VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 23-ENV-00037

0 Lakeshore Drive Site Plan Approval	**Decision on Motions**

In this matter, Appellant Scott Wood ("Appellant") seeks to appeal a decision of the Town of Colchester Development Review Board ("DRB") granting the Town of Colchester ("Town") site plan approval for the construction of a community center at property having an address of 0 Lakeshore Drive, Colchester, Vermont (the "Project").

There are multiple motions presently before the Court. First, Appellant presents a motion to allow his appeal "if 'participation' is challenged." See Motion to Allow Appeal if "Participation" is Challenged, filed on April 24, 2023.[1] The Town opposes this motion. Second, the Town moves to dismiss this appeal pursuant to Vermont Rules of Civil Procedure ("V.R.C.P.") Rule 12(b)(1) for lack of subject matter jurisdiction. Appellant opposes this motion. Third, Appellant moves to extend all further relevant deadlines, in connection to Appellant's request to convert the Town's motion to dismiss to one for summary judgment.

For the reasons set forth herein, Appellant's motion to allow appeal is **DENIED** as he has not demonstrated that he is entitled to party status under 10 V.S.A. § 8504(b)(2)(C). Having reached that conclusion, and to the extent that Appellant asserts in his Notice of Appeal that he is an "interested person" as otherwise defined by statute, we then turn to the Town's motion to dismiss, which we **GRANTED**, resulting in the **DISMISSAL** of this appeal. Thus, all other motions before the Court are **MOOT**.

In this matter, Appellant is represented by Brice Simon, Esq. The Town is represented by Brian P. Monaghan, Esq. and Kristen Shamis, Esq.

[1] Appellant does not cite to any specific rule under which this motion is made. However, for the reasons set forth herein, we interpret it as being made pursuant to Vermont Rules of Environmental Court Procedure ("V.R.E.C.P.") Rule 5(d)(2).

Discussion

Because there are multiple motions before the Court, each with their own applicable standards, we address each motion in turn. We address Appellant's Motion to Allow Appeal first, then turn to the remaining motions.

I. Motion to Allow Appeal if "Participation" is Challenged

Appellant's Notice of Appeal and other filings appear to assert that he is an "interested person" entitled to appeal pursuant to 10 V.S.A. § 8504(b)(1).[2] In the alternative, if this status is challenged due to Appellant's lack of participation below, Appellant asserts through both his Motion to Allow Appeal if "Participation" is Challenged, and through other filings made in connection with the Town's Motion to Dismiss, that he would also be entitled to appeal pursuant to 10 V.S.A. § 8504(b)(2)(C).[3]

Pursuant to V.R.E.C.P. Rule 5(d)(2), "[a]n appellant who claims party status under 10 V.S.A. § 8504(b)(2) . . . and who has not sought interlocutory relief pursuant to [V.R.E.C.P. 5(d)(1)] must assert that claim by motion filed not later than the deadline for filing a statement of questions on appeal." While Appellant's "motion to allow appeal" does not cite to Rule 5(d)(2) and appears to only be filed to be addressed if alternative party status is challenged, its contents seek to assert a claim that Appellant is entitled to party status pursuant to 10 V.S.A. § 8504(b)(2)(C). Thus, we read it as a motion made pursuant to V.R.E.C.P. 5(d)(2). To do otherwise would be to preclude Appellant from raising this issue, which has been the crux of the dispute between the parties because a determination of party status under § 8504(b)(2) is discretionary. As such, we address this motion first.

We begin by noting that Appellant's motion is very thin. Because the parties address the factual background giving rise to this appeal more fully through other motions, and these motions are all somewhat interrelated, we will refer to Appellant's factual allegations when addressing this motion.

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[2] Pursuant to V.R.E.C.P. 5(b)(3), a notice of appeal "must specify the party or parties taking the appeal and the statutory provisions under which each party claims party status . . . ." Appellant's Notice of Appeal claims party status under 24 V.S.A. § 4471. Section 4471 is not a provision defining a scope of party status. See 24 V.S.A. § 4471 (generally setting forth the provisions applicable to appealing to the Environmental Division). Subsection (a) of this section does state that "[a]n interested person who has participated in a municipal proceeding under this title may appeal a decision rendered in that proceeding by an appropriate municipal panel to the Environmental Division." 24 V.S.A. § 4471(a). This citation is erroneous and if Appellant was seeking to assert that he qualifies as an interested person to appeal, he should have cited to 10 V.S.A. § 8504(b)(1). To address the full scope of the issues before the Court, we interpret the Notice of Appeal in this manner.

[3] We note that Appellant does not cite to 10 V.S.A. § 8504(b)(2)(C) in his Notice of Appeal, as required by V.R.E.C.P. 5(b)(3). He does, however, raise it in his contemporaneous motion.

Even with this broad reading of all relevant filings, Appellant is not entitled to party status under § 8504(b)(2)(C).

Pursuant to 10 V.S.A. § 8504(b)(2)(C), "an interested person may appeal an act or decision under 24 V.S.A. chapter 117 if the Environmental judge determines that . . . some other condition exists that would result in manifest injustice if the person's right to appeal was disallowed." There is no participation requirement in § 8504(b)(2).

