

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00033

Windham & Windsor Housing Trust Permit Appeal

ENTRY REGARDING MOTION

Title: Motion for Stay of Permit During Appeal (Motion #2)
Filer: Appellant Laura Campbell, a self-represented litigant
Filed Date: April 11, 2022

Memorandum in Opposition filed by Peter Raymond, attorney for Applicant
Windham & Windsor Housing Trust

Reply in Support of Motion filed by Appellant Laura Campbell

The motion is GRANTED IN PART and DENIED IN PART.

This is the second order concerning Appellant Laura Campbell's Motion for Additional Time to File Statement of Questions and Stay of Permit During Appeal. In the first order, issued April 22, 2022, the Court granted Appellant's request for additional time to file her Statement of Questions and set her request for a stay for a motion hearing.

The motion hearing took place on May 9, 2022, via Webex, in conjunction with the initial status conference for this matter, which is an appeal from a zoning permit issued by the Town of Putney Development Review Board ("DRB"). Appellant seeks to stay the permit issued to Applicant Windham & Windsor Housing Trust for its proposal to build two buildings with 25 affordable housing units on undeveloped land in the village center of Putney, adjacent to the Putney Community Gardens and Putney Farmer's Market.

Appellant attended our initial conference and motion hearing along with Interested Parties Daniel Hartigan, Kira Sawyer-Hartigan,¹ Deborah Lazar, Vanessa Vadim, and Elizabeth Warner. Appellant and the Interested Parties appeared as self-represented litigants. Attorney Peter G. Raymond appeared at the conference and hearing as well, in his capacity as counsel for Applicant Windham & Windsor Housing Trust, as did Attorney Lawrence G. Slason, representing the Town of Putney.

¹ Following her request to withdraw, filed July 13, 2022, Kira Sawyer-Hartigan is no longer a party in this matter.

An appeal from a decision issued by a municipal panel, such as the DRB's instant permit approval, does not automatically stay that decision. See 10 V.S.A. § 8504(f); V.R.E.C.P. 5(e). While the Court may still issue a discretionary stay at the request of a party or on its own motion as "necessary to preserve the rights of the parties," V.R.E.C.P. 5(e), we consider such stays to be an "extraordinary remedy appropriate only when the movant's right to relief is clear." Howard Center Renovation Permit, No. 12-1-13 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2013) (Walsh, J.). The appropriateness of a stay request depends on four factors, "(1) [the moving party's] likelihood of success on the merits; (2) irreparable harm to the moving party should the stay be denied; (3) substantial harm to other parties should the stay be granted; and (4) the best interests of the public." 110 East Spring Street CU, No. 11-2-16 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Apr. 22, 2016) (Walsh, J.) (citing In re Tariff Filing of New England Tel. and Tel. Co., 145 Vt. 309, 311 (1984)).

During the May 9th hearing, the Court discussed the four-factor standard, heard arguments from the parties in attendance, and considered possible resolutions to the pending stay motion. Specifically, the Court asked for the parties' reactions to a partial stay that would prohibit occupancy of the proposed housing units while the appeal is pending but would not stay other activity under the permit. The Court also inquired as to the parties' positions on mediation. In the Scheduling Order issued on May 10, 2022, the Court gave the parties the opportunity to submit additional arguments in response to these questions in writing on or before May 16, 2022, noting the particular need for a showing of irreparable harm.

In response to the Court's question, Applicant states that it would not object to an order that denies the stay of the permit itself but prohibits occupancy of the proposed housing units while the appeal is pending. Under such a partial stay, Applicant could proceed at its own risk with planning and construction of the Project as approved by the DRB, and would reserve its right to move to lift the stay should this appeal be "unusually prolonged or as other circumstances warrant." Applicant's Response to Questions Raised by the Court, at 1, filed May 16, 2022. Appellant and Interested Parties argue in their filings that a partial stay would not address their concerns, some of which relate to construction of the Project, and maintain their support for a full stay.

Considering the parties' positions and Applicant's lack of objection to a partial stay, the Court will impose a stay of occupancy unless it can find sufficient justification for Appellant's request under the four factors articulated above.

The first factor the Court reviews when considering whether a stay request should be granted is Appellant's likelihood of success on the merits of her claims. This factor is difficult to assess especially at this early stage of this litigation and considering the *pro se* status of Appellant. In the past, in the interest of avoiding a "full and complete adjudication of the case" that would be inappropriate for a preliminary motion, we have brought this "standard into play as a test only when the movant's appeal is so tenuous that its invalidity is suggested on the face of the matter, or the [appeal] smacks of bad faith or frivolousness." Howard Center Renovation Permit, No. 12-1-13 Vtec at 2 (April 12, 2013) (citing Petition of Allied Power & Light Co., 132 Vt. 554, 556 (1974)) (internal quotations omitted). We find that it is unnecessary to decide on this factor given that the other three factors do not weigh in favor of granting a stay. See Devonwood Investors, LLC 75 Cheery Street, No. 39-4-17 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. May 22, 2017) (Walsh, J.) ("If the remaining three factors weighed in favor of granting a stay, we would be inclined to conduct a more thorough analysis of the merits at this stage").

