

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-00020

Radicioni Denial

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion: 1)
Filer: K. Heather Devine, Esq.
Filed Date: July 13, 2023

No response filed.

The motion is GRANTED IN PART and DENIED IN PART.

This is an appeal of a February 19, 2023 decision of the Town of Sharon Development Review Board (DRB) denying an application to extend a conditional use permit to rebuild a pole barn at property owned by Down River Investments, LLC, submitted by Walter Radicioni (Mr. Radicioni) located at 2911 VT Route 14, Sharon, Vermont (the Property). The barn is located in a Fluvial Erosion Hazard (FEH) area as mapped by the Agency of Natural Resources (ANR) and is subject to the Town of Sharon Flood Hazard Area Bylaw (the Flood Bylaws). Presently before the Court is the Town of Sharon's (Town) motion to dismiss the present action pursuant to V.R.C.P. 12(b)(6).

In this matter, Mr. Radicioni is self-represented¹, and the Town is represented by K. Heather Devine, Esq.

Legal Standard

The Town's motion is pursuant to V.R.C.P. 12(b)(6), seeking dismissal of the appeal alleging that Mr. Radicioni has failed to state a claim upon which relief can be granted. A Rule 12(b)(6) motion for failure to state a claim may not be granted unless it is beyond doubt that

¹ The Court assumes that Mr. Radicioni is a member of the LLC.

there are no facts or circumstances that would entitle the Applicant to relief. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1 (citation omitted). When ruling upon such a motion, we take all well-pleaded factual allegations made by the nonmoving party, here Mr. Radicioni, as true and “assume that the movant’s contravening assertions are false.” Alger v. Dep’t of Labor & Industry, 2006 VT 115, ¶ 12, 181 Vt. 309 (citation omitted). There is a “exceedingly low” threshold to survive a 12(b)(6) motion and, “[m]otions to dismiss for failure to state a claim are disfavored and should rarely be granted.” Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575 (mem.).

We note that Mr. Radicioni has not responded to the pending motion. The failure of a party to respond to a Rule 12(b)(6) motion does not independently warrant granting the motion, unless the pleadings do not sufficiently state a claim upon which relief can be granted. Amy’s Enters. v. Sorrell, 174 Vt. 623, 625 (2002).

Further, while not directly cited in its motion, the Town raises issues related to this Court’s jurisdiction to hear certain aspects of Mr. Radicioni’s appeal that would be properly raised pursuant to V.R.C.P. 12(b)(1). When considering V.R.C.P. 12(b)(1) motions to dismiss, “we accept all uncontroverted factual allegations of the nonmovant as true and construe them in the light most favorable to the nonmovant.” In re Burns 12 Weston St. NOV, No. 75-7-18 Vtec, slip op. at 2 (Vt. Super. Ct. Env’tl. Div. Apr. 5, 2019) (citing Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245). In any event, this Court has “an independent obligation to determine whether subject-matter jurisdiction exists” and must consider the issue on our own. See In re Verizon Wireless Barton Permit, No. 133-6-08 Vtec, slip op. at 8 (Vt. Env’tl. Ct. May 20, 2009) (Durkin, J.) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); see also V.R.C.P. 12(h)(3) (requiring this Court to dismiss an action sua sponte “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter”).

Statement of Questions

Mr. Radicioni presents 8 Questions in his Statement of Questions. They ask:

1. Why is there a discrepancy in the map lines from the river to Rte. 14? Some' properties are less than 20' and mine is over 1000'. Where is the scientific data supporting this Why isn't it the same distance for everyone.
2. With these line changes why hasn't there been a means to control the erosion as they did on Route 107 after Irene?

