below, the material facts are not in dispute here. While this Court does conclude that the appeal was untimely, Neighbors point to no presently unavailable essential facts that are not in their possession. Thus, we will not defer ruling upon the motion pursuant to Rule 56(d).

We recite the following factual background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the purpose of deciding the pending motions. The following are not specific factual findings relevant outside this summary judgment decision. See Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.)).

1. On March 10, 2021, Applicant submitted a zoning permit application for a "seasonal camp-no plumbing-1,386 sq ft" (the Project) at property located off of Elder Hill Road, Lincoln, Vermont (the Property).

2. The Project's application is subject to the Town of Lincoln Zoning Regulations (Regulations) adopted on March 1, 2011.

3. The Project will be a one-bedroom log cabin and associated living quarters, such as a dining and living area, a kitchen, a loft area, and a bathroom.[10]

4. The Property is located off of Elder Hill Road and is accessed by a private right of way across property owned by a third-party (the Easement).

5. The Property is located within the Outlying Zoning District and within the Viewshed Overlay Area.

6. Criteria applicable to the Overlay Area "will not prohibit building on a property, but may impose restrictions on where and/or how structures are sited." Regulations § 411.

7. Following the March 10, 2021 application, Applicant worked with the Town Zoning Administrator to provide information relevant to the Project and to properly site the cabin.

8. During this time, Applicant shifted the cabin structure, originally located approximately 70 feet from a ridge to a point approximately 120 feet from the edge of the ridge to reduce visibility from below.

9. Following these discussions, Applicant provided a revised site plan on June 1, 2021.

10. On June 2, 2021, Applicant received a zoning permit for the Project (the 2021 Zoning Permit).

11. With the 2021 Zoning Permit, Applicant received a "Z" permit sign (Z Sign) via regular mail.

12. The regulations require that, following the issuance of a zoning permit:

> Within three (3) days following the issuance of the permit, the Zoning Administrator will post a copy of the permit in at least one

[10] The parties dispute the status of the bathroom. Applicant has not obtained a wastewater permit and lacks a septic system. Applicant has indicated that at some point in the future, the bathroom may be hooked up to a septic system. Specifically, Neighbors assert that the bathroom is plumbing that is different from the originally applied for permit. This dispute is immaterial to our conclusion. Further, a review of the Lincoln Zoning Regulations shows that a bathroom, plumbed or un-plumbed, is irrelevant for zoning purposes. It would appear the plumbed nature of the bathroom may be relevant to a State wastewater permit, but such is not before the Court. Further, it is clear from a review of Applicant's exhibits that the existence of a bathroom does not mean that the bathroom is plumbed. See Applicant Ex. 4 (noting outhouses and composting toilets); Applicant Ex. 5 (noting that the State wastewater rules require that primitive camps may not have flush toilets, but may have incinerator toilets, chemical toilets, composting toilets, and port-o-lets inside or outside the structure). What's more, correspondence between Applicant and the Town Zoning Administrator shows that a bathroom was contemplated and understood to be a part of the application. See Applicant Ex. 4. It is for the same reason that the parties' dispute with respect to the number of bedrooms is immaterial.

> public place until the expiration of fifteen (15) days of the date of issuance. The applicant shall post [the Z Sign] in full view on the lot or premises for which it has been issued until the appeal period has expired (15 days after the permit issues).

Regulations § 507.

13. The Z Sign states that it "must be displayed on the subject premises in a clearly visible location from a public way. Th[e] notice may not be removed until after all pertinent construction has ceased." Applicant Ex. 9.

14. The Property has no frontage on a public right of way.

15. Applicant posted the Z Sign on the Property in the area of the construction site.

16. The Z Sign was posted in a location visible from the driveway near the construction site, but it was not visible from a public right of way, as the nearest public right of way is approximately a mile from the Property, via the Easement.

17. The Z Sign was not posted within view of a public right-of-way.

18. There is no location on the Property where a Z Sign would be viewable from a public right of way.

19. The Town Zoning Administrator posted the 2021 Zoning Permit at the Town offices on or about June 2, 2021.

20. Because this was occurring during the COVID-19 pandemic, the Town offices were open to the public by appointment only.

