

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-406

JUNE TERM, 2006

Stowe Highlands

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APPEALED FROM:

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v.

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Lamoille Superior Court

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Stowe Club Owners Association, Inc., et al.

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DOCKET NO. 248-11-03 Lecv

Trial Judges: Edward J. Cashman;

Howard E. VanBenthuisen

In the above-entitled cause, the Clerk will enter:

Plaintiff Stowe Highlands appeals from a series of superior court orders dismissing its action for declaratory judgment against defendants the Stowe Club Owners Association, Inc., various owners of real property in the Stowe Club development, and the Town of Stowe. We affirm.

The facts and procedural history may be summarized as follows. Stowe Highlands owns a portion of a 236-acre planned development known as the Stowe Club, located in the Town of Stowe. In 1985, the Town

granted Stowe Highlands= predecessor-in-interest a permit for a Resort Planned Unit Development (Resort PUD) consisting of 78 residential units and a 100-unit hotel. Since then, ownership of the development has changed hands several times, development plans have been revised, and permits for a number of residential units have been issued, but the area permitted and reserved for a hotel has remained undeveloped.

In November 2003, Stowe Highlands applied to the Town for an amendment to its Resort PUD permit to build a number of clustered residential units instead of the previously approved hotel. At approximately the same time, Stowe Highlands filed this action for declaratory and injunctive relief, essentially seeking a declaration that it was entitled to unilaterally amend or supplement the Declaration of Covenants, Easements and Restrictions for the Stowe Club; that it was authorized to apply for an amendment to the Resort PUD on behalf of all the individual owners; that it was under no obligation to construct a hotel on the property; and that any owner who opposed its plans was in violation of the Declaration. Stowe Highlands sought an injunction against the Association and individual property owners from interfering with its plans, damages against the owners who had unreasonably opposed its amendments and permit applications, and attorney=s fees.

In May 2004, the Town denied the application to amend the Resort PUD, ruling that a hotel was an essential component of the permit, and that if Stowe Highlands wished to abandon the hotel it should apply for a Planned Residential Development (PRD) permit, in which case it would need to include all other property owners within the Stowe Club development as co-applicants. Stowe Highlands appealed to the Environmental Court, which similarly concluded that the Resort PUD permit required an inn or hotel, but that an application for a PRD did not require all other owners as co-applicants. On appeal to this Court, we affirmed the Environmental Court=s ruling that a lodging facility was an essential component of the Resort PUD permit, but reversed as to the PRD, ruling that any discussion of the issue was premature until Stowe Highlands had actually applied for such a permit. In re Appeal of 232511 Investments, Ltd., 2006 VT 27, && 12, 18-19.

While the environmental court case was pending, the declaratory judgment action in superior court was the subject of a series of dismissal and summary judgment motions. In an entry order dated February 22, 2005, the court (Edward J. Cashman, J.) granted defendants= motion to dismiss, ruling that it lacked jurisdiction to

rule on issues that were before the Environmental Court, and further observing that plaintiff had offered no legal rationale to permit the court to enjoin defendants' right to participate in the Environmental Court proceedings. The court left unresolved defendants' counterclaims for abuse of process. In March 2005, the court (Howard E. VanBenthuysen, J.) issued a second entry order addressed to defendants' motion to cancel a lis pendens and Stowe Highlands' motion to dismiss defendants' counterclaims. The court dissolved the lis pendens and denied the motion to dismiss the counterclaims. In addition, while reaffirming most of Judge Cashman's earlier order, the court ruled that three specific claims in the declaratory judgment action remained viable and subject to superior court jurisdiction. These consisted of Stowe Highlands' claims that it had the right to unilaterally amend or supplement the Declaration and that it was entitled to apply for a permit amendment on behalf of all the individual owners.

