STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 41-3-19 Vtec

Midway Charter Ventures, LLC

ENTRY REGARDING MOTION

Development Review Board Appeal (41-3-19 Vtec)

Title: Motion to Clarify (Motion 2)

Filer: Appellants Richard and Veronica Woodworth, Kimberly and William Patsos, and Tabitha Bowling

Attorney: Nicholas A.E. Low

Filed Date: September 20, 2019

Response in Opposition filed on 10/04/2019 by Attorney Stephen L. Cusick for Appellee/ Applicant Midway Charter Ventures, LLC
Reply filed on 10/18/2019 by Attorney Nicholas A.E. Low for Appellants

The motion is GRANTED IN PART and DENIED IN PART.

In 2018, Midway Charter Ventures, LLC, ("Midway") took ownership of "Burklyn Manor," located at 2864 Darling Hill Road, Burke, Vermont ("the Property").[1] On October 10, 2018, Midway received a conditional use permit ("2018 Permit") from the Town of Burke Development Review Board ("DRB") to operate Burklyn Manor as an inn. The 2018 Permit was not appealed. On January 21, 2019 Midway applied for a permit to convert the wagon barn on the Property into a caretaker's cottage and the carriage barn into a tap house that serves food and alcohol to both inn guests and the general public. The DRB approved this permit ("2019 Permit"). A concerned group of nearby property owners ("Neighbors") appealed the DRB's decision.

On August 29, 2019 this Court issued a Decision granting in part and denying in part the Neighbors' motion for summary judgement on Questions 1 through 6 of their Statement of Questions pursuant to V.R.C.P. 56(a).[2] Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op.

[1] The property consists of 86 acres and is comprised of four separate parcels located in both the Towns of Lyndon and Burke. The existing structures on the Property include a large dwelling, garage, and several unimproved buildings including a horse barn, indoor arena, carriage barn, wagon barn, and field barn.

[2] On May 17, 2019, the Neighbors filed a motion for summary judgement arguing that (1) the tap house should be considered a bar, tavern, or restaurant under the Town of Burke Zoning and Subdivision Bylaw ("Bylaw") and therefore does not qualify as a permitted or conditional use in the Agricultural-Rural II District ("AR II District"), and (2) the application for the caretaker's cottage should be denied because the cottage is either not an allowed use

at 14 (Vt. Super. Ct. Envtl. Div. Aug. 29, 2019) (Durkin, J.). Neighbors did not move for summary judgement on Questions 7 through 13 of their Statement of Questions. Id. In our Decision, this Court granted in part the Neighbor's partial summary judgement motion in holding that the caretaker's cottage does not qualify as a single-unit dwelling, an accessory dwelling unit, or as part of the inn pursuant the Town of Burke Zoning and Subdivision Bylaw ("Bylaw"). Id. at 15. This Court denied in part the Neighbor's motion in stating that the caretaker's cottage may meet the standards of an accessory use to the inn. Id. at 5–7. As the DRB did not address whether the caretaker's cottage could be considered un the Bylaws as an accessory use and did not conduct the necessary site plan review, this Court remanded the matter for the DRB's consideration.[3] As a final matter, this Court denied the Neighbor's motion challenging whether the tap house can be permitted as part of the inn.[4] Id. at 7–13.

The matter presently before the Court is Neighbors' motion for clarification of this Court's August 29, 2019, Decision. Neighbors raise two issues for further clarification. First, Neighbors seek to clarify whether the Decision limits Midway to the operation of one dining facility for the inn. Neighbors argue that the Decision, the 2018 Permit, and Bylaws limit Midway to a single dining facility. Second, Neighbors request clarification on the status of Questions 7–13 of their Statement of Questions. Neighbors contend that the Court has improperly left these Questions unresolved when the Court remanded to the DRB and issued a judgement order without addressing Questions 7–13. In its responsive memorandum, Midway contests the Neighbors' assertion that Midway must be limited to one dining facility on its parcel of land. Midway does not address the Neighbors' second set of concerns.

Neighbors' motion for clarification is made pursuant to V.R.C.P. 59(e), which governs motions to alter or amend a judgment.[5] There are four principal reasons for granting a Rule 59(e) motion: "(1) to correct manifest errors of law or fact upon which the judgment is based; (2) to allow a moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) to respond to an intervening change in the controlling law." Old Lantern Non-Conforming Use, No. 154-12-15 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Sep. 13, 2017) (Durkin, J.) (quotations omitted); In re Green Mountain Power Corp., 2012 VT 89, ¶ 50, 192 Vt. 429 (stating that under Rule 56(e), "[t]he trial court enjoys considerable discretion in deciding whether to grant such a motion to amend or alter") (quoting In re SP Land Co., 2011 VT 104, ¶ 16, 190 Vt. 418). While V.R.C.P. 56(e) permits presentation of newly discovered

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in the AR II District, or the cottage qualifies as a single-dwelling unit under the Bylaws that cannot be sited on a lot with another principal use. Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Aug. 29, 2019) (Durkin, J.).

[3] Accessory uses are permitted uses in the AR II District that must undergo site plan review. Bylaw §§ 209, 210(4).

[4] In our Decision, this Court determined that the term "dining facility" includes public food establishments, the dining facility can be housed in a building separate from the principal structure, and the tap house application's status as an amendment to the 2018 Permit did not affect this Court's review. Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 9–13 (Aug. 29, 2019).

[5] V.R.C.P. 59(e) gives the Court broad power to alter or amend a judgment "if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." Rubin v. Sterling Enter., Inc., 164 Vt. 582, 588 (1996); Reporter's Notes, V.R.C.P. 59(e).

information, this Court recognizes that an action to alter or amend "a judgment after its entry is an extraordinary remedy which should be used sparingly."[6] In re Zaremba Grp. Act 250 Permit, No. 36-3-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J) (quotation omitted).

Neighbors raise two arguments in support of their motion which concern (1) the appropriate number of dining facilities and (2) the resolution of Questions 7–13 of their Statement of Questions. We address these in order below.

I. Whether this Court concluded that the Inn may have more than one dining facility.

Neighbors seek clarification concerning the number of appropriate dining facilities authorized by this Court's decision that "the tap house may be permitted as the dining facility for the inn."[7] Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 11 (Aug. 29, 2019). Neighbors argue that only one dining facility is permitted because the DRB only approved the existing dining facility in the 2018 Permit; the reading of the Bylaw to allow for multiple dining facilities would lead to absurd results; and the Bylaw term "dining facilities" is commonly used to collectively refer to a single dining area. Midway responds by asserting that the 2019 Permit application clearly requested authority for a second dining facility in a renovated barn and the Bylaw's plain language defining an "inn" allows for multiple dining facilities. For the reasons stated below, we conclude that the Bylaw does not restrict the proposed inn to a single dining facility and Midway may be permitted for multiple dining facilities on its parcels.

When interpreting a municipal ordinance, we begin with the plain language of the relevant provisions. In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 22, 199 Vt. 19 (citing Evans v. Cote, 2014 VT 104, ¶ 13, 197 Vt. 523). If the regulatory language is ambiguous, we resort to other tools of interpretation. In re Confluence Behavioral Health, LLC, 2017 VT 112, ¶ 20, 206 Vt. 302. When analyzing zoning regulations that "are in derogation of private property rights," this Court must resolve any lingering ambiguity in favor of the property owner. Lathrop, 2015 VT 49, ¶ 29 (quoting In re Champlain Oil Co., 2014 VT 19, ¶ 2, 196 Vt. 29).

Here, the Bylaw does not provide a specific definition for "facility" or "facilities." This Court previously interpreted this term as broad and generally inclusive. Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 9–10 (Aug. 29, 2019) (stating that the use of the term throughout

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[6] Rule 56(e) motions are "not intended as a means to reargue or express dissatisfaction with the Court's findings of fact and conclusions of law" and cannot "merely repeat[] arguments that have already been raised and rejected by the Court." Town Clarendon v. Houlagans MC Corp. of VT., No. 131-10-17 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J.); Appeal of Van Nostrand, Nos. 209-11-04 Vtec, 101-5-05 Vtec, slip op. at 4 (Vt. Envtl. Ct. Dec. 11, 2006) (Durkin, J.) (quoting Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2810.1) (internal footnotes omitted) (stating that motions to reconsider should not be used to "relitigate old matters").

[7] Reviewing this language from our August 29, 2019 Decision, we recognize that we contributed to an uncertainty of whether the proposed tap house would be a replacement for, rather than in addition to, the private dining room that was authorized by the 2018 Permit. We regret the confusion caused by our choice of words. Midway's 2018 and 2019 application materials, filed with Midway's Statement of Undisputed Facts on May 31, 2019, clearly reflect that Midway sought authority for a tap house as a separate and additional dining facility, open to the general public, and to be operated out of a to-be-renovated barn.

the Bylaw is broad and generally inclusive and "[a]s we presume the Bylaw's drafters used the same terms to connote the same meanings, we interpret "dining facility" in a similarly broad manner) (citing In re Town of Charlotte Recreational Trail, No. 98-5-08 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Feb. 14, 2011) (Durkin, J.); State v. Goldman Indus. Grp., Inc., No. 816-12-02 Wncv, slip op. at 12 (Vt. Super. Ct. May 19, 2003) (Teachout, J.) (concluding that an "expansive definition" of "facility" was appropriate)).

Under the Bylaw, an inn is defined as:

> A building or group of buildings on a single parcel which contains fewer than twenty-five (25) guest rooms which are rented out to provide overnight accommodations to transient travelers on a short-term basis, and which may offer dining facilities.

Bylaw Art. 10.

The language of the Bylaw implicitly allows for inns to offer multiple "dining facilities." The Bylaw provides for "dining facilities" and does not expressly exclude multiple facilities. In re Willowell Found. Conditional Use Certificate of Occupancy, 2016 VT 12, ¶ 19, 201 Vt. 242 ("Evidence of an intent to exclude a [specific use] would have to be direct and specific within the Bylaws."). The definition also allows for a "group of buildings" to serve as part of the inn, indicating that a permit under this Bylaw does not limit additional "dining facilities" to one building or facility.[8] Bylaw Art. 10. Indeed, this Court has held that regulatory provisions which refer to "facilities" generally include multiple facilities. See In re Town of Charlotte Recreational Trail, No. 98-5-08 Vtec at 3–4 (Feb. 14, 2011) (listing a variety of different structures and buildings included as "public facilities"); State v. Goldman Indus. Grp., Inc., No. 816-12-02 Wncv at 12 (May 19, 2003) (referring to "hazardous waste storage facilities" as multiple separate sites and interpreting 10 V.S.A. §6610a(a)(2)(B) "facilities" as multiple facilities). In addition, other courts have interpreted the term "dining facilities" to include multiple establishments. New Castle Cty. Dep't of Land Use v. Univ. of Delaware, 842 A.2d 1201, 1203 (Del. 2004) (holding that "dining facilities" included a hotel restaurant and various for-profit fast food establishments); Sodexo Am., LLC v. City of Golden, 2017 COA 118, ¶ 4, 442 P.3d 931, 933, cert. granted sub nom. City of Golden, Colorado v. Sodexo Am., LLC., No. 17SC735, 2018 WL 703622 (Colo. Feb. 5, 2018), and aff'd, 2019 CO 38, ¶ 4, 441 P.3d 444 (stating that Sodexo's "dining facilities" include traditional residential dining facilities and "branded" dining facilities, including the State Café, Diggers Den Food Court, Subway, and Einstein Bagels).

Considering, the Bylaw's exclusion of a more limiting language, the modifying language of the bylaw allowing a "group of buildings," and the generally inclusive nature of the term "facility," we see no basis to limit the Bylaws' plain language to restrict an inn to only one dining facility.

While this Court has recognized that a single dining facility may be referred to as an inn's "dining facilities," this does not have a preclusive effect inhibiting multiple facilities from being considered "dining facilities." See generally Sorg v. N. Hero Zoning Bd. of Adjustment, 135 Vt.

[8] This Court previously held that the "2018 Inn Permit does not confine the restaurant to the inn structure itself, and an inn can consist of multiple structures under the Bylaw . . . ." Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 11–12 (Aug. 29, 2019).