21. The 2021 Zoning Permit was posted at the Town offices for at least 6 months.

22. After the 15-day appeal period expired, Applicant purchased materials to construct the cabin, and arranged their delivery.

23. Applicant conducted minor site work for the Project, including clearing low-level brush in the construction area.

24. Applicant installed anchors and poured concrete footings for the structure, and constructed floor joists.

25. Now-dismissed Neighbor, Mr. Guy, viewed the construction and called the Zoning Administrator in June 2021 to discuss the Project work. ZBA Decision, ¶¶ 31–32.

26. The Town Zoning Administrator viewed the Property and completed foundation on September 13, 2021.

27. On November 1, 2021, the building materials were delivered to a separate property owned by Applicant along Elder Hill Road.

28. The materials were stored at this location in an open field for approximately 3 days then hauled to the Property by large trucks.

29. Ms. Tuxill saw these building materials at that time and was aware that there was construction generally proposed for the Property. ZBA Decision, ¶¶ 56–57.

30. Ms. Tuxill also saw the building materials when she looked up at the site at some point in 2021. Id. at ¶ 63.

31. Ms. Rickard also saw the building materials in the fall of 2021. Affidavit of L. Rickard, ¶ 5.

32. Ms. Rickard also saw people at that time "unloading and hauling a log cabin kit up to the intended building site" and that due to a lack of knowledge about zoning laws "assumed it was a done deal." ZBA Decision, ¶ 72; see also L. Rickard Affidavit at ¶ 5.

33. Ms. Laird did not view the materials but learned of the permit in 2022 at which time she requested a copy from the Town on April 4, 2022 and subsequently appealed the permit, along with Ms. Tuxill and Ms. Rickard on April 11, 2022.

34. On October 6, 2022, the ZBA issued a decision revoking the 2021 Zoning Permit and denying the application, in doing so it concluded that Neighbor's late appeal could move forward, that the Project constituted a single-family dwelling that complied with all applicable dimensional, area, and setback requirements, but that the Project failed to show compliance with Overlay Area criteria.

35. Two minority opinions were issued with the ZBA Decision.

36. Applicant timely appealed the ZBA Decision to this Court.

c. Discussion

The threshold question in this matter, and Applicant's motion for summary judgment, is whether Neighbors' appeal to the ZBA, approximately 10 months after the 2021 Zoning Permit was issued and otherwise became final, was timely.

Failure to appeal a decision results in all interested parties being bound by that decision. 24 V.S.A. § 4472(d). An appeal period for a zoning permit begins to run when the permit is issued, not when an interested party received notice of the permit. See In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 13, 206 Vt. 559 (citing V.R.C.P. 77(d)(1)); see also In re Mathez Act 250 LU Permit, 2018 VT 55, ¶ 16, 207 Vt. 537 (interpreting Mahar in the context of an Act 250 permit). The purpose of this procedural rule is to protect the finality of judgments. Mahar, 2018 VT 20, ¶ 16. This Court, and the ZBA below, lack jurisdiction to entertain an untimely appeal. 24 V.S.A. § 4472(d); see also Boutwell v. Town of Fair Haven, 148 Vt. 8, 10 (1987).

It is undisputed that Neighbors' appeal of the 2021 Zoning Permit was untimely, as it was filed many months after the 15-day appeal period expired. Therefore, the appeal must be dismissed unless circumstances exist to justify the filing of a late appeal. See In re Feeley Construction Permits, Nos. 4-1-10 Vtec, 5-1-10 Vtec, slip op. at 16–19 (Vt. Super. Ct. Envtl. Div. Jan. 3, 2011) (addressing the circumstances in which a party may file a late appeal). The Court is authorized to allow a late appeal if "there was a procedural defect that prevented the person from obtaining interested person status or 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). Allegations of improper notice are considered a "procedural defect" within the meaning of § 8504(b)(2)(A). In re Main St. Place Demo. Permit, No. 163-8-09 Vtec, slip op. at 2 (Vt. Envtl. Ct. Feb. 12, 2010) (Durkin, J.).

