

VERMONT SUPERIOR COURT  
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ENVIRONMENTAL DIVISION  
Docket No. 22-ENV-00112

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**6235 Stage Road CU Permit Application**

**DECISION ON MOTION**

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In this appeal, Harold Litchen, Trustee of the Shannon Liss-Riordan Family Trust (Applicant), appeals a decision of the Town of Barnard (Town) Development Review Board (DRB) denying Applicant's conditional use application to construct a 2,000 square foot residence with an indoor therapeutic pool (the Project) on the grounds that the Project constituted a prohibited "Recreational Use or Structure," as defined by the Town of Barnard Unified Zoning and Subdivision Regulations (the Regulations). Applicant appealed that decision to this Court. Presently before the Court is Applicant's motion for summary judgment on the sole Question before this Court. The Town opposes the motion. For the reasons set forth herein, the motion is **GRANTED**.

Applicant is represented by Michael Tarrant, Esq. The Town is represented by James Barlow, Esq.

**Statement of Questions**

Applicant presents a single Question for this Court's review in its Statement of Questions.

It asks:

1. Whether Barnard Zoning Regulation Sec. 3.1 which prohibits recreational uses and structures in the Lakeshore District bars Applicant from obtaining conditional use approval to construct a single-family residential structure which includes an indoor therapy pool on the first floor of the residential structure.

Applicant Statement of Questions (filed Dec. 1, 2022).

### **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 that the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a); V.R.E.C.P. 5. The nonmoving party “receives the benefit of all reasonable doubts and inferences.” Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. For the purposes of the motion, the Court “will accept as true all allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.” Id. As such, a 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 the factfinder.” Id. (citing Gore v. Green Mtn. Lakes, Inc., 140 Vt. 262, 266 (1981); V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)).

### **Undisputed Material Facts**

We recite the following factual background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the purpose of deciding the pending motions. The following are not specific factual findings relevant outside this summary judgment decision. See Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng’rs, Inc., 170 Vt. 632, 633 (2000) (mem.)).

1. Applicant owns property at 6235 Stage Road, Barnard, Vermont (the Property).
2. The Property is located within the Town’s Lakeshore District, as defined by the Regulations.
3. On or about July 19, 2022, Applicant applied for a conditional use permit to construct a 2,000 square-foot structure, which includes a residence, consisting of a bedroom, kitchen, bathroom, and an indoor pool area (the Project).
4. The pool is proposed for therapeutic purposes, not recreational purposes.
5. As such, the Project is a residence with an indoor therapy pool.
6. The DRB denied the application on or about October 12, 2022 on the grounds that the Project consisted a “Recreational Use or Structure” that was prohibited in the Lakeshore District.
7. Applicant timely appealed the DRB’s decision to this Court.

## Discussion

Applicant asserts in its motion that the Project is one for a residential use, which is conditional in the Lakeshore District. Applicant asserts that the inclusion of an indoor therapeutic pool does not convert the principal residential use of the Project from a conditional residential use to a prohibited recreational use and structure. The Town asserts that the Project is a recreational structure, in large part due to the fact that a majority of the main floor of the Project is dedicated to the therapy pool.

“The purpose of [the Lakeshore District] is to protect the water quality and scenic beauty of Silver Lake, while allowing limited non-commercial development.” Regulations § 2.2.8. In the Lakeshore District, one- and two-unit dwellings are a conditional use. Regulations § 3.1. “Recreational Use or Structure” is a prohibited use. Id. A “dwelling” is:

A building or portion thereof, designed, constructed, or used as separate living quarters for one family, and which includes facilities for food preparation, sleeping, and sanitary facilities and the right of the resident to use a minor portion of the structure as a home occupation.

Regulations, § 8.2 (“Dwelling”). A “recreational use or structure” is a “place designed and equipped for the conduct of recreational facilities of a non-commercial nature, including tennis courts, swimming pools, ponds, riding rinks and indoor arenas.” Regulations, § 8.2 (“Recreational Use or Structure”).

