

VERMONT SUPERIOR COURT
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Docket No. 22-ENV-00030
Docket No. 20-ENV-00010

Burton Corporation Act 250 District Commission Determination
Burton Corporation Conditional Use

ENTRY REGARDING MOTIONS FOR SUMMARY JUDGMENT

CRZ Group appeals the City of Burlington Development Review Board's September 4, 2020 decision regarding Burton Corporation's (Burton) application for a conditional use permit. See generally Burton Corporation Conditional Use Appeal, No. 20-ENV-10 (Conditional Use Appeal). In a coordinated matter, Wendy Bratt, Diane de Terra, Janice Ellis, Doug Goodman, Stephanie Herrick, Almy Landauer, Luc Logan, Sharon O'Neill, Lawrence Smith, Michael Turner, Dana Walrath, and Laura Waters (collectively Neighbors) appeal a decision of the District Commission issuing a Land Use Permit Amendment authorizing the redevelopment of an existing building into a mixed-use facility, and Burton cross-appeals. See generally Burton Corporation Act 250 District Commission Determination, No. 22-ENV-30 (Act 250 Appeal). These coordinated matters are presently before the court on Neighbors' and CRZ Group's (collectively Appellants) motions for summary judgment. Mot. Summ. J., Dkt. 22-ENV-20 (filed Dec. 14, 2022); Mot. Summ. J, Dkt. 20-ENV-10 (filed Dec. 14, 2022). In both matters, Appellants are represented by Attorney James A. Dumont. Burton is represented by Attorneys Jonathan T. Rose and Malachi T. Brennan. The City of Burlington (Burlington) is represented by Attorney Kimberlee J. Sturtevant. Colin K. McNeil represents the City of South Burlington (South Burlington). The Natural Resources Board (NRB) is represented by Attorneys Allison Milbury Stone and Jenny E. Ronis.

DISCUSSION

“Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law.” Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996); V.R.C.P. 56(a); V.R.E.C.P. 5. Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). Where “the moving party does not bear the burden of persuasion at trial,” however, “it may satisfy its burden of production by indicating an absence of evidence in the record to support the nonmoving party's case.” Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). Once the moving party has made that showing, the burden shifts to the non-moving party to demonstrate that there is a triable issue. Id. at 640. The party opposing a motion for summary judgment “cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to a factfinder.” Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citations omitted); V.R.C.P. 56(e). For the purposes of the motion, the court “will accept as true the allegations made in opposition to . . . summary judgment,” id., and gives the nonmoving party the benefit of all reasonable doubts and inferences, City of Burlington v. Fairpoint Commc’ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332. The evidence, on either side, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8, 208 Vt. 112.

Here, Appellants assert that they are partially entitled to judgment as a matter of law in both the Act 250 and Conditional Use Appeals. In the Act 250 Appeal, Appellants move for summary judgment on their Questions 1 and 8, which consider effects of noise from the project; Questions 10 and 11, which contemplate the project’s effects on Red Rocks Park; and Questions 12 and 13, which consider whether the proposed land use complies with the Burlington and South Burlington local land use plans. See Am. Statement of Questions, No. 22-ENV-30 (filed Nov. 28, 2022).¹ In the Conditional Use Appeal, Appellants move for summary

¹ Appellants also moved for Summary Judgment on Question 14, but neither the original nor the amended Statement of Questions contain a Question 14. See Am. Statement of Questions, 22-ENV-30 (filed Nov. 28, 2022).

judgment on Questions 2, 5, 6, and 6.4, which all directly or indirectly relate to night-time noise at the project site; and on Question 28 which considers the project's food and beverage service. See Am. Statement of Questions, No. 20-ENV-10 (filed Nov. 28, 2022).²