Manifest injustice is an "exacting and strict standard." In re Appeal of MDY Taxes, Inc., 2015 VT 65, ¶ 15, 199 Vt. 248, 256. A finding of manifest injustice "requires that due process or fundamental administrative fairness demand that the movant be allowed to contest the municipal approval, notwithstanding the strong policy interest in finality." In re Atwood PUD, No. 170-12-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Feb. 18, 2015) (Walsh, J.).

As such, to analyze whether Neighbors were able to pursue their untimely appeal, we must determine what notice they were entitled to and determine whether the notice provided was sufficient.

The Regulations require that:

> Each zoning permit issued under these regulations shall contain a statement of the period of time within which an appeal may be

> taken. Within three (3) days following the issuance of the permit, the Zoning Administrator will post a copy of the permit in at least one public place until the expiration of fifteen (15) days from the date of issuance. The applicant shall post a Notice of Permit in full view on the lot or premises for which it has been issued until the appeal period has expired (15 days after the permit issues).

Regulations § 507.

This is slightly different from the statutory provisions regarding zoning permits, 24 V.S.A. § 4449. Section 4449(b) states that:

> (b) Each permit issued under this section shall contain a statement of the period of time within which an appeal may be taken and shall require posting of a notice of permit on a form prescribed by the municipality within view from the public right-of-way most nearly adjacent to the subject property until the time for appeal in section 4465 of this title has passed. Within three days following the issuance of a permit, the administrative officer shall:
>
> (1) deliver a copy of the permit to the listers of the municipality; and
>
> (2) post a copy of the permit in at least one public place in the municipality until the expiration of 15 days from the date of issuance of the permit.

24 V.S.A § 4449(b)(1)–(2).[11]

It is undisputed that the Zoning Administrator posted a copy of the permit at the Town office and that this posting existed for at least six months. Neighbors argue that this posting was insufficient because, due to the COVID-19 pandemic, the Town office was open to the public by appointment only. Neighbors assert that, because of the COVID appointment system, the Town office was not in fact open to the public. We conclude that the appointment system, considering the unprecedented circumstances, did not transform the public Town office into a private place. Therefore, the posting complies with § 4449(b)(2).

The Regulations and § 4449(b) are slightly different. Regulations § 507 requires posting of the Z Sign "in full view" on the subject property. Section 4449(b) requires posting "within view from the public right-of-way most nearly adjacent to the subject property." The Z Sign itself notes

[11] Subsection (b)(1) is not at issue in this matter.

that the sign must be displayed "on the subject premises in a clearly visible location from a public way." Applicant Ex. 9.

The public right-of-way most nearly adjacent to the Property is Elder Hill Road. Because the Property lacks frontage on a public right-of-way, however, it is impossible to post the Z Sign on both the subject Property and within view of Elder Hill Road. Thus, the Z Sign was not visible from the public right-of-way. The parties, at length, dispute other locations that Applicant could have potentially posted the Z Sign. Namely, within the Easement or within the Town's right-of-way on Elder Hill Road. This Court need not conclude whether Applicant could have posted the Z Sign in these locations off of the Property and on land that Applicant does not own.[12] This is because the requirements of § 4449(b) and the Regulations require the Z Sign to be within view from Elder Hill Road. It is undisputed that the Z Sign was not so visible. We conclude that this error, in light of the fact that the Property lacks any frontage on Elder Hill Road and the other facts presented, does not warrant allowing a late appeal.

None of the Neighbors were entitled to personal notice. Compare 24 V.S.A. § 4449(b) with 24 V.S.A. § 4464(2)(A)–(B). They were only entitled to constructive notice of the permit. See id. Neighbors received constructive notice through the Zoning Administrator's public posting of the permit. Neighbors also received constructive notice when they viewed the delivered cabin materials and viewed it being transported to the Project site. Ms. Tuxill indicated at that time that she thought it was a "done deal." While this constructive notice occurred after the 15-day appeal period would have run, it still occurred approximately 5 months prior to the subsequent appeal being filed and we have been provided with no reason why an appeal did not occur for another 5 months. Allowing such a substantial delay in filing an appeal following clear constructive notice would result in substantial prejudice to permittees that undertake affirmative action on their approvals.

