

many as eleven spectators at one time. Material facts are in dispute, or at least have not been provided to the Court, as to whether any or how many of the users of the track are also residents of the Scarborough property.

The Johnsons had filed a complaint in June of 2007 with the Zoning Administrator, asserting that the use of the track interfered with their outdoor use and enjoyment of their property because of noise and dust. The Zoning Administrator issued a letter to on July 19, 2007, determining that the construction of the track infrastructure constituted land development as that term is defined in the Zoning Bylaws, requiring a zoning permit. The letter stated that, prior to reading an Environmental Court decision¹ construing another town's zoning ordinance on a similar issue, the Zoning Administrator would have classified the personal motorized-recreation use of a go-cart track as a residential accessory use, and would have then proceeded to determine whether its use violated the noise or dust performance standards in the Zoning Bylaws. § 641. However, based on her understanding of the Nixon decision, she determined that a zoning permit was required. She stated that, because outdoor recreation uses are conditional uses in the Residential-Agricultural district, Mr. Scarborough "must apply to the ZBA for a conditional use permit for the construction and operation of this track." She noted that the ZBA could decide to allow the track, could set conditions regarding noise, dust, and hours of operation, or could interpret the Zoning Bylaws differently from this Court's interpretation of the Town of Fairfax ordinance in Nixon. Neither party appealed the Zoning Administrator's determination to the ZBA, and it became final.

¹ In re: Appeal of Nixon, Docket No. 21-2-05 Vtec (Vt. Env'tl. Ct. May 12, 2006), in which the landowners had constructed a motocross track (for the use of their son and his friends) without a zoning permit. The appeal was from the issuance of a notice of violation; based on the evidence presented at trial, the Court determined that the track required a permit and that it violated the zoning ordinance's performance standards relating to dust and noise.

Instead, on July 20, 2007, Mr. Scarborough applied to the ZBA for conditional use approval, stating the nature of the proposed work as “recreation.” The attached sketch plan showed the dimensions of the track, labeled “track,” but did not state that the track was proposed for go-cart use, did not state whether it was proposed for use by residents of the property, and did not propose any specific hours or seasons, or numbers of users or spectators, or any other limitations on its operation.

The ZBA² held a hearing on the conditional use application on August 21, 2007. The minutes of the portion of the meeting related to this application state in full as follows:

Roger Scarborough – Go-cart track – conditional use – Sound complaint and dust complaint.

Discussion of definition of dirt.

Picture of track passed around.

Mr. Neuse present and representing Charles and Bonnie Johnson - parties with complaints. Mr. Neuse stated whether “outdoor recreation” (go-cart track) should even be[] allowed in the Town. He said (change of use). He questioned set-back from road - Roger’s land is situated on a corner lot - no problem with distance from road. Mr. Neuse went on to question the character of the area - rural-agricultural, provisions such as parking, landscaping, no provisions for to[]ilets with the track being visited by the public. Why, if application pending, go-cart track still in use. Dirt use discussed as well as sound issue. Listened to a tape from Bonnie Johnson - go-cart noise, She also presented photographs of dust, etc., hours of use too long.

Parking problem? No. What is substantial dirt? Scott Pidgeon³ questioned whether he would need a permit to put a driveway in. Chuck Charbonneau⁴ questioned whether or not horse tracks create dust.

Perhaps change of use?

² The minutes list the [roll] call of the ZBA as “Andrew Vanbenthuisen, Ronald Fiske, Shelley Glassner, Gerald Flint and Leslie Fiske, temporary secretary”

³ Person unidentified in the minutes.

⁴ Person unidentified in the minutes.

Proposed changes – mufflers, trees, a limited schedule. The Johnson[']s feel that any change would be for nothing. “No negotiations.” Gerald questioned if track useable – not until permit o.k.’d. Gerald motioned for a deliberative session. Shelley seconded it.

The deliberative session was held on September 11, 2007. After the session, the ZBA delivered an undated three-sentence decision, signed by the ZBA chair. The decision states in full as follows:

The Zoning Board of Adjustment held a deliberative session Sept. 11, 2007 at 6:45 on the matter of the Conditional Use permit # 27-07-ZBA submitted by Roger Scarborough.