423, 426, (1977) (leaving open the question whether multiple dining structures constituted "dining facilities"); see also In re Appeal of Ben Kernan, No. 121-6-00 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug. 20, 2001) (Wright, J.); In re Sardi, 170 Vt. 623, 624 (2000). Moreover, such a limited reading of "dining facilities" is not in keeping with the Bylaw's broad usage of the term nor will this Court read such an exclusion when one was not explicitly provided. Confluence Behavioral Health, 2017 VT 112, ¶ 39 n.6 (citing In re Willowell Found. Conditional Use Certificate of Occupancy, 2016 VT 12, ¶ 19, 201 Vt. 242).

As a final point, Neighbors assert that reading the Bylaw to allow multiple dining facilities would lead to absurd results because it invites a "free-for-all" development of restaurants so long as there is an inn on the parcel. While this Court has recognized that statutes should not be construed to produce illogical or absurd results, Neighbors must demonstrate "why the [regulation] in its ordinary sense or why the consequences of such a construction will cause hardship or constitute impossibility." Rhodes v. Town of Georgia, 166 Vt. 153, 157 (1997) (citing O'Brien v. Island Corp., 157 Vt. 135, 139 (1991)); see also In re Champlain Oil Co. Conditional Use Application, 2014 VT 19, ¶ 7, 196 Vt. 29, 34 (citing In re Casella Waste Mgmt., Inc., 2003 VT 49, ¶ 6, 175 Vt. 335) (holding that "zoning bylaws are interpreted according to the general rules of statutory construction"). Neighbors have not met this burden. While this reading would allow for additional structures to be constructed, the DRB may attach conditions to a permit that requires approval of subsequent or additional development. Here, the DRB attached the following condition to the 2018 Inn Permit: "If in the future [Midway] decide[s] to open the restaurant [to the public] they must come back to the Development Review Board for a change of use permit." Midway Charter Ventures, LLC, Findings of Fact & Decision, at 3 (Town of Burke Dev. Review Board Oct. 10, 2018). Such conditions provide effective and sufficient oversight over "free-for-all" development.

As evidenced above, the Court clarifies that the Bylaw term "dining facilities" allows for more than one dining facility. As such, Neighbors' motion to clarify that only one dining facility is permitted under V.R.C.P. 56(e) is **DENIED**.

II. Whether this Court erred in remanding to the DRB when Neighbors' Questions 7-13 remain unresolved.

Neighbors seek clarification concerning Questions 7–13 of their Statement of Questions. Neighbors contend this Court erred in remanding and issuing a judgement order without ruling on all the issues before it. The issue presently before the Court is whether remand and issuance of a judgement order was proper when the Court did not address Questions 7–13, Questions on which neither party requested summary judgment.

Generally, "summary judgement should not be granted on an issue not raised in the summary judgment motion unless the party against whom summary judgment is granted is given full and fair notice and opportunity to respond to the issue prior to the entry of summary judgment." State v. Therrien, 2003 VT 44, 175 Vt. 342, 352 (citing Versico, Inc. v. Engineered Fabrics Corp., 238 Ga.App. 837, 520 S.E.2d 505, 507 (1999)); Kelly v. Town of Barnard, 155 Vt. 296, 306, 583 A.2d 614, 620 (1990) (holding that before granting summary judgment, a court must give an "opposing party a reasonable opportunity to show the existence of a fact question"). Here,

neither party moved for summary judgment on Questions 7–13. Therefore, resolving Questions 7–13 in a final manner, without providing the parties with a full and fair notice and opportunity to respond, would disrupt general principles of civil procedure.[9]

This Court's decision to remand was necessitated when it became clear that the DRB had not addressed a legal issue integral to Midway's proposed improvements to the previously permitted inn and related facilities. We crafted our remand so as to afford the DRB the opportunity to address this legal issue in the first instance. See Timberlake Assocs. v. City of Winooski, 170 Vt. 643, 644 (2000) (mem.) (citing Maple Tree Place, 156 Vt. at 500) (a trial court may remand a land use application when an issue arises on appeal that was not presented to the lower tribunal). The February 13, 2019 DRB decision provides no record of whether the DRB considered whether the proposed use of the carriage barn as an independent caretaker's cottage is "customarily incidental" and "subordinate" to the principal use of the Property as an inn. Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 7 (Aug. 29, 2019). As this Court identified an issue not presented at the lower tribunal, we concluded that remand was appropriate.

