

**TOWN OF POMFRET
Zoning Board of Adjustment
Findings and Decision**

Appeal by the Town of Pomfret of the “Determination regarding log storage and firewood processing on lands of the William A. Russell Jr. Trust (Parcel ID #0500-A) west of Pomfret Road” issued by Pomfret Zoning Administrative Officer Preston Bristow, dated April 28, 2017.

A. Introduction

This matter has come before the Pomfret Zoning Board of Adjustment (ZBA) on the Town of Pomfret’s appeal of the April 28, 2017 “Determination regarding log storage and firewood processing on lands of the William A. Russell Jr. Trust (Parcel ID #0500-A) west of Pomfret Road” issued by Zoning Administrative Officer (ZA) Preston Bristow (the “April Determination”). The April Determination is the second such determination letter issued by ZA Bristow on this application. It was issued in response to a written request from attorney Peter DesMeules, counsel for Chippers, Inc., dated April 14, 2017.

On January 6, 2017, ZA Bristow issued his first determination letter in response to a request by Chippers, Inc. for clarification of the ZBA’s May 19, 2016, decision on Chippers, Inc.’s application to allow storage of logs and processing of firewood on the William A. Russell Jr. Trust property (the “January Determination”). On March 20, 2017, the ZBA held that ZA Bristow did not have jurisdiction to issue the January Determination and, as a result, the January Determination was void.

The basis of the ZBA’s holding in March was that the ZBA’s May 19, 2016 decision had been appealed by Chippers, Inc. to the Environmental Division of the Superior Court and that ZA Bristow lacked jurisdiction to issue the January Determination. Chippers, Inc.’s appeal to the Environmental Division has since been dismissed and jurisdiction has reverted to ZA Bristow.

The Town, by its May 12, 2017, Notice of Appeal, has requested that the ZBA declare that ZA Bristow lacked authority to issue the April Determination. Chippers, Inc. and ZA Bristow counter that the Town does not have standing to appeal the April Determination. Chippers, Inc. also asserts that under 24 V.S.A. §4472(d), the ZBA’s May 19, 2016 decision is final and binding and cannot be challenged by the Town through an appeal of the April Determination. Finally, Chippers, Inc. asserts that requiring it to submit a new application for the storage of logs and the processing of firewood on the William A. Russell Jr. Trust property (the “Trust Property”) is inconsistent with the ZBA’s May 19, 2016 decision.

B. Hearing

The Zoning Board of Adjustment held a hearing on the Town’s appeal on June 22, 2017. ZBA members Alan Blackmer, Hunter Ulf, and Shaun Pickett were present. ZBA Member Michael Reese, who is also a member of the Pomfret Selectboard, recused himself from the ZBA for a

conflict of interest. Member Loie Havill has recused herself from this matter for a conflict of interest.

Before the hearing, the Town, through attorney Amanda Lafferty, submitted the *Town of Pomfret's Proposed Findings of Fact and Conclusions of Law*. ZA Bristow submitted a *Response Regarding an Appeal Before the Zoning Board of Adjustment To Be Heard on June 22, 2017*. Chippers, Inc., through attorney Ryan Kane, provided a letter, dated June 20, 2017, presenting its positions regarding the Town's appeal.

Chair Blackmer opened the hearing at 6:35 P.M. Those present and participating in the hearing were ZA Preston Bristow, Selectboard member Michael Reese (representing the Town of Pomfret), attorney Ryan Kane (representing Chippers, Inc.), and attorney James Barlow (counsel to the ZBA). Employee Jason Eaton testified on behalf of Chippers, Inc. Selectboard member Scott Woodward offered testimony on behalf of the Town. Resident John Moore participated to offer his opinion on the matter. Reference is made to the minutes of the hearing for a summary of the testimony offered by the hearing participants.

After receiving testimony from the parties and interested persons, and receiving comments from members of the public, the Zoning Board of Adjustment closed the hearing at 7:40 P.M. The parties were directed to submit any additional written arguments to the ZBA by 5:00 P.M., Tuesday, June 27, 2017. On June 27, 2017 the Town, through attorney Lafferty, submitted a supplemental memorandum. ZA Bristow also submitted a supplemental memorandum.

C. Findings and Decision

Based on the submissions of the parties and the evidence and the testimony provided at the public hearing, the Zoning Board of Adjustment finds, concludes, and decides the following:

1. The Town's Standing to Appeal ZA Bristow's April Determination

Chippers, Inc. and ZA Bristow assert that the Town lacks standing to appeal the April Determination. By law, standing to appeal a zoning administrator's decision is only conferred upon interested persons. 24 V.S.A. 4465(a). Interested persons are defined to include, among others, "[t]he municipality that has a plan or bylaw at issue in an appeal..." 24 V.S.A. §4465(b)(2). Together these statutes would give the Pomfret Selectboard (acting on behalf of the Town) the right to appeal the April Determination if the Pomfret Zoning Ordinance is "at issue" in a case. See *Sanbourn v. Town of Essex*, 146 Vt. 419, 420 (1985).

