VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 22-CV-01101
Docket No. 22-ENV-00026

Daylight Lot Major Subdivision Amendment Application, et al.	**DECISION ON MOTIONS**

This Court sits specially assigned over these two coordinated matters. In the first, Francis and Rebecca Pastor, Dean Hewitt, and Katherine Mazer (together, Neighbors) appeal a Town of Hyde Park Development Review Board (DRB) decision allowing Michael and Portia Foss (the Fosses) to construct a single-family home within an area marked on a plat as a "No Building Zone" at property they own in the Green Park Subdivision, also known as the "Daylight Lot," and to amend a condition of a previously issued subdivision permit relative to the roadway to the Daylight Lot (the Municipal Action). In the second, Neighbors seek a declaratory judgment seeking enforcement of a restrictive covenant that they allege burdens the Daylight Lot and prohibits construction on a portion of the Daylight Lot (the Civil Action).

Presently before the Court are the parties' cross-motions for summary judgment. The Fosses move for partial summary judgment in the Municipal Action, on the question of whether the "No Building Zone" is enforceable. Neighbors move for summary judgment on the merits of both actions. Neighbors are represented by Chad Bonnani, Esq. The Fosses are represented by Hans Huessy, Esq.[1]

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

[1] The Town of Hyde Park has appeared in this matter as an interested party, and is represented by David Rugh, Esq. It has not been active in the pending motions.

reasonable doubts and inferences." Robertson v. Mylan Labs., Inc., 2005 VT 15, ¶ 15, 176 Vt. 356. When considering cross-motions for summary judgment, such as the court is presented with here, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 25, ¶ 5, 186 Vt. 332.

For the purposes of the motion, the Court "will accept as true all allegations made in opposition to . . . summary judgment, so long as they are supported by affidavits or other evidentiary material." Robertson, 2004 VT at ¶ 15. 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)).

Undisputed Material Facts

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)).

1. The Fosses own a parcel of land known Daylight Lot.
2. The Daylight Lot is an approximately 5.28-acre parcel of land in Hyde Park, Vermont.
3. The Daylight Lot is a part of a larger subdivision of approximately 115 acres of land (the Green Park Subdivision).
4. The Green Park Subdivision was developed by Sterling Meadows Farm, LLC, owned by Ralph Lawson.
5. The Green Park Subdivision was created pursuant to a 2013 subdivision approval from the DRB (the 2013 Subdivision Approval).
6. The Green Park Subdivision is served partially by Green Park West Road.
7. Green Park East Road is an extension of Green Park West Road.
8. The Daylight Lot is located on Green Park East Road.
9. The 2013 Subdivision Approval states that:

> The applicant[']s proposal for the maximum of 13 residential units to utilize green Park West Road and the associated 50-foot ROW's will be acceptable if the road is built to the standards established by this approval . . .
>
> The 2012 Town of Hyde Park Road and Bridge Standards must be met prior to any new development in Green Park West. The same road construction standards and conditions approved in 2012-058 are maintained in this approval, including the requirement that the applicant submit a final inspection report for the road improvements, prepared by a VT Licensed Professional Engineer. Prior to the issuance of a zoning permit for development of any lot, the engineer's inspection report must show that the road complies with all town requirements and approvals for the portion of private road serving as access from Battle Row Road to that lot. Only the construction of the individual driveway to the house, outside of the 50-foot ROW, may be deferred until after the zoning permit is issue[d]. Other state or local standards for such items as drainage and culvert or bridge standards must also be met for all public or private roads, including amendments to existing roadway & surface, ditches & slopes, culverts & bridges and guardrails, unless specifically waived by the DRB, must be met.

Neighbor's Ex. 3, p. 2—3.

10. The 2013 Subdivision Approval references earlier permitting relative to the Green Park Subdivision, 2012-058 (the 2012 Decision). Id.

11. The 2012 Decision concerned a subdivision permit amendment application by Sterling Meadow Farm, LLC concerning roads within the Green Park Subdivision, particularly Green Park West Road.

12. Like the 2013 Subdivision Approval, the 2012 Decision states "[t]he 2012 Town of Hyde Park Road and Bridge Standards must be met prior to any new development in Green Park West." Neighbor's Ex. 12, p. 4.

13. The 2012 Decision states:

> [I]f new land development is proposed to utilize this [right of way], then the DRB may require review and approval of the proposed uses to ensure compliance with the town highway standards should more than four or more residences use any section of the proposed private road per Section lV, G of the 2009 Hyde Park Subdivision Regulations.