The parties subsequently filed cross-motions for summary judgment, and the court issued a third entry order, dated June 28, 2005, granting defendants' motion. The court ruled that the claims failed to present an actual justiciable controversy, finding that there was no evidence before this Court that Defendants have or plan to take any action against [Stowe Highlands'] rights [to amend or supplement] the Declaration. See Doria v. Univ. of Vt., 156 Vt. 114, 117 (1991) (The purpose of a declaratory judgment is to provide a declaration of rights, status, and other legal relations of parties to an actual or justiciable controversy. (quoting Robtoy v. City of St. Albans, 132 Vt. 503, 504 (1974))). In this regard, the court noted that Stowe Highlands had already amended the Declaration once before and promulgated eleven supplementary provisions. The court further noted that the issue of whether other owners must be co-applicants to change the development permit was more properly within the jurisdiction of the Environmental Court. The court subsequently entered a final judgment order dismissing the declaratory judgment action. This appeal followed.

Although Stowe Highlands contends the court improperly dismissed its claim for declaratory judgment with respect to its right to amend or supplement the Declaration, it does not clearly assert or persuasively demonstrate that the court erred in finding that defendants had not interfered with its rights in this regard, or in concluding that, as a result, there was no actual controversy. See id. (Unless an actual or justiciable controversy is present, a declaratory judgment is merely an advisory opinion which we lack the constitutional

authority to render.@). Nor does Stowe Highlands demonstrate that the court erred in concluding that claims relating to defendants= rights to challenge its development plans were matters more properly within the jurisdiction of the Town=s planning boards and the Environmental Court. See Travelers Indem. Co. v. Wallis, 2003 VT 103, && 13-14, 176 Vt. 167 (declaratory judgment actions may not be used to circumvent primary jurisdiction of administrative boards and courts to decide matters within their area of expertise).

For the same reasons cited in In re Appeal of 232511 Investments, 2006 VT, && 18-19, we also conclude that Stowe Highlands= request for a declaratory judgment that it was entitled unilaterally to seek a PRD permit was not ripe at the time the court here addressed the issue; Stowe Highlands= application for an amendment to the Resort PUD was on appeal, and therefore whether a PRD application was even necessary remained in doubt. Accordingly, we discern no basis to disturb the court=s dismissal of the declaratory judgment action on the ground that there was no actual case or controversy ripe for decision at that time. See Doria, 156 Vt. at 117 (case-or-controversy requirement is satisfied only when issues are live at all stages of review).

Stowe Highlands further contends the court erred because defendants failed to file a statement of disputed facts in response to Stowe Highlands= motion for partial summary judgment. Defendants= motion for summary judgment and opposition to Stowe Highlands= motion for partial summary judgment was supported by a detailed affidavit rebutting Stowe Highlands= claims and setting forth facts demonstrating the lack of a justiciable controversy. This was sufficient. See Kingston Pipe Indus., Inc. v. Champlain Sprinkler, Inc., 2004 VT 59, & 9, 177 Vt. 484 (nonmoving party=s burden is to submit credible evidence or affidavits sufficient to rebut the evidence of the moving party). Stowe Highlands further contends the court erred in entering final judgment for the Town of Stowe. The record reveals, however, that Stowe Highlands requested the court to direct entry of final judgment of the court=s June 28, 2005 summary judgment decision, which reaffirmed the court=s earlier order dismissing the declaratory judgment action against all of the parties, including the Town of Stowe. Thus, any error was invited.

Finally, Stowe Highlands contends the court erred in dismissing its notice of lis pendens. The court

correctly ruled, however, that Stowe Highlands= declaratory judgment action seeking clarification of its rights to amend the Declaration and to apply for a permit amendment without opposition of the Association or individual owners did not directly involve its right to title to defendants= property. See 14 R. Powell et al., Powell on Real Property ' 82A.02[2], at 82A-9 (2005) (prerequisite to filing lis pendens is that litigation directly involve right to title, or right to possess or use, property which is the subject of the litigation). Although Stowe Highlands cites several out-of-state cases upholding the filing of a lis pendens in the context of a declaratory judgment action, these decisions generally concern the construction of covenants or restrictions that directly affect title to, or the right to convey, the property at issue. See, e.g., Sailfish Point, Inc. v. Sailfish Point Owners Representatives, 679 So. 2d 1283, 1285 (Fla. Dist. Ct. App. 1996) (upholding in part the filing of a lis pendens in action by landowners claiming that implied covenant in declaration prohibited sale of parcel within development). That is not the case here.

Affirmed.

THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice