

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 67-5-17 Vtec

109-111 Shelburne St/97 Locust St Cond. Use Appeal

ENTRY REGARDING MOTION

Appeal from DRB conditional use determination

Title: Motion for permission to proceed with appeal (Motion 1)

Filer: Margaret Murray

Attorney: Paul S. Gillies

Filed Date: May 26, 2017

Response filed in Opposition on 07/06/2017 by Attorney Brian S. Dunkiel for Appellee Champlain Housing Trust

Response filed in Agreement on 07/07/2017 by Attorney Kimberlee J. Sturtevant for Interested Person the City of Burlington

Reply in Support filed on 07/25/2017 by Attorney Paul S. Gillies for Appellant Murray

Consolidated Response in Opposition filed on 10/05/2017 by Attorneys Jonathan T. Rose and Brian S. Dunkiel for Appellee Champlain Housing Trust

The motion is DENIED.

The present appeal is of a March 17, 2017 City of Burlington (“City”) Development Review Board (“DRB”) decision approving a project application submitted by Champlain Housing Trust (“CHT”). Neighboring property owner, Margaret Murray, filed an appeal in this Court on May 26, 2017 and requests the Court permit the untimely appeal.

Ms. Murray argues she is an abutter to the project property and the DRB failed to provide her with a copy of the decision pursuant to 24 V.S.A. § 4464(b)(3). She argues she did not receive a copy until May 15, 2017, after she requested one. Therefore, she asserts that the Court must permit her to pursue her appeal rights to avoid a manifest injustice under 10 V.S.A. § 8504(b)(2)(C). CHT argues that Ms. Murray had actual knowledge of the approval as she attended the hearing at which the DRB approved the project such that she should be time barred from pursuing the present appeal.¹ For the following reasons, we agree.

¹ The City filed a response agreeing with CHT’s opposition on July 7, 2017.

The Court has discretion to allow an appeal where there is a condition “which would result in manifest injustice if the person’s right to appeal were disallowed.” 10 V.S.A. § 8504(b)(2)(C). Finding a manifest injustice “requires that due process or fundamental administrative fairness demand that the movant be allowed to contest the municipal approval, notwithstanding the strong policy interest in finality.” Atwood PUD-Jericho, No. 170-12-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Feb. 18, 2015) (Walsh, J.) (citing In re Feeley Constr. Permits, No. 4-1-1 Vtec, 5-1-1 Vtec, slip op. at 7 n.4 (Vt. Super. Ct. Envtl. Div. Jul. 5, 2011) (Wright, J.)). A party may not delay asserting an appeal after they have observed the contested activity under the principle of due process. Feeley Constr. Permits, No. 4-1-1 Vtec, 5-1-1 Vtec, slip op. at 7 n.4 (Jul. 5, 2011).

Generally, the 30-day appeal period doesn’t begin until the appellant receives actual or constructive notice of the relevant decision. Mahar Conditional Use Appeal, No. 113-9-15 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Jul. 13, 2016) (Durkin, J.).

Here, Ms. Murray has not demonstrated that requiring her to respect the 30-day appeal deadline would result in a manifest injustice. Ms. Murray had actual knowledge of the DRB’s March 13, 2017 decision to approve the project, as she attended the DRB deliberative hearing at which they approved the project. (Deposition of Margaret Murray at 67, filed on Oct. 5, 2017, CHT’s Consolidated Response to Appellant’s filings). Further, Ms. Murray read an article published in the Burlington Free Press on March 24, 2017, reporting that work on the project began. Id. at 14-15.

As such, Ms. Murray received both actual and constructive notice of the DRB decision on March 13 and on or about March 24, respectively. Even so, she did not file a notice of appeal until May 26. Ms. Murray may not have received a copy of the decision until May 15, 2017 (Affidavit of Margaret Murray at ¶ 8, filed Jul. 25, 2017) but has provided no information as to why permitting her to pursue the present untimely appeal despite her notice that the DRB had approved the project March 13 would result in a manifest injustice.²

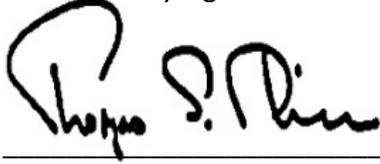
As no appeal was taken within the appeal period, and Ms. Murray has failed to show that a manifest injustice would occur if she was not allowed to file a late appeal, the March 17, 2017 decision has become final pursuant to 24 V.S.A. § 4472(d). The Court is without jurisdiction to hear an untimely appeal from a final decision. In re Gulli, 174 Vt. 580, 583 (2002).

For the foregoing reasons, Ms. Murray’s request is **DENIED**. Because of this, CHT’s motion to dismiss is now **MOOT**. These determinations complete the current proceedings in this appeal before this Court. A Judgment Order accompanies this Entry Order.

So Ordered.

² The Court would like to reiterate that, to the extent CHT asserts that Ms. Murray’s failure to sign the sign-in sheet resulted her not receiving a copy of the decision, the DRB has the burden of providing individuals who participated in the hearing with a copy of the decision, pursuant to 24 V.S.A. § 4464(b)(3), whether or not they sign in. Nothing in this decision should be construed as condoning the DRB’s failure to comply with statutory requirements.

Electronically signed on December 27, 2017 at Burlington, Vermont, pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read "Thomas S. Durkin". The signature is written in a cursive style with a large initial "T" and "D".

Thomas S. Durkin, Superior Judge
Environmental Division

Notifications:

Paul S. Gillies (ERN 3786), Attorney for Appellant Margaret Murray

Kimberlee J. Sturtevant (ERN 4778), Attorney for Interested Person City of Burlington

Brian S. Dunkiel (ERN 4594), Attorney for Appellee Champlain Housing Trust

Jonathan T. Rose (ERN 2170), Co-counsel for Appellee Champlain Housing Trust