

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00113

Purvis Nonconforming Use (ZAP-22-3)

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment (Motion #3).
Filer: Kyle S. Clauss, attorney for the City of Burlington.
Filed Date: February 10, 2023.
Response in Opposition filed on March 14, 2023, by Luke Purvis, self-represented litigant.

The motion is GRANTED.

For over eight years, Appellant Luke Purvis ("Appellant") has been involved in disputes with his neighbors, Joseph and Teresa Cleary, and the City of Burlington ("City") concerning his use of unpermitted parking areas on his property at 164 North Willard Street. One of those parking areas, located to the north of the driveway on his Property, has since been addressed by Appellant and is no longer the subject of the parties' dispute. A parking area to the south of his driveway, which may encroach onto property of his neighbors, the Clearys, remains the subject of various litigations initiated by Appellant.¹ In addition to that southern parking area adjoining Appellant's driveway, he has also asserted that he should be allowed to use an unpermitted area south of his garage. The garage is located at the easterly end of his driveway.

Appellant has presented these same or similar claims of authority to use the southern parking area and the area adjacent to his garage before the City of Burlington Zoning Administrator's Office, the City of Burlington Development Review Board ("the DRB"), this Court,

¹ See Purvis Nonconforming Use, No. 45-5-15 Vtec; Cleary Site Plan Application, No. 123-11-18 Vtec; Purvis North Willard Street, No. 88-7-19 Vtec; and Purvis Nonconforming Use, No. 22-ENV-00113, which is the appeal now pending before this Court.

and the Vermont Supreme Court. See In re Purvis Nonconforming Use, 2019 VT 60, 210 Vt. 601. None of Appellant's prior litigation efforts have proved successful.

Solely for purposes of analyzing the City's pending motion, we provide the following procedural background to Appellant's original request to the City of Burlington Zoning Manager and Principal Planner ("ZM"), the ZM's response, and the DRB determination that is now the subject of this appeal.

We caution, of course, that the following procedural background should not be regarded as findings of fact, since such finding may only be issued after the completion of a trial. See Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) ("It is not the function of the trial court to find facts on a motion for summary judgment").

Factual and Procedural Background

1. Appellant owns property located at 164 North Willard Street ("the Property"). The driveway onto his Property runs in a general east/west direction. He has previously used unpermitted parking spaces to the north and south of his driveway, as well as an area to the south of his garage, which is located at the easterly end of his driveway.
2. Appellant's claims about these unpermitted areas have been the subject of prior appeals to this Court and the Vermont Supreme Court. See In re Purvis Nonconforming Use, No. 45-5-15 Vtec; In re Purvis No. Willard St., No. 88-7-19 Vtec; and In re Purvis Nonconforming Use, 2019 VT 60, 210 Vt. 601 (which affirmed our decision in Docket No. 45-5-15 Vtec).
3. After the Supreme Court affirmed this Court's determination in Docket No. 45-5-15 Vtec, Appellant stopped using the unpermitted parking space to the north of his driveway and restored the area with grass. Thus, the only areas that Appellant appears to still dispute are the unpermitted areas to the south of his driveway and his garage.
4. In this appeal, Appellant's original request and its subsequent amendment, are somewhat unclear. The Court, however, summarizes the amended request presented to the ZM as follows: first, he requests authorization to use the unpermitted parking areas to the south of his driveway and garage, including areas that encroach onto the Clearys' neighboring property; second, he requests that if his first question is answered in the affirmative, "the Southern Parking Area (SPA), preexisting nonconforming use be considered as its [sic] entirety in addition to as its [sic] parts";

and third, he requests that the site plan he submitted in an earlier proceeding (ZP 21-275) “be included in the conditions of approval to install a fence.” See DRB Decision at 2 (dated October 24, 2022).²

5. On July 29, 2022, the ZM issued an adverse determination. However, the ZM later learned that, due to a technical glitch in the City’s online permitting system, the ZM had not seen several messages that Appellant had submitted through that system’s chat box feature. When the ZM advised Appellant that he had not seen Appellant’s latest chat box messages, Appellant requested that the ZM reconsider his adverse determination. See ZM Aff. ¶ 8 (filed Feb. 10, 2023).

6. On August 3, 2022, the ZM granted Appellant’s reconsideration request and advised that Appellant’s normal 15-day appeal period, which had begun to run on July 29, 2022, would be “tolled” until the ZM issued his reconsideration decision. Thus, according to the ZM, the first four days of Appellant’s appeal period had already run through August 3rd, but the ZM’s decision to toll the appeal period due to the chat box malfunction resulted in eleven days remaining in Appellant’s appeal period. Id. ¶ 9.

7. On Friday, September 2, 2022, the ZM issued another adverse determination, after considering Appellant’s most recent chat box messages. Id. ¶ 10. The ZM also immediately communicated with Appellant via the chat box, advising that his Amended Request had again been denied and that the remaining time on his once tolled appeal period would resume. Id.

8. On September 6, 2022, the ZM again communicated with Appellant via the chat box to remind Appellant that his appeal period had resumed “with 11 days remaining on the appeal period.” Id. Thus, by the ZM’s calculation, Appellant’s appeal period would expire after September 13, 2022.

