

VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
802-951-1740
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Docket No. 23-ENV-00030

In re Winooski Hotel Group, LLC Variance Denial

ENTRY REGARDING MOTION

Title: Motion to Dismiss and/or Strike (Motion: 1)
Filer: Stephen D. Ellis, Esq.
Filed Date: July 7, 2023

Memorandum in Opposition filed on August 3, 2023 by Attorney Russel D. Barr.

Reply in Support of Motion filed on August 16, 2023 by Attorney Stephen D. Ellis.

Title: Motion to Amend
Filer: Russell D. Barr, Esq.
Filed Date: August 3, 2023

Reply filed on August 15, 2023 by Attorney Stephen D. Ellis.

The motion to amend is GRANTED. The motion to dismiss and/or strike is MOOTED IN PART and GRANTED IN PART.

In this appeal, Winooski Hotel Group, LLC (WHG) appeals a decision of the City of Winooski Development Review Board (DRB) denying its request for a variance related to the development of a hotel on a property having an address of 4 Winooski Falls Way, Winooski, Vermont (the Property). Specifically, the variance request sought to allow parking related to the development to be located outside of the Property's zoning district, the Downtown Core District.

Presently before the Court is the City of Winooski's (City) motion to dismiss the present action pursuant to V.R.C.P. 12(b)(6). In response, WHG has moved to amend its Amended Statement of Questions.

Discussion

I. Motion to Amend

In response to the City's motion to dismiss, WHG moves to amend its Statement of Questions to address some of the concerns raised in the City's motion. The Second Amended Statement of Questions was filed as an exhibit to the motion. See WHG Ex. C. The Second Amended Statement has seven Questions, with Second Amended Questions 1 through 6 generally addressing issues presented in the previously-filed Questions 1 through 5, and expanding on those issues to address the relevant variance standards applicable to this appeal, and Second Amended Question 7 presenting previously-filed Question 6.

We "generally take a liberal view in granting a motion to amend a Statement of Questions." Laberge Shooting Range, No. 96-8-16 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Jan. 4, 2017) (Walsh, J.) (internal quotation marks omitted) (citing Colby v. Umbrella, Inc., 2008 VT 20, ¶ 4, 184 Vt. 1). Because a Statement of Questions is like a complaint in a civil case, the Court looks to V.R.C.P. 15(a) when addressing amendment. See In re Killington Mountain House, LLC NOV, Nos. 138-12-18 and 30-2-19 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Nov. 17, 2020) (Durkin, J.). Pursuant thereto, a party may amend its Statement of Questions more than 21 days after the pleading is served "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." V.R.C.P. 15(a).

WHG has represented that the City has consented to the amendment. In its Reply in Support of its Motion to Dismiss and/or Strike, the City recognizes that Second Amended Questions 1 through 6 resolves its motion to dismiss with respect to Questions 1 through 5 of the First Amended Statement of Questions, but issues remain with respect to Second Amended Question 7.¹ Thus, we **GRANT** WHG's motion to amend. In so doing, the City's motion to dismiss Questions 1 through 5, now numbered Second Amended Questions 1 through 6 is **MOOT**.

¹ Second Amended Question 7 is functionally identical to Question 6, with the exception that Question 6 notes that the relevant agreement was attached as Exhibit L. Because the Court grants WHG's motion to amend, for ease of reference, we will refer to the final Question the parties dispute in these pending motions as Second Amended Question 7.

II. Motion to Dismiss/Strike Second Amended Question 7

Having reached the above conclusion, the sole remaining issue presently before the Court is related to Second Amended Question 7. Second Amended Question 7 asks:

Does WGH's contract with the City of Winooski (the "Development Agreement") evince the City of Winooski's understanding that, if City owned parking facilities were full, Lot 9 would be undevelopable without a parking variance, and that, to protect against this situation, the City of Winooski confirmed within the Development Agreement that, if necessary WHG could "provide elsewhere" parking sufficient for satisfying the City of Winooski's Minimum Off-Street Parking Schedule of the Downtown Core District?

Second Amended Statement of Questions, Ex. C to WHG's Motion to Amend.

The City argues that this Question is outside the scope of this Court's jurisdiction. While the motion does not cite to V.R.C.P. 12(b)(1), it is such a motion. When reviewing a Rule 12(b)(1) motion, this Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party, here WHG. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.²

The City argues that Question 7 asks this Court to interpret the terms of a private contract, here the Development Agreement, between the City and WHG, outside the scope of the Court's jurisdiction.