Id. p. 3.

14. The 2013 Subdivision Approval approved the development of up to 13 single family units to be served by Green Park West Road, as extended by Green Park East Road.

15. Neighbors Hewitt and Mazer own a parcel of land in the Green Park Subdivision, adjoining the Daylight Lot on its western boundary line, also known as the "Twilight Lot."

16. The Pastors own property located outside of the Green Park Subdivision, having an address of 190 Twin Meadows Drive, Hyde Park, Vermont, and adjoining the Daylight Lot on its southern boundary (the Pastor Lot).

17. As initially approved by the 2013 Subdivision Approval, the Daylight Lot was 3.28± acres.

18. In approximately 2016, Mr. Larson contacted Neighbor Francis Pastor and told him that he was struggling to sell the Daylight Lot.

19. Mr. Lawson offered that, should the Pastors allow him to cut certain trees on the Pastor Lot to improve the view on the Daylight Lot, Mr. Lawson would create a building restriction on the Daylight Lot for the Pastor Lot's benefit.[2]

20. Mr. Larson and the Pastors agreed for the creation of an approximately 3.28 no building zone on the Daylight Lot, representing the originally permitted acreage of the Daylight Lot (the No Building Zone).

21. Mr. Larson then cut certain trees on the Pastor Lot.

22. To further the agreement between Larson and Pastor, Mr. Larson sought a boundary line adjustment of the Daylight Lot from the Town to add 2 acres to the Daylight Lot from a parcel of land Sterling Meadow Farm, LLC retained in the Green Park Subdivision (the 2016 Boundary Line Adjustment).

23. In connection with the 2016 Boundary Line Adjustment, Sterling Meadow Farm, LLC, submitted a plat to the Town stating "THE ORIGINAL 'DAYLIGHT LOT' 2.28 ACRES TO BE A NO BUILDING ZONE" (the Boundary Plat). Foss Ex. A.

24. The Boundary Plat was approved by the Town on January 9, 2017 and recorded in the Town of Hyde Park Land Records at Map Slide #110.

[2] Neighbors allege that this exchange was also for the benefit of Neighbors Hewitt and Mazer. They have not provided, however, any indication that either of Neighbors Hewitt or Mazer were involved in these conversations between Mr. Larson and the Pastor or were a party to the resulting agreement. What's more, Neighbors have provided no allegation that the Neighbors Hewitt or Mazer agreed to any alteration or other burden on the Twilight Lot in exchange for the creation of a building restriction on the Daylight Lot. Therefore, while we conclude that the undisputed material facts show that an agreement was reached to benefit the Pastor Lot, we cannot conclude that the restriction was for the benefit of the Twilight Lot.

25. The Fosses purchased the Daylight Lot in 2020, conveyed to them by Warranty Deed of Sterling Meadow Farm, LLC dated July 15, 2020, recorded at Volume 189, Page 143 of the Town of Hyde Park Land Records (the Daylight Lot Deed).

26. The Daylight Lot Deed defines the parcel as "being more particularly described as 5.28 acres, more or less, and depicted on a survey entitled 'Lot Line Adjustment "Daylight Lot" Sterling Meadows Farm, LLC Green Park West Hyde Park, VT – Dec. 2016' . . . recorded in Map Slide #110 . . . ." Foss Ex. D.

27. The Daylight Lot Deed does not contain explicit language creating a no building zone within the deed itself or restrictive covenant language.

28. There are presently two homes within the Green Park Subdivision, the Foss home would be the third.[3]

29. On December 21, 2021, the Fosses submitted an application to construct a single-family home within the No Building Zone and to amend the condition of the 2013 Subdivision Approval to allow for the construction of Green Park East Road to meet Town Driveway standards, as opposed to Town Road standards.

30. The DRB approved the application on or about February 13, 2022.

31. Neighbors appealed that decision to this Court, as defined above, the Municipal Action.

32. On or about March 29, 2022, Neighbors filed a complaint in the Vermont Superior Court, Civil Division, Lamoille Unit, seeking a declaratory judgment that the No Building Zone on the Daylight Lot is a restrictive covenant, and a ruling that the Fosses were enjoined from construction within the No Building Zone. Neighbors also sought damages, costs and fees, along with any other relief the Court found just and reasonable (the Civil Action).

