STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 107-10-18 Vtec

Snyder Group, Inc. Act 250 Appeal

ENTRY REGARDING MOTION

Title: Motion for Reconsideration (Motion 5)

Filer: Appellants Michael and Mary Scollins, Robert and Marley Skiff, and the Pinnacle at Spear Homeowners Association

Attorney: Daniel A. Seff

Filed Date: September 6, 2019

Response filed on 09/09/2019 by Attorney Evan P. Meenan for the Vermont Natural Resources Board

Response in Opposition filed on 09/19/2019 by Attorney Celeste E. Laramie for The Snyder Group, Inc.

Reply filed on 09/22/2019 by Attorney Daniel A. Seff for Appellants

The motion is GRANTED.

The District # 4 Environmental Commission ("District Commission") approved and issued an Act 250 permit to Snyder Group, Inc.; Spears Meadows, Inc.; 1350 Spear, LLC.; and Gary Farrell ("Snyder Group") for the development of land located at 1302 and 1350 Spear Street in South Burlington, Vermont. Snyder Group proposed to develop 47 new dwelling units, with associated infrastructure improvements, to subdivide, and to demolish an existing structure ("the Project").[1] A group of neighboring property owners ("Appellants") oppose the Act 250 permit.[2] Presently before the Court is Appellants' motion to reconsider this Court's August 14, 2019 Entry Order denying Appellants' July 17, 2019 Motion to Stay this appeal pending the Supreme Court's

[1] The Project has been referred to as a 48-unit development throughout its lifecycle because, in addition to the 47 new units, an existing residence will remain at 1350 Spear Street.

[2] Appellants are Michael Scollins, Mary Scollins, Robert Skiff, Marley Skiff, and the Pinnacle at Spear Homeowners Association. We resolved certain questions relating to their party status under Criterion 9(B) in a May 22, 2019 decision. See In re Snyder Grp., Inc. Act 250, No. 107-10-18 Vtec (Vt. Super. Ct. Envtl. Div. May 22, 2019) (Durkin, J.).

decision in a companion appeal related to Snyder Group's application for a municipal zoning permit for the Project ("Municipal Appeal").[3]

Appellants raise a concern that this Court's August 14, 2019 Entry Order ("August 14 Entry Order") did not consider Appellants' August 10, 2019 Reply Memorandum in Support of their motion to stay ("Reply Memorandum") and August 14, 2019 Supplemental Memorandum in support of their motion to stay ("Supplemental Memorandum"). Appellants urge the Court to reconsider the issues raised in these memoranda concerning whether (1) the "hardship or inequity" standard is applicable;[4] (2) ruling on a "potential future reduction" in the Project's number of units would amount to a substantial change constitutes an improper advisory opinion;[5] and (3) a continuance would delay this matter for an unspecified period of time. Snyder Group contends Appellants do not meet the standard required for a motion to reconsider because there is no evidence that the Court did not consider the Reply Memorandum prior to issuing our Decision and Appellants are merely attempting to relitigate old matters.

Appellants' motion is made pursuant to V.R.C.P. 59(e), which governs motions to alter or amend a judgment.[6] There are four principal reasons for granting a Rule 59(e) motion: "(1) to correct manifest errors of law or fact upon which the judgment is based; (2) to allow a moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) to respond to an intervening change in the controlling law." Old Lantern Non-Conforming Use, No. 154-12-15 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Sep. 13, 2017) (Durkin, J.) (quotations omitted); In re Green Mountain Power Corp., 2012 VT 89, ¶ 50, 192 Vt. 429 (stating that under Rule 56(e), "[t]he trial court enjoys considerable discretion in deciding whether to grant such a motion to amend or alter") (quoting In re SP Land Co., 2011 VT 104, ¶ 16, 190 Vt. 418).