"[D]etermination of party status under [10 V.S.A. § 8504(b)(2)] is discretionary, not automatic, and this discretion is vested in the trial court." In re Verizon Wireless Barton Permit, 2010 VT 62, ¶ 19, 188 Vt. 262. "The burden of establishing party status is on the appellant." In re Appeal of MDY Taxes, Inc., 2015 VT 65, ¶ 7, 199 Vt. 262 (citing Verizon Wireless Barton Permit, 2010 VT at ¶ 19; Reporter's Notes, V.R.E.C.P. 5).

The Vermont Supreme Court has looked to other contexts employing the "manifest injustice" standard when interpreting what might constitute a "manifest injustice" under 10 V.S.A. § 8504(b)(2)(C). See MDY Taxes, 2015 VT 65, ¶ 15. In so doing, the Vermont Supreme Court recognized that the "manifest injustice" standard "is an exacting and strict standard." Id. (citing State v. Dove, 163 Vt. 429, 431 (1995); N. Sec. Ins. Co. Mitec Elecs. Ltd., 2008 VT 96, ¶¶ 40—46, 184 Vt. 303.

This Court has held that where notice was properly provided and a party failed to participate in the proceedings that were noticed, denying party status to appeal the subsequent municipal decision does not result in manifest injustice. In re Mad River Barn Conditional Use App., No 149-11-16 Vtec slip op. at 2 (Vt. Super. Ct. Envtl. Div. Mar. 8, 2017) (Durkin, J.) (citing Zaremba Grp. CU – Jericho, No. 101-7-13 Vtec, slip op. at 9—10 (Vt. Super. Ct. Envtl. Div. Apr. 21, 2014) (Walsh, J.); Jolley Assoc. Car Wash, No. 179-12-13 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Mar. 19, 2014) (Walsh, J.); In re Cummings Subdivision, No. 156-9-10 Vtec, slip op. at 17—18 (Vt. Super. Ct. Envtl. Div. Jul. 13, 211) (Wright, J.). The Court in Mad River Barn noted that these cases can be contrasted by the matters in which we have found manifest injustice to have occurred. See id. (citing In re Honora Vineyard Application, No. 279-12-07 Vtec, slip op. at 5 n. 8 (Vt. Super. Ct. Envtl. Div. Oct. 31, 2008) (Durkin, J.) (holding that denying the right to appeal for failure to participate in municipal proceedings, where no such proceedings actually took place, would result in manifest injustice); In re Union Bank, No. 7-1-12, slip op. at 5-6 (Vt. Super. Ct. Envtl. Div. Apr. 1, 2013) (Durkin, J.) (holding that although appellant did not raise questions about all Act 250 criteria in the proceeding below and therefore should not have had standing to challenge all criteria on appeal, because appellant was pro se, because

she did participate in the hearing below, and because her concerns were closely related to all criteria in question, denying her permission to appeal all criteria would result in manifest injustice).

The facts presented are not such where Appellant can be conferred the exceptional party status set forth in § 8504(b)(2)(C). It is undisputed that Appellant is an abutter to the Project. It also appears undisputed that Appellant received notice from the Town of the Project application.[4] Appellant did not participate in any manner in the DRB proceedings below either by providing written or oral testimony, evidence, or a statement of concern. See 24 V.S.A. § 4471(a) (defining participation broadly before an appropriate municipal panel).

Appellant asserts that failure to allow his appeal would result in manifest injustice because it would "silenc[e] an abutter" . . . and "disallow[] review of substantive decisions" of the DRB absent review by this Court.[5] Motion to Allow Appeal if "Participation" is Challenged, at 2. Appellant's argument must fail. He received notice of the DRB proceedings to review the Project application and had concerns about the application. He affirmatively declined to participate in the proceedings below, and those proceedings resulted in a permit that he disagrees with. Disallowing Appellant's appeal based on the facts presented would not result in an injustice, let alone one of manifest proportions. Appellant offers no explanation or justification, compelling or otherwise, as to why he did not participate in the proceedings despite receiving notice thereof. Thus, we conclude that failure to allow

[4] Appellant in response to the Town's motion to dismiss asserts that the notice provided was somehow deficient because it was for a square footage less than that which was approved. Appellant does not raise this issue, or a claim of party status under 10 V.S.A. § 8504(b)(2)(A) in his motion. Thus we conclude that we need not address it as potential grounds for Appellant's party status approval. To the extent that the two issues are related, it is undisputed that he received notice for the Project, which is a community center. Further, Appellant does not assert that his concerns with the Project are at all related to the increase in size that happened during the permitting process. Instead, he notes in his motion that he "has expressed concerns about the Project" in its totality. Thus, it is not his assertion that he did not participate in the proceedings below because he found the Project, as noticed, to be acceptable but finds the Project, as permitted, to be objectionable. But instead it appears Appellant received notice, in a form that he has not objected to, of a Project that he found, as presented, to be of concern to him and he simply did not participate in the proceedings. For both reasons, this Court does not need to address the substance or type of notice, because it appears undisputed that notice was received.

