



Town of Wardsboro v. Fitzpatrick Excavating & Trucking, LLC

ENTRY REGARDING MOTION

Title: Motion for Default Judgment (Motion: 1)
Filer: Beriah Smith, Esq.
File Date: December 21, 2022

No response filed.

The motion is GRANTED.

This matter relates to the Town of Wardsboro's (Town) Complaint against Fitzpatrick Excavating & Trucking, LLC (Respondent), alleging that Respondent has continued zoning violations on its property located at 2085 Route 11, Wardsboro, Vermont (the Property). The Town alleges that the violations include installing a septic tank and completing substantial improvements to the structure on the Property and within a flood hazard area without permits.

The Town sent three Notices of Violation to Respondent prior to the commencement of this action, on March 22, 2021, September 13, 2021, and September 12, 2022. The September 12, 2022 Notice of Violation was sent with enclosed copies of the prior notices of violation by certified mail, and provided Respondent with 7 days to cure the violations at the Property and information as to the ability to appeal the notice. Respondent did not appeal any of the Notices of Violation or otherwise cure the violations.

On October 10, 2022, the Town filed the present action. Respondent was served with the Complaint on October 21, 2022, and the Sheriff's return of service was filed on November 18, 2022. Respondent has not answered the Complaint or otherwise appeared in this action.

Due to Respondent's failure to appeal or otherwise timely challenge the Notice of Violation, the alleged violations are final and binding. 24 V.S.A. § 4472(a), (d). Additionally, Respondent has failed to enter an appearance either pro se or through counsel and failed to answer or file any responsive pleading, including responding to the pending Motion. As such, the

Town's factual allegations are treated as admitted. See DeYoung v. Ruggiero, 2009 VT 9, ¶ 22, 185 Vt. 267. We conclude that the Town has made sufficient allegations showing that it is entitled to judgment. Therefore, the Court **GRANTS** the Town's motion for default judgment.

Having reached this conclusion, we provide the Town with the following relief. The Town requests injunctive relief. The Court orders Respondent to immediately cease all unpermitted development at the Property. Additionally, the Court orders Respondent to remove all unpermitted development at the Property, including any installed or constructed structures or infrastructure, within 60 days of the date of this Order.

Next, we address the fines due.¹ This Court has broad discretion to set a fine under 24 V.S.A. § 4451. See Town of Pawlet v. Banyai, 2022 VT 4, ¶ 29. Section 4451 authorizes a maximum fine of \$200 per violation, with each day that the violation continues counting as a new violation. 24 V.S.A. § 4451(a), (a)(3). This Court must "balance any continuing violation against the cost of compliance and . . . consider other relevant factors, including those specified in the Uniform Environmental Enforcement Act." In re Beliveau NOV, 2013 VT 41, ¶ 23, 194 Vt. 1.

The Uniform Environmental Enforcement Act factors are:

- (1) the degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation;
- (2) the presence of mitigating circumstances, including unreasonable delay by the Secretary in seeking enforcement;
- (3) whether the respondent knew or had reason to know the violation existed;
- (4) the respondent's record of compliance;
- (5) [Repealed];
- (6) the deterrent effect of the penalty;
- (7) the State's actual costs of enforcement; and
- (8) the length of time the violation has existed.

10 V.S.A. § 8010(b).

We conclude that the facts presented warrant the imposition of a substantial fine.

¹ This Court may enter judgment for a sum, when the sum claimed "can by computation be made certain, and when the opposing party is not a minor or incompetent, without notice or hearing upon affidavit of the amount due" V.R.C.P. Rule 55(c)(1). The sought fine here is able to be made certain by computation (i.e., the days of the violation and the amount of daily fine imposed, along with legal fees). We have been provided with an affidavit allowing us to assess the fines to be imposed and Respondent is neither a minor nor incompetent. We, therefore, conclude we can impose a fine in the context of this default judgment.

First, installing a septic system and causing unpermitted development within a flood hazard zone absent permitting poses a public health, safety, and environmental risk. While these threats will only be realized in the event of a flood, this factor still weighs in favor of a larger fine.

Second, the Town initially issued Respondent a Notice of Violation in March 2021 and did not initiate this action until October 2022. We conclude that this delay is mitigated by the fact that the Town presently only requests fines representing violations following the 7-day cure period following the September 2022 Notice of Violation.

Third, Respondent was made aware of the violations at the Property. Respondent has received three Notices of Violation regarding the violations and the Zoning Administrator personally made Respondent aware that permits required for the development of the Property by speaking with one of Respondent's owners. Respondent also received the Complaint in this matter. Respondent has taken no corrective action, or action to contest, any of the noticed violations for the nearly two years of Town action. We conclude that this weighs in favor of a substantial fine. For this same reason, we conclude that Respondent's record of compliance weighs in favor of a substantial fine. While we do not have evidence of other violations at Respondent-owned property in the Town, Respondent's complete failure to engage in the zoning process in light of the Town's repeated attempts to address compliance issues for almost two years demonstrates a considerable history of noncompliance at the Property.

