



Notice of DRB Decision
Town of Stowe Zoning Office
PO Box 730
Stowe VT 05672

Your DRB project listed below was recently denied by the Development Review Board. Attached is a copy of the DRB decision for your records.

Please contact the Planning and Zoning Office at 253-6141 if you have any questions.

APPLICATION INFORMATION

Project Number 6782
Application Date 1/28/2022
Physical Location 151 MAIN ST
Map ID 7A-052.000 **Tax ID** 01052
Project Description REQUEST RECONSIDERATION OF DRB DECISION 6710
Owner APPEALANTS:
Applicant MIDAS ENTERPRISES INC
Applicant Address 302 KIDDER LANE
STOWE VT 05672

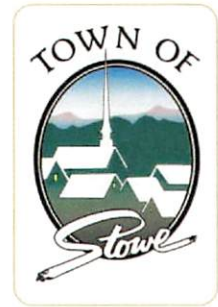
ACTIONS

Action Taken	Date	End of Appeal Period	
OTHER	1/26/2022		SENT TO DRB FOR DECISION
DRB DECISION	2/1/2022	3/3/2022	DENIED RECONSIDERATION

Sarah McShane

Zoning Office

TOWN OF STOWE
DEVELOPMENT REVIEW BOARD
Findings of Fact & Conclusions of Law



APPLICATION: 6782

SUBJECT PROPERTY: 151 Main Street; #7A-052.000

APPLICANT/APPELLANT:

Robert Foregger & Rebecca Chase
24 Sunset Street
Stowe, VT 05672

PROPERTY OWNER:

Midas Enterprises Inc.
302 Kidder Lane
Stowe, VT 05672

APPLICATION:

This application concerns a request for reconsideration filed by Robert Foregger & Rebecca Chase (herein referred to as the "Appellant"). The Appellant request reconsideration of the Development Review Board's (DRB) written decision dated December 28, 2021, denying their appeal of a determination made by the Town of Stowe Zoning Administrator. In the Board's written decision, the DRB denied their appeal upon concluding that the Appellant's notice of appeal was not submitted timely in accordance with Section 2.11 of the Town of Stowe Zoning Regulations; therefore, the DRB did not have the jurisdiction to address the substantive issues raised by the Appellant. The Appellant now asks the DRB to reconsider its decision and review their appeal request on the merits of the case. The Appellant further claims that they were not notified of the original DRB public hearing in 2016 and, as such, did not have the opportunity to participate as an interested party. In the Appellant's written request for reconsideration, they allege that the character of the area has been adversely affected and that the subject property has been the source of undue noise. The Appellant's request the DRB schedule a public hearing to reconsider the language in the prior approved zoning permit (#5294) pertaining to the use of the nearby building at 151 Main Street. Specifically, in their request for reconsideration, the Appellant request the DRB amend the language in its prior conditions of approval to read: "*No music shall be played on the patio; The patio shall close at 10:00 pm; The front door shall be closed at 10:00 pm.*"

The DRB acknowledges the concerns cited by the Appellant, however, must limit its review to whether the request for reconsideration complies with the Town of Stowe Zoning Regulations, particularly Section 2.11(1)(C), and in light of the relevant findings and conclusions of the DRB's prior decision. The following materials were submitted and considered by the DRB:

- 1) Notice of Appeal (3 pages) from Rob Foregger & Rebecca Chase, received 1/26/2022;
- 2) DRB Decision (Project 6710) dated December 28, 2021.

The DRB's procedural history and relevant findings are attached.

FINDINGS OF FACT: The Appellant's request for reconsideration was reviewed by the DRB under Section 2.11 [Appeals] of the Town of Stowe Zoning Regulations (as adopted October 9, 2018) and 24 VSA §4465. The DRB renders the following Findings of Fact.

- A. The Appellants own property at 24 Sunset Street which is situated across the street from the subject property, 151 Main Street. The Appellants are impacted by the noise originating from music and patrons of the Tap Room/Bar across the street. In the DRB written decision dated December 28, 2021, the DRB deemed that the Appellants satisfied the definition of an interested person under Section 2.11(2)(C).