33. This Court was specially assigned to hear the Civil Action on May 4, 2022.

[3] While neither party set forth this fact in their Statement of Undisputed Material Facts, fact is set forth in the underlying DRB decision on this matter and is discussed by both parties within their filings. It does not appear legitimately disputed by either party and is material to the motion before the Court. We therefore conclude that this fact is adequately established by the record before the Court. See V.R.C.P. 56(c)(5) and Reporter's Notes 2021 and 2012 Amendments.

Conclusions of Law

In the Municipal Action, Neighbors present three Questions in their Statement of Questions. They state:

> 1. Is the DRB's approval to remove a prior subdivision condition requiring the construction of a private road prohibited pursuant to the Vermont Supreme Court's holdings in *In re Stowe Club Highlands*, 166 Vt. 33 (1996) and *In re Hildebrand*, 2007 VT 5?
>
> 2. Is the DRB's approval allowing construction of a single family dwelling in the "No Building Zone" as shown on the survey entitled "Lot Line Adjustment 'Daylight Lot' Sterling Meadow Farm, LLC, Green Park West, Hyde Park, VT" dated Dec. 2016 by Glen Towne recorded at Map Slide 110 in the Town of Hyde Park Land Records and approved by the Town of Hyde Park Planning and Zoning Administrator under Permit No. 2016-066 prohibited pursuant to the Vermont Supreme Court's holdings in *In re Stowe Club Highlands*, 166 Vt. 33 (1996) and *In re Hildebrand*, 2007 VT 5?
>
> 3. Are Applicants prohibited from building in the "No Building Zone" as shown on the aforementioned survey and approved by the Town of Hyde Park Planning and Zoning Administrator under Permit No. 2016-066?

Statement of Questions (filed March 15, 2022).

The Fosses move for partial summary judgment on Questions 2 and 3 of Neighbors' Statement of Questions. Neighbors move for summary judgment on all three Questions, and the merits of the Civil Action (i.e., is the No Building Zone a binding restrictive covenant on the Daylight Lot). We note that, in the municipal action, while the parties move on the issue of whether the No Building Zone is a binding permit condition, neither party fully addresses remaining issue of Question 2, namely, if the Court concludes that the No Building Zone is a binding permit condition, whether the Fosses need, or are entitled to, a permit amendment under the Stowe Club Highlands and Hildebrand doctrines to for their proposed development. We address the Civil Action before moving to the merits of Municipal Action.

I. Whether the No Building Zone is a Restrictive Covenant on the Daylight Lot

To enforce a restrictive covenant against a landowner other than the original covenantee, the alleged covenant must run with the land. Rogers v. Watson, 156 Vt. 483, 487 (1991). For a restrictive covenant to run with the land, it typically must meet four requirements: (1) it must be in writing, (2) the parties must intend that the promise run with the land, (3) it must "touch and

concern" the land, and (4) there must be privity of estate between the parties. Id. (quotation omitted).

Unless an exception applies, the failure to comply with the Statute of Frauds renders the burden of the servitude unenforceable, and the benefit of the servitude becomes terminable at will. See Restatement (Third) of Property: Servitudes § 2.8. There are instances, however, where a writing may not be necessary. See Hayes v. Mtn. View Estates Homeowners Ass'n, 2018 VT 41, ¶ 20, 207 Vt. 293 (citing Restatement (Third) of Property: Servitudes § 2.9); see also Restatement (Third) of Property: Servitudes §§ 2.10, 2.13; see 12 V.S.A. § 181(5) ("Agreements required to be written").

It is undisputed that the Daylight Lot Deed does not contain language explicitly containing a restrictive covenant on the lot. Neighbors, however, argue that two exceptions are applicable here which render the No Building Zone an enforceable restrictive covenant on the parcel. First, they assert that the Boundary Line Plat, as referred to in the Daylight Lot Deed, creates a restrictive covenant. Second, they assert that the Pastors and Mr. Larson created an oral servitude binding on the Fosses in the interest of justice. We address each argument in turn.

Restatement (Third) of Property: Servitudes, § 2.13 addresses servitudes implied by a map or boundary reference.[4] Section 2.13 states:

> In a conveyance or contract to convey an estate in land, description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied by the circumstances:
>
> > (1) A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses.
> >
> > (2) A description of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way.

Restatement (Third) of Property: Servitudes, § 2.13. The Restatement's comments go on to state that the rationale for this rule:

[4] The Vermont Supreme Court has looked to this section in interpreting implied servitudes. See Noble v. Kalanges, 2005 VT 101, ¶ 23, 179 Vt. 1.

> [I]s the assumption that the grantor who uses such a description intends to include the use rights shown on the map, or in the street used as a boundary, and the grantee reasonably expects to receive them. The grantor's description, in effect, constitutes a representation to the grantee that the grantee will receive the use rights. When a developer conveys land by reference to a map showing parks, open space, beaches, or other areas of common use and benefit, the deed incorporates the map by reference.

Restatement (Third) of Property: Servitudes, § 2.13 cmt. a (emphasis added).

The No Building Zone is not the type of servitude contemplated in § 2.13 of the Restatement. This exception addresses instances where grantor refers to benefits afforded to purchaser-grantee that are marked on development maps and plans made by the developer. This section generally addresses affording a grantee use benefits of a development, such as streets and parks. It generally does not reference instances in which a developer-grantor seeks to burden a specific property for the benefit of property outside of its development.[5] Instead, § 2.13 works to address situations where developer must be held to promises it made to purchasers of property, as depicted on maps and plats. We, therefore, conclude that § 2.13 is inapplicable to the facts presented and not grounds to exempt the No Building Zone from the Statute of Frauds.

Second, Restatement (Third) of Property: Servitudes, § 2.9 states that:

> The consequences of failure to comply with the Statute of Frauds, set out in § 2.8, do not apply if the beneficiary of the servitude, in justifiable reliance on the existence of the servitude, has so changed position that

[5] To the extent that § 2.13 limitedly addresses burdening a grantee's property through a map reference, we conclude that the facts presented here are not such that would allow us to burden the Daylight Lot. Section 2.13, comment b briefly addresses burdening property by implication. It states:

> The impact of implying a servitude on the values of both the burdened and benefitted properties may be factors bearing on the intent of the parties. The circumstance that the impact on the value of the burdened estate would be severe and the value to the benefited estate would be negligible, may indicate an intent that no servitude should be implied.

Restatement, § 2.13, cmt. b.

The No Building Zone purports to restrict over 50% of the otherwise likely developable area of the Daylight Lot. This portion of the lot was approved by the 2013 Subdivision Approval as a residential lot. Should no restriction be imposed, the Pastors will be in generally the same position as when the 2013 Subdivision Approval was issued. There is no allegation that the reinstallation of any landscape screening would be unduly difficult. While we conclude that the No Building Zone is not the type of covenant addressed by § 2.13, assuming *arguendo* that it is relevant here, we note that the considerations set forth in comment b weigh in favor of not concluding that the map references constitutes a restrictive covenant on the Daylight Lot.

> injustice can be avoided only by giving effect to the parties' intent to create a servitude.

Restatement (Third) of Property: Servitudes, § 2.9.[6]

While § 2.9 addresses broader circumstances than that set out in § 2.13, "[t]he power to dispense with the Statute[of Frauds'] requirements to give effect to the intent of the parties should be exercised with caution because of the risk that exceptions will undermine the policies of the Statue of Frauds." Id. at cmt. b.

Section 2.9 states that there are two elements that the Court should consider when determining whether to find a covenant in the absence of a writing: "first, the extent to which the evidentiary function of the statutory formalities is fulfilled; and second the extent to which the conduct of the parties provides a basis for substantive relief sufficient to justify overriding the Statute's protective and channeling functions." Id. The first element is generally referred to as the evidentiary element, and the second as the substantive element.

Generally, at issue in this motion is the substantive element, particularly as it relates to Pastor's conduct in response to the agreement with Mr. Larson.[7] Considerations of the substantive element include "the nature of the grantor-promisor's conduct and the reliance by the grantee-promisee to determine whether the social interest in preventing injustice outweighs the social interests served by requiring that land transactions be in written form." Id. Normally, the level of positional change sufficient to justify the Statute of Frauds requirements include purchasing land in reliance on a promise or investment in improvements on land in furtherance

[6] The Vermont Supreme Court has looked to § 2.9 in VTRE Invs., LLC v. MontChilly, Inc., 2020 VT 77, 213 Vt. 175 and Hayes, 2018 VT 41, 207 Vt. 293