Regarding night-time noise, comparison of the parties' statements of undisputed and disputed facts shows that there are significant disputes of material fact concerning the key issue of whether Burton has sufficiently shown that noise levels of the proposed project will not have an undue adverse effect on criteria under the standards applicable to both a conditional use permit and the pertinent Act 250 criteria. Specifically at issue is whether Burton's noise consultant has sufficiently addressed likely noise levels resulting from the use of doors to the outdoor lounge in conjunction with music performances as well as the effect of the use of main doors in general, as he did not model any projections for noise levels with doors open. Although the Operational Management Plan, incorporated in the conditions imposed by the DRB in its permit approval, says "[d]oors remain closed during events," reasonable inferences from the material facts set forth by both parties suggest that it is not likely that all the doors to the performance space would remain absolutely closed all of the time throughout the duration of musical performances. Findings of fact are necessary to resolve this issue. There is also a legal issue concerning the applicable standard for determining an acceptable level of noise. This is best resolved in the context of determined facts. As such, the court **DECLINES** to enter judgment for the Appellants on Act 250 Appeal Questions 1 and 8, and Conditional Use Appeal Questions 2, 5, 6, and 6.4.

To the extent the Appellants seek summary judgment regarding the project's effects on Red Rocks Park, the court concludes that Appellants have failed to meet their burden of presenting evidence that entitles them to judgment as a matter of law. Specifically, Appellants have provided no evidence regarding overuse or increased noise in Red Rocks Park or otherwise showing impact on the public's investment in the Park. At best, Appellants argue that the noise

² While Appellants initially moved for summary judgment on Question 3, they withdraw their motion as to that Question in their reply memorandum. See Corrected Reply Mem. to Burlington and Burton Opp. at 5, 22–23 (filed Feb. 8, 2023).

may have an impact on the public's use and enjoyment of Red Rocks Park. See Appellants Act 250 Mot. for Summ. J. at 15 (filed Dec. 14, 2022). To the extent that noise is raised here, it is genuinely disputed. Accordingly, the court **DECLINES** to enter judgment for the Appellants on Act 250 Appeal Questions 10 and 11.

Similarly, to the extent Appellants seek summary judgment regarding whether the proposed land use complies with Burlington and South Burlington local land use plans (Questions 12 and 13), the court again finds Appellants have failed to meet their burden of presenting evidence that entitles them to judgment as a matter of law. The issue in these Questions concerns whether the proposed land use conforms with the Burlington and South Burlington land use plans. To prevail, Appellants have the burden to show an absence of evidence in the record. Mello, 168 Vt. at 639–40. Appellants, however, failed to identify such an absence in their statement of undisputed material facts. Further, to the extent that they claim evidentiary shortcomings, when giving Burton the benefit of all reasonable doubts and inferences, Burton has produced plausible evidence and legal theories to survive summary judgment. See, e.g., Duncan Aff., Ex. 5 ¶¶ 12–15 (showing that the modelled sound levels from the project fall below ANSI standards for land uses in urban/suburban residential areas and arguing that the “plainly audible” standard is vague, ambiguous, and unenforceable). Again, to the extent that Appellants argue that the noise emanating from the venue creates nonconformity, there remains a genuine dispute of material fact. Accordingly, the court **DECLINES** to enter judgment for the Appellants on Act 250 Appeal Questions 12 and 13.

Finally, as to Appellants' remaining question in the Conditional Use Appeal (Question 28), the issue is whether the proposed plan for serving food and beverages complies with the Burlington Code of Development Regulations. Comparison of the parties' statements of undisputed and disputed facts shows that there are significant disputes of material fact and/or combined questions of fact and law. Specifically, there is a dispute as to whether the layout plan for service of alcohol complies with the “accessory space” limitation for food and beverage service. Again, the court concludes that any legal disputes regarding this issue are best

resolved in conjunction with resolution of disputed facts. As such, the court **DECLINES** to enter judgment for the Appellants on Conditional Use Appeal Question 28.

CONCLUSION

For the foregoing reasons, the court **DENIES** Appellants' motions for summary judgment in both the Act 250 and Conditional Use appeals.

The court will schedule a pretrial status conference, site visit, and consolidated de novo hearing for both cases.

Electronically signed February 23, 2023 pursuant to V.R.E.F. 9 (d).

A handwritten signature in black ink that reads "Mary Miles Teachout". The signature is written in a cursive, flowing style.

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned