VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 22-ENV-00061

In re O'Brien Farm Road, LLC	**Decision on Motions**

This matter is an appeal of a District #4 Commission (the Commission) decision imposing a $90,640.25 permit application fee on a minor amendment application. The application sought to amend a previous master plan approval filed by O'Brien Farm Road, LLC (Applicant) in relation to a mixed-use development in South Burlington, Vermont, including 118 units of housing and six residential/mixed-use lots (the Project). The minor amendment is for the construction of two 47-unit buildings on two previously approved lots within the Master Plan Project. Through this appeal, Applicant asserts that it need not pay any further application fees for the Project because it has previously paid a $165,000 application fee in connection with the Project's master plan.[1]

Presently before the Court are the parties cross-motions for summary judgment on Applicant's Question 1, which asks: "Was it wrong to require O'Brien to pay an application fee in excess of the statutory cap set by 10 V.S.A. § 6083a(a)(6)?"[2] For the reasons set forth below, we **DENY** Applicant's motion for summary judgment on Question 1 and **GRANT** the NRB's motion on the same.

Applicant is represented by Matthew Byrne, Esq. The Natural Resources Board (NRB) is represented by Alison Milbury Stone, Esq.

[1] Applicant additionally asserts that, should a fee be imposed, that fee should be further reduced. The parties do not request that the Court rule on this issue at this time, however.

[2] We note that this Question is phrased in an "on-the-record" context. In this action, this Court conducts a de novo review. 10 V.S.A. § 8504(h). Thus, we sit in the shoes of the District Commission and the appeal occurs as if no action were held below. See Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989). As such, based on the parties' filings, we interpret Question 1 to ask whether O'Brien need not pay any additional application fee in excess $165,000 for the Project.

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 reasonable doubts and inferences." Robertson v. Mylan Labs., Inc., 2004 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 59, ¶ 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 15, ¶ 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) (mem.)).

1. Applicant is the developer of a mixed-use development in South Burlington, Vermont known as Hillside at O'Brien Farm Community, which includes 118 residential units, and six large residential/mixed use development lots (the Project).

2. On or about September 25, 2017, Applicant received master plan approval from the Commission for the Project, Land Use Permit 4C1106-3-ALTERED (the Master Plan Approval).

3. In connection with the Master Plan Approval, Applicant paid a permit application fee of $165,000.

4. This fee was based on the projected construction costs for the entirety of the Project.

5. On or about April 8, 2022, Applicant submitted Land Use Permit Application 4C1106-C, a minor permit amendment application for the construction of two 47-unit residential buildings on Lots 10 and 11 in the Project (the 2022 Application).

6. These lots, and buildings, were subject to the Master Plan Approval and the construction costs were included in the Master Plan Approval's application fee.

7. On or about April 26, 2022, the District Coordinator issued an incompleteness determination on the grounds that Applicant failed to pay the relevant application fee, which was calculated to be $113,300.31.

8. On May 17, 2022, the District Commission issued a Notice of Minor Application for the 2022 Application.

9. On May 16, 2022, Applicant applied for a fee waiver or reduction of the fee pursuant to 10 V.S.A. §6083a(f) on the grounds that it had previously paid a $165,000 fee in 2017, in relation to the Master Plan Approval.

10. On June 2, 2022, the District Commission issued a decision reducing the 2022 Application fee by 20%, which resulted in a $90,640.25 fee in total.

11. On June 16, 2022, Applicant paid this fee "under protest."

12. On June 27, 2022, Applicant appealed the Commission's June 2, 2022 fee reduction decision to this Court.

13. On August 31, 2022, the Commission issued the permit.

Discussion

Applicant asserts that it need not pay any further application fees related to the project because it paid a $165,000 permit application fee in 2017 in connection with the Master Plan Approval. Effectively, it argues that the statutory maximum permit application fee set forth in 10 V.S.A. § 6083a(a)(6) applies on a project-wide basis, not on a per-application basis. The NRB argues that § 6083a(a)(6) is a per-application fee cap, not a per-project fee cap. For the reasons set forth below, we conclude that § 6083a(a)(6) is a per-application fee cap such that Applicant

may be required to pay subsequent application fees in addition to the $165,000 fee it has previously paid.

Relevant to application fees, the statute provides that:

> (a) All applicants for a land use permit under section 6086 of this title . . . shall be subject to the following fees for the purpose of compensating the State of Vermont for the direct and indirect costs incurred with respect to the administration of the Act 250 program:
>
> (1) For projects involving construction, $6.65 for each $1,000.00 of the first $15,000,000.00 of construction costs, and $3.12 for each $1,000.00 of construction costs above $15,000,000.00. An additional $0.75 for each $1,000.00 of the first $15,000,000.00 of construction costs shall be paid to the Agency of National [sic] Resources to account for the Agency of Natural Resources' review of Act 250 applications.
>
> . . .
>
> (5) For projects involving the review of a master plan, a fee equivalent to $0.10 per $1,000.00 of total estimated construction costs in current dollars in addition to the fee established in subdivision (1) of this subsection for any portion of the project seeking construction approval.
>
> (6) In no event shall a permit application fee exceed $165,000.00.

10 V.S.A. § 6083a(a)(1)–(6).

These application fees are, however, subject to waiver of all or part of the calculated fee. 10 V.S.A. § 6083a(f). Section 6083a(f) states that:

> In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the Chair of the District Commission to waive all or part of the application fee. If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the Chair may waive all or part of the fee for a new or revised project if the Chair finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, or that there will be substantial savings in the review process due to the scope of review of the previous applications.

10 V.S.A. § 6083a(f).

When interpreting a statute, our goal is "to give effect to the intent of the Legislature. State v. Therrien, 2011 VT 120, ¶ 9, 191 Vt. 24 (quotation omitted). "In determining that intent,

we begin by looking at the plain language of the statute." Flint v. Dep't of Labor, 2017 VT 89, ¶ 5, 205 Vt. 558. "[W]hen a statute is unambiguous and has a plain meaning, we 'accept the statute's plain meaning as the intent of the Legislature and our inquiry proceeds no further.'" Town of Pawlet v. Banyai, 2022 VT 4, ¶ 21 (quoting Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 14, 177 Vt. 287). Further, when interpreting a statute, there is a basic presumption "that language is inserted in a statute advisedly." Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 104 (1993). As such, we "construe statutes to avoid rendering one part mere surplusage." In re Jenness & Berrie, 2008 VT 117, ¶ 24, 185 Vt. 16. "'Provisions that are part of the same statutory scheme must be read in context and the entire statutory scheme read' together to ascertain the legislative intention from the whole of the enactments." Negotiations Comm. Of Caledonia Central Supervisory Union v. Caledonia Central Edu. Ass'n, 206 Vt. 636, 646 (2018) (quoting In re Griev. Of Danforth, 174 Vt. 231, 238 (2002)).

Read in its entirety, the permit application fee cap set forth in 10 V.S.A. § 6083a(a)(6) applies on a per-application basis, not a per-project basis.[3] We reach this result based on the plain reading of § 6083a, in the context of the purpose of Act 250 fees and the entirety of the section.[4]

Section 6083a(a)(6) states that "[i]n no event shall a permit application fee exceed $165,000." Unlike the other subparts of § 6083a(a), which calculate fees based on the "projects," the statutory-cap provision does not reference a "project," but rather an "application," specifically. We conclude that this alternative phrasing is intentional. See Clymer v. Webster, 156 Vt. 614, 625 (1991) (applying maxim of "expressio unis est exclusio alterius" when contrast enforces affirmative inference that that which is omitted was intended to have opposite

[3] Applicant seeks to have the Court adopt the logic of In re Snyder Taft Corners, No. 15-2-15 Vtec (Vt. Super. Ct. Envtl. Div. Jan. 27, 2016) (Walsh, J.). Snyder Taft Corners concluded that § 6083a(a)(6) set a permit application fee cap relative to an entire project. The decision did not address the additional context provided in § 6083a(f) in interpreting the legislative intent of § 6083a, as a whole, and was ultimately vacated by this Court to allow the applicant to pursue a waiver of fees pursuant thereto. Snyder Taft Corners, No. 15-2-15 Vtec (Vt. Super. Ct. Envtl. Div. July 18, 2016) (Walsh, J.). It is specifically not binding precedent on this Court and we decline to adopt the logic therein, as it lacks a complete review of § 6083a.

[4] Because we conclude that the statute is unambiguous, we need not reach the issue of whether deference to the NRB's interpretation is warranted. See Levine v. Wyeth, 2006 VT 107, ¶ 31.

treatment).[5] Section 6083a(a)(6) does not use the word "project" at all. If the Legislature wanted to explicitly set a fee cap for an entire project, which may include multiple applications, it could have written § 6083a(a)(6) to do so. It did not. Instead, the Legislature declined to reference "projects," and chose instead to use the more specific "application."

Further, this interpretation is required based on a complete reading of § 6083a. Section 6083a not only includes the maximum application fee, but also the purpose of the fees and a means by which the fees may be completely or partially waived.

We give effect to the intent of the Legislature when it drafted § 6083a and created Act 250 application fees. See Therrien, 2011 VT 120, ¶ 9 (stating that the goal of statutory interpretation is "to give effect to the intent of the Legislature."). Act 250 fees are imposed to compensate the State of Vermont for the costs of administering the Act 250 program. 10 V.S.A. §6083a(a). In the context of a specific project, the State's costs in administering Act 250 do not necessarily end after an initial permit application, even when that application warranted a maximum permit fee. A project may be structured in a way that contemplates further permit applications after initial permitting, or it may be amended in such a manner that would require an amendment to an initial permit. These reviews may be substantial or minimal, depending on the scope of the application in the context of the initial permitting, and the State may incur varying costs in these subsequent reviews.[6]

Ultimately, Applicant's interpretation would extend the maximum fee's applicability beyond each application, making it cumulative for the life of the project. Such a reading would restrict the State's ability to recoup costs relevant to subsequent permit applications. This could result in the State being unable to recoup any costs from any subsequent permit amendments if

[5] Applicant would have us read the word "project" into § 6083a(a)(6) based on its inclusion in subsections (1) through (4). It's omission, however, carries weight not only due to the maxim of "expressio unis est exclusio alterius," but also within the context of the scheme as a whole, particularly in light of § 6083a(f), discussed below.

