

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00029

25 Cliff Street ZA Determination Appeal

ENTRY REGARDING MOTION AND JUDGMENT ORDER

Title: Motion to Dismiss, and in the alternative to Dismiss and/or Clarify Appellant
Statement of Questions (Motion: 2)
Filer: Geoffrey Hobart Hand
Filed Date: June 15, 2022

The motion is GRANTED.

Arthur Foelsche (Applicant) filed an application with the City of Montpelier seeking permission to construct a temporary access path for installation of a solar facility at property located at 25 Cliff Street in the City. Applicant also, and properly, registered his solar facility with and received a Certificate of Public Good from the Vermont Public Utility Commission (PUC). The City's Planning Department granted approval to the Applicant. Susan Abdo Bandfield (Neighbor) appealed the decision to the City's Development Review Board (DRB). The DRB approved the permit with conditions, which Neighbor now appeals to this Court. Presently before the Court is Applicant's Motion to Dismiss for lack of subject matter jurisdiction.

Applicant filed with the Court a Motion to Dismiss under V.R.C.P. 12(b)(6). Neighbor filed a reply to the motion. Although the reply was filed late, the Court considered the reply non-the-less. A Rule 12(b)(6) "motion to dismiss serves to identify an insufficient cause of action . . . where essential elements [of the claims] are not alleged." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1. A motion for failure to state a claim may not be granted unless it is beyond doubt that there are no facts or circumstances that would entitle the Neighbor to relief. Id. ¶ 5 (citation omitted). The Court takes all well-pleaded factual allegations in the Complaint and all reasonable inferences derived therefrom as true and "assume[s] that the movant's contravening assertions are false."¹ Alger v. Dep't of Labor & Industry, 2006 VT 115, ¶ 12, 181

¹ In this Court, the Statement of Questions "functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court." In re Conlon CU Permit, No. 2-1-12 Vtec, slip Entry Regarding Motion

Vt. 309 (citation omitted). The Court’s job is to determine whether the Neighbor has alleged a set of facts upon which relief could be granted, not to determine the veracity of those allegations. The Neighbor’s burden to state a claim under Vermont’s “notice-pleading standard is exceedingly low.” Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575.

Municipal bylaws cannot “regulate electric generation facilities, energy storage facilities, and transmission facilities regulated under 30 V.S.A. § 248 or subject to regulation under 30 V.S.A. § 8011.” 24 V.S.A. § 4413(b). The PUC regulates these facilities, including solar generation facilities, under 30 V.S.A. § 248. The Vermont Supreme Court has held that the PUC’s authority supersedes that of the municipality regarding facilities regulated under 30 V.S.A. § 248. City of S. Burlington v. Vt. Elec. Power Co., Inc., 133 Vt. 438, 447 (1975). The PUC regularly reviews projects associated with the construction and usage of electric generation facilities, including temporary access roads. See, e.g., In re Acorn Energy Solar 2, LLC, 2021 VT 3, ¶¶ 4–5, 214 Vt. 73 (discussing a decision from PUC regarding solar facility and temporary gravel access road).

Applicant improperly applied to the City for a permit to construct a temporary access road for the installation of their solar facility. The City did not have the authority to consider the application or issue the permit—the PUC has jurisdiction over this project. The City’s permit is void ab initio; thus this Court cannot provide Neighbor relief. We therefore **DISMISS** this appeal pursuant to V.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted as there is no valid City decision to appeal from.

This completes the matter before the Court. This order is also a V.R.C.P. Rule 58 Judgement Order.

Electronically signed November 8, 2022 pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized, with the first name "Tom" and the last name "Walsh" written in a cursive-like script.

Thomas G. Walsh, Judge
Superior Court, Environmental Division

op. at 1 (Vt. Super. Ct. Env’tl. Div. Aug. 30, 2012) (Durkin, J.). It provides notice to other parties of the issues to be determined within the case, while also limiting the scope of the appeal. Id.