The Vermont Supreme Court has instructed that a zoning ordinance is only "at issue" when the municipality claims that the zoning administrator has exceeded his authority or misconstrued the zoning ordinance. See *Rosetti v. Chittenden County Transportation Authority*, 165 Vt. 61, 66 (1996); *In re 232511 Investments Ltd.*, 2006 VT 27, ¶ 5. If the municipality simply disagrees with the zoning administrator's application of its zoning ordinance, the municipality does not have standing to appeal the zoning administrator's decision, for such an appeal would amount to a challenge to the wisdom of the zoning administrator's decision and invade the zoning administrator's exclusive area of authority. See *Rosetti*, 165 Vt. at 66; *In re 232511 Investments Ltd.*, 2006 VT 27, ¶ 5.

Here, the Selectboard has clearly challenged the authority of ZA Bristow to issue his April Determination. The Selectboard asserts that under the Pomfret Zoning Ordinance, ZA Bristow was required to refer an application to the ZBA for the proposed location for the storage and processing of wood on the Trust property prior to issuing the April Determination. The Selectboard also asserts that the ZBA's May 19, 2016 decision did not give ZA Bristow the authority to issue the April Determination.

The ZBA finds and concludes that the Town, having claimed that ZA Bristow exceeded his authority, is an interested person as defined by 24 V.S.A. §4465(b)(2) and has standing under 24 V.S.A. §4465(a) to bring the present appeal.

2. ZA Bristow's Authority to Issue the April Determination

As set forth above, the Town claims that ZA Bristow exceeded his authority by issuing the April Determination. The essence of the Selectboard's argument is that the ZBA's May 19, 2016 decision, from which ZA Bristow obtained authority to issue the April Determination, is flawed.

As grounds for this claim, the Selectboard first asserts that the ZBA's May 19, 2016 decision should have been limited to that portion of the Trust property on the east side of Pomfret Road.¹ The Selectboard claims that because Pomfret Road subdivided the Trust property into two separate lots, and because Chippers, Inc.'s original application only addressed use of that portion of the Trust property on the east side of Pomfret Road, the ZBA erred in considering storage of logs and processing of firewood on the west side of Pomfret Road without receiving a zoning application for the Trust property on the west side of Pomfret Road.

Next, the Selectboard asserts that the ZBA's May 19, 2016 decision is flawed because the ZBA found that "Chippers is grandfathered for the level of use taking place on [the William A. Russell Jr. Trust property] under the Vermont statute of limitations of 15 years." The Selectboard asserts that Chippers, Inc. cannot be "grandfathered" for use on the west side of Pomfret Road because it stopped using the Trust property on the west side of Pomfret Road for storing logs and processing firewood in 2011 after constructing a greenhouse in the location where such processing and storage had previously occurred.

It was on the basis of its finding of grandfathering that the ZBA restricted any storage of logs and processing of firewood on the west side of Pomfret Road "to a volume and level no greater than was in use in 2001." Having made this finding, the ZBA authorized ZA Bristow "to work with applicant Chippers, Inc. to determine through historic aerial imagery or other means, the volume and level of storage and disposition of logs and processing of firewood in 2001 on the lands of the William A. Russell Jr. Trust...*for the purpose of implementing this condition* [emphasis added]."

¹ In its June 17th *Proposed Findings of Fact and Conclusions of Law*, the Town refers to the portion of the Trust property on the east side of Pomfret Road as the "Small Parcel" and that portion on the west side as the "Main Parcel." The ZBA notes that the portion of the Trust property on the east side (i.e., the Small Parcel) was conveyed by the William A. Russell Jr. Trust to Hudson Holland. For consistency with its prior decisions, the ZBA will continue to use the "east side" and "west side" distinctions when describing the Trust property.

Under 24 V.S.A. §§4471(a) and 4472(a), exclusive jurisdiction over appeals from zoning board decisions is vested in the Environmental Division of Superior Court. If an interested person fails to appeal a zoning board's decision, the decision is final and not contestable; all interested persons are bound by decisions of the board and "shall not thereafter contest, either directly or indirectly, the decision or act...in any proceeding." 24 V.S.A. §4472(d).