[12] Further, to the extent that such an analysis would require this Court to interpret the scope of the Easement or otherwise step outside of the bounds of this Court's jurisdiction, we could not reach such a conclusion. See In re Woodstock Cmty. Tr. & Hous. Vt. PRD, 2012 VT 87, ¶¶ 40–41, 192 Vt. 474 ("[T]he Environmental Division does not have jurisdiction to determine private property rights."); Nordlund v. Van Nostrand, 2011 VT 79, ¶ 13, 190 Vt. 188 (confirming that this Court can evaluate a right-of-way's compliance with municipal regulations, but not its scope); Blanche S. Marsh Inter Vivos Tr. v. McGillvray, 2013 VT 6, ¶¶ 19–22, 193 Vt. 320.

Ultimately, Neighbors were entitled to receive constructive notice of the permit and did receive constructive notice of the permit. In this unique circumstance, where a property lacks frontage on a public right-of-way but Applicant was directed to post notice on the subject property in "view," we conclude that the failure to post notice within view of the public right-of-way was not such a procedural defect that would have prevented Neighbors from obtaining interested person status or otherwise appealing the permit. Therefore, we conclude that 10 V.S.A. § 8504(2)(A) does not present grounds for a late appeal. It is for this same reason that we conclude that disallowing the untimely appeal would not result in a manifest injustice. Neighbors received the type of notice to which they were entitled. That they lacked multiple forms of constructive notice does not allow them to appeal the permit 10 months after it was issued, or 5 months after they learned about it. This does not meet the high, strict standard of manifest injustice. This delay is substantial.

We are further guided to this conclusion by the scope of this appeal. The ZBA concluded that the Project was a single-family dwelling in compliance with all applicable dimensional, area, and setback requirements. See ZBA Decision at 26. Applicant has not appealed that aspect of the Decision to this Court. See Amended Statement of Questions. Neighbors, for the reasons set forth above, have not filed a cross-appeal within the time required to do so. Therefore, this aspect of the ZBA's decision is final and binding. The remaining aspect of the ZBA's decision—compliance with Overlay Area standards—has been appealed to this Court. A review of those standards shows, however, that they cannot prohibit the Project but can only authorize the imposition of mitigation measures.[13]

For these reasons, we conclude that the material facts are not in dispute and Applicant is entitled to judgment in its favor on Question 1. In so doing, we conclude that Neighbors' appeal was not timely filed. Thus, the ZBA lacked jurisdiction over the appeal, and it was in error to deny the application and revoke the permit. The ZBA's decision is hereby vacated and the June 2, 2021 zoning permit is final. Having reached this conclusion, all other issues before the Court are

[13] While additional Questions address whether the adequacy for the Property's access, equitable estoppel, and disputed site plan review standards, the above-sited provision is the stated reason for the ZBA's denial.

rendered **MOOT** as this Court is without jurisdiction to address the merits of the zoning permit as it has become final and binding on all parties.

Conclusion

For the foregoing reasons, we conclude that Neighbors Tuxill and Rickard each have standing to appear in this matter. All remaining Neighbors have failed to show that they have standing before this Court. Therefore, Applicant's motion to dismiss is **GRANTED** with respect to Ms. Laird, Mr. Guy, Ms. Sutlive, Ms. Zimmer, and Ms. Fraioli and **DENIED** with respect to Ms. Tuxill and Ms. Rickard. Having reached this conclusion, Neighbors' motion to intervene is **MOOT** with respect to Ms. Tuxill and Ms. Rickard and **DENIED** we respect to Ms. Laird. Next, Neighbors' motion to amend Applicant's Statement of Questions is **DENIED**. Finally, we **GRANT** Applicant's motion for summary judgment and in so doing conclude that Neighbors' appeal was untimely. In reaching this conclusion, all other issues before the Court are **MOOT**. The ZBA's decision is hereby **VACATED** and the June 2, 2021 zoning permit is final.

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

Electronically signed this 18th day of May 2023, pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division