VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00055

34 Look Road, LLC Permit

DECISION ON MOTION TO DISMISS AND CLARIFY

Title: Motion to Dismiss and Clarify Cross-Appellant's Section Amended Statement of Questions (Motion: 7)
Filer: David Grayck, Esq., Christopher Boyle, Esq.
Filed Date: November 22, 2022

Cross-Appellants' Memorandum in Opposition, filed on December 5, 2022, by Attorneys James Valente and Zachary Hozid.

Appellant's Reply to Cross-Appellants Memorandum in Opposition filed on December 7, 2022, by Attorneys David Grayck and Christopher Boyle.

The motion is DENIED IN PART and GRANTED IN PART.

34 Look Road, LLC and Yisroel Teitlebaum (together, Applicant) received approval from the Town of Wilmington Development Review Board (DRB) to use property located at 34 Look Road in Wilmington, Vermont (the Property) for "lodging," as that term is defined by the Town of Wilmington Zoning Ordinance (the Ordinance). Applicant appeals that decision to this Court. Additionally, before the Court is a cross-appeal by abutting property owners, Jennifer Nielsen and Eric Potter (Neighbors). Presently before the Court is Applicant's motion to clarify Neighbors' Questions 1 through 3 and to dismiss Questions 4 and 5 pursuant to V.R.C.P. 12(b)(1) of their Amended Statement of Questions. For the reasons set forth below, the motion is **DENIED IN PART** and **GRANTED IN PART**.

Legal Standard

Statements of Questions are subject to a motion to dismiss or clarify the questions therein. V.R.E.C.P. 5(f). With respect to motions to clarify, this Court has the discretion to order an appellant to clarify or narrow its Statement of Questions. See In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 14, 204 Vt. 301. We will direct a party to clarify when it is necessary to ensure that "the claims have enough specificity to notify the opposing party and the court of the issues on appeal." Id. (citing In re Verizon Wireless Barton Permit, 2010 VT 62, ¶ 20, 188 Vt. 262; In re Gulli, 174 Vt. 582, 583 (2002) (mem.)).

With respect to motions to dismiss for lack of subject matter jurisdiction, we follow the standards established in V.R.C.P. 12(b)(1), since the Civil Procedural Rules govern proceedings in this Division. See V.R.E.C.P. 5(a)(2). When considering V.R.C.P. 12(b)(1) motions to dismiss, this Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. We, therefore, provide deference to Neighbors in reviewing the pending motion.

Conclusions of Law

I. Questions 1 through 3

Questions 1 through 3 of Neighbors' Statement of Questions ask:

> 1. Was the grandfathered legal nonconforming use of lodging (as defined in Article X of the Wilmington Zoning Ordinance) at 34 Look Road discontinued pursuant to Wilmington Zoning Ordinance § 708(b)?
> 2. Whether the Court should deny the application pursuant to Wilmington Zoning Ordinance §§ 431B and 708 because the nonconforming use of lodging was not actively engaged in for a period of twelve (12) months and is thus now considered a discontinued Use making the property subject to the requirements of this ordinance, unless this Court has a basis to and grants an extension of the nonconforming use?
> 3. Whether, pursuant to Wilmington Zoning Ordinance §708(A), the application should be denied because the application's proposal will increase the degree of nonconformity?

Neighbors' Amended Statement of Questions (filed on Nov. 21, 2022).[1]

[1] To the extent that Applicant argues that Neighbors' November 21, 2022 Amended Statement of Questions have not been granted leave to file an amended Statement of Questions, we conclude that they have. On November

Applicant's motion shows that there is no lack of clarity of the issues raised by these Questions. Applicant instead seeks to require Neighbors' Questions to comport to Applicant's preferred phraseology. This is not grounds for clarification.

With respect to Question 1, Applicant takes issue with the fact that the word "lodging" is not capitalized and with the fact that "(b)" within the citation to the Ordinance is not capitalized. Neither impact the clarity of the Question generally, or Applicant's or this Court's understanding of the Question. Lodging is clearly a defined term, and the Question contains a citation to that definition. Neither party disputes that the Question addresses "lodging," as that term is defined by the Ordinance. Further, this Question cites to § 708(b). We note that there is no § 708(b), but there is a § 708(B). Thus, this failure to capitalize the "b" is a clerical typo and is not confusing or unclear. All parties, through their filings, agree that this Question addresses Applicant's compliance with § 708(B). Thus, no party is unclear as to the issues presented by this Question and it does not need to be clarified.

Next, Applicant takes issue with Question 2's phrasing. First, Applicant argues that Question 2 raises an issue that the parties dispute (i.e., whether the lodging use was discontinued as defined by the Ordinance). Applicant argues that it must be rephrased, because it raises the specific issue before the Court, whether the nonconforming use at issue here has been discontinued. We disagree. Question 2 asks, in part, the Court to determine whether the Property's lodging use has been discontinued such that it is no longer a preexisting non-conformity. Applicant does not assert that the Question is unclear in this regard. The parties dispute the merits of this aspect of the Question, but the dispute does not render the question unclear such that it must be rephrased.

