

VERMONT SUPERIOR COURT  
Environmental Division  
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Docket No. 22-ENV-00055

34 Look Road, LLC Permit

### ENTRY ORDER

Title: Motion to Strike (Motion: 10)  
Filer: David Grayck, Esq., Christopher Boyle, Esq.  
Filed Date: August 2, 2023

Cross-Appellants' Memorandum in Opposition, filed on August 18, 2023, by Attorney James Valente.

Appellants' Reply to Cross-Appellants' Memorandum in Opposition, filed on August 25, 2023, by Attorneys David Grayck and Christopher Boyle.

**The motion is DENIED.**

This is an appeal of a decision of the Town of Wilmington Development Review Board (DRB) approving an application of 34 Look Road, LLC and Yisroel Teitlebaum (together, Applicant) to use property located at 34 Look Road, Wilmington, Vermont (the Property) for "lodging," as that term is defined by the Town of Wilmington Zoning Ordinance (the Ordinance). Applicant appeals that decision to this Court. Additionally, before the Court is a cross-appeal by abutting property owners, Jennifer Nielsen and Eric Potter (Neighbors). Presently before the Court is Applicant's motion to strike two exhibits and certain facts relying thereon from Neighbors' motion for summary judgment pursuant to V.R.C.P. 12(f) and 56(g).

Applicant requests that this Court strike certain Exhibit 4, a letter from Deborah Perkins to Ms. Neilsen, Exhibit 5, an affidavit of Ms. Perkins, and paragraphs 6 through 12 of Neighbors' Statement of Undisputed Material Facts in support of their Motion for Summary Judgment, which rely upon Exhibits 4 and 5. Ms. Perkins is the former owner of the Property. Applicant asserts that they have been unable to depose Ms. Perkins despite efforts to do so such that it is improper

to rely upon these exhibits in the pending motion for summary judgment. Thus, Applicant argues that the materials should be stricken pursuant to V.R.C.P. 12(f). Additionally, Applicant argues that, because Neighbors' counsel instructed Neighbors to not communicate with Ms. Perkins, the material should be struck as a sanction pursuant to V.R.C.P. 56(g).

Pursuant to V.R.C.P. 12(f):

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 21 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

V.R.C.P. 12(f).

Further, the Court may impose sanctions when it determines that an affidavit in support of a motion for summary judgment was "submitted in bad faith or solely for delay." V.R.C.P. 56(g).

Applicant's grounds for striking the at-issue exhibits and facts are based on insufficient discovery of the affiant. While this gives cause for concern of these exhibits, discussed below, Applicant fails to show how the exhibits or facts are an "insufficient defense or . . . redundant, immaterial, impertinent, or scandalous" such that they should be stricken pursuant to V.R.C.P. 12(f). Thus, we **DENY** Applicant's motion to strike in this regard.

With respect to Applicant's motion made pursuant to V.R.C.P. 56(g), we conclude that there has not been a showing that the affidavit was submitted in bad faith or solely for delay. The affidavit was submitted in October 2022. Response thereto is pending. In that interim, Neighbors successfully scheduled a deposition of Ms. Perkins, but for efficiency purposes and due to a lack of discovery received by Applicant, that deposition was postponed. Ms. Perkins is not a party to this suit, and she has evaded all attempts to be deposed since the postponement. We decline to ascribe bad faith in filing the motion in October 2022 to Neighbors' counsel for Ms. Perkins' evasiveness in the period following. This is particularly true when Neighbors' counsel is the party who successfully originally scheduled a deposition for Ms. Perkins. Thus, to the extent that Applicant requests that this Court strike the at-issue documents and paragraphs supported by those documents as a sanction to Neighbors, that motion is **DENIED**.

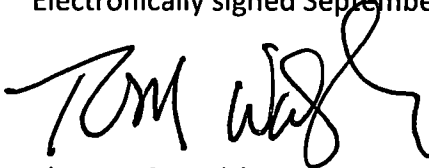
In reviewing the pending motion and the dispute between the parties, the Court is asked whether it is fair to consider these exhibits and supporting facts when ruling upon the pending summary judgment motion. Effectively, Applicant is asserting that the exhibits are inadmissible because it has not been able to depose Ms. Perkins as requested, and these facts are, therefore, not supported by admissible evidence as required by V.R.C.P. 56. See V.R.C.P. 56(c)(2) and (4); Gross v. Turner, 2018 VT 80, ¶ 8. This is a valid objection to facts supplied by a party in support of a motion for summary judgment. See V.R.C.P. 56(c)(4).

The inability to depose Ms. Perkins presents grounds for this Court to not consider the affidavit, letter, and paragraphs in Neighbors' Statement of Undisputed Material Facts relying thereon. This is because the probative value of the exhibits is "substantially outweighed by the danger of unfair prejudice" because Applicant has been unable to depose Ms. Perkins despite efforts to do so. V.R.E. 403. Thus, the Court will not consider these exhibits when reviewing the pending motion for summary judgment.<sup>1</sup>

### **Conclusion**

For the foregoing reasons, Applicant's motion is **DENIED**. In so concluding, we note that the Court will not consider Exhibit 4 and 5 when ruling upon the pending motion for summary judgment. Discovery has concluded and a response to the pending motion for summary judgment has not been filed. Given the fact that the motion has been pending for nearly a full year and discovery has been closed for approximately two months, Applicant is directed to respond to the pending motion within 14 days of the date of this Entry Order. Any subsequent reply may be submitted in accordance with the Vermont Rules of Civil Procedure.

Electronically signed September 29, 2023 in Burlington, Vermont pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink, appearing to read "Tom Walsh", is written over a horizontal line.

Thomas G. Walsh, Judge  
Superior Court, Environmental Division

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<sup>1</sup> We note that nothing would have prevented Applicant from raising this objection, available to it by rule, in response to the pending motion for summary judgment, allowing the Court to address all issues before it in an efficient manner.