VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00069

2078 Jersey Street CU Reconsideration Denial

ENTRY REGARDING MOTION

Title: Ferrisburgh's Motion to Dismiss and/or Narrow Appeal
Filer: Kevin L. Kite
Filed Date: October 21, 2022

Appellant's Response to Town of Ferrisburgh's Motion to Dismiss and/or Narrow Appeal, filed November 21, 2022, by Attorney Liam L. Murphy

Reply Memorandum in Further Support of the Town's Motion to Dismiss and/or Narrow Appeal, filed December 4, 2022, by Attorney Kevin L. Kite

The Motion is **DENIED.** The Court **DISMISSES** Question 3 sua sponte.

Kevin Sullivan and Sarah Stradtner (collectively Applicants) appeal the Town of Ferrisburgh's (Town) decision denying their conditional use application. Presently before the Court is the Town's Motion to Dismiss and/or Narrow Appeal (Motion), filed pursuant V.R.E.C.P. 2(d)(v)–(vi). The Town asserts that the appeal should be dismissed in full because the appeal was untimely, and therefore the Court lacks subject matter jurisdiction over the appeal. Alternatively, Town argues that one of Applicants' questions is beyond the scope of the appeal. Applicants oppose the Motion, arguing that their request for reconsideration reset the clock for filing their notice of appeal, and as a result, their appeal was timely, and that their Question 1 is within the scope of the appeal because it was considered by the ZBA below.

In these proceedings, attorney Kevin L. Kite represents the Town, and attorney Liam L. Murphy represents the Applicants.

Legal Standard

When reviewing a motion to dismiss, the Court accepts "all uncontroverted factual allegations presented by the nonmovant as true" and construed in the light most favorable to the nonmoving party. In re Stewart, No. 21-ENV-00007, slip op. at 2 (Vt. Super. Ct. Envtl. Div. July 20, 2021) (Durkin, J.). "On a motion to dismiss for lack of subject matter jurisdiction, . . . consideration of matters outside the pleadings is permissible." Messier v. Bushman, 2018 VT 93, ¶ 12, 208 Vt. 261 (citing Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1010–11 (2d Cir. 1986)).

Motion to Dismiss

The Town moves to dismiss this appeal, arguing that because the appeal was untimely the Court lacks subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction is reviewed as a motion to dismiss pursuant V.R.C.P. 12(b)(1). See V.R.E.C.P. 5(a)(2) (applying Vermont Rules of Civil and Appellate Procedure unless modified by this rule); Stewart, No. 21-ENV-7 at 2 (July 20, 2021); see **Legal Standard**.

To perfect an appeal from a Zoning Board of Adjustment, an appellant must file a notice of appeal within 30 days of the relevant decision, "unless the court extends the time as provided in Rule 4 of the Vermont Rules of Appellate Procedure." See V.R.E.C.P. 5(b)(1) (governing appeals from municipal review boards to environmental court). In addition to providing means to extend appeal periods, Rule 4 includes a tolling provision, which provides that if a party files a motion to alter or amend the judgment, "the full time for appeal begins to run for all parties from the entry of an order disposing" the motion to reconsider. V.R.A.P. 4(b)(5); see In re Appeal of Joanne Dahl, No. E96-035, slip op. 2 (Vt. Envtl. Ct. Apr. 26, 1996) ("If the authority to reconsider is inherent, to preserve due process rights of fairness it must carry with it a tolling of the running of the appeal period."). If a notice of appeal untimely, however, this Court is divested of jurisdiction. In re Gulli, 174 Vt. 580, 583 (2002).

