

VERMONT SUPERIOR COURT
Environmental Division
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ENVIRONMENTAL DIVISION
Docket No. 21-ENV-00017

In re: Moniz Zoning Appeal

DECISION ON MOTIONS

The Town of Fair Haven and Appellants Laura and Jose Moniz submitted cross-motions for summary judgment in this appeal from a decision issued by the Town of Fair Haven Zoning Board of Adjustment (the Board). On February 10, 2021, the Board affirmed the Zoning Administrator's decision not to pursue an enforcement action regarding the orientation of the fence located on the property immediately adjacent to Appellants' property having an address of 23 South Main Street, Fair Haven, Vermont. Appellants appealed the Board's decision and now seek a judgment that the fence on the neighboring property must be reversed to comply with the Town of Fair Haven Zoning Regulations (Fair Haven Regulations). The Town of Fair Haven (the Town) opposes Appellants' motion and seeks a judgment that the fence does not violate the Fair Haven Regulations.

Appellants are represented by Attorney Stephen E. Crowley and the Town is represented by Attorney William J. Bloomer. The fence at issue is located on property occupied by Cynthia Hutchins and owned by William Toftness. Neither Ms. Hutchins nor Mr. Toftness have joined this appeal.

The parties filed a Joint Statement of Undisputed Facts containing the facts to which both parties agree, but Appellants also included a separate statement of facts in their motion for summary judgment. The Town asks the Court to strike any alleged facts in Appellants' motion that are not set out in the joint statement. The Court finds that it does not need to consider the facts Appellants allege in their separate statement in order to rule on the motions

for summary judgment. Appellants alleged additional facts in their motion for the purpose of providing background information, they do not bring the facts in the joint statement into dispute. The Town's motion to strike is consequently **GRANTED**.

Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The nonmoving party "receives the benefit of all reasonable doubts and inferences," but must respond with more than unsupported allegations in order to show that material facts are in dispute. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary judgment, so long as they are supported by affidavits or other evidentiary material." Id.; Pettersen v. Monahan Safar Ducham, PLLC, 2021 VT 16, ¶ 9.

Here, there is no genuine issue of material fact as the Court will only be considering the stipulated facts in the Joint Statement of Undisputed Facts. The Court's inquiry on these cross-motions for summary judgment is consequently whether either party is entitled to judgment as a matter of law.

Facts

Appellants and the Town submitted the following facts in a Joint Statement of Undisputed Facts on July 1, 2021. The Court relies on these facts for the sole purpose of deciding on the request for summary judgment.

1. At all times relevant to this proceeding, Laura and Jose Moniz resided at 25 South Main Street, in Fair Haven, Vermont.
2. At all times relevant to this proceeding, Cynthia Hutchins resided at 23 South Main Street, in Fair Haven, Vermont.
3. Both properties are on the west side of South Main Street, and they directly abut each other, and share property boundary lines.

4. Specifically, the northern and western property boundary lines of the Moniz parcel are shared property boundary lines, with the parcel of property occupied by Ms. Hutchins.¹
5. In the summer and early fall of 2020, Cynthia Hutchins erected a fence on her property that runs close to the boundary line between two parcels.
6. The fence consists of vertically oriented, wood support posts, sunk into the ground; steel wire mesh fencing material, stapled or otherwise fastened to each wooden post; and – in some sections - horizontal wooden support beams running between the posts and along the top and the very bottom of wire mesh fencing material.
7. As first erected in the summer and into the early fall of 2020, one section of the fence the entire span running from north to south (parallel to Main Street) - was erected so that the wooden support posts were positioned on the “Monizes’ side” of wire mesh - i.e., relative to the steel wire mesh material, the wooden posts were positioned closer to the Moniz property than the wire mesh material. No horizontal support beams were installed along this span of the fence, and that is how that portion of the fence remained.
8. Another section of the fence - the span running east to west (perpendicular to Main Street) - was erected so that the wooden support posts were positioned on the “Hutchins side” of the wire mesh material, such that the wire mesh was closer to the Moniz parcel than the wooden posts. No wooden, horizontal support beams were initially installed along this portion of the fence.
9. The fence was four feet in height. The fence was installed as an animal pen, for pets.
10. In late October of 2020, Laura Moniz contacted Phil Adams, the Town of Fair Haven’s Zoning Administrator, with a complaint that a portion of the Hutchins’ fence had its unfinished side facing outward, toward the Moniz property.
11. In relevant part, the Section 913 of the Town’s Zoning Ordinance provides:

¹ The real property occupied by Ms. Hutchins is owned by William Toftness, but for ease of reference, the joint statement refers to the property as the “Hutchins property” or “Hutchins parcel.”