3. It states in the town bylaws statement of purpose, how do any of these appl to my property?
4. We have maps from 1850-present showing very little erosion, so again, where is the scientific data supporting new boundaries?
5. By deeming my full 19 acres of property now unbuildable to benefit the public and town, where is my compensation for loss?
6. Why am I not allowed to extend the original granted permit of re-establishing pole barn? I understand what the town is stating and take responsibility for my lack of knowledge in the process. At the same time other towns allow people to renew expired permits regardless of circumstances daily.
7. Why at the town meeting to update the Town plan was the original map from 2010 used on display to show boundary lines for flood plain and not the supposed updated map of 2016? This could be viewed as deceiving the public.
8. The ANR and the town planning board didn't do their due diligence in 2016, 2017 of updating erosional map.
 1. No notification to landowners' phone, email, mail or newspaper
 2. Confiscated land without proper representation from landowners.
 3. Seizure of land for public purposes is like eminent domain without paying for it.
 4. Using erosional map of 2010 in April of 2023 town wide plan knowing the map of 2016/2017 [s]hould have been the map used. This established the Town acceptance of the map of 2010 was voted on. Are they trying to deceive the voters in 2023? If so, we should have a new revote.
 5. Is there a statute that allows ANR and the town planning board to exclude us from the map process.
 6. I would like to see all engineering reports on the erosion, especially since my engineer Pathways disagrees immensely. This boils down to political control.

Appellant Statement of Questions, filed May 30, 2023.

Discussion

I. Questions 1, 2, 4, and 8(1), (2), and (4)—(6).

Questions 1, 2, 4, and 8(1), (2), and (4) through (6) generally seek to challenge ANR's adoption and creation of the FEH maps. Specifically, these Questions challenge the FEH maps, and Flood Bylaws incorporating these maps, on the location of FEH areas themselves (Question 1), the data and/or science backing up the location of erosion areas on the FEH maps (Question 1, 4, 8(6), the

availability of other erosion control measures that Mr. Radicioni considers less burdensome on the Property (Question 2), and the process by which the FEH maps were amended (Question 8(1), 8(4) 8(5)).²

The Town argues that Mr. Radicioni is precluded from raising Questions challenging the FEH maps because he sought to challenge them in a previous appeal. See In re Down River Invs., LLC, No. 139-12-18 Vtec (Vt. Super. Ct. Env'tl. Div. Jun. 30, 2020) (Durkin, J.). In the previous appeal, Mr. Radicioni sought to construct a different structure on the Property and the DRB denied the application. In granting the Town summary judgment, this Court concluded such a challenge was outside of its jurisdiction. Alternatively, the Town argues that, for the same reasons that the Court concluded that these types of challenges were outside of the Court's jurisdiction in the previous appeal, they remain outside the scope of the Court's jurisdiction in the present appeal.

This Court is one of limited jurisdiction and, with limited exceptions not relevant here, we review appeals de novo. See 4 V.S.A. § 1001(b); 10 V.S.A. § 8504(h). We are further limited "to consideration of the matters properly warned as before the local board." In re Maple Tree Place, 156 Vt. 494, 500 (1991). As such, our subject matter jurisdiction is confined to those issues that the municipal panel below had the authority to address when considering the original application. See In re Transtar LLC, No. 46-3-11 Vtec, slip op. at 4 (Vt. Super. Ct. Env'tl. Div. May 24, 2012) (Durkin, J.). Thus, our review is limited by the applicable substantive standards applied in the proceeding before the DRB. See 10 V.S.A. § 8504(h); V.R.E.C.P. 5(f); In re Torres, 154 Vt. 233, 235 (1990) ("The reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment of a planning commission but not broader.").

Presently before the Court is an application to extend a conditional use permit to allow reconstruction of portions of a pole barn on the Property pursuant to the Flood Bylaws, which incorporates the FEH maps created by ANR. The DRB could not amend, alter, or otherwise challenge the FEH maps in relation to the pending application, nor is there any allegation that the DRB could amend, alter, or otherwise challenge the incorporation of the FEH maps into the Flood

² The Town also moves for dismissal of Questions 8(2) and 8(3). The Court separates out these Questions, as we conclude that we have jurisdiction over these Questions, and addresses Questions 8(2) and 8(3) in Section III.

Bylaws in relation to this application. Thus, in this action, this Court on appeal may only determine if Mr. Radicioni is entitled to the permit applied for, not whether the FEH are properly, procedurally or otherwise accurate.

