VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00065

In re Cortina Inn	**Decision on Motions**

This matter is an appeal of Jurisdictional Opinion #1-405 (the JO) issued June 13, 2022 by the Act 250 District 1 Coordinator concluding that there had been a change of use at the Cortina Inn in the Town of Rutland (Town), Vermont requiring an Act 250 permit amendment. Specifically, the JO concluded that Appellant's operation of the Cortina Inn, a hotel, as transitional housing as a part of the State of Vermont Department of Children and Families' Transitional Housing Program (THP), which provided long term housing in hotels to those experiencing homelessness in Vermont, was a material change to its existing Act 250 permit requiring an amendment. The Cortina Inn is owned and operated by Tulsi Rudraksha Hospitality, LLC (Appellant). The JO was requested by the Town. Appellant appealed that decision to this Court on July 11, 2022.

Presently before the Court are the Town's and Appellant's cross-motions for summary judgment. Additionally, before the Court is the Natural Resources Board's (NRB) motion to dismiss Appellant's Question 5 as outside the scope of this Court's subject matter jurisdiction. In April 2023, when the Court was reviewing the pending motions, the Court became aware, through Appellant's filings, that the THP program had ended March 31, 2023. The Court set this matter for a status conference to discuss the impacts the program's cessation had on this matter for May 1, 2023. As a result of that status conference, both Appellant and the Town submitted supplemental filings to this Court regarding the impact of the THP expiring had on this case.

In this matter Appellant is represented by Stephen Cusick, Esq. and Philip Zalinger, Esq. The Town is represented by Kevin Brown, Esq. The NRB is represented by Jenny Ronis, Esq. The

City of Rutland (City) has appeared as an interested party in this matter and is represented by Joseph McLean, Esq.

Discussion

Because of this Court's conclusion with respect to the pending cross-motions for summary judgment, we address those motions first.

I. 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 these motions, 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)).

II. 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 cross-motions. The following are not specific factual findings relevant outside the scope of this decision on the pending cross-motions. 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. Appellant owns and operates property located at 476 Holiday Drive, Town of Rutland, Vermont (the Property) as a hotel known as the Cortina Inn.

2. The Property was previously operated as a part of the Holiday Inn franchise and, in relation to that use, received Act 250 Land Use Permit # 6000028 on June 30, 1971 (the Original Permit). See Town Ex. 2.

3. The Original Permit authorized the construction and operation of a two-story motel with a restaurant and recreational facilities. Id.

4. The Original Permit concluded that the use would "not place an unreasonable burden on the ability of the Town of Rutland to provide municipal or governmental services." Id. ¶ 11.

5. Previous owners of the Property received subsequent permit amendments to add an additional story to the building for a banquet/conference center, a 550-seat conference center, indoor health complex, and additional rooms. See Town Exs. 3, 4.

6. Each permit amendment included a finding that the development would "not place an unreasonable burden on the ability of the Town of Rutland to provide municipal or governmental services." Id.

7. The Property presently has 151 rooms.

8. From 1971 to 2020, the Property provided overnight lodging to guests on both a short-term and longer-term basis. Affidavit of A. Sachdev, ¶ 5.

9. Longer-term stays would last anywhere from a week to over a month. Id.

10. In late March 2020, as a result of the COVID-19 pandemic, the Property was forced to cease operations as a motel. Id. ¶ 6.

11. In the period shortly thereafter, Appellant provided lodging to nurses and medical personnel working with the Rutland Regional Medical Center in connection with the pandemic. Id.

12. Appellant closed the recreational facilities, such as the swimming pool, fitness center, restaurant, and convention center at that time. Id. at ¶ 7.

13. The recreational facilities and restaurant remain closed. Id.

14. For brief period in 2020 and 2021 the convention center served as a vaccine staging area. Id.

15. In late 2020, the Property resumed offering lodging to the public. Id. ¶ 8.

16. Concurrently, the Property also began offering lodging to transient individuals through a pandemic-era emergency voucher program operated by the Vermont Department of Children and Families. Id.

17. The emergency voucher program provided vouchers allowing for stays of one or two days with a maximum of 28 vouchers per household. Id.

18. As a result of its participation in the voucher program, from late 2020 through January 2022, Appellant provided lodging to guests in the ordinary course of business, largely business travelers, and those with vouchers under the emergency program. Id. ¶ 9.

19. During this period, the total room occupancy rate was about 40%, with 20 to 30 rooms occupied by the guests in the ordinary course of Appellant's business, and 20 to 30 rooms occupied by those with vouchers. Id.

20. In February 2022, Appellant ceased offering lodging to the general public and began offering lodging exclusively to those with vouchers through the State. Id. at ¶ 10.

21. In 2022, Appellant began participating in the THP.[1]

22. The THP, administered through the Department of Children and Families, was a program where the State of Vermont distributes federal Emergency Rental Assistance Program funds to provide emergency housing in lodging establishments to those individuals or families experiencing homelessness as defined by standards set by HUD. See Appellant Ex. 4; Town Ex. 6.

23. Subject to certain eligibility and certification requirements, the THP offered housing for up to 18 months, though individuals could stay for a shorter term. Id.

24. As a part of the THP, individuals or households entered to occupancy agreements with participating hotels that operated much like a lease, "lay[ing] out an occupancy time frame and payment amounts." Id. at 7.

25. While participating in State-funding programs, each guest at the Property, whether private customer or guest staying at the Property through any State program, such as the voucher program or THP, received the same services, including daily housekeeping upon request, access

[1] The parties dispute the exact date that Appellant began participating in the THP. Ultimately, for the reasons set forth below, the exact date is immaterial to our conclusion. In either event, it undisputed that Appellant's participation began in 2022, which is why this Court cites this year.

to internet service and hotel computer use, coin-operated laundry and safe-deposit boxes. Affidavit at ¶ 14.

26. Each room has a bed(s), linens, including towels, toiletries, and a microwave and small refrigerator. Id.

27. No guest has access to the restaurant, swimming pool, or fitness center as those remain closed. Id.

28. The THP ended effective March 31, 2023. Id. at ¶ 15; Appellant Ex. 5.

29. The State of Vermont has reverted back to providing emergency vouchers on a short-term basis via a voucher program. Appellant Supp. Ex. 4.

30. There is no occupancy agreement between the hotel or any voucher holder. See Appellant Ex. 6.

31. It is somewhat unclear, but it appears that Appellant accepts vouchers at the time of Appellant's last filing on May 15, 2023.

32. This voucher program is set to expire June 30, 2023. Id.

33. The State has since enacted other programs offering housing assistance for varying lengths of up to 120 days through Executive Orders. Town Supp. Ex. 1.

34. None of these programs appear to have occupancy agreements or allow for stays near what the THP afforded, up to 18 months.

35. There is no allegation that Appellant is participating, or will participate, in these Executive Order-enacted programs.[2]

36. On May 25, 2022[3], the Town submitted a request for a jurisdictional opinion defining the at-issue project as "[c]hange in use of the previously approved Holiday Inn motel (now operated under the Cortina Inn) to transitional housing for the homeless as part of the State of Vermont

[2] The Town provides an affidavit from a member of the Town Selectboard stating that the Town "reasonably expects that [Appellant] will continue" to provide housing to those receiving State housing benefits. The Town provides no support for this assertion, and in any event, there is no evidence that this assertion is anything more than an assumption.

[3] The Town does not provide its original request for a jurisdictional opinion, and the JO does not provide the date of the request, but the Town includes in its cross-motion the referenced date of the request for a jurisdictional opinion. See Town of Rutland Mot. for Summary Judgment (filed Dec. 9, 2022) at 1. This date is not material, but the Court includes for context purposes.

Department of Children and Families' Transitional Housing Program designed to provide long-term housing hotels." Town Ex. 1 at 1.

37. The District Coordinator concluded that a permit amendment was required "[b]ased solely on the representations in the jurisdictional request and supplemental data filed." Id. at 2.

38. Appellant timely appealed that conclusion to this Court.

III. Conclusions of Law

"A case is moot if the reviewing court can no longer grant effective relief." In re Moriarty, 156 Vt. 160, 163 (1991) (quoting Sandidge v. Washington, 813 F.2d 1025, 1025 (9th Cir. 1987)). "The mootness doctrine derives its force from the Vermont Constitution, which, like its federal counterpart, limits the authority of the courts to the determination of actual, live controversies between adverse litigants." Holton v. Dep't of Emp. & Training (Town of Vernon), 2005 VT 42, ¶ 14, 178 Vt. 147. If "the appellant obtains [the same] relief by another means" after filing a case, that case will likely become moot. In re Barlow, 160 Vt. 513, 518, (1993). "Any alternative relief, however, must be complete so that 'nothing further would be ordered by the court.'" Id (quoting 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2, at 238 (2d ed. 1984)).