“A fence will be considered a structure unless it is four (4) feet or less in height and is used to enclose a garden or animal pen.”

“All fences shall be constructed so that the finished side faces outward.”

(The parties stipulate to the full and complete copy of the Town of Fair Haven Zoning Ordinance, Exhibit A.)

12. On October 30, 2020, the Zoning Administrator sent a letter to Mrs. Moniz, a copy of which is Exhibit B.
13. The Zoning Administrator received a call from Cynthia Hutchins on or about November 8, 2020, advising that Mrs. Moniz would not allow Ms. Hutchins to step on the Moniz property to reposition the wire mesh fencing material on the “north-to-south” portion of the fence, so as to make the wire mesh directly facing the Monizes’ property.
14. On November 12, 2020, the Zoning Administrator sent Mrs. Moniz another letter, a copy of which is Exhibit C.
15. The Zoning Administrator did not receive a response from Mrs. Moniz to his letter of November 12, 2020.
16. Subsequently, the “north to south” portion of the fence was not altered.
17. Mrs. Moniz later filed an appeal of the Zoning Administrator’s decision not to take an enforcement action with regard to the Hutchins’ fence.
18. After the appeal was filed, the “east to west” span of the fence was reversed by Ms. Hutchins, so that the posts on that section were also positioned on the outside of the wire mesh fencing material (i.e., closer to the Moniz parcel than the wire mesh).
19. Subsequently, along this same east-to-west portion of the fence, horizontal wooden support beams were installed between the support posts, and positioned along the very top and very bottom of the wire mesh fencing material.
20. Shortly thereafter, green-colored, opaque screening fabric, approximately the same height as the wire mesh, was attached along a portion of the “east to west” span of fencing.

21. The privacy screen was attached to the wire mesh and directly facing the Hutchins' parcel. This left the wooden features, the posts and beams, facing and exposed to the Moniz property, as depicted in the photographs in Exhibit D.
22. The Zoning Administrator did not personally see the privacy screen when it was in place, but has no reason to believe that the photos of the screen, in Exhibit D, are inaccurate.
23. The photographs attached as Exhibit D were filed on Mrs. Monizes' behalf with the Town's Zoning Board of Adjustment, as exhibits to her attorney's pre-hearing written statement in support of her appeal to the Board.
24. The Town's Zoning Board of Adjustment heard Mrs. Monizes' appeal at a hearing held December 28, 2020.
25. Subsequent to that hearing, the green privacy screen was taken down by Ms. Hutchins.
26. On February 10, 2021, the Zoning Board of Adjustment issued its Findings and Decision denying Mrs. Monizes' appeal.

Analysis

The sole question in the Statement of Questions for this appeal is whether § 913 of the Fair Haven Regulations requires the reversal of the fence on the Hutchins property so that the finished side of the fence faces Appellants' property (Question). The Court reviews this Question de novo, In re Poole, 136 Vt. 242, 245 (1978), and applies the familiar principals of statutory interpretation to the Fair Haven Regulations. See In re Vermont National Bank, 157 Vt. 306, 312 (1991). The Court will interpret its provisions with the goal of giving effect to the intent of the municipal legislative body that drafted them, accepting the ordinary meaning of the regulatory language where it is unambiguous. Town of Killington v. State, 172 Vt. 182, 188 – 89 (2001). This approach conforms with § 103, which instructs that “[e]xcept where specifically defined herein, all words used in these Regulations shall carry their customary meanings.” Fair Haven Regulations § 103.

To answer Appellants' Question, the Court looks first to whether § 913 applies to the fence at issue. Appellants argue that it does because § 913 requires that “[a]ll fences shall be constructed so that the finished side faces outward.” Fair Haven Regulations § 913. The Town

focuses, as did the Board, on the fact that the fence was installed to pen animals and is no more than four feet in height. As such, the fence is not a “structure” in the meaning of the Fair Haven Regulations. See Fair Haven Regulations § 913 (“[a] fence will be considered a structure unless it is four (4) feet or less in height and is used to enclose a garden or animal pen”); § 105 (defining “structure” with the same exclusion). The Town argues that because the fence is not a structure it is not “development” as defined by § 105 and requests a determination that it does not violate the Fair Haven Regulations.