Questions 1, 2, 4, 8(1), 8(4)—(7), in different manners, seek to challenge the FEH maps. This is outside the scope of this Court’s jurisdiction in the present action and, therefore, we **GRANT** the Town’s motion in this regard and **DISMISS** these Questions. Having reached this conclusion, we need not address the Town’s argument that Mr. Radicioni is precluded from addressing these issues due to the prior appeal of another permit.

II. Question 3

Question 3 asks this Court to analyze the applicability of certain purpose statements in the Town’s bylaws to the Property. The Question does not identify specific purpose statements.

The Town argues that Mr. Radicioni is precluded from raising this question because he challenged a purpose statement of the Town Bylaws in the prior appeal. This Question, however, does not specifically identify what statement within the bylaw Mr. Radicioni believes is applicable to the present application and the Property and that he seeks review of in this appeal. We therefore cannot analyze whether it is duplicative of the previous appeal.³ We therefore decline to grant the Town’s motion with respect to Question 3 on preclusion grounds.

To the extent that the Town argues that we must dismiss the Question for the same reason we granted it summary judgment in the previous action on similar issues, we decline to do so at this time. As a general matter, purpose statements in zoning bylaws are unenforceable. See In re Wagner & Guay Permit, 2016 VT 96, ¶ 26, 203 Vt. 71 *overruled on other grounds by* 2017 VT 112. That said, some specific statements may be enforceable if the statement “set[s] forth a specific policy stated in language that is clear and unqualified, and creates no ambiguity,” See In re Liberty St. Permit, No. 21-ENV-00085, slip op. at 3 (Vt. Super. Ct. Envtl. Div. May 24, 2022 (Walsh, J.) (citations omitted).

The Question does not point to specific statements in the bylaws. Thus, we cannot determine whether the Question addresses language that would not be enforceable in this

³ We further note that the applications, while related to the same property, are for different projects. The Town has not provided an understanding as to whether or not this impacts any application of an issue preclusion in this matter.

matter. We therefore **DENY** the Town's motion to dismiss Question 3. In so doing, we direct Mr. Radicioni to file an amended Question 3 with this Court, identifying the specific purpose statements at issue in this matter. In so doing, we remind Mr. Radicioni of the relevant law in the above paragraph, guiding how this Court interprets such purpose statements. Should he fail to do so, this Court will dismiss the Question.

III. Question 5, 8(2) and 8(3)

Questions 5, 8(2) and 8(3) effectively raise a regulatory takings challenge. The Town argues that such a claim is outside the scope of this Court's jurisdiction.

While this Court lacks jurisdiction to rule upon the constitutionality of a zoning bylaw on its face, the Court does have jurisdiction over claims that a zoning bylaw or regulation would amount to a taking as applied to a particular permit application on appeal. See In re Umpire Mtn., LLC WW/WS, No. 171-12-12 Vtec, slip op. at 8 (Vt. Super. Ct. Envtl. Div. Feb. 27, 2014) (Walsh, J.) (citing In re Britting Wastewater/Water Supply Permit, No. 259-11-07 Vtec, slip op. at 5 (Vt. Envtl. Ct. Apr. 7, 2008) (Wright, J.)).

The Town argues that these Questions must be dismissed because either they seek to challenge the FEH map or seek to make a facial takings challenge thereof. The Court disagrees with this narrow interpretation. Question 5 does not mention ANR or the FEH maps, but instead benefits to the Town and the public from the limitations on the Property set forth in the applicable Flood Bylaws. Questions 8(2) and 8(3), as subparts of the general Question 8, address both ANR and the Town.⁴ Thus, the Questions, while somewhat unclear as written, are not so narrow as the Town proffers and, rather than challenge the maps themselves, appear to challenge the impact the Flood Bylaws, by incorporating the maps, have on Mr. Radicioni's property in the context of this appeal. Thus, we conclude that the Questions assert a regulatory taking claim as it relates to the pending application before the Court within the scope of the Court's jurisdiction. Thus, we **DENY** the Town's motion to dismiss Questions 5, 8(2) and 8(3).

