

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 79-7-19 Vtec

Katzenbach A250 Permit #7R1374-1

ENTRY REGARDING MOTION

Count 1, Act 250 District Commission Decision (79-7-19 Vtec)

Title: Motion to Dismiss (Motion 2)
Filer: Rebecca Beidler
Attorney: Nicholas A.E. Low
Filed Date: October 18, 2019

Response filed on 10/29/2019 by Attorney Gregory J. Boulbol for Interested Person Natural Resources Board
Opposition
Response filed on 11/01/2019 by Clark Katzenbach, Appellee
Opposition

The motion is DENIED.

Christian Katzenbach and his son, Clark Katzenbach, seek a permit to operate a three-acre commercial sand and gravel pit on Mr. Katzenbach's West Griggs Road property in Albany, Vermont. On August 29, 2017, the District #7 Environmental Commission (District Commission) issued Act 250 Permit #7R1374 for the pit. On September 27, 2017, neighboring property owners Rebecca Beidler and Jeffrey Ellis—individually and d/b/a Peace of Earth Farm—Mimi Aoun, and Judy Valley timely appealed to this Court.

The Court conducted a single-day trial on November 13, 2018, at the Orleans County Courthouse in Newport, Vermont. We conducted a site visit after trial on the same day.

Based upon the evidence presented at trial we issued a January 2, 2019 decision concluding that the Katzenbachs failed to meet the initial burden of production for each of the criteria under review. We expressly noted that pursuant to 10 V.S.A. § 6087(c), the Katzenbachs had the opportunity to apply for reconsideration within six months of the January 2 decision after supplementing the application with evidence of compliance with the relevant criteria. See In re Times & Seasons, LLC, Act 250 Reconsideration, No. 45-3-09 Vtec, slip op. at 7-8 (Vt. Env'tl. Ct. Mar. 29, 2010) (Durkin, J.) (discussing Act 250 application for reconsideration), *aff'd*, 2011 VT 76, 190 Vt. 163.

On February 22, 2019, the Katzenbachs filed application #7R1374-1 with the District Commission for the same sand and gravel operation. The District Commission approved the application and issued Land Use Permit #7R1374-1. Rebecca Beidler and Jeffrey Ellis, individually

and d/b/a Peace of Earth Farm (together, Appellants), timely appealed to this Court. Presently before the Court is Appellants' Motion to Dismiss.

Appellants' grounds for dismissal are that: 1) the Katzenbachs failed to file an affidavit with the reapplication affirming that deficiencies have been corrected (10 V.S.A. § 6087(c)); 2) the Katzenbachs' reapplication still fails to meet the burden of production; and 3) the successive application doctrine precludes the Katzenbachs' reapplication.

We consider this motion under Vermont Rule of Civil Procedure 12(b)(6) as it seeks dismissal. In ruling on the motion, we only grant dismissal if "it appears beyond doubt that there exist no facts or circumstances that would entitle [the Katzenbachs] to relief." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1 (quoting Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309).

1. Affidavit

When an Act 250 application is denied, the applicant may reapply for reconsideration. 10 V.S.A. § 6087(c). When reapplying, the applicant must include an affidavit addressing that the deficiencies have been corrected. As grounds for dismissal, Appellants assert that the Katzenbachs failed to provide this affidavit to the District Commission.

In this *de novo* proceeding, this Court does not consider any previous decisions or proceedings below; "rather, we review the application anew as to the specific issues raised in the statement of questions." In re Whiteyville Props. LLC, No. 179-12-11 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Dec. 13, 2012) (Durkin, J.); see also Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) (quoting In re Poole, 136 Vt. 242, 245 (1978) ("A *de novo* trial 'is one where the case is heard as though no action whatever had been held prior thereto.'")). Whether or not the Katzenbachs provided an affidavit to the District Commission is not considered by this Court. Rather, we consider the evidence offered to this Court during our appeal process. Thus, the motion to dismiss this matter on the grounds that a supporting affidavit has not been offered is premature.