After due deliberation it was determined by majority to deny the permit. The denial is based on section 641(1) performance standards for noise in the Town of Leicester Zoning Bylaws.

Mr. Scarborough appealed the ZBA’s decision to this Court. His statement of questions states in full as follows:

[1] Conditional use permit is not needed: Children['] do not need to have permits to ride gocarts on private property[;] this is an accessory use of the property.

[2] No one brought any evidence of a noise violation.

[3] The [ZBA’s] conclusion was not supported by findings of fact and the reasons for its conclusion. There is no finding of fact by the [ZBA].

[4] The [ZBA] held a special meeting closed to the public. There are no minutes of the meeting, no public records of the meeting, no finding of facts, no record of who was there, no record of the vote, no public notice.

At a telephone conference held on December 10, 2007, Judge Wright inquired as to whether the matter should be remanded to allow the Town to correct the procedural issues described in Questions 3 and 4. All the participants in the conference, including specifically both the Town and Applicant Scarborough, stated their preference that the matter not be remanded, but instead that it proceed to its merits before this Court. A schedule was set for the submission of motions for summary judgment, and Applicant Scarborough, as an

unrepresented party, was sent a copy of the Court's informational sheet for unrepresented parties, regarding motions for summary judgment.

Adequacy of ZBA decision

Although by requesting the Court to proceed to the merits Mr. Scarborough has essentially waived or abandoned questions three and four of his statement of questions, the Court must address those issues briefly to avoid any implication that the Court thereby approves of the adequacy of the ZBA decision. Rather, it is important to note that the minutes and notice of decision, taken together, are completely inadequate under 24 V.S.A. § 4464(b)(1).

That section requires that the ZBA decision must be issued in writing and must "include a statement of the factual bases on which the [ZBA] has made its conclusions" as well as "a statement of the conclusions." The minutes of the hearing may suffice as the written decision, as long as the required "factual bases and conclusions relating to the review standards are provided" in the minutes.

Neither the minutes nor the ZBA's decision contains any factual findings at all, nor any discussion of the review standards for conditional use approval under which the application was required to be analyzed. In its decision, the ZBA only stated that it denied the application under § 641(1), which is the Zoning Bylaws performance standard relating to noise. That section requires that the volume of noise be "limited to levels that will not be a nuisance to adjacent uses," and provides that noise levels or frequencies which are "not customary" or which represent a "substantial repeated disturbance to others" are presumed to constitute a nuisance. No factual findings were made in the minutes or in the decision as to what noise levels or frequencies were generated by the go-cart track, whether they were customary in the district or neighborhood, whether they represented a substantial repeated disturbance to the Johnsons or any other neighbors, or whether they

constituted a nuisance. Nor did the ZBA make any findings or determine whether conditions could be imposed on the operation of the track, as to numbers of go-carts or hours of operation or any other factor, that could result in levels of noise that would not be a nuisance to adjacent uses.

As our Supreme Court has noted, “property owners are entitled to a decision that leaves them with an understanding of how a board’s decision was reached based on the evidence submitted.” In re Appeal of Leikert, Docket No. 2004-213 slip op. at 2 (Vt. Sup. Ct. Nov. 10, 2004) (unpublished three-justice mem.) (citing In re Town of Sherburne, 154 Vt. 596, 605 (1990)).

Motion for Summary Judgment as to Question 1 of the Statement of Questions

Although Mr. Scarborough has not responded to the Johnsons’ motion for summary judgment, it is not appropriate for the Environmental Court simply to grant the relief requested by an appellant as if by default. In re: Free Heel, Inc., d/b/a Base Camp Outfitters, Docket No. 217-9-06 Vtec, slip op. at 1, n. 1 (Vt. Env’tl. Ct. Mar. 21, 2007). Rather, the Court must independently examine the material facts, and may only grant the motion if the moving party is entitled to judgment under the applicable substantive law, because the Court is obligated to apply the substantive standards that were applicable before the tribunal appealed from. 10 V.S.A. §8504(h); V.R.E.C.P. 5(g); see also In re Bergmann Act 250 Subdivision, Docket No. 158-8-05 Vtec, slip op. at 6–7 (Vt. Env’tl. Ct. Mar. 12, 2008). On summary judgment, the Court must satisfy itself that the materials supporting the motion are “both formally and substantively sufficient to show absence of a fact question” and that the moving party is entitled to judgment as a matter of law. Miller v. Merchant’s Bank, 138 Vt. 235, 238 (1980).