⁴ For the reasons set forth in Section I, issues related to ANR activities are not before the Court in this municipal zoning appeal and to the extent that these Questions sought the Court's review on such actions, they are beyond the scope of the Court's jurisdiction in this appeal.

Questions 5, 8(2), and 8(3) are, however, not drafted clearly and require amendment. The Court amends the Questions to a single revised Question asking:

Whether the Town Bylaws and Flood Bylaws, as applied to the Property, has resulted in a regulatory taking at the Property due to their incorporation of the FEH maps.

IV. Question 6

Question 6 asks “[w]hy am I not allowed to extend the original granted permit of re-establishing pole barn?” It then goes on to add two sentences: “I understand what the town is stating and take responsibility for my lack of knowledge in the process. At the same time other towns allow people to renew expired permits regardless of circumstances daily.”

The Town argues that this Question must be dismissed because it includes references to other municipalities not before the Court. This ignores the sole question included in Question 6, which asks, functionally, whether Mr. Radicioni is entitled to an extension of the original conditional use permit for the re-establishment of the pole barn. While the question itself is not artfully drafted, it encompasses the crux of the issue before the DRB and this Court on appeal: the merits of Mr. Radicioni’s application to extend the conditional use permit for the Property and barn. This is a proper issue for this Court to adjudicate on appeal.

Thus, the Town’s motion to dismiss Question 6 is **DENIED IN PART**. To the extent that the narrative portion of the Question is irrelevant and raises issues outside the scope of this Court’s jurisdiction, the Court **GRANTS IN PART** the Town’s motion to dismiss this aspect of the Question. We thus read Question 6 as follows:

Whether Mr. Radicioni is entitled to an extension of the original conditional use permit relative to the reconstruction of the pole barn at the Property.

V. Question 7

Questions 7 seeks to attack the process by which amendments to the Town of Sharon Town Plan were made in 2016 and/or 2017.⁵ The Town argues that the Town Plan, generally, is

⁵ The Town also moves to dismiss Question 8(4) for the same reasons it moved to dismiss Question 7. Question 8(4) was dismissed for the reasons set forth in Section I. Thus, Section V is specific to Question 7. To the extent that the subsection also sought to challenge the Town Plan, we dismiss Question 8(4) for the same reason as Question 7.

irrelevant to the present application, which addresses the Flood Bylaws and the application's compliance therewith. Mr. Radicioni has provided no understanding of how the Town Plan is related to the pending application, nor has he provided an understanding of how the process by which the Town Plan was amended impacts his present application. A review of the Flood Bylaws does not show any such connection either.

Thus, we **GRANT** the Town's motion with respect to Question 7 and the Question is **DISMISSED**.

Conclusion

For the foregoing reasons the Town's motion is **GRANTED IN PART** with respect to Questions 1, 2, 4, 7 and 8(1), 8(4)—(7) and these Questions are **DISMISSED**. The Court **DENIES IN PART** the Town's motion with respect to Questions 3, 5, 6, 8(2) and 8(3). In so doing, the Court revises Questions 5, 6, 8(2) and 8(3) to read as:

1A. Whether the Town Bylaws and Flood Bylaws, as applied to the Property, has resulted in a regulatory taking at the Property due to their incorporation of the FEH maps.

2A. Whether Mr. Radicioni is entitled to an extension of the original conditional use permit relative to the reconstruction of the pole barn at the Property.

The Court further directs Mr. Radicioni to provide an amended Question 3 identifying the specific purpose provisions of the applicable bylaws that he believes at issue in this appeal. The amended Question 3 shall be filed **on or before September 29, 2023**. Should Mr. Radicioni fail to so file, the Question will be dismissed.

Electronically signed this 12th day of September 2023 in Burlington, Vermont pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized, with the first name "Tom" and the last name "Walsh" written in a cursive-like script.

Thomas G. Walsh, Judge
Superior Court, Environmental Division