- B. On October 7, 2021, the Appellant filed an appeal of a determination made by Stowe Zoning Administrator, Sarah McShane, in her email dated September 21, 2021. In Ms. McShane's email she afforded Ms. Chase the opportunity to appeal to the DRB within fifteen (15) days of the date of her email.
- C. The Appellant's notice of appeal asked the DRB to amend the conditions of zoning permit (#5294) to include: *"No music shall be played on the patio; The patio shall close at 10:00 pm; The front door shall be closed at 10:00 pm."*
- D. The DRB held a warned public hearing on November 16, 2021.
- E. The Notice of Appeal was received on October 7, 2021, sixteen (16) days following the determination and therefore was not submitted timely.
- F. Upon submission of evidence and testimony, the DRB closed the hearing on November 16, 2021 and rendered a written decision on December 28, 2021, denying the Appellant's notice of appeal on the basis that it was not submitted timely in accordance with Section 2.11 of the Town of Stowe Zoning Regulations.
- G. A written request for reconsideration was filed by Appellants Robert Foregger & Rebecca Chase on January 26, 2022, within the thirty (30) allowed under Section 2.11(4).
- H. The Zoning Administrator immediately notified the DRB Chair and Vice Chair that a request for reconsideration had been received by the Planning & Zoning Department. The DRB received the written request for reconsideration that same day, January 26th.
- I. In the Appellants written request for reconsideration, they ask the DRB to reconsider its decision and review their appeal on the merits of the case. Their written request for reconsideration provides no additional information on the timeliness of the original notice of appeal, rather ask the DRB to reconsider the language in the prior approved zoning permit (#5294) pertaining to the use of the adjacent building at 151 Main Street. Specifically, their request for reconsideration ask the DRB amend the language in its prior conditions of approval to read: *"No music shall be played on the patio; The patio shall close at 10:00 pm; The front door shall be closed at 10:00 pm."*

Conclusion- Following submission of evidence and testimony, the DRB concluded in its written decision dated December 28, 2021, that it did not have the jurisdiction to address the substantive issues raised by the Appellants because their notice of appeal was not received timely in accordance with Section 2.11 and 24 V.S.A. § 4465¹. During the public hearing on November 16, 2021, the Appellants acknowledged that their appeal was filed after the normal 15-day appeal period. The DRB therefore concluded that it was not submitted timely and was barred from reviewing the appeal on its merits. The Appellants now submit a written request for reconsideration yet offer no explanation or additional evidence on why the DRB should have concluded that their appeal was submitted timely. Rather, they ask the DRB to reconsider its decision and hear the case on its merits. Further, the Appellant's request that the DRB amend its prior conditions of approval pertaining to Permit 5294 to include additional/amended conditions of approval not contained in the DRB's original written approval.

¹ 24 V.S.A. § 4465 states: *"(a) An interested person may appeal any decision or act taken by the administrative officer in any municipality by filing a notice of appeal with the secretary of the board of adjustment or development review board of that municipality or with the clerk of that municipality if no such secretary has been elected. This notice of appeal must be filed within 15 days of the date of that decision or act, and a copy of the notice of appeal shall be filed with the administrative officer."*

Although the DRB recognizes the noise concerns cited by the Appellants, the DRB must limit our review to whether the requested activity complies with the Town of Stowe Zoning Regulations. Perhaps no principles of Vermont zoning law are as well established as those regarding “exclusivity of remedy” and “finality,” as set forth in 24 V.S.A. § 4472(a) and (d), respectively. Section 4472(a) provides, in pertinent part:

Except as provided in subsection (b) and (c) hereof, the exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act, [in a matter of municipal planning and zoning] shall be the appeal to the board of adjustment or the development review board under section 4464 of this title24 V.S.A. § 4472(a).

The Vermont Supreme Court has strictly enforced this exclusivity-of-remedy provision, consistent with the Legislature’s clear intent to require zoning challenges to go through the administrative review process in a timely fashion. The policy underlying the statute is to assure parties of finality. Therefore, subsection (d) of § 4472 states:

Upon the failure of any interested person to appeal to a board of adjustment under section 4464 of this title, or to appeal to a superior court under section 4471 of this title, all interested persons affected shall be bound by such decision or act ... and shall not thereafter contest, either directly or indirectly, such decision or act ... in any proceeding, including, without limitation, any proceeding brought to enforce this chapter. 24 V.S.A. § 4472(d).