This Court is one of limited jurisdiction. 4 V.S.A. § 34; see also V.R.E.C.P. 3. Further, with limited exceptions not relevant here, we review appeals do novo. 10 V.S.A. § 8504(h). Therefore, "we review the application anew as to the specific issues raised in the statement of questions." In re Whiteyville Props. LLC, No. 179-12-11 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Dec. 13, 2012) (Durkin, J.). We are further limited "to consideration of the matters properly warned as before the local board." In re Maple Tree Place, 156 Vt. 494, 500 (1991). This means that our subject matter jurisdiction is confined to those issues the municipal panel had the authority to

² WHG correctly notes that the City has failed to cite to V.R.C.P. 12(b)(1) despite challenging this Court's jurisdiction to review Question 7. This does not deprive the Court of the obligation to review its ability to hear the Question. The Court has both the power, and the obligation, to raise its lack of subject matter jurisdiction sua sponte, regardless of how the issue comes to the Court's attention. See V.R.C.P. 12(h)(3); In G.R. Enters., Inc., No. 27-2-08 Vtec, slip op. at 2 (Vt. Envtl. Ct. May 12, 2008) (Wright, J.).

address when considering the original application. See In re Transtarr LLC, No. 46-3-11 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. May 24, 2012) (Durkin, J.).

WHG's Question 7 is somewhat unclear. But, based on WHG's opposition to the pending motion, in Question 7 WHG asserts that the Development Agreement is relevant evidence relating to whether WHG complies with the necessary variance standards. Specifically, it states that the agreement "contains important factual context for the variance request." WHG fails to provide an understanding of how a private agreement between the parties bears any relevance to this Court's analysis of the variance factors.

Further, aspects of the Question appear to be irrelevant to this Court's review on appeal of the variance denial. As to the first aspect of this Question, it asks, effectively, whether Development Agreement demonstrates the City's belief that WHG would need to seek a variance if it sought to develop the Property as proposed and the City lacked parking to offer WHG. Whether a variance is necessary is not before the Court. The variance application itself is before the Court.

As to the second aspect of the Question, it appears to ask this Court to conclude that the Development Agreement was an approval to provide parking outside the Downtown Core Development District, the crux of the variance application before the Court. WHG presents no argument that a private agreement can supersede the regulatory and statutory requirements to grant a variance.

To the extent that there is any relevancy of the Development Agreement, Second Amended Question 7, and WHG's proffer as to why this Court should not dismiss the Question, shows that WHG is asking this Court to interpret terms of the Development Agreement to guide our review of the relevant variance standards and to extrapolate the intent of the City from our interpretation of the agreement.

This Court does not have jurisdiction over private contractual disputes between parties. See 4 V.S.A. § 34 (defining the limited jurisdiction of the Environmental Division). The proper Court for such a dispute is the Civil Division. See 4 V.S.A. § 31 (defining the jurisdiction of the Civil Division). Through these motions, the parties have informed the Court that there is a related

Civil Division action. Thus, interpretation of the Development Agreement is before the Civil Division.³

Thus, the Second Amended Question 7 is outside the scope of this Court's jurisdiction.⁴ For these reasons, the Question is **DISMISSED**.⁵

Conclusion

For the foregoing reasons, the Court **GRANTS** WHG's motion to amend its Statement of Questions. In so doing, the City's motion to dismiss First Amended Questions 1 through 5 is **MOOT**. Finally, Second Amended Question 7, the functional equivalent of First Amended Question 6, is outside the scope of this Court's jurisdiction and therefore, **DISMISSED**. The Court directs WHG to file its Second Amended Statement of Questions as provided in Exhibit C, excluding Second Amended Question 7, on or before **Thursday, September 28, 2023**.

Electronically signed September 21, 2023 in Burlington, Vermont 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

³ To the extent that the parties dispute the import of conclusions in a separate contract dispute presently pending in the Civil Division on this Court's review of the pending variance application, the Court declines to opine on this issue at this time as it appears that the Civil Division has not reached any final ruling in that matter.

⁴ To the extent that WHG argues that, because V.R.E.C.P. 5(f) allows it to raise any question that it "desires to have determined," V.R.E.C.P. 5(f), it has "great latitude" for presenting Questions to this Court for review, WHG Memorandum in Opposition at 6 (filed on Aug. 3, 2023), Rule 5(f) does not supersede this Court's statutory jurisdictional limitations. See 4 V.S.A. § 34.

⁵ To the extent that WHG seeks to introduce the Development Agreement into evidence at trial, this Court reserves any ruling on the document's admissibility until a proper offer or objection is made.