Here, the relevant uncontroverted facts are as follows. The Town Zoning Board of Adjustment (ZBA) entered its written Findings and Decision on Applicants' conditional use application on May 20, 2022, denying the permit application. On June 15, 2022—26 days later—the Applicants filed a request for reconsideration to the ZBA. Ex. E ("We are writing to

formally request that the [ZBA] reconsider its decision dated May 20, 2022 on the application and to re-open the hearing on the application."). When the request was made, the appeal deadline had not passed. On July 11, 2022—26 days after the request for reconsideration was made—the ZBA denied the Applicants' request, basing its decision on the fact that the appeal deadline had now passed and its May 20, 2022 decision final. On July 15, 2022, Applicants filed their notice of appeal with this Court, 4-days after the request for a reconsideration was denied but 56-days after the original Findings and Decision was rendered.

Based on this timeline, the Court must conclude that the Applicants' notice of appeal was timely filed. Applicants filed their notice of appeal 4 days after the ZBA rendered its decision on their request for a reconsideration. This is well within the Rules' permitted 30 days to file. V.R.A.P. (b) (giving appellants "the full time appeal" after the entry of an order disposing of a motion to reconsider).

The Court is not persuaded by the Town's argument that, for tolling to occur, the municipal panel must indicate its intent to reconsider prior to the expiration of the appeal period. Indeed, Town's argument runs counter to the Rule and the Court's reasoning in Dahl: "The time during which the ZBA was considering whether to reopen must have tolled the running of the appeal period; otherwise, by agreeing to reconsider a decision, an administrative body could easily mislead litigants into waiving their rights to appeal." In re Appeal of Joanne Duhl, No. E96-035, slip op. 2 (Vt. Envtl. Ct. Apr. 26, 1996).[1] Similarly, by waiting until after an appeal period has run to deny an applicants' request to reconsider, the administrative body could cause litigants to waive their rights to an appeal.

The Court concludes that Applicants request for reconsideration terminated the running of the appeal clock, and Applicants' time to file an appeal began to run, with a full 30 days, on July 11, 2022 when the ZBA declined to reconsider its Findings and Decisions. V.R.A.P. 4(b). Applicants' July 15, 2022 notice of appeal was timely. The Town's motion to dismiss is **DENIED**.

[1] The Court is also unpersuaded by Town's argument that Dunn supports its assertion. The issue in Dunn was whether the ZBA's reconsideration was appropriate in light of its timing and lack of notice. The rule the Town cites is the Court's rule for when conditions are appropriate for a municipal review board to reopen a decision.

Motion to Narrow

In the alternative, the Town requests that the Court dismiss Question 1 as beyond the scope of the appeal.[2] The Town asserts that Question 1 is beyond the scope of the appeal because it "seeks resolution of issues that were not presented on the face of the [Applicants'] application." Town's Mot. to Dismiss at 19. The Applicant argues that it is within the scope of this appeal because the ZBA's decision denying the conditional use permit for the access road was predicated on the ZBA's conclusions regarding the scope of the pre-existing nonconforming use. Applicants' Opp. at 16. Considering these arguments and the relief sought, the Court reviews the motion to narrow for lack of subject matter jurisdiction. See **Legal Standard**.

In the Environmental Division, the Statement of Questions limits the scope of the appeal. In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). The scope of the Court's review of this *de novo* appeal is further limited by the scope of the issues the ZBA had the authority to review in considering the conditional use permit application. In re Transtar LLC, No. 46-3-11 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. May 24, 2012) (citing In re Torres, 154 Vt. 233, 235 (1990)). Thus, the Court's subject matter jurisdiction is confined to those issues the municipal panel below had the authority to address when considering the original application which are now raised by the appellant in the Statement of Questions. Id. Finally, as appeal rights are remedial in nature, those rights "must be liberally construed in favor of persons exercising those rights." In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 15, 204 Vt. 301 (quoting In re Milton Arrowhead Mountain, 169 Vt. 531, 533 (1999)).

Here, the Town requests the Court dismiss Question 1 as beyond the scope of the appeal because it was not before the ZBA and therefore beyond the Court's jurisdiction. Question 1 asks:

> 1. Are the Town and interested parties bound by the determination that there was and is an existing rock quarry operation at the property which was made in an un-appealed and final decision of the Zoning Board Of Adjustment dated October,5,

[2] Town also requests that the Court dismiss Question 2 as beyond the scope of appeal because the appeal was untimely. As this is the basis for its Motion to Dismiss, which the Court denied, the Court also declines to dismiss Question 2 on this premise.