² This is the DRB decision that is the subject of this appeal; a copy was filed in this appeal on November 17, 2022, just after Appellant filed this appeal with the Court.

We rely upon the DRB’s summary of Appellant’s Amended Request because it appears that Appellant submitted his original and Amended Requests to the ZA through a series of e-mails and “chat box” exchanges with the ZA. Appellant submitted some of his email and chat box exchanges with the ZA as Appellant’s Exhibit 5, 6, and 7. Appellant’s Exhibits were filed in bulk as one 81-page document, but we have reviewed those Exhibits in their entirety and find that the DRB, in its October 24, 2022, Decision, provided an accurate summary of Appellant’s Amended Request to the ZM.

9. On September 13, 2023², Appellant initiated his appeal to the DRB of the ZM's adverse determination, but did not pay the requisite appeal fee and did not submit all the information or supporting documents for his appeal that are required pursuant to the City of Burlington Comprehensive Development Ordinance ("the CDO"). ZM Aff. ¶ 13.
10. On September 15, 2022, the ZM advised Appellant that his appeal to the DRB remained incomplete.
11. On September 19, 2022, Appellant paid his appeal fee and submitted the required supporting information.

Legal Analysis

Appellant presented a single legal issue for this Court to address in this appeal. By his Statement of Questions, filed on December 8, 2022, Appellant posed one Question: "[w]as the appeal to Development Review Board be timely?" In its motion for summary judgment, the City poses a similar question for the Court's consideration: whether Appellant's appeal, completed on September 19, 2022, was timely. For the reasons stated below, we answer Appellant's sole Question in the negative and grant summary judgment to the City.

The CDO provides specific guidance on what constitutes a completed appeal request and how the CDO directs the counting of days. Before we reach those issues, we first address how the ZM calculated the days in which Appellant could file a timely appeal, since the procedural facts presented here are somewhat unique.

It appears clear to the Court that the ZM was attempting to rectify a procedural error after Appellant brought to the ZM's attention that the ZM had not reviewed some of Appellant's messages, submitted on the electronic chat box. The ZM suspended the running of the appeal period that began after the ZM issued his first adverse determination on Appellant's requests. The process the ZM adopted to rectify the errors that resulted from the untimely receipt of the chat box messages, however, is not authorized or referenced in the CDO. Neither party has directed the Court to a provision authorizing the "tolling" of an appeal period, and the Court's own independent research has not revealed such a provision.

Instead, we note that the CDO authorizes "[a]ny interested person [to] take an appeal from any final order or decision of the administrative officer to the DEB within fifteen [15] days

after the date of decision or act appealed from” CDO § 12.2.2.³ When the ZM agreed to reconsider his initial adverse determination, he in effect suspended the finality of that initial decision. Then, when on September 2, 2022, the ZM issued an adverse determination, after considering Appellant’s most recent chat box messages, he issued a new determination. Appellant was entitled to appeal reconsidered determination pursuant to CDO § 12.2.2.

The CDO also provides direction on how an appeal period is to be calculated and how an appeal must be filed. First, the CDO directs that:

Where an event is required or permitted to occur by this ordinance before, on, or after a specified period of time measured from another event, in calculating the period:

- (a) The first day shall not be counted;
- (b) The final day shall be counted; and
- (c) Weekend days and holidays shall be counted.

CDO § 1.1.10

Thus, when the ZM issued his adverse determination on September 2, 2022, the period during which Appellant could file an appeal began on Saturday, September 3, 2022 and ran through Saturday, September 17, 2022.⁴

Appellant submitted his appeal form on September 13, 2022, but his appeal was not complete, since he did not include payment for the appeal filing fee, nor did he submit the documentation necessary to file a complete application, as required pursuant to CDO § 12.2.2 (a). Appellant has not disputed that he did not file all the supporting documents that are required for a complete Notice of Appeal until Monday, September 19, 2022. Thus, we must conclude that his appeal was not timely under the applicable provisions of the CDO.

For all these reasons, we conclude that we must answer Appellant’s sole Question from his Statement of Questions in the **negative** (i.e.: that his appeal was not timely), and hereby **GRANT** the City’s motion for summary judgment.

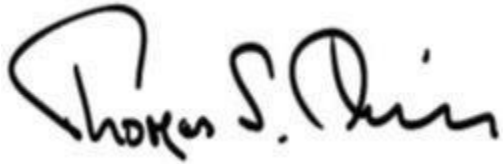
³ The parties have not filed a complete copy of the CDO in this appeal proceedings. However, Appellant has filed copies of the applicable provisions of the CDO as Exhibits 1, 3, and 4.

⁴ Unlike our Rules that govern Court proceedings, the CDO directs that “[w]eekend days and holidays shall be counted” when computing periods of time. See CDO § 1.1.10 (3).

This completes the current proceedings in this appeal. A Judgment Order accompanies this Entry order.

So Ordered.

Electronically signed at Newfane, Vermont on Wednesday, July 5, 2023, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, reading "Thomas S. Durkin". The signature is written in a cursive, flowing style with a large initial 'T'.

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