---

[3] The related appeal concerns the City of South Burlington Development Review Board's municipal approval for the Project. See In re Snyder Grp. Inc. PUD Final Plat, No. 114-8-17 Vtec, at 1–3 (Vt. Super. Ct. Envtl. Div. Feb. 28, 2019) (Durkin, J.). This Court decided, on cross-motions for summary judgment, that the Project exceeded the municipality's maximum density limit of 1.2 units per acre and that South Burlington's "transferrable development rights" regulation was unconstitutionally vague and failed to comply with its enabling statute, 24 V.S.A. § 4423(a). Id. at 4–21.

[4] This Court's Decision stated that Appellants "must make out a clear case of hardship or inequity in being required to go forward if there is a possibility that a stay will damage someone else." In re Snyder Group, Inc. Act 250 Appeal, No. 107-10-18 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug, 14, 2019) (Durkin, J.) (citing In re Woodstock Cmty. Tr. & Hous. Vt. PRD, 2012 VT 87, ¶ 36, 192 Vt. 474); see also In re Killington Resort Parking Project Act 250 Permit Application, No. 173-12-13 Vtec, slip op. at 2-3 (Vt. Super. Ct. Envtl. Div. May 13, 2015) (Durkin, J.).

[5] In our August 14 Entry Order, this Court concluded that ruling on this question would constitute an improper advisory opinion and the Court did not have sufficient information necessary to make such a determination. In re Snyder Group, Inc. Act 250 Appeal, No. 107-10-18 Vtec at 3 (Aug. 14, 2019) (citing In re Regan Subdivision Permit, No. 188-9-09 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. June 18, 2013) (Durkin, J.)); see also In re Appeal of 232511 Invs., Ltd., 2006 VT 27, ¶¶ 18-19, 179 Vt. 409) (declining to issue an advisory opinion); In re Paynter 2-Lot Subdivision, No. 160-7-08 Vtec, slip op. at 9-10 (Vt. Envtl. Ct. May 1, 2009) (Wright, J.).

[6] V.R.C.P. 59(e) gives the Court broad power to alter or amend a judgment "if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." Rubin v. Sterling Enter., Inc., 164 Vt. 582, 588 (1996); Reporter's Notes, V.R.C.P. 59(e).

The grant of a motion to reconsider, alter, or amend "a judgment after its entry is an extraordinary remedy which should be used sparingly." In re Zaremba Grp. Act 250 Permit, No. 36-3-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J) (quotation omitted); see also State v. Tongue, 170 Vt. 409, 414 (2000), (quoting State v. Bruno, 157 Vt. 6, 8 (1991))(stating that "it is better practice for the court to reconsider a pretrial ruling 'where serious grounds arise as to the correctness of the . . . ruling'"). Rule 59(e) motions are "not intended as a means to reargue or express dissatisfaction with the Court's findings of fact and conclusions of law" and cannot "merely repeat[] arguments that have already been raised and rejected by the Court." Town Clarendon v. Houlagans MC Corp. of VT., No. 131-10-17 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J.); Appeal of Van Nostrand, Nos. 209-11-04 Vtec, 101-5-05 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Dec. 11, 2006) (Durkin, J.) (quoting Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2810.1) (internal footnotes omitted) (stating that motions to reconsider should not be used to "relitigate old matters"). Given this strict standard of review, motions to reconsider are rarely granted. In re Martin & Perry, No. 20-10-18 Vtec, slip op. 2 (Vt. Super. Ct. Envtl. Div. Jan. 22, 2010) (Durkin, J.) (citing In re Rivers Dev., LLC Appeals, Nos. 7-1-05 Vtec, 183-8-07 Vtec, 248-11-07 Vtec, & 157-7-08 Vtec, slip op. at 5 (Vt. Envtl. Ct. Nov. 21, 2008) (Durkin, J.)).