The motion for summary judgment first argues that the go-cart track does not fall within the permitted use category of “accessory use,” which is the only permitted use

category potentially applicable. To qualify as an accessory use, the evidence⁵ would have to show that go-cart tracks are “customarily incidental and subordinate to” the residential use of property in Leicester.

This Court in In re: Deer View LLC PUD Subdivision Application (Appeal of Madden), Docket No. 182-8-07 Vtec, slip op. at 1, n.1 (Vt. Env'tl. Ct. Feb. 5, 2008), recently laid out the standard that Vermont courts must apply in analyzing a motion for summary judgment, as follows:

As discussed in In re Morris 7-Lot Subdivision, 71-4-07 Vtec (Vt. Env'tl. Ct. Nov. 26, 2007), each party's motion for summary judgment is analyzed giving the nonmoving party the benefit of all reasonable doubts and inferences. Alpine Haven Property Owners Ass'n, Inc. v. Deptula, 175 Vt. 559, 561, 2003 VT 51, ¶8. In responding to a motion for summary judgment supported by affidavits and other evidentiary material, the nonmoving party “may not rest upon the mere allegations or denials in its pleadings.” White v. Quechee Lakes Landowners' Ass'n, 170 Vt. 25, 28 (1999). Rather, V.R.C.P. 56(e) requires that the opposing party must set forth specific facts showing a genuine issue for trial. Dillon v. Champion Jogbra, Inc., 175 Vt. 1, 2–3 (2002). Those facts must be supported by affidavits or other evidentiary material. Morway v. Trombly, 173 Vt. 266, 270 (2001). It is not sufficient for the opposing party to rely on “conclusory allegations or mere conjecture.” Mello v. Cohen, 168 Vt. 639, 641 (1998). “[M]ere allegations of counsel unsupported by documented evidence are not enough to create a genuine issue of material fact” sufficient to preclude summary judgment. Progressive Ins. Co. v. Wasoka, 178 Vt. 337, 349, 2005 VT 76, ¶25.

See also Johnson v. Harwood, 2008 VT 4, ¶ 5 (“In evaluating [a motion for summary judgment], we resolve all doubts and inferences in favor of the nonmoving party . . .”).

The Johnsons' affidavit states that “go-carts and go-cart race tracks are not customarily used on residential property in Leicester.” Applicant Scarborough has not

⁵ The fact that evidence in the Nixon case did not support a finding that such uses were customary in the Town of Fairfax is not dispositive of the present case; this is a fact-based issue.

submitted any countering affidavit. However, the Zoning Administrator's unappealed determination of July 19, 2007, at page 2, contained the following factual statements on this issue:

[I have] grown up racing motocross, and [live] in East Middlebury presently on a half-acre residential lot next to another half-acre residential lot comprising a motocross track, and [I have] routinely observed that ATV and snowmobile operation is a daily, ordinary recreational activity by persons in Leicester as well as in my home neighborhood

Giving Applicant Scarborough, as the nonmoving party, the benefit of all reasonable doubts and inferences, material facts are therefore in dispute as to whether a go-cart track is "customarily incidental and subordinate to" the residential use of property in Leicester. Accordingly, summary judgment must be denied as to Question 1 of the Statement of Questions. That question remains for trial.

The motion for summary judgment next argues that the go-cart track, as motorized recreation, does not fall within the definition of "outdoor recreation" as it is not one of the listed facilities within that definition, nor is it "similar" to any of the listed facilities, which the motion characterizes as designed for non-motorized recreational activities.