The THP no longer exists. Appellant has offered that it is not able to provide long-term housing to low-income or transient individuals based on the existing programs. There is no allegation that Appellant is participating in any new program that provides for stays longer than voucher program's short-term stays. Meaning there is no allegation that Appellant is participating in a program such as those Executive Order programs allowing for stays longer than the voucher program but less than the 18-month maximum provided by the THP. The Town's request, as classified by the JO, is related specifically to the THP and the provision of long-term transitional housing. See Town Ex. 1; Town Cross-Motion for Summary Judgment (filed on Dec. 9, 2022) at 6 (requesting the JO "as a result of the change of [Appellant's] use from a 151-room motel to long-term housing for the homeless"). The Town seeks to have this Court reach the main legal conclusion of the Jurisdiction Opinion - that Appellant's activities trigger the need for an Act 250 permit amendment. The need to the filing of an Act 250 permit amendment

application is mooted by the expiration of the THP and, by extension, Appellant's cessation of providing long-term housing to eligible individuals and families under an existing state program.[4]

The Town, in its response to Appellant's supplemental filing, argues that its request is not moot under the doctrine of a claim that is "capable of repetition, yet evading review." In re Durkee, 2017 VT 49, ¶ 12, 205 Vt. 11. For a claim to remain ripe for adjudication under such a theory, the proponent must show that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subject to the same action again." Id. (citing In re P.S., 167 Vt. 63, 67–68 (1997). Even considering this exception, the Town's argument fails.

First, the Town provides no basis to satisfy the first prong of the analysis. The Town sought a jurisdictional opinion regarding the Property in May 2022, in which it asserts alleged violations of Appellant's Act 250 permit had been ongoing for a period of time. This request was promptly addressed by the District Coordinator within approximately 3 weeks. Appellant timely and properly appealed to this Court. At that time, there was no allegation that the State had announced that the THP would be expiring in the near future. The fact that the THP program and long-term housing for eligible populations ceased to exist during the pendency of this appeal does not make this dispute "too short to be fully litigated prior to its cessation or expiration."[5] Compare State v. Rooney, 2008 VT 102, ¶ 12, 184 Vt. 620 (holding that less than four months was sufficient time to complete appellate review and declining to apply the mootness exception) and In re Vt. Dep't of Pub. Serv. (Vermont Yankee), 2008 Vt 89, ¶ 11, 184 Vt. 613 (holding ten months

[4] The Town, through its supplemental filing only, asserts that the provision of State-funded transitional housing for any length of time is before the Court. Effectively, the Town appears to take issue with the housing of any person receiving public assistance at the Property at all. This is not before the Court. The Town's request for a jurisdictional opinion is related exclusively to long-term housing. This is similarly true of its cross-motion, which does not address short-term housing. Thus, Appellant's participation in any emergency voucher program for short-terms stays is not before the Court. In any event, the parties have informed the Court that this program is similarly scheduled for expiration.

[5] To the extent that the Town argues that Appellant's motion was filed with the intent to "run out the clock" on the THP, this Court disagrees. This assertion ignores the fact that the parties stipulated to filing the pending motions on the record at this Court's October 31, 2022 status conference in this matter and the Town stipulated to a week-long extension of the deadline to file such motions. The assertion is further contrary to the Town's own motion in this matter, filed the same day as Appellant's. If Appellant did not file its cross-motion, the Town's motion would have still stood and required this Court's adjudication. What's more, the Town points to no authority where filing an otherwise proper motion would result in a mootness exception.

was sufficient time to complete appellate review and declining to apply the mootness exception) with Price, 2011 VT 48, ¶¶ 23–25, 190 Vt. 66 (applying the exception to a review period of 90 days to review challenged action at both the trial and appellate level) and Durkee, 2017 VT 49, ¶¶ 10–13 (applying the exception to a 6-month judicial review period at both the trial and appellate levels). Thus, we conclude that the Town fails prong one.