[6] It is for this same reason that we conclude Applicant's amendment application is subject to the provisions of § 6083a. Applicant asserts that § 6083a is not applicable to its application, which is one for an amendment to a permit, not for a new permit. This technical reading is contrary to the purpose of § 6083a, which is to allow the State to recover costs associated with administering Act 250, generally, which includes reviewing and ruling upon all amendment applications. See Act 250 Rules, Rule 34 (governing the process for permit amendments). It further disregards the reality of a permit amendment application's end result: a permit. When an applicant submits a permit amendment application, should that application be approved, the Commission issues a permit. This is what occurred here, and Applicant has received a permit. Thus, a permit amendment application is a permit application.

the original permit application resulted in a fee of $165,000, even if the project requires substantial subsequent review with significant costs incurred by the State. This is contrary to the stated purpose of Act 250 fees. We, therefore, cannot adopt such an interpretation of 10 V.S.A. § 6083a(a)(6).

The compensatory purpose of Act 250 fees, and the interpretation that § 6083a(a)(6) applies on a per-application basis, is further supported by the ability of an applicant to receive a complete or partial waiver of fees in relation to subsequent application review for a specific project. 10 V.S.A. § 6083a(f).[7] In this regard, § 6083a(f) states that "[i]n the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the Chair of the District Commission to waive all or part of the application fee."

In this waiver provision, the statute uses "application" and "project" as distinct from one another, in that it addresses a situation in which a project has been previously reviewed by the Commission such that the fee levied should be reduced. It goes on to specifically address the present situation: a project that is subject to master plan permitting that requires subsequent review. 10 V.S.A. § 6083a(f) ("If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the Chair may waive all or part of the fee for a new or revised project if the Chair finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, or that there will be substantial savings in the review process due to the scope of review of the previous applications."). Section 6083a(f) contemplates multiple applications for a single project. It does not include any language stating that a total fee incurred on the project would be capped at $165,000 or provide any support for § 6083a(a)(6) being interpreted as such. Instead, § 6083a(f) acknowledges that a project may be subject to multiple instances of permit review, which may lessen administrative burdens such that any application fee may be waived in whole or in part. This further supports the interpretation of § 6083a(a)(6) as being a per-application maximum, not a per-project maximum.

[7] Applicant has provided no analysis as to how the waiver provision of 10 V.S.A. § 6083a(f) should be interpreted in light of its proffered interpretation of 10 V.S.A. § 6083a(a)(6).

It follows that this interpretation of § 6083a is consistent with the purpose of master plan review. Act 250 Rules, Rule 21 II(G) (stating that master plan review "is intended to minimize costs and inconvenience to applicants and shall be applied liberally by the district commission for that purpose."). If an applicant chooses to pursue master plan review, and requires future permit review, the subsequent fee should properly reflect the previous review, reducing costs to a master plan applicant. See 10 V.S.A. § 6083a(f) ("If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the Chair may waive all or part of the fee for a new or revised project if the Chair finds that the impacts of the project have been reviewed in an applicable master permit application . . . ."). This interpretation is the only means by which to balance the competing goals of reasonably minimizing costs in a master plan process and the State's need to recoup costs in administering Act 250, and to give effect to the entire statutory scheme relevant to Act 250 application fees.[8]

Read in total, the maximum application fee set forth in 10 V.S.A. § 6083a(a)(6) applies on a per-application basis. This result furthers the Legislative purpose of Act 250 fees generally and is consistent with the entirety of the statute. Specifically, this interpretation is consistent with the wavier provision of 10 V.S.A. § 6083a(f), which curtails the risk of excessive or duplicative fees based on previous reviews and approvals. As set forth in 10 V.S.A. § 6083a(f), this waiver provision acts as a means by which applicants may reasonably reduce application fees based on previous permitting. In instances where permitting review and agency costs are negligible, the fee should, based on § 6083a(f) appropriately reflect such negligible State costs. This is consistent with the stated purpose of Act 250 fees. 10 V.S.A. § 6083a.

We therefore **DENY** Applicant's motion for summary judgment on Question 1 and **GRANT** the NRB's motion for summary judgment on the same.

Conclusion

For the foregoing reasons, we conclude that 10 V.S.A. § 6083a(a)(6) sets a per-application fee cap. We, therefore, answer Applicant's Question 1 in the negative and, in so doing, find that the material facts are not in dispute and **DENY** Applicant's motion for summary judgment and

[8] The merits of a § 6083a(f) waiver, as applied to Applicant, is addressed by Applicant's Question 2 in its Statement of Questions. Neither party has addressed this in their respective motions.

GRANT the NRB's motion. In reaching this conclusion, we do not reach a conclusion on Applicant's Question 2, which addresses the Applicant's request for a fee waiver pursuant to § 6083a(f).

In a separate notice, this matter is set for a follow-up status conference to discuss how the parties wish to proceed in resolving Question 2.

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

Thomas G. Walsh, Judge
Superior Court, Environmental Division