[5] Appellant also appears to assert that the permit at issue can only be challenged in this Court because the Town is both the applicant, as landowner, and reviewer, through the DRB. He presents no allegation of impropriety during the permit application process beyond this fact. Absent any allegation, the mere fact that the Town is both applicant and, through a development review board, the adjudicating panel, does not present independent grounds to allow Appellant's appeal pursuant to 10 V.S.A. § 8504(b)(2)(C), particularly in light of the fact that Appellant was noticed of the Project and did not participate in the proceedings.

his appeal in this circumstance would not result in a manifest injustice. See Mad River Barn Conditional Use App., No 149-11-16 Vtec, slip op. at 2 (Mar. 8, 2017) (citations omitted).[6]

For these reasons, we conclude that Appellant is not entitled to party status pursuant to 10 V.S.A. § 8504(b)(2)(C) and disallowing his appeal will not result in a manifest injustice.

II. Motion to Dismiss

Having reached this conclusion, we must turn to the Town's motion to dismiss. While a large portion of that motion addressed Appellant's party status under 10 V.S.A. § 8504(b)(2), it also addresses Appellant's status as an interested person. Appellant's Notice of Appeal appears to assert that he qualifies as an interested person to appeal to this Court pursuant to 10 V.S.A. § 8504(b)(1). Pursuant to V.R.E.C.P. 5(d)(2), an appellant claiming party status under § 8504(b)(1) "will be automatically accorded that status when the notice of appeal is filed unless the court otherwise determines on motion to dismiss a party." Thus, while Appellant's motion was based on his assertion that he was entitled to party status under § 8504(b)(2)(C), to the extent that he has claimed party status under § 8504(b)(1), we must analyze Appellant's standing in this regard in light of the Town's motion to dismiss.

When reviewing a Rule 12(b)(1) motion, the Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party, Appellant here. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. It is well-established that the Court may consider evidence outside of the pleadings when resolving a Rule 12(b)(1) motion. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11 (citing Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)).[7]

Pursuant to 10 V.S.A § 8504(b)(1), "an interested person, as defined in 24 V.S.A.§ 4465, who has participated as defined in 24 V.S.A. § 4471 in the municipal regulatory proceeding under [Chapter 117] may appeal to the Environmental Division an act or decision made under [Chapter 117]" by an appropriate municipal panel. Section 4465(b) defines types of parties that would qualify as interested

[6] To the extent that Appellant alleges that there are others in the Town that would wish to participate in this appeal, it is a well-established standing principal that a party may not bring claims on behalf of third parties. See Hinesburg Sand & Gravel Co. v. State, 166 Vt. 337, 341 (1997). Thus, that others may want to provide testimony should Appellant's appeal go forward is also not grounds to allow his appeal to remain should Appellant lack party status.

[7] It is for this reason that we must deny Appellant's request to convert the Town's motion to dismiss to one for summary judgment pursuant to V.R.C.P. Rule 56. Pursuant to V.R.C.P. Rule 12(b), the Court may only convert a motion to dismiss made pursuant to Rule 12(b)(6), failure to state a claim upon which relief can be granted, to one for summary judgment. See V.R.C.P. Rule 12(b)(6). Again, it is well-settled that the Court can consider evidence outside of the pleadings when ruling upon a Rule 12(b)(1) motion. Further, because the scope of the Town's motion to dismiss is narrowed by the Court's ruling on the Motion to Allow Appeal, consultation of matters outside of the filings is unnecessary.

persons. Participation is defined as "offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding." 24 V.S.A. § 4471(a).

It is undisputed that Appellant did not participate, through any means available to him, in the proceedings below. He therefore fails to qualify as an interested person entitled to appeal pursuant to 10 V.S.A. § 8504(b)(1). Having reached this conclusion, this Court need not address whether Appellant meets the definition of an interested person pursuant to 24 V.S.A. § 4465(b) because he is not entitled to appeal the underlying decision due to his lack of participation.

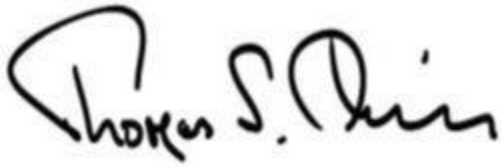
For this reason, the Town's motion to dismiss the appeal is **GRANTED** and the appeal is **DISMISSED**.

Conclusion

For the foregoing reasons, we conclude that Appellant is not entitled to party status pursuant to 10 V.S.A. § 8504(b)(2)(C) and, therefore, his motion to allow appeal, which we interpret as a motion made pursuant to V.R.E.C.P. 5(d)(2), is **DENIED**. Having reached this conclusion, and to the extent that Appellant claimed interested person status pursuant to 10 V.S.A. § 8504(b)(1), we conclude that Appellant failed to participate in the proceedings below and therefore **GRANT** the Town's motion to dismiss this appeal. Having reached these conclusions, the appeal is **DISMISSED**. All other motions before the Court are **MOOT**.

This concludes the matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed at Burlington, Vermont on Thursday, August 31, 2023, pursuant to V.R.E.F. 9(d).



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