2. Burden of Production

The burden of proof consists of both a burden of production and a burden of persuasion. See In re Route 103 Quarry, No. 205-10-05 Vtec, slip op. at 8 (Vt. Envtl. Ct. Nov. 22, 2006) (Durkin, J.), *remanded on other grounds by* 2007 VT 66, 182 Vt. 569, *and aff'd*, 2008 VT 88, 184 Vt. 283. The burden of production requires the burdened party to "produce sufficient evidence for a district commission, or this Court on appeal, to make a factual determination," while the burden of persuasion obligates the burdened party to "persuad[e] the fact finder that certain facts are more likely true than not." In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 4 (Vt. Envtl. Ct. Feb. 15, 2008) (Durkin, J.) (citing In re Denio, 158 Vt. 230, 237–39 (1992)), *aff'd*, 2009 VT 98, 187 Vt. 208.

Section 6088 of Title 10 specifically assigns the burden of *persuasion* for each Act 250 criterion to either applicants or to opponents of the application. See Eastview at Middlebury, No. 256-11-06 Vtec at 4–5 (Feb. 15, 2008). Applicants bear the burden of persuasion on Criteria

1, 2, 3, 4, 9, and 10. See 10 V.S.A. § 6088. Parties opposing an application bear the burden of persuasion for Criteria 5 through 8. *Id.*

Applicants, however, always bear the burden of *production* and must offer the fact finder “evidence sufficient to enable [the district commission or this Court] to make the requisite positive findings on all of the criteria.” *In re Rinkers, Inc.*, No. 302-12-08 Vtec, slip op. at 11 (Vt. Env’tl. Ct. May 17, 2010) (Wright, J.) (quotation omitted). Said another way, an applicant must meet his or her burden of production for each criterion by establishing a “prima facie case on each of the elements.” *In re Champlain Parkway Act 250 Permit*, 2015 VT 105, ¶ 15, 200 Vt. 158 (quoting *State v. Baker*, 154 Vt. 411, 414 (1990)).

As stated above, this is a *de novo* appeal. We do not yet have the application or the parties’ evidence before us. Thus, we cannot yet decide whether the Katzenbachs have met their burden of production.

3. Successive Application Doctrine

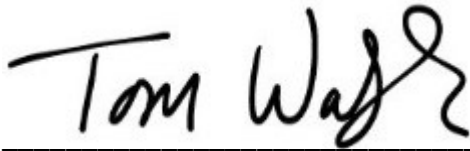
The successive-application doctrine implements the principles of issue preclusion, as adapted to the specific context of multiple land use applications. See *In re Armitage*, 2006 VT 113, ¶ 4, 181 Vt. 241. Issue preclusion serves to prevent the relitigation of issues that have already been settled in a previous action. See *State v. Pollander*, 167 Vt. 301, 304 n.2 (1997). The successive-application doctrine attempts to strike the proper balance between finality and flexibility. “In keeping with the flexibility of successive-application doctrine a second complete application is not precluded by the denial of a prior incomplete application.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 15, 192 Vt. 474. Furthermore, “[a] reconsideration application is . . . a continuation of the original Act 250 permit application.” *In re Times & Seasons, LLC*, 2011 VT 76, ¶ 10, 190 Vt. 163.

This is not a case where the applicants will simply “offer[] different evidence on a matter settled by the earlier decision.” See *Armitage*, 2006 VT 113, ¶ 11 (applying the successive-application doctrine). Our January 2, 2019 decision did not reach conclusions on any of the Act 250 criteria at issue. The decision expressly provided that the Katzenbachs could reapply supplementing the application with evidence of compliance to cure the burden of production issue. Thus, the successive application doctrine does not bar this application.

Appellants 12(b)(6) motion is therefore **DENIED**. This matter shall be scheduled for trial. On or before January 10, 2020, the parties shall file in writing with the Environmental Division their dates of **UNAVAILABILITY** for a one-day trial in March or April 2020.

So ordered.

Electronically signed on December 23, 2019 at 02:40 PM pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized with a large, sweeping "T" and a cursive "Walsh".

Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

Nicholas A.E. Low (ERN 7275), Attorney for Appellant Rebecca Beidler

Nicholas A.E. Low (ERN 7275), Attorney for Appellant Jeffery Ellis

Gregory J. Boulbol (ERN 1712), Attorney for Interested Person Natural Resources Board

Appellee Clark Katzenbach

Appellee Christian D. Katzenbach