

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-00001

Ely Administrative Decision Appeal

ENTRY ORDER

Title: Motion to Strike and/or Clarify (Motion: 1)
Filer: Kimberlee Sturtevant
Filed Date: May 24, 2023

Memorandum in Opposition filed on June 8, 2023 by Timothy Ely, Appellant/Applicant.

The motion is GRANTED IN PART AND DENIED IN PART.

This is an appeal of a December 21, 2022 decision of the Burlington Development Review Board (DRB) upholding the denial of an administrative permit for the installation of vinyl windows at property owned by Timothy Ely (Appellant) having an address of 47 Harrison Avenue, Burlington, Vermont (the Property). Appellant timely appealed that denial to this Court.

Presently before the Court is the City of Burlington's (City) motion to strike and/or clarify Appellant's Statement of Questions. For the reasons set forth herein, we **GRANT IN PART** and **DENY IN PART**. In so doing, we conclude that Questions 2 and 5 must be **DISMISSED** as outside the scope of this Court's jurisdiction and Questions 1, 3, and 4 must be clarified.

In this matter, Appellant is self-represented. The City is represented by Kimberlee Sturtevant, Esq.

Discussion

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)).

While not expressly cited, the City’s motion argues that a number of the Questions are outside of the scope of this Court’s review. As such, we view the motion, to the extent that it seeks dismissal of some or all the Questions, as being made for lack of subject matter jurisdiction. 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. Rheume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. We, therefore, provide deference to Appellant in reviewing the pending motion.

Appellant files a 5 Question Statement of Questions. The Statement of Questions includes some narrative background, and generally does not conform to the typical practice in this Court. We note, however, that Appellant is self-represented in this matter, and is likely unfamiliar with the typical practice of this Court. While this Court must enforce the rules governing this Court equitably, we are careful to ensure that self-represented litigants are not “taken advantage of by strict application of the rules of procedure.” Town of Washington v. Emmons, 2007 VT 22, ¶ 7, 181 Vt. 586 (mem.).

We begin with Question 2 and 5, which address issues that are outside the scope of this Court’s jurisdiction. Question 2 asks “[i]f the appeal is denied, what is the next step?” Question 5 asks “[w]hat is the plan going forward, or is it going to be some allowed to keep vinyl and other[s] pay for [the] type [the City is] asking for?”

This Court is one of limited jurisdiction. 4 V.S.A. § 1001(b). Further, this Court cannot issue advisory opinions. 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, issues presented on appeal “must be a necessary part of the final disposition of the case to which it pertains.”

Baker v. Town of Goshen, 169 Vt. 145, 151–52 (1999) (citing Wood v. Wood, 135 Vt. 119, 121 (1977)).

Question 2, including the narrative provided around the Question, seeks to address what could occur at the Property if the Court determines vinyl windows are not permissible. This Question seeks an advisory opinion because it seeks guidance on what Appellant may do at the Property outside the scope of the application before it, which is one to install vinyl windows at the Property. To the extent that Question 5 seeks to address prospective permitting, on a general scale, in light of the windows in the Property’s area, such a Question would also be an impermissible advisory opinion.¹

We therefore conclude that Question 2 and Question 5, to the extent it seeks to address future permitting in the district, are outside the scope of this Court’s subject matter jurisdiction. Thus, we **GRANT IN PART** the City’s motion with respect to Questions 2 and 5 and they are **DISMISSED**.

We next turn to the remaining Questions before the Court. While the Questions remaining may not be the most artfully drafted, a review of the narratives provided in both the initial filing and Appellant’s response to the pending motion demonstrates that the issues Appellant attempts to raise are within the scope of this Court’s jurisdiction.

We interpret the remaining three Questions as addressing three issues. Question 1 appears to address whether Appellant is entitled to install vinyl windows at the Property due to the fact that vinyl windows have been in place for more than 15 years. Question 3, and parts of Question 4, seemingly ask whether Appellant is entitled to install vinyl windows at the Property due to other properties in the area, including the other side of the duplex of the Property, having vinyl windows.² Question 4, generally, appears to ask whether the application complies with the City’s applicable historical regulations.

While the City may dispute the merits of the issues before the Court, that does not result in those issues being outside of the scope of this Court’s jurisdiction. See e.g., Powers v. Office

¹ To the extent that Question 5 seeks to have this Court consider whether the area surrounding the Property has bearing on the application before the Court, we believe such an inquiry is intrinsic to the proposed revised Questions below.

² To the extent that Question 5 sought to address a similar issue, it would appear to fall under scope of this general issue.

of Child Support, 173 Vt. 390, 395 (2002) (“The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it.”). Ultimately, Appellant appears to present three reasons why he asserts that he is entitled to a zoning permit in this matter: one based in the law applicable to statutes of limitations and unenforceable zoning violations, one based in an equitable theory, effectively of estoppel, and one based on the merits of the application in the context of the City’s zoning regulations.

We agree, however, that the Questions as written are somewhat confusing and should be rewritten in a manner consistent with the issues as presented in the above paragraph. We therefore restate the Questions as follows:

1. Is Appellant entitled to install vinyl windows at the Property due to the fact that vinyl windows have been in place for more than 15 years?
2. DISMISSED.
3. Is Appellant entitled to install vinyl windows at the Property due to other properties in the area, including the other unit of the subject duplex, having vinyl windows?
4. Does the application comply with the City’s applicable historical regulations?
5. DISMISSED

Should Appellant seek to have the Court consider specific provisions of the City’s regulations, particularly the provisions applicable to historical buildings as referenced in Question 4, the Court orders that Appellant file in writing a list of the provisions within 10 days of this decision.

Thus, we **DENY IN PART** the City’s motion to strike and dismiss Questions 1, 3, and 4. We **GRANT IN PART** the City’s motion to clarify these Questions and the Court restates Questions 1,3, and 4 for clarity.

Conclusion

For the reasons set forth herein, we **DENY IN PART** the City’s motion to dismiss Questions 1, 3, and 4. We **GRANT IN PART** the City’s motion to dismiss Questions 2 and 5 as being outside the scope of this Court’s jurisdiction. Further, we **GRANT** the City’s motion to clarify Appellant’s Questions and provide restated Questions as set forth herein. Should Appellant seek to have this Court consider specific provisions of the regulations beyond the general reference in Question 4,

Appellant must file a list of those provisions Appellant believes are at issue within 10 days of the date of this Order.

Electronically signed this 10th day of August 2023, pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, slightly stylized font.

Thomas G. Walsh, Judge
Superior Court, Environmental Division