The second factor is whether the moving party will suffer irreparable harm if the stay is denied. The alleged harm must be imminent in the sense that is likely to occur while the appeal is pending, it must have a probable link to the activity authorized by the permit, and it must be irreparable, such that a court may not be able to grant an effective remedy should it occur. *Id.* at 4 – 5; Howard Center Renovation Permit, No. 12-1-13 Vtec at 3 – 4 (April 12, 2013); 17 Potter Road Permit #20-028, No. 21-ENV-00064 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Oct. 26, 2021) (Durkin, J.).

Appellant and Interested Parties had an opportunity to make a showing as to this factor at the May hearing as well as in the post-hearing filings that the Court allowed. While they have cited a multitude of concerns about the Project, some are too generalized and unsupported for the Court to consider them as specific allegations of irreparable harm. Others, such as the ability of the Town's emergency services or sewer system to accommodate new residents, would only be implicated after occupancy of the proposed housing units and are consequently not applicable at this time, in light of the partial stay that this Court issues here.

The remaining concerns, namely the alleged elimination or loss of community resources such as public green space where the Project is proposed to be located, the Putney Community Gardens, and the Putney Farmer's Market, lack imminency. Applicant has stated that it does not plan to begin construction until the appeal is resolved, and the parties have not given the Court reason to believe that Applicant's planning or preparations under the permit prior to construction would impact these community resources. Further, Applicant does not propose to eliminate the Putney Community Gardens or the Putney Farmer's Market, and has instead stated its intention to sell the lot encompassing their current location (described as Lot B in the Project) to the organization that runs them. To the extent that the allegation of harm pertains to a reduction in the amount of space available to the Putney Community Gardens or the Farmer's Market, the Court cannot discern from the filings how much acreage is at risk, if any, and there would still be an issue with imminency even with that information.

It is possible that, without a stay, Applicant could change its plans and decide to move forward with construction before the appeal is resolved. It would be doing so at its own risk, however, as the Court can order Applicant to remove anything it has built and to remediate the site should we determine that the Project does not comply with the applicable regulations, or must be modified in some way in order to comply. *See* Devonwood Investors, LLC 75 Cheery Street, No. 39-4-17 Vtec at 4 (May 22, 2017) (explaining that "the Court has the authority to impose penalties and order the removal of a structure built without final permit approval" and citing examples of cases). Appellant and Interested Parties have not alleged any harms that could not be remedied through site remediation if the Court finds that such relief is necessary. The Court finds here, as it has in previous cases, that "allowing construction to move forward after a permit has been granted, but while that permit is being challenged in Court, will not lead to irreparable harm." *Id.*

The concerns that Appellant and Interested Parties cite about construction are neither imminent nor irreparable, and consequently fail to establish the need for a full stay. This factor weighs against granting Appellant's request.

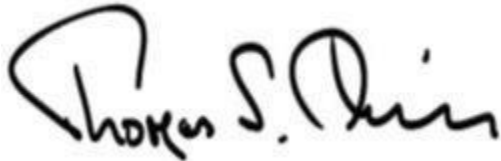
For the last two factors, the Court looks to whether a stay would cause substantial harm to the non-moving party, and whether a stay is in the best interests of the public. Applicant convincingly alleges that it would likely suffer substantial financial harm if the Court granted Appellant's stay request because its ability to plan and access funding for the Project depends on municipal approval of it. This factor weighs against a stay.

Applicant also cites to the significant need for affordable housing, which some Interested Parties also recognize in their filings. The Court does not have enough information to determine how a full stay would impact the timing of the Project, especially in context of Applicant's stated intention to wait until the appeal is resolved to begin construction. Considering the acknowledged need for affordable housing in the area, however, and that there was no showing of irreparable harm to the Putney community during the pendency of the appeal, we conclude that this factor is at least neutral in that it does not weigh in favor of a stay.

For the foregoing reasons, the Court finds that Appellant has not justified her request for a full stay under the applicable legal standards. We consequently impose a partial stay that applies only to occupancy of the Project should Applicant decide to proceed with construction during the pendency of the appeal.

Finally, the Court declines to impose mandatory mediation in light of the preferences that the parties expressed in their filings following the Scheduling Order issued May 10, 2022. Instead, we urge parties to resume or continue their efforts to reach a resolution on their own. The Court reserves the right to order the parties to engage a mediator and complete the mediation process at a later date, if later circumstances warrant.

Electronically signed at Brattleboro, Vermont on Friday, July 15, 2022, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Thomas S. Durkin". The signature is stylized with a large, looping initial 'T' and a cursive 'D'.

Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division