> 2021 which stated that "[t]he installation of a new road constitutes an extension of the existing non-conforming use," such that "[i]f the intent is to continue quarrying operations at the subject property", the Appellant shall apply for a conditional use permit"?

Applicant's Statement of Questions (filed Aug. 5, 2022).

The Court concludes that this Question is within the scope of the appeal. The issue before the ZBA below was whether the access road was a permissible expansion to the quarry, which is a nonconforming use in the RA-5 District. As demonstrated by the ZBA's Findings and Denial, determining the degree of the nonconforming use was central to that determination. Further, if the earlier notice of violation determinations, which are now final and binding on all parties and this Court, made factual findings or legal conclusions on the subject of the nonconforming use, those are relevant to this determination. Finally, the bulk of the ZBA's Findings and Decision centered on whether the existing quarry was a pre-existing nonconforming use and the degree of that use. As such, it is clear to this Court that Question 1 is intrinsically related to determining whether the access road should be approved (Question 2) and was contemplated by the ZBA below. See Atwood, 2017 VT 16, ¶ 17 (citing In re Jolly Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190). Question 1 is within the scope of this Court's review. The Town's motion to narrow is **DENIED.**

Relatedly, though not raised by the Town, the Court finds that Question 3 is both advisory and moot, and accordingly dismisses Question 3 for lack of subject matter jurisdiction. See Casella Const., Inc. v. Dep't of Taxes, 2005 VT 18, ¶ 2 (dismissing appeal sua sponte for lack of jurisdiction). Question 3 asks:

> 3. Did the Town incorrectly determine that the time for appealing its decision was not stayed by the filing of a Motion for Reconsideration within thirty days of the original decision and that it could not entertain the Motion because it failed to vote on the Motion within thirty days of the original decision.

Applicants' Statement of Questions.

The Environmental Court reviews appeals such as this by trial de novo. V.R.E.C.P. 5(g). As the Court frequently notes, "a de novo trial is one where the case is heard as though no action whatever has been held prior thereto." Burton Corp. Site Work Approval, No. 15-2-20

Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. June 25, 2021) (Durkin, J.) (quoting Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989)). Thus, during this appeal, the Court will "review the application anew as to the specific issues raised in the statement of questions." Id. (quoting In re Whiteyville Props., LLC, No. 179-12-11 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Dec. 13, 2012) (Durkin, J.)).

The Court need not address whether the Town erred in its determination of whether the appeal clock was tolled by the request for reconsideration, as the Court concludes that the issue has been cured by the current *de novo* trial, and as such is now moot. See Holton v. Dep't of Emp. & Training (Town of Vernon), 2005 VT 42, ¶ 14, 178 Vt. 147 ("The mootness doctrine . . . limits the authority of the courts to the determination of actual, live controversies between adverse litigants."). Further, Questions about whether the Zoning Board followed proper procedures ask for advisory opinions regarding ZBA process, and such questions are not "a necessary part of the final disposition of the case to which it pertains." Baker v. Town of Goshen, 169 Vt. 145, 151–152 (1999) (citing Wood v. Wood, 135 Vt. 119, 121 (1977)). Responding to such process questions would be an improper action by this Court, as the Court is cautioned to not provide such advisory opinions. Id. at 151–52. As such, the Court **DISMISSES** Question 3 as it requests an advisory opinion and is functionally rendered moot by this Court's *de novo* review.

CONCLUSION

For the foregoing reasons, the Court **DENIES** the Town's motion to dismiss the appeal, and, in the alternative, **DENIES** the Town's motion to dismiss Question 1. The Court, however, does find that Question 3 is rendered moot by the Court's trial *de novo* process, and as such, **DISMISSES** Question 3 from Applicants' Statement of Questions.

Electronically signed March 14, 2023 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division