As a preliminary matter, this Court notes that it both had access to and considered Appellants' Reply and Supplemental Memoranda. As noted by Appellants, this Court had access to the Reply Memoranda and the absence of a filing indication in our August 14 Entry Order, for both the Reply Memorandum and Supplemental Memorandum, was a mere technical error.[7] This Court considered the Reply Memoranda and concluded that "Appellants have not shown the type of one-sided, probable hardship and inequity our standards require." In re Snyder Grp., Inc. Act 250, No. 107-10-18 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug. 14, 2019) (Durkin, J.). This is evidenced by the Entry Order's discussion of the Court's substantial discretion in considering a motion to stay and holding that the applicable precedent instructs this Court to apply the "hardship or inequity" test. Id. at 2–3 (citing Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); State v. Schreiner, 2007 VT 138, ¶ 14, 183 Vt. 42; In re Killington Resort Parking Project Act 250 Permit Application, No. 173-12-13 Vtec, slip op. at 2-3 (Vt. Super. Ct. Envtl. Div. May 13, 2015) (Durkin, J.)). In addition, and as is evidenced by the Entry Order, this Court recognized and clearly summarized the contentions that Appellants stated in their Reply Memorandum.[8] See In re Snyder Grp., Inc. Act 250, No. 107-10-18 Vtec at 2 (Aug. 14, 2019). This Court also considered the Vermont Supreme Court's scheduling of oral argument for the Municipal Appeal and determined that the scheduling did not supersede the weight given to an applicant's perspective on how the

[7] For clarification, this Court's filing system develops templates that automate the input of responses and replies filed by parties. In this instance, the lack of an indication on the August 14 Entry Order that the Reply and Supplemental Memoranda had been received and considered was a technological error, caused by the fact that we had begun (but not completed) the drafting of the Entry Order before those filings were received. This Court both received and considered both Memoranda.

[8] In our Decision, this Court noted that Appellants' challenges, stated in their Reply Memoranda, that (1) a reduction in units would be a substantial and material change; (2) proceeding would result in a waste of resources; and (3) a stay is in the best interest of Snyder Group. In re Snyder Grp., Inc. Act 250, No. 107-10-18 Vtec at 2 (Aug 14, 2019).

permitting process would proceed best or provide a specific period of time for a continuance.[9] Id. at 3 (citing In re Killington Vill. Act 250 Master Plan Application, No. 147-10-13 Vtec at 2 (May 13, 2015)); In re Wagner & Guay Permit, No. 150-10-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Mar. 27, 2015) (Walsh, J.). Therefore, this Court considered both Memoranda in its Entry Order.

Appellants assert the basis for granting reconsideration in this case is to correct manifest errors of law or fact upon which the judgment is based. Appellants assert that this Court incorrectly applied the "hardship or inequity" standard. Appellants further argue in the alternative that, should the "hardship and inequity" standard apply, this Court must acknowledge a change in intervening law that occurred when this Court decided in the Municipal Appeal that South Burlington's TDR Bylaw was invalidated. In re Snyder Group Inc. PUD Appeal, No. 114-8-17 Vtec, slip op. at 23 (Vt. Super. Ct. Envtl. Div. Feb. 28, 2019)(Durkin, J.). We address these two arguments below, in that order.

First, Appellants assert this Court erred in applying the Woodstock "hardship or inequity" standard. Appellants raised this issue in their Reply Memoranda and this Court clearly determined that "precedent instructs" this Court to apply the hardship or inequity standard. In re Snyder Grp., Inc. Act 250, No. 107-10-18 Vtec at 3 (Aug. 14, 2019) (citing In re Woodstock Cmty. Tr. & Hous. Vt. PRD, 2012 VT 87, ¶ 36, 192 Vt. 474). In re Woodstock's decision to apply the "hardship inequity" standard is binding precedent on this Court. In re Woodstock, 2012 VT 87. Moreover, we note that contrary to Appellants' assertion, the Vermont Supreme Court in In re Chaves merely noted that the Environmental Division has discretion in deciding continuances and did not supplant the "hardship or inequity" standard. In re Chaves A250 Permit Reconsider, 2014 VT 5, ¶ 16, 195 Vt. 467, 475, abrogated by In re B & M Realty, LLC, 2016 VT 114, ¶ 16, 203 Vt. 438; see Dodge v. Precision Const. Prod., Inc., 2003 VT 11, ¶ 25, 175 Vt. 101 (citing Vt. Accident Ins. Co. v. Howland, 160 Vt. 611, 612 (1993) (mem.)) (stating that the Supreme Court will "apply a ruling prospectively only if (1) we overrule past precedent or decide an issue of first impression whose resolution was not clearly foreshadowed"). Therefore, this Court did not make a manifest error of law in our August 14 Entry Order.