We therefore conclude that issuance of a Judgment Order was proper, albeit not clearly explained. We take the opportunity to do so here.

We note that our Rules allow for this Court to issue a judgment that orders "remand [. . .] for further proceedings consistent with the order of the Court, and may expressly set forth conditions and restrictions with which the parties must comply." V.R.E.C.P. 5(j). This remand provision "give[s] the [C]ourt maximum flexibility in framing its mandate." See Reporter's Notes, V.R.E.C.P. 5 (applying Rule 5(j) to appeals on the record as well as those by trial de novo). This Court's August 30, 2019 Judgement Order, accompanied by this Court's Decision, highlighted the legal issues that the DRB should consider upon remand. Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 7 (Aug. 30, 2019).

For all these reasons, we conclude that while our August 29, 2019 Decision is not a model of clarity, we remain convinced that it was proper to issue our Decision and Judgement Order.[10]

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[9] While this Court's Decision recognized that this matter would be remanded, we addressed the issue of whether the proposed tap house was a permittable part of the inn because Neighbors had moved for summary judgement on Questions 1 and 2, which are the Questions that raised that particular issue. Midway Charter Ventures, LLC, No. 41-3-19 Vtec, slip op. at 7 (Aug. 29, 2019). This Court noted that "[w]hile we ultimately remand, this Court may reach issues that are likely to arise during any future litigation of a matter in the interest of judicial economy." Id. (citing In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 23; In re Taft Corners Assocs., 160 Vt. 583, 632 (1993); In re 34 Fitzsimonds Rd 3-Lot Subdivision, No. 68-6-18 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. Apr. 25, 2019) (Durkin, J.)).

[10] Neighbors contend that this Court's Decision constituted a final judgement and therefore necessitates adjudication of all claims raised in the Neighbors' Statement of Questions. The Vermont Supreme Court has noted that this Court may issue a partial summary judgement and remand to a lower court for reconsideration of particular issues. In re Estate of Fitzsimmons, 2013 VT 95, ¶ 9, 195 Vt. 94; see also V.R.C.P. 54(b) (" . . . , the [C]ourt may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment"). Rule54(b) "does not affect finality of judgment, because any claim as to which the court directs entry of judgment must independently meet the tests of finality." Reporters Notes V.R.C.P. 54(b) (citing 3 Barron & Holtzoff, Federal Practice and Procedure § 1193.1 (Supp.1969).

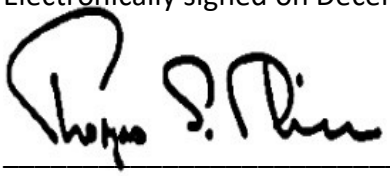
The Vermont Supreme Court has recognized that "broad authority [is given] to trial judges to manage dockets to do justice for all the litigants." Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court, 154 Vt. 392, 402 (1990). Given that Questions 7–13 remain pending and may be mooted by the DRB's ultimate conclusions concerning the remanded issues, this Court **DISMISSES WITHOUT PREJUDICE** Questions 7–13 of the Neighbors' Statement of Questions.

Our Supreme Court has held that a dismissal without prejudice does not constitute an adjudication on the merits. Rheaume v. Maguire, No. 2012-040, 2012 WL 5974998, at *2 (Vt. Sept. 26, 2012) (citations omitted). As this Court has remanded issues concerning the 2019 Permit application for reconsideration by the DRB, this Court will waive filing fees for Neighbors for any subsequent appeal concerning the 2019 Permit application.

We hope and trust that this Entry Order provides some clarification of our August 29, 2019 Decision. For that reason, we **GRANT IN PART** Neighbors motion for clarification. However, since our clarification here does not cause us to alter the outcome, we conclude that Neighbors' clarification motion must in all other respects be **DENIED**. Questions 7–13 of the Neighbors' Statement of Questions remain **DISMISSED WITHOUT PREJUDICE**.

So Ordered.

Electronically signed on December 18, 2019 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



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Thomas S. Durkin, Superior Judge
Environmental Division
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Notifications:

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