The exclusivity of 24 V.S.A. §4472(d) is strictly enforced "to require that all zoning contests go through administrative and appellate review process in a timely fashion." *In re Ashline*, 175 Vt. 203, 207 (2003). Section 4472(d) applies to preclude untimely challenge to a zoning board decision, even when it is alleged to have been void *ab initio*. *In re Ashline*, at 207; *City of South Burlington v. Dep't. of Corr.*, 171 Vt. 587, 589 (2000) (mem.); *Levy v. Town of St. Albans Zoning Bd. of Adjustment*, 152 Vt. 139, 142 (1989). See also *In re Musty Permit*, 2012 VT 42 ¶ 6 ("Even if the DRB's approval of the subdivision application was ultra vires...the policy of repose imposed by statute and by this Court does not allow appellant to challenge the subdivision approval at the Environmental Division level because he did not appeal the decision to the DRB.")²

On June 7, 2016, Chippers, Inc. appealed the ZBA's May 19, 2016 decision to the Environmental Division. The Selectboard did not appeal the ZBA's May 19, 2016 decision. Chippers, Inc.'s appeal was dismissed, on Chippers, Inc.'s motion, by the Environmental Division on April 11, 2017.

The ZBA finds and concludes that the Town, having failed to appeal the ZBA's May 19, 2016 decision to the Environmental Division, is now barred under 24 V.S.A. §4472(d) from contesting the validity of the May 19, 2016 decision. In that decision, the ZBA held that the Trust property on the west side of Pomfret Road may be used to store logs and process firewood at a volume and level consistent with the use of the property in 2001. Whether the ZBA was correct in making this holding cannot be challenged by the Selectboard in the present appeal.

The ZBA also finds and concludes that, having failed to appeal the May 19, 2016 decision, the Selectboard is barred by 24 V.S.A. §4472(d) from challenging ZA Bristow's authority to issue the April Determination. In its May 19, 2016 decision, the ZBA authorized ZA Bristow to determine

² In its supplemental June 27th Memorandum, the Town cites to *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288 (1981). *Hanson-Walbridge* arose from a zoning enforcement action brought by the Town of Bennington against a funeral home that had obtained a permit to expand its facilities, including operation of a pathological incinerator "on an intermittent basis for disposal of waste products associated with the regular conduct of the funeral home business." *Id* at 291. The funeral home did not disclose to the zoning administrator that the pathological incinerator would also be used to perform cremations. In fact, cremation of bodies on the property was not discussed. *Id* at 291. When Bennington sought to enforce its zoning ordinance against the funeral home for operation of a crematory without a permit, the funeral home asserted that 24 V.S.A. §4472(d) barred enforcement because its permit for the pathological incinerator had not been appealed. *Id* at 292. The Supreme Court held that with respect to operation of a pathological incinerator, 24 V.S.A. §4472(d) applied, noting that "The use applied for and contemplated by the zoning permit must now stand unchallenged." However, judicial review of "the extension of that use to include the cremation of human bodies, either in connection with the funeral business or as an independent service" was not barred by 24 V.S.A. §4472(d). *Id* at 293. Unlike the applicant in *Hanson-Walbridge*, there is no indication that Chippers, Inc. withheld facts from the ZBA regarding storage of logs and processing of firewood on the Trust property, nor that Chippers, Inc. is conducting a use not contemplated by the ZBA's May 19, 2016 decision. In short, *Hanson-Walbridge* does not require the ZBA to reach a different result in this appeal.

the volume and level of storage and disposition of logs and processing of firewood in 2001 on the Trust property on the west side of Pomfret Road for the purpose of implementing this condition. This has been done. If the Town wanted to challenge the ZBA's grant of this authority to ZA Bristow, it was required under 24 V.S.A. §4472(d) to appeal the ZBA's May 19, 2016 decision. The Town cannot challenge ZA Bristow's authority to make this determination through the present appeal.

Finally, having found in its May 19, 2016 decision that Chippers, Inc's use of the Trust property on the west side of Pomfret Road was grandfathered, the ZBA cannot, as the Town argues, require Chippers, Inc. to submit a new application to determine the location for processing of firewood and storage of logs on the west side of Pomfret Road. Requiring a new application would be inconsistent with the May 19, 2016 decision, which is final and binding on the parties.

The Town's appeal is denied.

The Zoning Board of Adjustment approves these Findings and Decision, dated at Pomfret, Vermont this 6 day of ~~June~~ 2017.

JULY,



Alan Blackmer, Chair

Pomfret Zoning Board of Adjustment

Voting in favor of these Findings and Decision were ZBA members Alan Blackmer, Hunter Ulf, and Shaun Pickett. ZBA members Michael Reese and Loie Havill recused themselves. The ZBA is appointed as a 5-member board.

NOTICE: This decision may be appealed to the Environmental Division of the Vermont Superior Court by an interested person who participated in the proceeding(s) before the Zoning Board of Adjustment. Such appeal must be taken within 30 days of this decision, pursuant to 24 V.S.A. §4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.