

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 2-1-19 Vtec

Dorset Meadows Associates LLC PUD

ENTRY REGARDING MOTION

Count 1, Zoning Appeals (2-1-19 Vtec)

Title: Motion to Dismiss Appeal (Motion 1)

Filer: Dorset Meadows Associates, LLC

Attorney: Matthew B. Byrne

Filed Date: February 26, 2019

Response in Opposition filed on 03/01/2019 by Attorney Daniel A. Seff for Appellant Darrilyn Peters

Reply filed on 03/11/2019 by Attorney Matthew B. Byrne for Appellee Dorset Meadows Associates, LLC

The motion is GRANTED.

Dorset Meadows Associates, LLC, (Dorset) seeks permit approval for a planned unit development (PUD) on its property located at 1505 Dorset Street in South Burlington, Vermont. Thus far, Dorset has submitted a sketch plan, an application for master plan review, and an application for preliminary subdivision plat review to the City of South Burlington Department of Planning and Zoning (Planning and Zoning). A number of neighboring residents (Neighbors) appealed after Planning and Zoning moved on from the sketch plan and began to review Dorset's master plan and subdivision plat applications (Applications). Presently before the Court is Dorset's motion to dismiss Neighbors' appeal, which asserts that this Court does not have subject matter jurisdiction because there was not an appealable decision or act below pursuant to 24 V.S.A. § 4471(a).

We provide a brief overview of the relevant case history for context:

On June 11, 2018, Dorset submitted a proposed sketch plan for the PUD to Planning and Zoning. An Assistant Administrative Officer reviewed the sketch plan and concluded that the PUD needed to undergo master plan review in addition to the other stages of the City of South Burlington's multi-stage review process. On July 17, 2018, the City of South Burlington Development Review Board (DRB) discussed and took comments on the sketch plan before continuing it to August 7, 2018. After taking further comments at the August 7, 2018 hearing, the DRB adjourned the meeting without continuing sketch plan review. The DRB did not take a vote or otherwise formally announce a decision at the August 7, 2018 hearing.

On September 26, 2018, Dorset proceeded to submit the Applications as part of the next phase of review. Planning and Zoning's Administrative Officer and Assistant Administrative Officer deemed these complete. Neighbors appealed the completeness determination to the DRB on October 11, 2018. They argued that the Applications were premature, unripe, and could

not proceed because the DRB hearings on Dorset's sketch plan did not result in formal approval of the sketch plan. On appeal, the DRB concluded that it completed its sketch plan review with the August 7, 2018 hearing and the Applications could proceed. Neighbors appealed that determination to this Court on January 4, 2019. Dorset's motion to dismiss followed.

In reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to V.R.C.P. 12(b)(1), this Court accepts all uncontroverted factual allegations as true while construing them in the light most favorable to the nonmovant. In re Pelkey Final Plat Major Subdivision, No. 172-12-12 Vtec, slip op. at 1 (Vt. Super. Ct. Env'tl. Div. July 3, 2013) (Durkin, J.) (citing Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245).

This Court only has subject matter jurisdiction over an appeal pursuant to 24 V.S.A. § 4471(a) if the decision or act appealed from is final. In re Saxon Ptnrs LLC BJ's Warehouse Sketch Plan, No. 5-1-16 Vtec, slip op. at 2 (Vt. Super. Ct. Env'tl. Div. July 15, 2016) (Walsh, J.). Municipal decisions are final when they resolve the "ultimate issue" before the municipal panel. In re Scott Farm Act 250, No. 48-4-17 Vtec, slip op. at 1-2 (Vt. Super. Ct. Env'tl. Div. Aug. 22, 2017) (Walsh, J.) (citing Jordan v. State Agency of Transp., 166 Vt. 509, 513 (1997)).

This interpretation of "decision" strikes a balance between the need for appellate review of municipal decisions before the final permit determination and the delay and inefficiencies that result from piecemeal appellate review. See, e.g., Castle v. Sherburne Corp., 141 Vt. 157, 163-64 (1982) (discussing the purposes and dangers of interlocutory appellate review). Thus, a municipal panel's commentary, guidance, or hypothetical discussion is not appealable to this Court. Saxon Ptnrs, No. 5-1-16 Vtec at 2 (July 15, 2016) (citing In re Stowe Club Highlands Merger/Subdivision Application, No. 35-3-11 Vtec, slip op. at 6 (Vt. Super. Ct. Env'tl. Div. Feb. 15, 2012) (Walsh, J.), *aff'd*, 2013 VT 4, 193 Vt. 142). This Court has also looked to whether the municipal panel is authorized or required to make a decision at a particular stage of review to determine whether a decision is final. See, e.g., In re Perras & Sons, Inc. Preliminary Plat, No. 29-2-06 Vtec, slip op. at 6-9 (Vt. Env'tl. Ct. Oct. 18, 2006) (Durkin, J.).

Given the posture of this matter, it is important that we define what "decision or act taken, or [] failure to act" is on appeal before us. The act, or failure to act, Neighbors appeal is the DRB's alleged failure to properly conclude sketch plan review before moving on to accept the Applications as complete in the next stage of review.

