VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
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Docket No. 23-ENV-00010

Cathedral of the Immaculate Parish Charitable Trust Appeal

ENTRY REGARDING MOTIONS

Motion #1: Appellants' Motion for Stay

Filer: Ron Wanamaker, Spokesperson for Appellants

Filed Date: March 1, 2023

Memorandum in Opposition to Motion for Stay, filed by John L. Franco, Attorney for the Cathedral of the Immaculate Conception Parish Charitable Trust ("Trust"), on March 13, 2023[1]

City of Burlington's Memorandum of Law Regarding Appellants' Motion to Stay, filed by Johnathan T. Rose and Malachi T. Brennan, Attorneys for the City, on April 12, 2023

Motion #2: Motion to Dismiss

Filer: John L. Franco, Attorney for Cathedral of the Immaculate Conception Parish Charitable Trust

Filed Date: March 13, 2023

City of Burlington's Memorandum of Law Regarding the Trust's Motion to Dismiss, filed by Johnathan T. Rose and Malachi T. Brennan, Attorneys for the City, on April 12, 2023

Memorandum of Law by Appellants in Opposition to the Trust's Motion to Dismiss, filed by David L. Grayck, Attorney for the Appellants, on April 25, 2023

Statement of Undisputed Facts in Support of Opposition to the Trust's Motion to Dismiss, filed by David L. Grayck, Attorney for the Appellants, on April 25, 2023

The Trust's Reply in Support of the Motion to Dismiss, filed by John L. Franco, Attorney for the Trust, on May 12, 2023

[1] Filed in the same document as the Cathedral of the Immaculate Conception Parish Charitable Trust's Memorandum in support of motion to dismiss.

The Trust's Supplemental Statement of Undisputed Material Facts, filed by John L. Franco, Attorney for the Trust, on May 12, 2023

City of Burlington's Reply Memorandum Regarding the Trust's Motion to Dismiss, filed by Johnathan T. Rose and Malachi T. Brennan, Attorneys for the City, on May 26, 2023

Motion #9: Appellants' Motion to Treat Appellee's Motion to Dismiss as Motion for Summary Judgment

Filer: David L. Grayck and Christopher H. Boyle, Attorneys for the Appellants

Filed Date: May 25, 2023

The Trust's Opposition to Appellants' Motion to Treat the Motion to Dismiss as a Motion for Summary Judgment, filed by John L. Franco, Attorney for the Trust, on May 25, 2023.

The Motion for Stay is Granted. The Motion to Treat the Rule 12(b)(6) Motion to Dismiss as a Rule 56 Motion for Summary Judgment is Denied. The Motion to Dismiss is Denied.

The Cathedral of the Immaculate Conception Parish Charitable Trust ("Trust") seeks approval to demolish the existing church building, bell towner, parking lot, and impervious pathways (the "Project") located on its property at 20 Pine Street in Burlington, Vermont (the "Property"). The Project will leave the planned landscaping, trees, and lawn on the Property intact, and would fill, grade, and seed the area once hosting the foundation hole. A group of Burlington residents—Carolyn Bates, Robert Devino, Pauline Kehoe, Amy Mentes, Jack Mentes, Margaret Mentes, Karyn Norwood, Liisa Reimann, Matthew Shoen, and Ronald Wanamaker (collectively "Appellants")—petitioned the DRB to deny the permit for the Project, asserting that the permit application was deficient under the City of Burlington's Comprehensive Development Ordinance ("CDO").

The City of Burlington Development Review Board ("DRB") approved the Project on January 17, 2023. Appellants timely appealed that approval to this Court on February 15, 2023, raising two questions in their Statement of Questions: whether the structure qualifies for the religious purpose zoning exemption under 24 V.S.A. § 4413 despite no longer being used for a religious purpose; and if the exemption applies, whether the exemption precludes the Burlington DRB from considering whether the demolition complies with Article 14 of the CDO and the CDO's alternative compliance standards.

Presently before the Court are several related but separate motions: (1) the Trust's Motion to Dismiss the Appellants for lack of standing, or in the alternative, (2) for failure to state a claim for which relief may be granted; (3) Appellants Motion to Treat the Trust's Rule 12(b)(6) Motion to Dismiss as a Motion for Summary Judgment, and (4) Appellants' Motion to Stay the permit pending appeal. The Trust opposes the Appellants' motion for stay and motion to treat the Rule 12(b)(6) motion as a Rule 56(a) motion. The Appellants oppose the Trust's Motion to Dismiss. The City of Burlington ("City") opposes Appellants' Motion for Stay, supports the Trusts Rule 12(b)(6) motion to dismiss, and did not take a position on the Trust's Rule 12(b)(1) motion to dismiss or Appellants' motion to treat the Rule 12(b)(6) motion as Rule 56(a) motion. Because this Decision addresses several motions, each with its own legal standards and relevant facts, the Court addresses each motion separately. In doing so, the Court sets forth the applicable legal standards, and any factual background relevant thereto, separately within this Discussion.