When interpreting zoning ordinances, we apply the rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, we “construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” Id. (citations omitted). If there is no plain meaning, we will “attempt to discern the intent from other sources without being limited by an isolated sentence.” In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). In construing statutory or ordinance language, our paramount goal is to implement the intent of its drafters. Morin v. Essex Optical/The Hartford, 2005 VT 15, ¶ 7, 178 Vt. 29. We will therefore “adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense.” In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578; see also In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49, 195 Vt. 586 (1986)) (“Our goal in interpreting [a zoning regulation],

like a statute, ‘is to give effect to the legislative intent.’”). Finally, because zoning regulations limit common law property rights, we resolve any uncertainty in favor of the property owner. Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22.

Applicant has provided an application for a residence. It contains facilities for food preparation (a kitchenette), a proposed sleeping area, and a bathroom. This is a dwelling as defined by the Regulations. See Regulations, § 8.2 (“Dwelling”) (defining “dwelling” as “A building or portion thereof, designed, constructed or used as separate living quarters for one family, and which includes facilities for food preparation, sleeping, and sanitary facilities and the right of the resident to use a minor portion of the structure as a home occupation.”).

The Town has asserted that the pool is a prohibited recreational use and, given the size of the pool relative to the size of the Project structure overall, the entirety of the structure is a prohibited recreational use. First, the Town has not provided any analysis as to how this use, a therapeutic use, is a recreational one beyond impliedly asserting that because the indoor pool could be used recreationally it constitutes a recreational use. The Town does not dispute that the pool is therapeutic in nature. While swimming pools are generally listed as an example of a “Recreational Use or Structure,” it is undisputed that the use of this pool is not recreational in nature, it is solely therapeutic. The Regulations’ definition of “Recreational Use or Structure” as addressing structures “designed and equipped for the conduct of recreational activities.” Applicant has represented, and the Town has not disputed, that the pool is designed for therapeutic activities. Given that zoning laws limit common private property rights, and to the extent that there’s any ambiguity in this regard, we must resolve it in favor of Applicant. We will not read the prohibition on recreational uses and structures in the Lakeshore District as prohibiting a therapeutic use as proposed.<sup>1</sup>

Further, the Town asserts that the Project, in its entirety, is recreational in nature, and not a dwelling. The Town bases its assertion on the fact that a majority of the Project structure is dedicated to, or could be used in connection with, the indoor therapy pool. Effectively, the Town asserts that a mathematical consideration of the relative square footage of potential uses

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<sup>1</sup> Nothing within this decision would prevent the Town from pursuing an enforcement action should the therapeutic use be discontinued or should the actual use be recreational in violation of the Regulations.

within a structure that would otherwise constitute a dwelling. The Town has not directed the Court to any provision of the Regulations authorizing the type of mathematical consideration the Town proposes. Because there is no authority for this Court to undertake the mathematical approach to determine the use of the Project in the Regulations, we will not undertake such an analysis. This is further supported by the fact that the Town concedes that the Project could be used as a dwelling. See Town Response to Appellant's Motion for Summary Judgment at 5 ("[I]t is conceivable that a portion of the proposed building could be used as a dwelling with food preparation, sleeping, and sanitary facilities.").

Further, the Court's conclusion that the Project is not a prohibited recreational use is consistent with the purpose of the Lakeshore District and the Regulations applicable thereto. The purpose of the Lakeshore District is "to protect the water quality and scenic beauty of Silver Lake, while allowing limited non-commercial development." Regulations, § 2.2.8. There is no allegation that the indoor therapeutic pool will impact the scenic beauty of the lake.

For these reasons, we conclude that the material facts are not in dispute and Applicant is entitled to judgment as a matter of law because the Project is not a prohibited recreational use or structure. Instead, the Project is a dwelling subject to conditional use review. Accordingly, we **GRANT** Applicant's motion for summary judgment. Having reached this conclusion, however, we note that the DRB did not address the merits of the Project's compliance with applicable conditional use standards. We, therefore, **REMAND** this application back to the DRB for complete consideration of the application.

### **Conclusion**

For the foregoing reasons, we conclude that the Project is one for a dwelling and the therapeutic nature of the proposed indoor pool does not result in the Project being prohibited as a recreational use or structure. Therefore, we **GRANT** Applicant's motion for summary

judgment and **REMAND** this matter back to the DRB for consideration of the remainder of Applicant's application in light of this Decision.

This concludes the matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed April 13, 2023 in Burlington, Vermont pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, flowing style.

Thomas G. Walsh, Judge  
Superior Court, Environmental Division