Second, Appellants argue that even if the "hardship or inequity" standard does apply, there has been a change in intervening law because this Court invalidated South Burlington's former TDR Bylaw, thereby expressly limiting the Project to a maximum of 31 dwelling units, in its February 28, 2019 Decision in the Municipal Appeal. See In re Snyder Group Inc. PUD Final Plat, No. 114-8-17 Vtec, slip op. at 23–24 (Vt. Super. Ct. Envtl. Div. Feb. 28, 2019) (Durkin, J.). Our August 14 Entry Order stated we could not presently decide "whether a potential future reduction in the Project's number of units would amount to a substantial change" as it would

[9] Appellants note that their Supplemental Memorandum was filed seventeen minutes prior to issuance of this Court's Decision and infer that this Court lacked awareness of the filing. It is important to note that the Court was aware and considered the one-page Supplemental Memorandum, which included a brief statement regarding the scheduling of the oral argument in the Municipal Appeal and no additional legal challenges. Here, merely scheduling a date for oral augment does not provide a specific time for a continuance. Id. at 3 (stating that "[a] continuance would delay this matter for an unspecified period of time, while postponing progress on certain issues that will need to be resolved in any case").

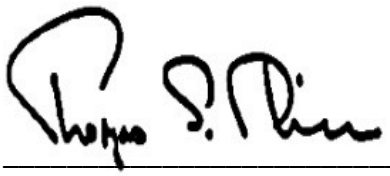
constitute an advisory opinion and we lack the information necessary to make such a determination. In re Snyder Grp., Inc. Act 250, No. 107-10-18 Vtec at 3 (Aug. 14, 2019). Generally, "a judgment of an adjudicative body remains valid until reversed or annulled." In re Ashline, 2003 VT 30, ¶ 9, 175 Vt. 203 (citing Davidson v. Davidson, 111 Vt. 24, 29 (1939). It therefore follows that this Court's February 28, 2019 Decision presently has a preclusive effect. As such, the City of South Burlington's TDR Bylaw is currently considered invalid and unconstitutional, subject to the pending Vermont Supreme Court determination.

However, upon further reflection of these matters and the nature of the impending Supreme Court determination, this Court concludes that it should **STAY** this appeal, in the interest of avoiding conflicting judgments, until the Supreme Court renders its determinations in the pending Municipal Appeal.

For these reasons, we **GRANT** Appellants' motion for reconsideration of our August 14, 2019 Entry Order denying Appellants' July 17, 2019 Motion to Stay this appeal as Appellants have presented adequate grounds to reconsider the Decision. We therefore conclude that this pending appeal from the Act 250 determinations must be **STAYED** until the Supreme Court renders its determinations in the Municipal Appeal.

So Ordered.

Electronically signed on December 24, 2019 at Brattleboro, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division

Notifications:

Daniel A. Seff (ERN 1514), Attorney for Appellants Michael and Mary Scollins, Robert and Marley Skiff, and the Pinnacle at Spear Homeowners Association

Evan P. Meenan (ERN 1632), Attorney for the Vermont Natural Resources Board

Matthew B. Byrne (ERN 2486), Attorney for Appellee The Snyder Group, Inc.

Robert H. Rushford (ERN 4714), Attorney for Appellee The Snyder Group, Inc.

Celeste E. Laramie (ERN 8852), Attorney for Appellee The Snyder Group, Inc.

Alison Milbury Stone (ERN 7087), Attorney for the Vermont Agency of Agriculture