

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-128

JANUARY TERM, 2007

In re Bostwick Road - 2 Lot Subdivision
and Final Plan Application
(Appeal of Senesac)

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APPEALED FROM:

Environmental Court

DOCKET NO. 211-10-05 Vtec

Trial Judge: Thomas S. Durkin

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

The Environmental Court granted summary judgment in favor of appellee-applicant Kenneth Albert, concluding that appellant Christopher Senesac was not an Ainterested person@ under the statutory definition of the term and therefore lacked standing to appeal from a planning commission decision granting final site-plan approval for Albert=s proposed vineyard and wine-processing facility in the Town of Shelburne. Senesac contends: (1) genuine issues of material fact precluded the issuance of summary judgment; and (2) the court improperly denied him an adequate opportunity to conduct discovery. We affirm.

In September 2005, the Town of Shelburne Planning Commission granted final site-plan approval to Albert and the Meach Cove Real Estate Trust (hereafter AAlbert@) for a planned six-acre vineyard, together with a seven-acre site for wine processing and storing, retail sales, tours, and private events. Appellant Senesac had opposed the site-plan application based on concerns about its potential impact on traffic, wildlife, and aesthetics, and appealed the Commission=s decision to the Environmental Court.

Following a pre-trial conference, the court, in early December 2005, issued a scheduling order setting mid-December as the deadline for pretrial motions and late December for the filing of discovery requests. Thereafter, Albert filed a timely motion to dismiss, asserting that Senesac lacked standing to appeal because he was not an Ainterested person@ under 24 V.S.A. ' 4465(b)(3), which permits appeals by persons who own or occupy property Ain the immediate neighborhood@ of the project in dispute and Awho can demonstrate a physical or environmental impact on the person=s interest under the criteria reviewed.@*

In support of the motion to dismiss, Albert filed an affidavit alleging that the proposed winery was not visible from Senesac=s house and would not affect traffic on Bostwick Road. Senesac opposed the motion, claiming that it was premature prior to the completion of discovery and asserting in a counter-affidavit that he was Aconcerned@ about the project=s impact on wildlife, traffic, the McCabe Brook that forms the western boundary of the project site, and the overall character of the area. Senesac also requested an extension of the discovery deadline. The court, in response, issued an order notifying the parties of its intent to treat the motion to dismiss as a motion for summary judgment, and indicating that it intended to rule on the motion by late February 2006. See V.R.C.P. 12(c) (when matters outside the pleadings are presented in a motion to dismiss, it shall be treated as a motion for summary judgment). In the same order, the court granted Albert=s motion to extend the discovery deadline to mid-March 2006, and scheduled a site visit to the subject property. Senesac served his first set of interrogatories in late December 2005, and Albert timely responded the following January. Neither party undertook any further discovery.

Following the submission of supplemental memoranda by the parties, the court issued its summary judgment ruling on February 24, 2006. Based upon its site visit, various maps of the area, a traffic study showing that the estimated daily trips generated by the winery would add little to the overall traffic on Shelburne

Road, and other materials submitted principally by Albert, the court found as follows. The site of the proposed vineyard and processing facility is located on the west side of Shelburne Road, just south of the intersection with Bostwick Road. Entrance to the planned vineyard and winery would be gained exclusively from Shelburne Road, through a curb cut approximately 365 yards south of the Bostwick Road intersection and the Morgan Horse Museum, and 400 yards south of the entrance to the Shelburne Museum. The site is situated about 240 yards north of a small hotel on Shelburne Road, and about a quarter mile north of the Vermont Teddy Bear Company. The site is situated in the Town=s rural-zoning district.

Appellant Senesac lives in a small development on the north side of Bostwick Road, about half a mile (850 yards) west of the Bostwick/Shelburne Road intersection. As the crow flies, the distance between Senesac=s house and the proposed winery building is between one-half and one-third of a mile. Between the two lie approximately 122 acres of the remaining Meach Cove Trust, much of it consisting of tall trees and dense vegetation. The neighborhood where Senesac lives sits in a small valley and cannot be seen from the vineyard, nor can the vineyard be seen from Senesac=s home. The neighborhood is located in the Town=s residential-zoning district.

The court noted that Albert hoped to produce up to five-thousand cases of wine a year. In addition, Albert planned to operate a retail facility to sell wine, conduct tours, and offer wine-tastings. The retail operation would be open from 10:00 a.m. to 5:00 p.m. Trucks would deliver grapes and supplies to the site on a regular, though not a daily, basis.