An interested person may appeal “any decision or act taken by the administrative officer” by filing a notice of appeal with the board of adjustment or, as in this case, the DRB, within fifteen (15) days of the decision. [24 V.S.A. § 4465(a)]. A timely appeal from the zoning administrator to the DRB is the exclusive remedy for a party aggrieved by the administrator's decision [24 V.S.A. § 4472(a)]. If a timely appeal is not taken to the DRB under § 4465, the DRB is barred under § 4472(d) from asserting jurisdiction over the matter. In this case, the Appellants concede that their appeal of the Zoning Administrator’s September 21, 2021 determination was untimely filed under 24 V.S.A. § 4465(a), however they ask that the DRB reconsider its decision and hear the application on its merits. Their request for reconsideration offers no further evidence or legally adequate excuse for the untimely filing, yet oddly requests that the DRB amend its prior conditions of approval pertaining to Project 5294 to include additional, or amended, conditions of approval. Project 5295 granted approval, subject to conditions, for a 25-seat bar to locate across the street from the Appellants at 151 Main Street.

The exclusivity of remedy and finality provisions of § 4472 prohibit the DRB from hearing a request that was not submitted timely and prohibits the DRB from re-opening a public hearing on its own motion that closed nearly six (6) years ago. Although the Appellants claim they did not receive notice and therefore not afforded the opportunity to participate in the 2016 hearing granting approval for the space to be used as a 25-seat bar, it is their responsibility to take reasonable and appropriate steps to safeguard their interests. Public hearings are warned in accordance with 24 V.S.A. § 4464 and only those property owners directly adjoining receive a mailed hearing notice. The Appellants had a duty to take reasonable and appropriate steps to safeguard their interests, participate in the public hearing, and make a timely appeal. They did not then and have not now. When interested persons fail to act timely, they are bound by such decision or act and cannot thereafter contest, either directly or indirectly, such decision or act. Although the DRB acknowledges the Appellants concerns, their notice of appeal was not timely filed; the DRB therefore does not have jurisdiction to address the substantive issues raised by Appellant. The Appellants written request for reconsideration fails to identify points of law or fact overlooked or misapprehended by the DRB or additional evidence that warrants reconsideration. Therefore, based upon on the above findings, the DRB rejects the Appellant’s January 27, 2022, request for reconsideration without hearing and concludes the

issues raised by the Appellant have been decided in an earlier appeal and are based on the same material facts.

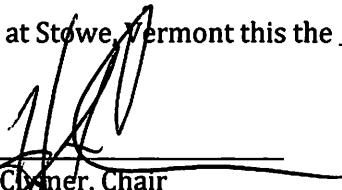
DECISION

Based upon the foregoing findings of fact and conclusions of law, the Development Review Board hereby denies the Request for Reconsideration in accordance with Section 2.11 of the Town of Stowe Zoning Regulations as amended, effective October 30, 2018 and 24 V.S.A. §4470.

Voting to Deny the Reconsideration: Drew Clymer, Francis Aumand III, Tom Hand, Michael Diender, Tom Hand, Chris Walton, and Leigh Wasserman.

Voting to Approve the Reconsideration: None

Dated at Stowe, Vermont this the 1 day of February 2022

By: 
Drew Clymer, Chair

NOTICES:

1. In accordance with 24 V.S.A. § 4449(e), applicants are hereby notified that state permits also may be required prior to land subdivision or construction. The applicant should contact the DEC Permit Specialist for District #5 (802-505-5367) to determine whether state permits are required.
2. The applicant or another interested person may request reconsideration of this decision by the Development Review Board, including associated findings and conditions, within 30 days of the date of this decision by filing a notice of appeal that specifies the basis for the request with the Secretary of the Development Board. Pursuant to 24 V.S.A. § 4470, the board may reject the request within 10 days of the date of filing if it determines that the issues raised on appeal have already been decided or involve substantially or materially the same facts by or on behalf of the appellant.
3. This decision may also be appealed to the Environmental Division of the Vermont Superior Court by the applicant or another interested person who participated in the proceeding before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A. § 4471 and Rule 5(b) of the Vermont Rules for Environmental Division Court Proceedings.
4. In accordance with 24 V.S.A. § 4455, on petition by the municipality and after notice and opportunity for hearing, the Environmental Division may revoke a permit based on a determination that the permittee violated the terms of the permit or obtained the permit based on misrepresentation of material fact.