In these proceedings, Attorneys David L. Grayck and Christopher H. Boyle represent the Appellants. Attorney John L. Franco represents the Trust. Attorneys Jonathan T. Rose and Malachi T. Brennan represent the City.

Motion to Dismiss for Lack of Standing

I. Legal Standard

The Trust moves to dismiss the Appellants as interested persons in this appeal for lack of standing. A party's standing is a question of subject matter jurisdiction. Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 8, 182 Vt. 234 (citation omitted). Therefore, the Court reviews the motion under the standard of review afforded by Vermont Rules of Civil Procedure ("V.R.C.P.") Rule 12(b)(1). On a motion to dismiss for a lack of subject matter jurisdiction, the Court may consider evidence outside the pleadings if necessary to resolve the motion. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11. The Court accepts as true all uncontroverted factual allegations and construes them in a light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

II. Discussion

a. Statutory Standing

The Appellants appeal the DRB's decision in this matter relying on 24 V.S.A. § 4465(b)(4) "group of ten" statutory standing for their "interested person" appellant status. To appeal a municipal planning or zoning decision, a party must have participated as an "interested person" in the municipal proceeding below. See 10 V.S.A. 8504(b)(1); 24 V.S.A. § 4471. Under 24 V.S.A. § 4465(b), the Legislature has provided five different definitions for "interested person" including a group of:

> Any ten persons who may be any combination of voters, residents, or real property owners within a municipality . . . who, by signed petition to the appropriate municipal panel of [the] municipality, the plan or bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

24 V.S.A. § 4465(b)(4).

While the Trust concedes that the Appellants have satisfied the statutory elements of group-of-ten standing, see Trust's Reply in Supp. of Mot. to Dismiss at 4 (filed May 12, 2023), the Court takes a moment to address it, as standing is a jurisdictional prerequisite that may be addressed at any time. First, here, it is undisputed that each appellant is a voter in, resident of, or real property owner in Burlington, Vermont. See Exs. A22–A31 [hereinafter "Appellants' Affs."], ¶ 1. Second, each of the Appellants signed petitions, which were sent prior to each DRB hearing. Appellants' Affs. ¶¶ 2–3; Ex. A18 (Dec. 15, 2022 Petition); Ex. A19 (Jan. 10, 2023 Petition). Further, while not every Appellant attended the DRB hearing, each of them satisfied the participation requirement with the submission of two petitions. See 24 V.S.A. § 4471(a) ("Participation in a local regulatory proceeding shall consist of offering, through oral *or written testimony*, evidence or a statement of concern related to the subject of the proceeding.") (emphasis added). Finally, those petitions allege that the proposed demolition Project is not in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

The only outstanding issue is whether Appellants satisfied the requirement that they designate a spokesperson. See 24 V.S.A. § 4465(b)(4) ("This petition to the appropriate municipal panel must designate one person to serve as the representative of the petitioners regarding all matters related to the appeal."). While neither petition identified the "one person to serve as the representative of the petitioners regarding all matters related to the appeal," it is clear from the participation at the DRB hearing and the Notice of Appeal filed with this Court that Ron Wanamaker acted as the spokesperson. See Ex. A21 at 3 (showing DRB Minutes with Ron Wanamaker speaking). Even the Trust conceded that Ron Wanamaker acted as the Spokesperson for the other Appellants at the DRB hearing. See, e.g., Trust's Resp. to Appellants' Statement of Facts, ¶ 38 (filed May 12, 2023) ("Ron Wanamaker acted as the spokesperson for the remaining nine Appellants during the January 11, 2023 hearing. Appellants Affidavits, ¶ 4. **A: Undisputed.**"). Further, "the statutory requirement that the petition designate a group representative is not jurisdictional." In re Brandon Plaza Conditional use Application, No. 128-8-10 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. Aug. 5, 2011) (Wright, J.) (citing 24 V.S.A. § 4465(b)(4)). Rather, the requirement serves judicial efficiency. The other definitions of "interested person" each result in one person or entity, for purposes of service, notice, and other procedures. See 24 V.S.A. § 4465(b)(1)–(3), (5). Requiring a designated spokesperson simplifies group-of-ten standing for purposes of service and notice due process requirements. This is consistent with the Court's practice of authorizing groups to change their representative during a proceeding, if circumstances necessitate it. Brandon Plaza Conditional use Application, No. 128-8-10 Vtec at 6 (Aug. 5, 2011)). As such, we agree with the Trust that Appellants have satisfied the statutory standing requirements.