Next, we conclude that there is a significant need for a deterrent in this matter. Respondent has actively continued to allow the violations to occur at the Property despite the Town's attempts to bring the Property into compliance. This has included three notices of violation and the present action, all of which Respondent has ignored. We conclude that there is a need for a fine to deter continued violations at the Property.

Further, the Town's actual costs of enforcement presently amount to \$2,099.66 in legal fees, to be updated to include costs to date. The Town has also spent significant personnel hours related to the notices of violation and these compliance issues. These costs have likely been compounded by Respondent's failure to engage with the Town in any manner to address the compliance concerns at the Property. These costs are reasonable in light of the facts of this matter.

Finally, this violation has been ongoing for nearly two years. This is a substantial length of time, during which Respondent has repeatedly been informed of the violation. This weighs in favor of a larger fine.

The Town has provided an affidavit of the Town's Zoning Administrator which provides the Court with sufficient information to determine the appropriate fine in this case. The Town requests that the Court impose a \$10,000 fine, or \$107.52 per day fine, for the period between the date the Town received notice that the Respondent was served with the Complaint to the date of this motion, or 93 days. The Town then requests that this Court impose a \$200 per day fine from December 22, 2022, the day after the Town's motion, to the date of this Decision, or 85 days. This would result in a total fine of \$26,999.36.

The total maximum fine that could be imposed for this violation is \$35,600 (representing a \$200.00 per day fine from September 19, 2022 to date). For the reasons set forth above, we conclude the facts presented warrant a substantial fine. We will not, however, impose the maximum fine from December 22, 2022 to date. "[W]e reserve a fine of [\$200.00] per day for the most egregious of zoning infractions." In re Huntington NOV Appeal, Nos. 204-8-06 Vtec, 209-9-06 Vtec, slip op. at 8 (Vt. Env'tl. Ct. Mar. 18, 2008) (Durkin, J.). Further, fines authorized by 24 V.S.A. § 4451(a) are civil in nature such that they must not be punitive and must be "rationally related to the damages suffered from landowner's violation of [the] Town's bylaw." Town of Hinesburg v. Dunkling, 167 Vt. 514, 528 (1998). The Town has provided the Court with no basis to increase the daily fine following the date of the motion. Given the purpose of § 4451 fines, and the guidance to reserve the maximum fines for the most egregious violations, we will not impose the maximum for this period absent evidence warranting an escalation.

It is clear that the Town has incurred considerable expense relative to Defendant's violations, including both legal expenses, along with Town staff time and resources. It is also clear that Defendant has consistently ignored compliance issues at the Property and those compliance issues, particularly with respect to the installation of a new septic system in a flood hazard area, could pose public health, safety, and environmental concerns in the event of a flood. We, therefore, adopt the Town's proposed fee of \$107.52 per day from September 19, 2022 to the date of this decision (178 days), resulting in a fee of \$19,138.56.

The Town additionally requests reimbursement of its attorney fees and costs. While § 4451 does not expressly authorize a court to award attorney fees and costs, we are authorized

to base a continuing fine on the Town's costs of enforcement, provided that the total fine remains under the daily cap required by statute. See Dunkling, 167 Vt. 514, 528—29 (interpreting a prior iteration of § 4451). Given the Town's substantial efforts relative to this violation, the Respondent's failure to appear here, and the fact that inclusion of the fees will result in a fee under the daily maximum, we award the Town's its attorneys fees relative to this action. The Town is directed to file with the Court an affidavit or other evidentiary support showing the amount of fees incurred to date within 7 days of the date of this decision, at which point the Court will issue a judgment order incorporating the accurate legal fees.

Conclusion

For the foregoing reasons, we **GRANT** the Town of Wardsboro's motion for default judgment against Respondent. The Court orders Respondent to immediately cease all unpermitted development at the Property. Respondent is ordered to remove all unpermitted development at the Property within 60 days of the date of this order. Further, the Court imposes a fine of \$107.52 per day, running from September 19, 2022 to March 17, 2022, (178 days), for a total fine of \$19,138.56. Additionally, the Court awards the Town attorneys fees relative to this matter. The Town is directed to file an affidavit or other evidentiary support showing the amount of fees incurred to date within 7 days of the date of this decision, at which point the Court will issue a judgment order incorporating the accurate legal fees. The total fee amount, inclusive of the Town's legal fees, will constitute a lien on the Property.

A Judgement Order will be issued upon receipt of the above-referenced evidence of attorneys fees. At which point, the matter will be concluded.

Electronically signed March 17, 2023 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