[7] To the extent that the evidentiary element is at issue, we conclude that it is satisfied. Section 2.9, comment c notes that the existence of a servitude made by oral means, "evidence of its existence and terms may be provided by the testimony of the parties or others, and corroborated by maps, plats, advertisements, or other documents, or by subsequent actions by the parties." Here, we have an affidavit of Mr. Pastor that this agreement took place, the Boundary Line Plat, and the cutting on the Pastor Lot. We do not, however, have evidence that the Pastors and Mr. Larson agreed that the No Building Zone would be a restrictive covenant on the land. There has been no allegation that the Pastors and Mr. Larson agreed as to the form this restriction would take. Meaning, it is not alleged that the Pastors and Mr. Larson agreed that the exchange would result in the creation of a deed restriction or restrictive covenant on the Daylight Lot, but subsequently failed to memorialize that agreement. Instead, it could be inferred by the actions of Mr. Larson that he intended the restriction, for the reasons set forth below, to be one of permitting, not of deed restrictions, as there are many means by which a landowner-developer may seek to memorialize the agreed-upon restriction. Therefore, while we have sufficient evidence to conclude an agreement was reached, we have no evidence as to the form the restriction was to take.

of the servitude, or the relinquishment of established servitude rights in reliance on the agreement to create a new servitude. Id. at cmt. e. The investment in improvements must be "substantial." Id. ("If proof of the oral easement is clear, any substantial expenditure on improving the easement, or improvements to the dominant estate, in reliance on the existence of the easement provides sufficient basis for enforcing the oral transaction.").

Further, the reliance must be reasonable. Id. "When neighbors enter into oral easement arrangements, reliance on the oral easement is usually justified by the facts that the transaction is relatively simple, the economic impact on the servient estate is not great, and there is a natural reluctance to insist on formality between neighbors." Id.

We conclude that, while the Pastors' reliance on the agreement was reasonable, the change in position is not one that would justify dispensing the Statute of Frauds.[8] Mr. Larson requested the ability to cut certain trees on the Pastor Lot to improve views on the Daylight Lot, in exchange, he would create a No Building Zone on the Daylight Lot to preserve privacy. The Pastors then allowed the cutting to move forward. This is a simple agreement between neighboring property owners. While the impact on the Daylight Lot is great, there is evidence that Mr. Larson entered into the agreement to receive an economic benefit – selling the Daylight Lot, which he was struggling to do. Sterling Meadow Farm, LLC subsequently sold the Daylight Lot. Based on the simple nature of the agreement and transaction, we conclude that the Pastors' reliance on the agreement was reasonable.

While the reliance was reasonable, the Pastors did not change their position to a degree that would allow the Court to disregard the formalities of the Statute of Frauds and conclude that the No Building Zone is a restrictive covenant on the Daylight Lot. There has not been any allegation of a substantial investment by the Pastors. Mr. Larson cut a series of trees on the Pastor Lot. There is no allegation that the Pastors spent any money in relation to that action, nor is there any allegation that the reinstallation of landscaping is so severe that it would not be feasible to reinstall privacy screening should the Court conclude there is no servitude. There is no allegation that the Pastors undertook any other investment in reliance on the agreement with Mr. Larson. There is also no allegation that the Pastors changed their position in any other way

[8] There has been no allegation that Neighbors Hewitt/Mazer changed any position in relation to the agreement.

contemplated by § 2.9 by either purchasing property or relinquishing rights that they had in reliance on the agreement. Thus, the Pastors have not changed their position to the degree required to allow the Court to deviate from the requirement that servitudes must comply with the Statute of Frauds in the interests of justice.[9]

Because there is no writing establishing a restrictive covenant on the Daylight Lot, and there is no applicable exemption to the Statute of Frauds presented here, we conclude that the No Building Zone is not a restrictive covenant on the Daylight Lot. We therefore **DENY** the Neighbors' motion for summary judgment in the Civil Action.

Based on the above, we conclude that there is no dispute of material fact, and that, even when providing Neighbors with the benefit of all reasonable doubts and inferences, conclude the No Building Zone is not a restrictive covenant on the Daylight Lot as it does not comply with the Statute of Frauds or a relevant exception thereto. This conclusion will conclude the Civil Action in the Fosses favor. The Fosses, however, have not moved for summary judgment on this issue. Thus, in the interest of judicial efficiency, unless the parties respond within 10 days of the date of this decision, the Court will conclude that the No Building Zone is not a restrictive covenant and **GRANT** summary judgment in favor of the Fosses. V.R.C.P. 56(f); Burns 12 Weston Street Nov, No. 75-7-18 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Oct. 25, 2019) ("Under [56(f)] authority, this Court would normally have to give notice and a reasonable time of 10 days from the filing of this Order for the [party] to respond.").

II. Whether the No Building Zone is a Binding Permit Condition

While we have concluded that the No Building Zone is not a restrictive covenant on the Daylight lot, we must now determine whether the No Building Zone binds the property as a land

[9] It is for the same reason that we conclude that a servitude was not created by estoppel. See Restatement (Third) of Property: Servitudes, § 2.10 (addressing servitudes created by estoppel, in which a court could conclude a servitude was valid absent a writing where "injustice can be avoided only by establishment of a servitude . . . when: the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or (2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.")

use permit condition in the Municipal Action. For the reasons set forth below, we conclude that it does.

This issue requires us to address Questions 2 and 3 of the Statement of Questions. These Questions ask:

> 2. Is the DRB's approval allowing construction of a single family dwelling in the "No Building Zone" as shown on the survey entitled "Lot Line Adjustment 'Daylight Lot' Sterling Meadow Farm, LLC, Green Park West, Hyde Park, VT" dated Dec. 2016 by Glen Towne recorded at Map Slide 110 in the Town of Hyde Park Land Records and approved by the Town of Hyde Park Planning and Zoning Administrator under Permit No. 2016-066 prohibited pursuant to the Vermont Supreme Court's holdings in *In re Stowe Club Highlands*, 166 Vt. 33 (1996) and *In re Hildebrand*, 2007 VT 5?
>
> 3. Are Applicants prohibited from building in the "No Building Zone" as shown on the aforementioned survey and approved by the Town of Hyde Park Planning and Zoning Administrator under Permit No. 2016-066?

Restrictions on land "should be explicit to provide notice of all conditions imposed because subsequent purchasers would lack notice of all restrictions running with the property." In re Willowell Found. Conditional Use Cert. of Occupancy, 2016 VT 12, ¶ 14, 201 Vt. 242 *overruled on other grounds by* In re Confluence Behavioral Health, LLC, 2017 VT 112, 206 Vt. 302 (internal quotation and citation omitted). This Court, and the Vermont Supreme Court, has concluded that, in order to be an enforceable permit condition, some plat labels require accompanying documentation setting forth the terms of the restriction. Id. (concluding the terms "Agricultural Reserve" and "Building Envelope" on a plat were unenforceable without a document to describe the terms); see also In re N. Acres, LLC, 2007 VT 109, ¶ 12, 182 Vt. 618 (mem.) (concluding that the plat term "common land" was an enforceable permit condition where the plat referenced regulations assisting in defining the term); In re Stowe Club Highlands, 164 Vt. 272, 277 (1995) (concluding the term "agricultural easement" on a plat was unenforceable without a recorded permit with conditions defining the phrase). That said, this "holding does not categorically prevent all plat labels from imposing land-use restrictions. It is possible that a plat description could be specific enough to notify an owner of restrictions." Id. at ¶ 20.

The Boundary Plat states: "The Original 'Daylight Lot' 3.28 Acres To Be A No Building Zone." We further conclude that the term "No Building Zone" is sufficiently clear to provide

landowners notice of the restrictions on their property absent an accompanying document describing the terms of the No Building Zone.

First, the No Building Zone identifies the specific 3.28 acres subject to the restriction: the originally permitted 3.28 acres. Thus, there is no question about the scope of the parcel subject to the restriction. Second, the term "No Building Zone" is sufficiently clear on its face. The language denotes that there shall be no building within the 3.28 acres. The Court concludes that this restriction is neither vague nor ambiguous. One reading the Boundary Plat can come to one conclusion upon viewing the plat: there is to be no building sited within the 3.28 acres of the original Daylight Lot.[10]

The No Building Zone is different from the plat descriptions discussed in Willowell and its cited cases. In Willowell, the plat marked certain areas as "agricultural reserve" and "building envelope." Willowell, 2016 VT at ¶¶ 19–20. These were instances where the landowner could not understand "what it can and cannot do with the land." In re Handy, 171 Vt. 336, 347 (2000). The No Building Zone does not require the Court to "infer a restriction on a landowner's use of [their] land . . . ." Willowell, No. 142-10-12 Vtec, slip op. at 14 (Vt. Super. Ct. Envtl. Div. July 10, 2014) (Walsh, J.) *aff'd by* Willowell. It is simple, there may not be a building within the zone.[11]

Therefore, we conclude that the No Building Zone is a binding condition on the Daylight Lot. In so concluding, we **GRANT** the Neighbors' motion for summary judgment in this respect and **DENY** the Fosses motion in the same. In reaching this conclusion, however, the Court is presented with a new issue. Question 2 addresses the permit amendment processes set forth in Stowe Club Highlands and Hildebrand. 166 Vt. 33; 2007 VT 5. We cannot conclude at this time

[10] To the extent that the Fosses argue that the No Building Zone is unenforceable because it was included as a part of a boundary line adjustment, as opposed to a more intensive land use permitting process, this is not fatal to the condition. Landowners and developers may self-impose conditions upon their land use projects for reasons beyond instances to ensure compliance with land use regulations. Land developers regularly voluntarily propose restrictions on their land to appease neighbor concerns and limit opposition to their project. That the "No Building Zone" was not required by the Town or the zoning regulations, therefore, does not negate the fact that the No Building Zone was imposed.

[11] The Fosses seek to create ambiguity in the term "building" by listing smaller non-single family home structures. This Court cannot provide an advisory opinion as to whether these structures would constitute "building" in the No Building Zone. In re Snowstone, LLC Stormwater Discharge Authorization, 2021 VT 36, ¶ 28 ("Courts are not authorized to issue advisory opinions because they exceed the constitutional mandate to decide only actual cases and controversies."). Such a determination would need to be considered by the DRB in the first instance, pursuant to the zoning regulations applicable at that time.

whether the Fosses are entitled to seek an amendment of the No Building Zone under Stowe Club Highlands and Hildebrand. The parties have not fully briefed this issue and the Town did not conduct an analysis in the first instance. Instead, the Town concluded that the No Building Zone was not a permit condition that they retained jurisdiction over. For the reasons set forth herein, we conclude otherwise. Because the Town reached a different conclusion and, therefore, did not address the merits of a permit amendment analysis, we must **REMAND** this portion of the municipal action to the DRB to complete the Stowe Club Highlands and Hildebrand review, and if the DRB concludes that the amendment request is not barred, the DRB should review the substance of the amendment request. See In re Killington Resort Pkg. Project Act 250 Permit Application, No. 173-12-13 Vtec, slip op. at 4—5 (Vt. Super. Ct. Envtl. Div. Jan. 28, 2015) (Durkin, J.) (noting that, because this Court is one of limited jurisdiction, a remand is necessary to ensure that "the tribunal below has fulfilled its important responsibility of hearing new applications in the first instance.") (citing In re Torres, 154 Vt. 233, 236 (1990)); see also V.R.E.C.P. 5(j) (affording this Court discretion to remand matters for further review consistent with its orders).

III. Whether the Road Condition is Subject to Amendment

The Fosses have applied for a permit amendment for relief from the requirement that they improve Green Park East Road to roadway standards prior to the development of the Daylight Lot.

The 2013 Subdivision Approval, creating the Daylight Lot, stated:

> The applicants['] proposal for the maximum of 13 residential units to utilize green Park West Road and the associated 50-foot ROW's will be acceptable if the road is built to the standards established by this approval . . .
>
> The 2012 Town of Hyde Park Road and Bridge Standards must be met prior to any new development in Green Park West. The same road construction standards and conditions approved in 2012-058 are maintained in this approval, including the requirement that the applicant submit a final inspection report for the road improvements, prepared by a VT Licensed Professional Engineer. Prior to the issuance of a zoning permit for development of any lot, the engineer's inspection report must show that the road complies with all town requirements and approvals for the portion of private road serving as access from Battle Row Road to that lot. Only the construction of the individual driveway to the house, outside of the 50-foot ROW, may be deferred until after the zoning permit is issue[d].

> Other state or local standards for such items as drainage and culvert or bridge standards must also be met for all public or private roads, including amendments to existing roadway & surface, ditches & slopes, culverts & bridges and guardrails, unless specifically waived by the DRB, must be met.

Neighbors Ex. 3, p. 2—3.

We construe the terms of a permit using ordinary rules of statutory construction. In re Barry, 2011 VT 7, ¶ 19, 189 Vt. 183. Thus, we attempt first to give effect to the plain meaning of permit terms. In re Weeks, 167 Vt. 551, 554 (1998). If the meaning is plain, we go no further. Id. But, because a land use permit is in derogation of common law property rights, we construe any ambiguities in the permit in favor of the landowner. Barry, 2011 VT 7, ¶ 18.

The Fosses present two arguments that the requirement to upgrade the roadway has not been triggered. First, they argue that the type of "new development" triggering roadway standards is not the development of the Daylight Lot, but instead the development of adjacent land then-owned by Sterling Meadow Farm, LLC. This is contrary to the language of the permit and the facts giving rise to the condition.