b. Constitutional Standing

Satisfying this statutory standing provision, however, does not relieve the Appellants of the constitutional standing requirement. See Capitol Plaza 2-Lot Subdivision Capitol Plaza Major Site Plan, Nos. 3-1-19 Vtec and 4-1-19 Vtec, slip op. at 2–7 (Vt. Super. Ct. Envtl. Div. Nov. 12, 2019) (Walsh, J.) (addressing the requirement in detail). Vermont has adopted this principle, such that Vermont courts, including the Environmental Court, "have subject matter jurisdiction only over

actual cases or controversies involving litigants with adverse interests." Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235 (quotation omitted). To show standing, Appellants have the burden of demonstrating "(1) injury in fact, (2) causation, and (3) redressability." Parker v. Town of Milton, 169 Vt. 74, 76–77 (1998); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (describing the three elements in detail). At this stage, however, the bar to survive dismissal is not high." Burton Corp. Site Work Approval, No. 15-2-20 Vtec, slip op. at 8, (Vt. Super. Ct. Envtl. Div. June 25, 2021) (Durkin, J).

The Trust primarily challenges the "injury in fact" prong of standing, arguing that aesthetic injuries are insufficient in a zoning context. The Supreme Court has established that, to satisfy the injury-in-fact prong, the injury must be "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical . . . .'" Lujan, 504 U.S. at 560.

Each Appellants' affidavit also addresses their constitutional standing. It is undisputed that each Appellant "takes the opportunity to view and admire the Church and the 20 Pine Street Property on a regular basis." Trust's Resp. to Appellants' Statement of Facts, ¶ 39 (citing Appellants' Affs. ¶¶ 5–6) ("Undisputed."). Each Appellant affirmed that they would be aesthetically and/or professionally injured if the demolition were permitted to go forward without full review by no longer being able to view and admire the Church and the Property after its demolition. Appellants' Affs. ¶¶ 6–7. The Court can redress this harm by requiring full review of the proposed Project, and potentially if the merits require, deny the demolition permit.

While these particularized aesthetic injuries are generally sufficient, see Lujan, 504 U.S. at 563, the Trust argues that the Appellants' purely aesthetic and professional injuries, untethered to a property interest, are not sufficient to establish standing in a zoning context. Trust's Reply in Supp. of Mot. to Dismiss at 4–5. Specifically, the Trust asserts that because the Appellants all live too far from the property, they cannot and do not allege a physical or environmental injury as necessary under the statutory standing limitations and applicable case law. Id. In support of this assertion, the Trust directs the Court to several zoning cases. In most of these cases, however, the law the Trust relies on was applied to § 4465(b)(3) immediate

neighborhood interested-person standing, which requires "a physical or environmental impact on the person's interest under the criteria reviewed" for *statutory* standing. 24 V.S.A. § 4465(b)(3); see Ermoine LLC S.D. and CU, No. 53-5-17 Vtec, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. Dec. 22, 2017) (Durkin, J.) (addressing immediate neighborhood standing, and particularized and unique property interests for § 4465(b)(3) statutory standing, not constitutional standing); see also In re Two Bad Cats, LLC., No. 169-12-14 Vtec (May 29, 2016 (Walsh J.) (aff'd Vt. Supreme Court unpublished opinion, 2015-238) (finding Appellants lacked group-of-ten standing for failure to submit a petition before addressing § 4465(b)(3) standing); see also In re Castleton Expansion and Renovation Permit, No. 129-9-13 Vtec, slip op. at 1–3 (Vt. Super. Ct. Envtl. Div. Apr. 28, 2014) (Durkin, J.) (considering § 4465(b)(1)–(3) statutory standing, but addressing neither constitutional nor § 4465(b)(4) standing requirements); and see also Bostwick Road Two-Lot Subdivision, No. 211-10-05 Vtec, slip op. at 2–3 (Vt. Envtl. Ct. Feb. 24, 2006) (Durkin, J) (discussing distance between appellant and project in the context of § 4465(b)(3) statutory standing, not constitutional standing).[2] Unlike § 4465(b)(3), which requires the Appellant to own or occupy property in the "immediate neighborhood" and that they "demonstrate a physical or environmental impact on the person's interest[s]," neither § 4465(b)(4) nor constitutional standing principals carry such an express limitation.