Based upon the foregoing findings, the court concluded that Senesac does not qualify as an interested person under 24 V.S.A. ' 4465(b)(3) and therefore lacks standing to appeal. See In re Gulli, 174 Vt. 580, 582 n.* (2002) (mem.) (standing requirements of ' 4465(b) are Adesigned to limit the number of appeals@). The court observed that while Senesac=s property was nearCbut not adjacent toCthe proposed vineyard, the character of the two properties and neighborhoods was not alike; the vineyard would be located within an area of several tourist attractions similar to the winery, while Senesac=s neighborhood was residential and wooded. Furthermore, the extensive acreage, dense vegetation, and rolling landscape lying between the two properties

acted as an effective buffer so that neither was visible from the other. As for traffic, the court found that, viewing the evidence in the light most favorable to the nonmoving party, there was no basis to support Senesac's claim that the vineyard would add to existing traffic congestion from the Shelburne Museum; the vineyard's principal hours of operation were during the daytime, while many of the Museum's largest concerts were in the evening. Nor was there any evidence to demonstrate an impact on wildlife or the McCabe Brook. Accordingly, the court concluded that Senesac had failed to demonstrate that he owned property in the immediate neighborhood that would suffer a physical or environmental impact from the proposed project. The court, therefore, entered judgment in favor of Albert. This appeal followed.

Senesac first contends the court erred in granting summary judgment because genuine material issues of fact existed as to the project's impact on his property. We review a summary judgment using the same standard as the trial court. To prevail on such a motion, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. In re Margaret Susan P., 169 Vt. 252, 257 (1999). In determining whether factual issues exist, the court must regard as true all allegations of the nonmoving party supported by admissible evidence and afford the nonmoving party the benefit of all reasonable doubts and inferences. Powers v. Hayes, 172 Vt. 535, 536 (2001) (mem.). No genuine factual issue exists when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. Al Baraka Bancorp (Chicago), Inc. v. Hilweh, 163 Vt. 148, 153 (1994).

Although Senesac raised broad concerns in his affidavit about the project's potential effect on traffic, wildlife, the viability of McCabe Brook, lighting, and aesthetics, he advanced no specific facts to demonstrate that the project would have an impact on his property in any of these respects. See White v. Quechee Lakes Landowner's Ass'n, 170 Vt. 25, 28 (1999) (Amere conclusory allegations without facts to support them are insufficient to raise genuine factual dispute); Schwartz v. Frankenhoff, 169 Vt. 287, 296 (1999) (affidavits containing only general and conclusory statements do not demonstrate the existence of genuine issues of fact). In contrast, the obvious physical characteristics and locations of the properties observed by the court and apparent from the various sketches and maps, the nature and hours of operation of the proposed vineyard, and the uncontradicted evidence showing its relatively limited impact on local traffic fully support the court's

conclusion that the project would not have an impact on Senesac's property in respect to the issues raised. The court properly ruled, therefore, that Senesac lacked standing to appeal under the statute.

In a related claim, Senesac contends the court failed to afford an adequate period of time for discovery prior to the entry of summary judgment. When converting a motion to dismiss to one for summary judgment, the court must provide the parties a reasonable opportunity to submit additional materials pertinent to such a motion. V.R.C.P. 12(c); Fitzgerald v. Congleton, 155 Vt. 283, 293-94 (1990). Indeed, prior to ruling on any summary judgment motion the court must have afforded the parties an adequate time for discovery. Poplaski v. Lamphere, 152 Vt. 251, 254-55 (1989). Here, although the court granted the motion for summary judgment before the deadline for the completion of discovery had passed, it afforded the parties an opportunity to conduct additional discovery and submit additional materials before its ruling. See Town of Victory v. State, 174 Vt. 539, 543 (2002) (mem.) (The summary judgment rule . . . does not require that the trial court must wait until the completion of discovery to address a summary judgment motion, but does require an adequate time for discovery. (internal quotations omitted)).

Senesac had served interrogatories and received Albert's responses. After the court's order converting the motion to one for summary judgment, Senesac also requested, and Albert provided, additional materials, including a traffic study concerning an unrelated project on Shelburne Road and an Agency of Transportation traffic study. While Senesac claims that he was deprived of the additional opportunity to obtain the opinions of traffic experts retained by Albert, the record does not show that Albert had retained traffic experts. The record thus shows that Senesac was afforded a reasonable opportunity to obtain and submit additional materials. Senesac has made no showing, in contrast, that he was deprived of reasonable discovery opportunities, nor what that discovery might have disclosed, nor how it would have supported his position. See Al Baraka Bancorp., 163 Vt. at 155 (rejecting claim that summary judgment was premature where plaintiff had made no showing that additional discovery could help its position). In any event, additional discovery would not have affected the court's findings regarding the location and character of Senesac's property in relation to the planned vineyard, facts not in dispute. Accordingly, we find no merit to the claim that summary judgment was prematurely entered in this case, and therefore no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

* This section provides, in full, that an Ainterested person@ means:

A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person=s interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of the municipality.

24 V.S.A. ' 4465(b)(3). Albert=s motion to dismiss also claimed that the proposed vineyard was fully consistent with local land use policies and bylaws, and indeed asserted that, as an agricultural use under 24 V.S.A. ' 4413(d), the vineyard was subject to limited local regulation. The trial court did not reach these arguments, and, although Albert has renewed them on appeal, it is likewise unnecessary for us to address them.