The condition states that road standards are triggered upon "new development in Green Park West" (or the Green Park Subdivision) and "development of any lot." The Green Park Subdivision was approved as a residential subdivision, with the lots being residential in nature. The condition does not state that road standards are triggered by additional subdivision, or the approval of additional lots on the remaining acreage. Instead, the condition references the development of the subdivision, which is residential in nature.

The 2013 Subdivision Approval references Sterling Meadows Farm, LLC's 2012 permit decision, Permit 2012-058 (the 2012 Decision). The 2012 Decision contains language mirroring the 2013 Subdivision Approval, stating that "any new development" in the subdivision triggers the requirement that the road(s) be improved to Town roadway standards. See Neighbors Ex. 12. It goes on to note that "new homes" are the type of development that would trigger this requirement. At no point do either the 2013 Subdivision Approval or the 2012 Decision contain reference to further subdivision of lands within the subdivision not then before the Town as being the type of "new development" that would trigger improvement of the roads. We, therefore, conclude that, as the Fosses propose to construct a new home on the Daylight Lot, they would

need a permit amendment to be relieved of the requirement to upgrade the Green Park East to Town roadway standards. Having concluded that the type of development that the Fosses propose is subject to the condition, we now turn to whether the Fosses' proposal, in the context of the condition, triggers roadway improvement.

Second, the Fosses contend that the need to upgrade the road to Town road standards is not required until the road serves four or more residences. This interpretation is consistent with the 2013 Subdivision Approval.

The 2012 Decision, left largely intact by the 2013 Subdivision Approval with respect to the roadway condition, notes in its conclusion that upgrading the roads is a consideration when four or more residences use a section of the proposed roadway. Neighbors Ex. 12 at 3. The Town, therefore, was contemplating triggering roadway improvements when four or more homes used a section of the roadway.[12] It is undisputed that less than four homes use Green Park East, should the Daylight Lot be improved with a new home. Further, to the extent that Neighbors argue that we must consider the entirety of the Green Park Subdivision, even those homes not accessed by Green Park East Road, it is undisputed that the Fosses proposed home would only be the third home within the development. To the extent that the condition is ambiguous, we must resolve that ambiguity in favor of the Fosses. Barry, 2011 VT 7, ¶ 18.

We therefore conclude that the Fosses do not need to upgrade Green Park East to Town roadway standards should they be permitted to construct a home on the Daylight Lot.

We therefore **DENY** the Neighbors' motion for summary judgment with respect to Question 1 and conclude that Stowe Club Highlands is not relevant to the Fosses current proposal. The Fosses have not moved for summary judgment on this issue. Thus, in the interest of judicial efficiency, unless the parties respond within 10 days of the date of this decision, the Fosses do not need a permit amendment to be relieved of the requirement that Green Park East be upgraded to Town road standards and GRANT summary judgment in favor of the Fosses. V.R.C.P. 56(f); Burns 12 Weston Street Nov, No. 75-7-18 Vtec, at 4 (Oct. 25, 2019).

[12] While neither party has submitted a copy of the Town regulations, it appears undisputed that this would be consistent with current Town regulations regarding roads.

Conclusion

For the foregoing reasons, we conclude that the No Building Zone is not a restrictive covenant on the Daylight Lot. We therefore **DENY** Neighbors' motion in the Civil Action. The No Building Zone is, however, a binding permit condition. We therefore **GRANT** Neighbors' motion in this respect and **DENY** the Fosses' in the same. For the reasons set forth herein, we conclude that we must **REMAND** the discrete issue of whether the Fosses are entitled to a permit amendment back to the DRB for consideration in the first instance. This includes the DRB reviewing the amendment request pursuant to Stowe Club Highlands and Hildebrand and, if the DRB concludes that the amendment request is not barred, the DRB should review the substance of the amendment request.

Finally, we conclude that the requirement that Green Park East Road must be upgraded has not been triggered and, therefore, the Fosses do not need to seek an amendment of the 2013 Subdivision Approval. Because the Fosses have not cross-moved on the merits of the Civil Action or the roadway condition, they parties have 10 days of the date of this decision to respond to this decision. If no party responds, we will conclude that the No Building Zone is not a restrictive covenant and that the Fosses do not need a permit amendment to be relieved of the requirement that Green Park East be upgraded to Town road standards and **GRANT** summary judgment in favor of the Fosses. V.R.C.P. 56(f); Burns 12 Weston Street Nov, No. 75-7-18 Vtec at 4 (Oct. 25, 2019).

Prior to issuing a Judgment Order and the Order of Remand, we provide the parties with 10 days to file a response as outlined above.

Electronically signed February 27, 2023 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division