Indeed, under constitutional standing principles, purely aesthetic injury is "undeniably a cognizable interest for purpose of standing," and is sufficient so long as it is particularized. Lujan, 504 U.S. at 560, 563. With no such express limitations to the group-of-ten statutory standing or constitutional standing, the Court declines to extend the requirement of a property or environmental impact to a property interest to the constitutional standing requirement in zoning contexts. Cf. In re Munson Earth Moving Corp., 169 Vt. 455, 465, 737 A.2d 906, 913 (1999) ("Where the Legislature includes particular language in one section of a statute but omits it in

[2] While Burton did involve a group-of-ten, in that matter, the injuries-in-fact asserted by the Appellants were related to traffic and noise resulting from the Project, which uniquely necessitated proximity for the injury to occur. The court, however, did not limit that impact to a particularized Property interest. Indeed, the standing could have extended to any resident that may have been regularly exposed to Queen City Park Road's traffic impacts. The only two Appellants dismissed by the Court either failed to allege any injury, to property or otherwise, or have moved out of the municipality and therefore lost statutory group-of-ten standing.

another section of the same act, it is generally presumed that the Legislature did so advisedly."). Therefore, the Court finds that Appellants' alleged aesthetic and professional injuries are sufficiently imminent, concrete, and particularized to satisfy the constitutional standing requirement at this stage. The Court, accordingly, **DENIES** the Trust's motion to dismiss for lack of standing.

Motion to Treat the Rule 12(b)(6) Motion as a Rule 56(a) Motion

In responding to the Trust's motion to dismiss for want of standing, the Appellants presented evidence, several affidavits, and a statement of facts supporting their memorandum of law opposing the motion. In considering a motion to dismiss for a lack of standing, however, the Court may consider evidence outside the pleadings to resolve the motion. Conley, 2010 VT 38, ¶ 3. The rules regarding how the Court is to consider evidence on a Rule 12(b)(6) motion, however, are more proscribed.

On a motion to dismiss for failure to state a claim upon which relief can be granted, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." V.R.C.P. 12(b)(6). "If the parties rely on extrinsic evidence," it is in the Court's discretion whether to convert the motion or to "simply disregard the extrinsic materials instead." Island Indus., LLC v. Town of Grand Isle, 2021 VT 49, 215 Vt. 162, 2 (quoting S. Gensler & N. Mulligan, 1 Federal Rules of Civil Procedure, Rules and Commentary Highlights, Rule 12 (2021)).

Here, the Court elects to disregard the matters outside the pleadings and consider the motion to dismiss pursuant the Rule 12(b)(6) standard. First, it is clear to the Court that most of the exhibits presented during this motion practice were filed in connection to the motion to dismiss for lack of standing. Evidence beyond the pleadings is permissible, if not necessary, on such a motion. Conley, 2010 VT 38, ¶ 3. The evidence needed to establish standing, however, may be different than the evidence necessary to prevail on a summary judgment motion. Second, the filings presently before the Court, due to the overlapping nature of the motions and multitude of exhibits, were not presented in the orderly, organized fashion as required by

Rule 56. To consider the present filings as such would invite error. Finally, to the extent that Appellants request that the Court "allow Appellants the discovery and additional briefing necessary to respond to the Trust's Motion," the Court finds that this process would be inefficient. As noted, the current evidence focuses on the Appellants standing. Rather than allowing an extended briefing period to add to these motions, which largely presented evidence immaterial to the merits, the Court would benefit from a coherent presentation of the arguments and undisputed material facts focused on the merits and substantive law in a formal summary judgment motion.[3] The Court therefore **DENIES** Appellants' motion and disregards any extrinsic evidence in its consideration of the pending Rule 12(b)(6) motion to dismiss. In so doing, the Court makes no statement on the prospective merits of such a future motion for summary judgment.

Motion to Dismiss for Failure to State a Claim

I. Legal Standard

The Court applies the Vermont Rules of Civil Procedure to motions to dismiss filed in municipal zoning appeals. V.R.E.C.P. 5(a). The Court, in reviewing a motion to dismiss, must "accept all facts as pleaded in the complaint [and] accept as true all reasonable inferences derived therefrom . . . ." Felis v. Downs Rachlin Martin PLLC, 2015 VT 129, ¶ 12, 200 Vt. 465. The Court is "not required to accept as true 'conclusory allegations masquerading as factual conclusions' in 12(b)(6) analysis." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 10, 184 Vt. 1 (quoting Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002)).