Additionally with respect to Question 2, Applicant takes issue with the final clause of the Question. This clause states: "unless this Court has a basis to and grants an extension of the nonconforming use." Applicant would prefer that the clause read: "unless an extension is granted by the Court in this de novo appeal." The parties do not dispute that this Court, sitting in the place of the DRB, has the authority to grant an extension. Instead, the parties agree that

3, 2022, this Court held a status conference, directing the parties to submit amended Statement of Questions. Neighbors, and Applicant, subsequently filed Amended Statement of Questions, as directed by the Court. Thus, the parties had both been granted leave to file Amended Statements of Questions.

this Question seeks a determination as to whether an extension of a discontinuance of a nonconformity is warranted. Thus, Question 2 need not be clarified.

Finally, Applicant disagrees with Question 3's use of the term "the application's proposal will increase the degree of nonconformity" and asks the Court to require Neighbors to re-file Question 3 using the phrase "the application proposes a use which will increase the degree of nonconformity." There is no meaningful difference in this phrasing. This Question asks the Court to determine whether the application presents an instance of expansion of a nonconformity. Both parties, through their filings, are clear in their understanding of the issue raised by Question 3. Question 3 need not be clarified.

Applicant's filings show that Applicant clearly understands the issues before the Court in Neighbors' Questions 1 through 3. Because the parties, and the Court upon review of the filings, understand the issues before the Court, the motion to clarify Questions 1 through 3 is **DENIED**.

II. Questions 4 and 5

Questions 4 and 5 ask:

> 4. Is [Applicant's] application seeking uses in addition to lodging as defined in Wilmington Zoning Ordinance Article X.
> 5. If Applicants' proposed use of the property is not for lodging, are the sought uses permitted or conditional uses in a residential district pursuant to Wilmington Zoning Ordinance § 450(C).

Applicant argues that these Questions are outside of the scope of this Court's jurisdiction. For the reasons set forth below, Question 4 is properly before the Court, while Question 5 is outside the scope of the Court's jurisdiction.

With respect to Question 4, Applicant argues that because the application identifies a specific use of the property— "Lodging" as that term is defined by the Ordinance—the Court cannot make a determination as to uses Applicant propose at the Property beyond "lodging." Applicant asserts that, to consider uses "in addition to" lodging would be outside the bounds of the application before the Court and, therefore, the Question requests an advisory opinion.

This Question does not request an advisory opinion. This Court, on appeal, is tasked with determining whether an application complies with the relevant zoning provisions, as those issues

are presented through the Statement of Questions. This Question, as understood by the parties' filings, asks whether the application comports with the definition of "lodging." The Question asks for a determination that the application complies with the use sought. This is well within the scope of the Court's jurisdiction. The scope of the DRB's review determines the scope of ours. See In re Sweet Bldg. Permit, No. 19-2-12 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Jan. 25, 2013) (Walsh, J.) (citing In re Torres, 154 Vt. 233, 235 (1990)). The Court sits in the DRB's shoes on appeal. V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h); In re Feeley Constr. Permits, Nos. 4-1-10 Vtec, 5-1-10 Vtec, slip op. at 11-13 (Vt. Super. Ct. Envtl. Div. Jan. 3, 2011) (Wright, J.) (citing In re Maple Tree Place, 156 Vt. 494, 500 (1991)). The DRB, in considering the application, was tasked with determining whether the application comported with the definition of "lodging," and this Court, sitting in its place on appeal, can address the same issue. The motion to dismiss Question 4 is, therefore, **DENIED**.

Question 5, however, is outside the scope of our jurisdiction. Applicant has submitted a specific application for a change of use and identified the scope of that use, which it asserts is "lodging." Applicant has not submitted an application for a use other than lodging. Should this Court conclude that the project does not constitute "lodging," then further consideration of the application will not take place. This Court cannot opine, in the first instance, as to whether a use other than lodging complies with the zoning provisions. This was not presented to the DRB below and is beyond the scope of the application presented. See Sweet Bldg. Permit, No. 19-2-12 Vtec at 2 (Jan. 25, 2013) (citation omitted); see also Torres, 154 Vt. 233, 235 (stating that, in considering an application before it, "[t]he reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broader."). To rule on this issue would be to provide an impermissible advisory opinion. In re Snowstone, LLC Stormwater Discharge Authorization, 2021 VT 36, ¶ 28, 214 Vt. 587 ("Courts are not authorized to issue advisory opinions because they exceed the constitutional mandate to decide only actual cases and controversies."). Thus, Applicant's motion with respect to Question 5 is **GRANTED** and the Question is **DISMISSED**.

For the reasons set forth herein, Applicant's motion to clarify Questions 1 through 3 and motion to dismiss Question 4 are **DENIED**. Applicant's motion to dismiss Question 5 is **GRANTED**, as the Question is outside the scope of this Court's jurisdiction.

Electronically signed this 1st day of March 2023 pursuant to V.R.E.F. 9(F)

Thomas G. Walsh, Judge
Superior Court, Environmental Division