The definition of the use category of "outdoor recreation" in § 190 of the Zoning Bylaws defines it as:

Golf course, hunting preserve, skating rink, riding stable, park, beach, tennis court, swimming pool, skiing facility, playground, ball field, or other similar places of outdoor recreation.

Unlike the similar issue discussed with respect to the Town of Addison zoning ordinance in In re: Appeal of Spencer, Docket No. 24-2-98 Vtec, slip op. at 4-5 (Vt. Env'tl. Ct. May 17, 1999) and In re: Appeal of Valois, Docket No. 226-12-04 Vtec, slip op. at 3-4 (Vt. Env'tl. Ct. August 24, 2005), the Leicester ordinance defines outdoor recreation in terms of the listed types of places and "other similar places," not other similar uses, and not an exclusive list of places or uses. At least two of the listed types of outdoor recreation places in the

definition have the potential to generate mechanical or motorized noise: hunting preserve (see, e.g., In re Appeal of Smith, 2006 VT 33, ¶ 3, 179 Vt. 636, 637 (2006)) and skiing facility (see, e.g., In re: Appeal of Sno-Cross Appeal Group, Docket No. 206-9-00 Vtec, slip op. at 4 (Vt. Env'tl. Ct. Jan. 30, 2002)). Material facts are in dispute as to the attributes of the listed places as compared with the attributes of the go-cart track, from which the Court could determine whether it is "similar" enough to the places listed in the definition to fall within this conditional use category. This issue therefore also remains for trial.

Motion for Summary Judgment as to Question 2 of the Statement of Questions

The performance standards in § 641 of the Zoning Bylaws apply to the operation of a use, whether it is a permitted use or a conditional use, and whether it has been proposed or has received a permit and is in operation.

However, all that is before the Court in the present appeal⁶ is what was before the ZBA, that is, Applicant Scarborough's application for conditional use approval of the go-cart track. Section 352(9) of the conditional use standards requires an applicant to show that the proposed project will comply with the performance standards, but § 352(15) provides that the ZBA, and hence this Court in this de novo appeal, "may attach such reasonable conditions and safeguards as it may deem necessary." If the application remains for a conditional use,⁷ the issue before the Court is therefore whether there are any conditions or safeguards that could be imposed, under which the go-cart track could meet

⁶ No notice of violation was issued and no enforcement action was begun by the Town, nor did any party appeal the Zoning Administrator's July 2007 determination letter to the ZBA.

⁷ If Applicant Scarborough succeeds in proving that go-cart tracks are a customarily incidental and subordinate use to the residential use of property, then the application for a permitted use will again be before the Zoning Administrator, not before the Court.

the noise performance standard.

As to this issue, the Johnsons' affidavit states simply that "the use of the track has caused noise and dust which has been a substantial and repeated disturbance" to them. As this affidavit has not been countered by an affidavit or other evidence from Applicant Scarborough, even giving him the benefit of all doubts and inferences as the nonmoving party, summary judgment must be granted in favor of the Johnsons that the past use of the track has violated the noise performance standard. However, that determination does not dispose of the conditional use application now before the Court. Material facts remain in dispute as to whether the track is capable of meeting the required standard in the future, and, if so, what conditions and safeguards may be necessary to achieve that result.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that the Johnsons' Motion for Summary Judgment is GRANTED in PART and DENIED in PART, as follows:

- (1) summary judgment is denied as material facts are in dispute as to whether the proposal falls within the permitted use category of an accessory use to a residential property;
- (2) summary judgment is denied as material facts are in dispute as to whether the proposal falls within the conditional use category of 'outdoor recreation,' as an "other similar place" of outdoor recreation; and
- (3) summary judgment is granted in favor of the Johnsons that the past operation of the track failed to meet the performance standard for noise, but is denied as to this application for conditional use approval, as material facts are in dispute as to whether the proposal is capable of meeting the performance standard for noise under any possible conditions or safeguards.

The trial remains scheduled for May 9, 2008. However, please note that the scheduling order issued on December 11, 2007 (copy enclosed) requires this matter now to proceed to mediation.

Done at Berlin, Vermont, this 13th day of March, 2008.

Merideth Wright
Environmental Judge