"A motion to dismiss for failure to state a claim is not favored . . . ." Ass'n of Haystack Prop. Owners, Inc. v. Sprague, 145 Vt. 443, 446–47 (1985). The Court should not dismiss a cause of action for failure to state a claim unless it appears "beyond doubt that there exist no facts or circumstances, consistent with the complaint, that would entitle the plaintiff to relief." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575. Plaintiff's burden to state a claim under Vermont's "notice-pleading standard is exceedingly low." Id.

[3] Should the parties elect.

II. Statement of Questions

In the Environmental Division, the Statement of Questions provides notice to other parties and this Court of the issues to be determined within the case and 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.). It functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court. Id. It is, therefore, the document the Court considers here to determine if it is beyond doubt that there are no facts or circumstances that could entitle the Appellants to relief.

Appellant's Statement of Questions presents the following two Questions for the Court's review:

1. Whether a vacant structure which is not being used for religious purposes, has not been used for religious purpose (or any other purpose) for more than four years, and is not going to be used for religious purposes in the future, nevertheless qualifies for the zoning exemption under 24 V.S.A. 4413?
2. Whether, assuming *arguendo* that 24 V.S.A. 4413 does apply, it precludes the Burlington DRB from considering whether the proposed demolition complies with Article 14 of the Burlington CDO and the CDO'S "alternative compliance" standards?

Statement of Questions (filed Mar. 1, 2023).

III. Discussion

The Trust moves to dismiss Appellants' appeal for failure to state a claim for which relief can be granted. In support of its motion, the Trust raises several arguments: (1) CDO § 5.4.8 does not apply to the subject building because it is not old enough; and therefore (2) the limitations of 24 V.S.A. § 4413 are not necessary because of the buildings age; but (3) even if § 4413 was at issue, the Appellants' Questions are barred by the ecclesiastical abstention doctrine; and, finally, even if the Court could reach these issues, (4) zoning issues regarding religious exercise are preempted by federal law pursuant the Religious Land Use and Inmate Protection Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*.

Regarding the Trust's first two arguments, the Trust argues that because the building is not yet 50-years old, CDO § 5.4.8's limitations on the demolition of historical properties does not

apply. The Trust goes on to argues that because CDO § 5.4.8 does not apply and that there are no other standards governing demolition in the CDO, there is no claim for relief under the Bylaws. Whether true or not, the Trust has, through its motion to dismiss for failure to state a claim, argued the merits of these Questions by applying facts of the case to law. This is not the function of a 12(b)(6) motion. Further, the Court finds that there may be applicable standards limiting demolition. The CDO expressly requires a zoning permit for all "development," which expressly includes "[d]emolition." CDO § 3.1.2(a)(4). For buildings in the Downtown District, i.e., where the Property is located, the CDO requires authorization for developments, including demolitions, under Article 14. Accordingly, the Court must deny the Trust's motion as based on these grounds.

The Trust's ecclesiastical abstention doctrine argument also provides insufficient grounds to support a motion to dismiss for failure to state of claim for which relief may be granted. On this point, the Trust argues that the decision to deconsecrate the Cathedral by demolition is an ecclesiastical decision governed by the Canon Law of the Roman Catholic Church, and that the DRB, and now this Court, must abstain from delving into these considerations. Thus, the argument is that the appeal violates the ecclesiastical abstention doctrine.

However, there is a split in authority regarding whether the ecclesiastical abstention doctrine serves as an affirmative defense or a jurisdictional bar to a court's review. See Kavanagh v. Zwilling, 997 F. Supp. 2d 241, 248 n.7 (S.D.N.Y. 2014) ("It is somewhat unclear whether the First Amendment serves as jurisdictional bar or an affirmative defense to claims that require courts to review ecclesiastical decisions."). It is well established that affirmative defenses may be raised in a 12(b)(6) motion to dismiss, without resort to summary judgment procedure, but only if the defense appears on the face of the complaint. See Pellegrino v. New York State United Tchrs., 843 F. App'x 409, 410 (2d Cir. 2021). Here, the affirmative defense is not clear from the face of the Statement of Questions, particularly when giving the Appellants the benefit of reasonable inferences. However, even if it was clear from the face of the Statement of Questions, it is not clear that it applies, as discussed further below.