The Town's argument also fails the second prong. The Town's request was based on participation in the THP and long-term transitional housing at the Property. The Town argues that, because the State has recognized that ending the THP leaves the State tasked with a ongoing housing crisis, which it currently lacks adequate facilities to remedy, the State is likely to look to similar options to alleviate the crisis. The Town asserts that not only is it likely that similar State-funded long-term housing of homeless individuals and families at lodging establishments will repeat itself, but it is also likely Appellant will participate in any subsequent program. While eligible populations may still receive some State-assistance to stay at the Property for short-term stays, the present circumstances do not support a reasonable expectation of repetition for long-term stays of over a year at the Property through State-funded occupancy agreements. Presently, the program giving rise to, and specifically addressed within, the jurisdictional opinion request no longer exists, and Appellant's potential participation in any potential future State-funded long-term program analogous to the THP is purely speculation. See State v. Gundlah, 160 Vt. 193, 196 (1993) (noting the exception to the mootness doctrine does not apply when repetition of fact pattern is unlikely). Further, this assertion ignores the incredibly unique circumstances that led to the THP program, a COVID-19-era program administering federal funds in relation to the pandemic and the complete or partial closure of lodging establishments.

The Town is tasked with demonstrating that it is more than just "theoretically possible" that the present circumstance will repeat itself and instead must show that there is a "demonstrated probability" that it will. See In re Green Mtn. Power Corp., 148 Vt. 333, 335 (1987). The Town's present assertion that there is an "absence of existing alternatives to the use of hotels to house the homeless" is no more than a theoretical assertion that the COVID-era housing programs will be repackaged and reinstated, and that Appellant will participate in those programs. Thus, the Town fails the second prong of the analysis. Further, the JO and request

were specific to the THP and the long-term provision of State-funded transitional housing. Any further programs that the State implements, and Appellant actively participates in could be subject to review when ripe and based on those fact patterns. See In re P.S., 167 Vt at 68 (citing Gundlah, 160 Vt. at 196). [6]

The result of a jurisdictional opinion is a conclusion as to whether a certain land use or development requires Act 250 review. While there is an aspect of jurisdictional opinions that are inherently advisory, the circumstances the Town argues are such here where the underlying request is not ripe for adjudication. The Town requests that we issue an order requiring Appellant to seek and obtain an Act 250 permit amendment for participation in the THP and providing long-term transitional housing pursuant thereto. The THP no longer exists and thus, Appellant is not participating in the program. Nor is there an allegation that Appellant is participating any long-term housing at the Property pursuant to any State-funded occupancy agreement like the THP. Despite this, the Town still requests a decision requiring the filing of an Act 250 permit amendment application on the grounds that Appellant may, in the future, participate in another program.[7] We cannot require Appellant to file an Act 250 permit application on the grounds that, at some point in the future, the State may institute a program that would afford housing assistance for long-term stays at lodging establishments in Vermont and that, at that time, Appellant may decide to participate in that program. Thus, the relief requested (i.e., an order requiring Appellant to submit an Act 250 permit amendment application) is now **MOOT**.

At this stage of this matter, the Court is uncertain as to whether the parties wish to proceed with reviewing the correctness of the District Coordinator's June 13, 2022 Jurisdictional Opinion. While the parties have briefed the merits of the JO, it is unclear to the Court, as to how

[6] We note in reaching this conclusion, the Town's assertion is based in part on its assertion that it will seek a jurisdictional opinion if "the recipients of housing benefits continue to reside in the Cortina Inn and continue to place unreasonable burdens on the Town . . . ." See Town Opp. To Appellant's Supp. To Cross-Motion at 3. For the reasons set forth above, this is beyond the scope of the initial request for a jurisdictional opinion. The request before the Court is not to conclude that simply housing those receiving public-assistance at the Property requires an Act 250 permit amendment. The Court is without the authority to rule upon such an issue.

[7] It appears that the Town, through its supplemental filing, asserts that the provision of any transitional housing, for any length of time, to any person qualifying for State benefits would require Act 250 review. This is outside the scope of the request before the Court and, therefore, the Court specifically declines to address this assertion.

the parties would like to proceed in light of the conclusion that no permit amendment application is required.[8]

The Court will set this matter for a status conference to discuss whether the parties would like this Court to review the correctness of the underlying JO with the understanding that, for the reasons set forth herein, the Court cannot require Appellant to file an Act 250 permit amendment application.

Conclusion

For the reasons set forth herein, the question as to whether Appellant is required to file an Act 250 permit amendment application is **MOOT** based on the expiration of the THP program and the cessation of providing transitional housing on a long-term basis at the Property due to said expiration.

This matter will be set for a status conference to discuss how the parties wish to proceed with this appeal in light of the conclusion reached herein.

Electronically signed this 26th day of June 2023, pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[8] It is for this reason that the Court defers ruling upon the NRB's motion to dismiss Question 5.