Whether the fence amounts to “development” does not control the Court’s inquiry on this Question. Section 913 broadly requires that “[a]ll fences shall be constructed so that the finished side faces outward.” Fair Haven Regulations § 913. The words “all” and “shall” make it clear that every type of fence must comply with the requirement that the finished side face outward. See Fair Haven Regulations § 103 (“the word ‘shall’ means mandatory”). None of the provisions in § 913 limit its applicability to things that qualify as “development.” While § 913 excludes this type of fence from the category of structures, the distinction goes to whether the fence requires a zoning permit, however, it does not impact the requirement placed on “all fences.” Nor does the Town suggest that the fence would not fall inside the scope of “all fences.” See also Fair Haven Regulations § 105 (defining “fence” as “[a]nything constructed or erected to act as a barrier to travel on foot or by vehicle”). Regardless of whether a fence is a structure or amounts to development in the meaning of the Fair Haven Regulations, the finished side of a fence must face outward.

The Town also cites to § 1501 to argue that it cannot bring an enforcement action in the absence of land development. Section 1501 defines when “land development” constitutes a violation, stating that “[t]he commencement or continuation of any land development . . . that does not meet the requirements of these regulations shall constitute a violation.” Fair Haven Regulations § 1501. In the absence of a definition for “land development,” the Town cites to the definition of “development” in § 105 to make the point that the fence would only constitute land development if it were a structure. The term “development,” however, encompasses both “structures” and changes to land use:

- (1) any construction which serves to create or to alter the dimensional aspects of the exterior of any structure
- (2) any construction which serves to create, add, expand, or change the use of any structure or land.
- (3) any relocation of a structure, or section of a structure from, to, or upon a lot.
- (4) an activity or use of land or a building (such as quarrying, excavating, road building, or subdivision) which will expand or change its present use.

Fair Haven Regulations § 105.

The construction of a fence for the purpose of an animal pen on the property amounts to change in the use of land. Thus, the activity falls within the scope of §1501. Further, while the Fair Haven Regulations do not require a zoning permit for this type of fence, see § 1202(8), it must still comply with the applicable requirements placed on fences set forth in §913. In particular, the finished side of the fence must face outward.

This approach is consistent with Supreme Court case law concluding that a use that is exempt from zoning permit requirements can still be subject to other regulatory standards. See In re Laberge, 2011 VT 1, ¶¶ 13, 16, 189 Vt. 578 (holding landowner did not need zoning permit for moto-cross track but discussing compliance with noise limits and other requirements). See also In re Fowler NOV, No. 159-10-11 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. Feb. 4, 2013)(Durkin, J.) (holding that “while dirt bike riding is a generally lawful use of private property, it is not exempt from the [municipality’s] noise performance standard”).

Having found that § 913 applies to the fence, the Court next considers whether the fence complies with the regulation. The fence is composed of wire mesh fencing material fastened to vertical wooden posts, with the wooden posts “positioned on the outside” of the wire fence so they are closer to Appellants’ property than the wire mesh. Joint Statement of Undisputed Facts (SOUF) ¶¶ 6 – 8, 18. A portion of the fence has horizontal wooden support beams between the vertical support posts. SOUF ¶ 19. For some periods of time, a section of the fence had an opaque fabric privacy screen that covered the wire mesh on the Hutchins’ side of the fence and left the wooden posts and beams exposed to Appellants’ property. SOUF ¶¶ 20, 21, 25. The stipulated facts support Appellants’ position that the unfinished side of the fence faces outward towards the Appellants’ property, and the Town does not object to this characterization in its briefing. The Court concludes that the fence violates the Fair Haven Regulations and answers the

Question in the affirmative in Appellants' favor. Under § 913, the fence must be reversed so that its finished side faces Appellants' property.

Conclusion

For the foregoing reasons, the Town's motion to strike is **GRANTED** and its motion for summary judgment is **DENIED**. Appellants' motion for summary judgment is **GRANTED**. The Court issues judgment on the single question in this appeal in favor of Appellants, ordering that the fence must be modified to comply with § 913 of the Fair Haven Regulations.² In particular, the finished side of the fence must face outward. A judgment order accompanies this decision.

Electronically Signed: 1/4/2022 at 9:35 AM pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink that reads "Tom Walsh" with a stylized flourish at the end.

Thomas G. Walsh, Judge
Superior Court, Environmental Division

² The Court understands that the fence runs very close to the boundary line between the two properties and that there are concerns about the ability to modify the fence without trespassing on Appellants' property. The Town has requested that the Court authorize intrusions upon Appellants' property for the limited purpose of reversing the fence. This Court is one of limited jurisdiction, and as the Town acknowledges, trespass is a common law issue. The Court denies the Town's request as it does not have jurisdiction over private property rights. See In re Woodstock Community Trust & Housing Vermont PRD, 2012 VT 87, ¶ 40, 192 Vt. 474 ("parties agree that the Environmental Division does not have jurisdiction to determine private property rights").