Most courts have considered the application of the ecclesiastical abstention doctrine as jurisdictional. Therefore, the defense would have been more appropriately raised in a 12(b)(1)

motion to dismiss. However, because the Court has an "independent obligation to ensure that we act only in cases where we have subject-mater jurisdiction," we consider the argument now as a 12(b)(1) motion.

The ecclesiastical abstention doctrine, as recognized in Watson v. Jones, "bars courts from becoming too closely involved in the internal, ecclesiastical matters of religious institutions." Turner v. Roman Catholic Diocese of Burlington, Vermont, 2009 VT 101, ¶ 33, 186 Vt. 396. In determining whether the Court should abstain, "[t]he threshold inquiry is whether the underlying dispute is a secular one, capable of review by a secular court, or an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law.'" Id. (quoting Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 331 (4th Cir.1997)). Here, the facts presented do not convince us that the pending application and the opposition thereto involve the internal, ecclesiastical matters of a religious institution. Indeed, the dispute appears, in all pretenses, to be a purely secular dispute—i.e., whether an Applicant is entitled to a demolition permit under the applicable secular bylaws of the municipality. Thus, the Court cannot find that we lack subject matter jurisdiction over the appeal as predicated on the ecclesiastical abstention doctrine.

Finally, the Trust argues that the municipality's (and therefore this Court's) jurisdiction over its planned demolition is preempted from Burlington's permit requirement pursuant RLUIPA's broad protection and the inclusive "religious exercise" definition. 42 U.S.C. §§ 2000cc-3(g); 2000cc-5(7). Specifically, the Trust argues that the City is not permitted to regulate the demolition of the Property because such regulation would violate RLUIPA by not treating the Trust on equal terms and by imposing a substantial burden on the Trust. The Court can neither find merit to this assertion, nor find sufficient grounds to dismiss the pending appeal, for several reasons. First, preemption is also an affirmative defense. Ricci v. Teamsters Union Loc. 456, 781 F.3d 25, 28 (2d Cir. 2015). Thus, while preemption "can still support a motion to dismiss," such grounds are only available on a 12(b)(6) motion "if the statute's barrier to suit is evident from the face of the complaint." Id. Here, the affirmative defense is not clear from the face of the statement of questions, particularly when giving the Appellants the benefit of reasonable

inferences. The Questions do not argue that the Trust's project should be subjected to anything more than equal treatment of other developments in the district.

Even assuming, however, that such preemption was intrinsically clear on the face of the Statement of Questions, preemption falls short. RLUIPA expressly provides that "[n]othing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally protective of religious exercise as, or more protective of religious exercise than, this chapter." Thus, Burlington's CDO and 24 V.S.A. § 4413 are only preempted if it implements "a land use regulation in a manner than imposes a substantial burden on the religious exercise of a person,"[4] or "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(a), (b). The term "substantial burden" cannot be read out of the statute; RLUIPA does not stand for the proposition that a demolition plan is immune from a town's zoning ordinance simply because the institution undertaking the development once pursued a religious purpose. See Westchester Day Sch. v. Vill. of Mamaroneck, 417 F.Supp.2d 477, 544 (S.D.N.Y.2006), aff'd, 504 F.3d 338 (2d Cir.2007) ("[C]ourts must ensure that the facts warrant protection under RLUIPA, rather than simply granting blanket immunity from zoning laws."). From the Statement of Questions, and giving the benefit of all reasonable doubts and inferences to Appellants, the Court cannot conclude that the pending application or appeal present a violation of RLUIPA such that the CDO may be preempted by Federal law.

Thus, for the reasons discussed above, the Court **DENIES** the Trust's motion to dismiss for failure to state a claim for which relief may be granted.

Motion for Stay

Appellants request the Court stay the demolition permit, arguing that without a stay, they will suffer irreparable harm that will functionally vitiate this Court's jurisdiction over the dispute. It is well established that land use permit decisions are generally not automatically stayed during the pendency of an appeal. V.R.E.C.P. 5(e); see also 10 V.S.A. § 8504(f)(1)(A)–(B) (enumerating

[4] A substantial burden is permissible if it satisfies the statute's strict scrutiny test. See 42 U.S.A. § 2000cc(a)(1)(A)–(B).

the limited circumstances where a stay is automatic). A party, however, may move to request a stay from this Court pending appeal of the underlying decision. V.R.E.C.P. 5(e); 10 V.S.A. § 8504(f)(2). In these instances, a stay is considered "an extraordinary remedy appropriate only when the movant's right to relief is clear." In re Howard Ctr. Renovation Permit, No. 12-1-13 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2013).