Neighbors do not appeal any substantive conclusion reached by the DRB in sketch plan review. They do not allege that the DRB improperly reached a decision on a feature of the application that will bind parties in later stages of review.¹ See 24 V.S.A. § 4472(d); see, e.g., In re Bridges Zoning Permit Approval, No. 3-1-18 Vtec, slip op. at 4-5 (Vt. Super. Ct. Env'tl. Div. Aug. 29, 2018) (Walsh, J.). Instead, they assert a procedural irregularity that does not limit or have consequences for the DRB's review moving forward.

Thus, Neighbors seek to appeal an action of the DRB that itself did not resolve any issues relevant to the application in sketch plan review. Neighbors' concern lies with the lack of a vote itself, not with any consequences or deprivation of rights resulting from it. Here the lack of finality merges with the absence of a justiciable injury. See Brod v. Agency of Natural Res., 2007

¹ For instance, Neighbors do not appeal the DRB's decision in the sketch plan phase that Dorset is applying for a "major" PUD that requires master plan review. See Perras, No. 29-2-06 Vtec at 6-9 (Oct. 18, 2006) (concluding that the decision that the application involved a major subdivision in the sketch plan phase was appealable because the town's ordinance required the municipal panel to make that determination at that stage). That sort of substantive determination becomes final and binding without an appeal. 24 V.S.A. § 4472(a). DRB actions that do not conclusively resolve any issues relevant to the application do not fall within the same category.

VT 87, ¶ 8-10, 182 Vt. 234 (describing the case and controversy requirements, specifically the injury requirement); Parker v. Town of Milton, 169 Vt. 74, 78 (1998) (emphasizing that “[t]he injury must be an invasion of a legally protected interest,’ not a generalized harm to the public.” (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))). If the DRB had perfected the vote Neighbors allege is necessary, the substantive aspects of the application, as well as the parties, would be in the same position as before this appeal, just without the delay. Brod, 2007 VT 87, ¶ 6 (affirming the lower court’s determination that the standing requirements were not met because any ruling “would not change ‘the current state of affairs’ . . .”).

Therefore, we conclude that Neighbors have appealed a DRB action that did not conclusively resolve any issues relevant to the permit. Further, Neighbors have not shown how their interests are particularly affected by the DRB’s acts. These acts do not constitute a final, appealable decision. Accordingly, Dorset’s motion to dismiss the appeal is **GRANTED**.²

While we ultimately conclude that this Court does not have subject matter jurisdiction, our conclusions do not in any way affect the rules surrounding divestiture of jurisdiction. See In re Freimour & Menard Conditional Use Permit, No. 59-4-11 Vtec, slip op. at 6-7 (Vt. Super. Ct. Envtl. Div. June 6, 2012) (Durkin, J.) (citations omitted) (discussing how an appeal to this Court divests the municipal panel below of its authority to decide on those aspects of the application involved in the appeal). Dorset argues that, despite the present appeal, the DRB retained its ability to decide on the Applications in the next phase of review. The DRB, however, did not have control over the reviewability of the Applications while this appeal was pending.³ The question of whether the DRB could properly proceed to the next stage of review was the basis of Neighbors’ appeal and constituted the matter before this Court. The DRB could not decide this question for themselves. Any steps taken by the DRB related to the Applications during the pendency of this appeal were carried out without the power to do so. See, e.g., Kotz v. Kotz, 134 Vt. 36 (1975) (vacating a trial court order that issued while the matter was on appeal to the Supreme Court).

² Because we dismiss the present appeal, Neighbors’ motion for summary judgment is **MOOT**. A cursory review of Neighbors’ motion reveals that they do not assert any new legal theories that would unsettle our conclusions here.

Neighbors also request review under V.R.C.P. 75 as an alternative to an appeal pursuant to 24 V.S.A. § 4471. They ask that we either treat their notice of appeal as the complaint required by V.R.C.P. 75(b) or give them permission to file a separate V.R.C.P. 75 complaint.

Neighbors do not identify any statutory authority or procedural rule enabling this Court to discard the specific procedural requirements of V.R.C.P. 75 through a rebranding of their notice of appeal. Nor is a V.R.C.P. 75 action a matter of permission, though the weaknesses we identify in the present appeal will likely pervade Neighbors’ other requests for relief. To the extent Neighbors request an advisory opinion on a V.R.C.P. 75 complaint not presently before the Court, that is beyond this Court’s authority to give. See Chittenden S. Educ. Ass’n, Hinesburg Unit v. Hinesburg Sch. Dist., 147 Vt. 286, 294 (1986) (citing In re Constitutionality of House Bill 88, 115 Vt. 524, 529 (1949)) (discussing the prohibition on advisory opinions in Vermont courts).

³ We note that Planning and Zoning’s conclusion that the Applications were complete occurred before the notice of appeal and was not barred by the divestiture of jurisdiction.

So ordered. This concludes the current proceedings before this Court. A Judgment Order accompanies this Entry Order.

Electronically signed on March 19, 2019 at 1:48 PM pursuant to V.R.E.F. 7(d).

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

Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

Daniel A. Seff (ERN 1514), Attorney for Appellant Tom Anfuso
Daniel A. Seff (ERN 1514), Attorney for Appellant Donna Anfuso
Daniel A. Seff (ERN 1514), Attorney for Appellant Robert Brinkerhoff
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