To prevail on a motion to stay, "the moving party must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." Gilbert v. Gilbert, 163 Vt. 549, 560 (1995); see also In re Route 103 Quarry, No. 205-10-05 Vtec, slip op. at 3, (Vt. Envtl. Ct. Sept. 14, 2007) (Durkin, J.) (quoting same). When there is a possibility that a stay will harm another party, the movant "must make out a clear case of hardship or inequity in being required to go forward." Morrisville Hydroelectric Project Water Quality, No. 103-9-16 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug. 26, 2020) (Walsh, J.) (quoting In re Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36, 192 Vt. 474). "Courts disapprove stays . . . when a lesser measure is adequate to protect the moving party's interests." Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36. "The criteria are flexible in as much as the court may consider varying strengths and weaknesses as to each in determining the necessity of a stay." White v. State, No. 14-1-21, slip op. at 1 (Vt. Super. Apr. 28, 2021). The Court addresses each criterion in turn.

First, Appellants have not demonstrated a *strong* likelihood of success on the merits. They only note that "it is difficult to predict how this Court or the Vermont Supreme Court may rule on the merits of an issue of first impression," rather than attempting to argue their likelihood of success. Instead, Appellants argue that they can satisfy the Second Circuit's less-rigorous standard for preliminary injunctions: demonstrating "sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly" in the moving party's favor. Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

While the Court agrees with Appellants that they have satisfied the Second Circuit's test, we have not been made aware of the precedent for Vermont state courts applying this standard. Stays and preliminary injunctions in Vermont require the moving party to demonstrate the same four prongs. Cf. Taylor v. Town of Cabot, 2017 VT 92, ¶ 19, 205 Vt. 586 (listing the same four requirements for preliminary injunctions). Therefore, in looking only to the factors weighed in this Court, the Court cannot conclude that Appellants have demonstrated a *strong* likelihood of success on the merits. This factor weighs in favor of denying the stay.

Courts, however, have lowered the threshold for satisfying this prong when the irreparable injury is great. See In re Simpson, No. 17-10442, 2018 WL 1940378 (Bankr. D. Vt. Apr. 23, 2018) (quoting In re 473 W. End Realty Corp., 507 B.R. 496, 502 (Bankr. S.D.N.Y. 2014)) ("The probability of success that must be demonstrated 'is inversely proportional to the amount of irreparable injury that the plaintiff will suffer absent the stay; in other words, more of one excuses less of the other.'"). Here, because we find the concern of irreparable harm particularly great, as well as the other factors favoring a stay, we somewhat lower the threshold of the likelihood of success prong. In so doing, we can find that there may be a possibility of success on the merits. See supra, Discussion re: the Trust's 12(b)(6) Motion to Dismiss. Because we find a possibility of success on the merits (though not a "strong likelihood"), we minimize the weight this first prong carries. See Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir. 2002) (quoting Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) ("The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors.").

Second, the Appellants have undisputedly demonstrated irreparable injury if a stay is not granted. To demonstrate irreparable injury, the proponent "must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir.1995) (quotation marks and citation omitted). Typically, this Court grants motions to stay DRB decisions that grant a permit, after finding that the consequence of allowing the proposed development to move forward would include irreparable harm. See, e.g., In re 110 East Spring St. CU, No. 11-2-

16 Vtec, slip op. at 5-8 (Vt. Super. Ct. Envtl. Div. Apr. 22, 2016) (Walsh, J.); In re Appeal of Wood, Nos. 185-10-04 Vtec, 174-8-05 Vtec, slip op. at 4-5 (Vt. Envtl. Ct. Apr. 13, 2006) (Durkin, J.). Here, without a stay, the demolition permit granted by the DRB is active. The Trust could complete the demolition of the building prior to the resolution in this appeal, and such action would irreparably eliminate the remedy that Appellants seek: review of the proposed demolition and, ultimately, preservation of the building. Such harm could not be redressed with monetary damages. This factor weighs in favor of granting the stay.

Further, the Court affords this prong considerable weight. While the motion here is for a stay pending appeal, the *de novo* review of this Court makes it functionally identical to that of a request for a preliminary injunction. See Mohammed, 309 F.3d at 100–101 (noting the functional similarities and differences and their rationale). In a preliminary injunction, irreparable harm is "the single most important prerequisite" for supporting its issuance. Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir.1983) (quoting 11 C. Wright & A. Miller, Federal Practice & Procedure, § 2948 at 431 (1st ed.1973)).

Third, the Court finds that the stay may harm the Trust. The Trust alleges constitutional violations, as well as some federal statutory violations, that may occur from denying them a demolition permit, namely an interference with the free exercise clause of the First Amendment. Such an allegation sufficiently establishes a possibility of irreparable harm. See Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1992) (citing Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992) ("[I]t is the alleged violation of a constitutional right that triggers a finding of irreparable harm."). There is no evidence or argument that the stay would harm the City.

When there is a possibility that a stay will harm another party, the movant "must make out a clear case of hardship or inequity in being required to go forward" without a stay. In re Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36, 192 Vt. 474 (quoting Landis v. North American Co., 299 U.S. 248, 254–55 (1936). In this case, Appellants have made such a showing. If allowed to go forward, the Trust could demolish the improvements on the Property prior to the resolution of the appeal, potentially depriving Appellants of any meaningful review, thereby resulting in irreparable harm. Conversely, if the stay is granted, the Trust's alleged harm

is only that resulting from delay. Thus, the balance of hardships and equity favors the Appellants, and on balance this prong carries neutral weight.

Finally, the Court finds that a stay here serves the best interests of the public. The purpose and intent of Burlington's Comprehensive Development Ordinance ("CDO") was written to serve the public's interest by, *inter alia*, encouraging development that promotes Burlington's public health, safety, and welfare; implements the goals of the Burlington Municipal Development Plan; and facilitates the growth "to create an optimum environment, with good urban and civic design . . . ." CDO § 1.1.2 ("Intent and Purpose"). To effectuate these goals, the CDO provides that "no development may be commenced within the city without a zoning permit issued," with such development expressly including "[d]emolition." CDO § 3.1.2(a)(4). Despite these goals, the proposed demolition here was permitted to go forward with the Trust relying on review limitations set forth under 24 V.S.A. § 4413. It is the applicability of this exemption that is at issue in the appeal before the Court. If Appellants' assertions are correct, a stay serves the best interests of the public, as it preserves the appeal's justiciability and enables resolution of the issues and, if necessary, substantive review of the proposed Project. Without a stay, the Trust could complete the demolition prior to resolution of the appeal, and functionally render any necessary review moot. Thus, the Court finds that it is in the best interests of the public to ensure that the appeal remains justiciable, and if necessary, the goals of the CDO are upheld. See cf. Ofosu v. McElroy, 98 F.3d 694, 702 (2d Cir. 1996) ("In staying administrative orders, courts give significant weight to the public interest served by the proper operation of the regulatory scheme.").

Thus, while the Court cannot find all four factors favor a stay, in weighing the relative strengths and weaknesses of each of the factors, the Court concludes that a stay is warranted here. In so finding, the Court is tasked with one final consideration: whether "a lesser measure is adequate to protect the moving party's interests." Woodstock, 2012 VT 87, ¶ 36. Because the permit sought here is one for demolition, and the relief sought from the Appellants is preservation and full substantive review of the Project, the Court cannot find a lesser measure

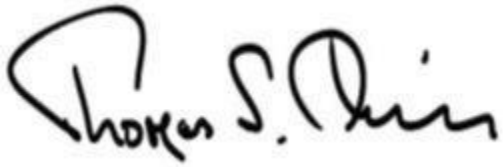
adequate to protect the Appellants' interests. Accordingly, the Court concludes that the stay must be **GRANTED**.

Conclusion

Thus, for the foregoing reasons, the Court **DENIES** the Trust's motion to dismiss for lack of standing (Motion #2), **DENIES** the Appellants' motion to treat the 12(b)(6) motion as a summary judgment motion (Motion #9), **DENIES** the Trust's motion to dismiss for failure to state a claim (also Motion #2), and **GRANTS** the Appellants' motion for a stay (Motion #1).

In light of these decisions, the Court **SETS** the matter for a status conference to discuss the timely resolution of this matter. The Court notes that this appeal has already been pending before the Court for six months. Our Court's disposition guidelines, as approved by the Supreme Court, provide that such municipal de novo appeals should be resolved within 10 months, with complex de novo appeals taking up to 16 months. This Court does not view this as a complex municipal appeal. At the status conference, the Court therefore looks forward to a discussion as to how the parties would like to pursue the timely resolution of this matter within the Court's disposition guidelines, particularly in light of the Court's decision to grant the stay.

Electronically signed at Brattleboro, Vermont on Monday, August 28, 2023, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division