

VERMONT SUPERIOR COURT
Environmental Division
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ENVIRONMENTAL DIVISION
Docket No. 121-10-19 Vtec

83 North Willard Street

DECISION ON THE MERITS

The City of Burlington is experiencing significant quality of life issues. This matter is one example of neighboring properties experiencing nuisance type impacts from daily activities. We acknowledge the concerns cited by the interested parties. We must, however, limit our review to whether the requested activity complies with the City of Burlington regulations.

Andrew and Diane Frankenfield (Appellants) appeal the Burlington Development Review Board's (DRB) denial of an application to increase the occupancy of a single family home located at 83 North Willard St., Burlington, Vermont (the Property) from 4 to 5 unrelated adults. Interested parties Caryn and Michael Long (Longs), who reside next to the subject property, oppose the application. The City of Burlington (City) participated in the matter, originally opposing the application. On the eve of trial, the City entered into a stipulation with Appellants supporting approval of the application.

Appellants' Statement of Questions contains 5 questions for our review. Questions 1 and 2 raise noise issues.¹ During the early pre-trial conferences in this matter, Appellants' attorney

¹ These two questions ask:

1. Did the Burlington Development Review Board err in determining that Appellants had failed to adequately address issues related to alleged noise impacts?
2. Can any alleged noise impacts be addressed by designating a tenant as the "noise contact" for neighbors and the City?

See Statement of Questions filed Cot. 24, 2019, at 1.

explained that his clients, the Appellants, had decided to appoint a contact person for the neighbors and police to contact should there be any noise issues and that this aspect of managing the property would be incorporated in writing in the leases. At this conference, Mr. Long noted how tenants socialize on the porch generating noise. Following this August 10, 2020 conference, noise issues were not further addressed or raised by the parties. Furthermore, this Court's July 9, 2020 and August 3, 2021 pretrial decisions on motions for summary judgment are clear that the only Questions remaining for trial are Questions # 4 and 5. See 83 North Willard Street CU, No. 121-10-19 Vtec, slip op. at 8 (Vt. Super. Ct. Envtl. Div. Aug. 3, 2021) (Walsh, J.) ("Question 4 remains before the Court, and Question 5 remains before the Court to the extent it raises issues related to the contents or sufficiency of Appellants' Parking Management Plan and waiver request pursuant to CDO § 8.1.15."); see also 83 North Willard Street CU, No. 121-10-19 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Jul. 9, 2020) (Walsh, J.).

Question 3 asks whether the DRB erred in determining that Appellants' property has less than 2,700 square feet of living space. For the reasons set forth in our July 9, 2020 Decision on motion for summary judgment, we conclude that the top floor of the Property is not an "attic" and is included in the square foot calculation pursuant to Comprehensive Development Ordinance (CDO) § 4.4.5(d)(5)(C). See 83 North Willard Street CU, No. 121-10-19 Vtec at 1 (Jul. 9, 2020). Thus, the dwelling meets the 2,700 square foot threshold.

Question 4 asks: "[d]id the Burlington Development Review Board err in determining that Appellants were not entitled to a waiver from the additional parking requirement?" See Statement of Questions at 1. For the reasons set forth in our March 3, 2021 Decision on summary judgment, we conclude that Appellants may request a waiver for 1 of the 3 required parking spaces at the Property. See 83 North Willard Street CU, No. 121-10-19 Vtec at 5 (Mar. 3, 2021).

Question 5 asks: "Can the additional parking requirement be met by either 1) inserting a lease provision that prohibits the 5th tenant from owning a car and expressly forbids them from parking on-site or 2) leasing an off-site parking spot?" Statement of Questions at 1. As concluded in our March 3, 2021 Decision on summary judgment, to the extent Question 5 asks whether Appellants can use a lease provision or off-site parking as a direct replacement for a required

parking space under CDO Table 8.1.8-1 or § 4.4.5(d)(5)(C)(ii), we conclude that the answer is no. Id. at 5–6. It is the Court’s understanding that the City and Appellants agree. In the absence of a waiver, Appellants must provide 3 on-site parking spaces and there are no provisions for alternative compliance. See CDO § 8.1.8; CDO Table 8.1.8-1; CDO § 4.4.5(d)(5)(C)(ii). The applicable parking requirements of CDO Table 8.1.8-1 and § 4.4.5(d)(5)(C)(ii) cannot be fulfilled by lease provisions or off-site parking arrangements.

This matter was set for trial on Questions 4 and 5 on May 25, 2021. At the outset of trial, Appellants and the City advised the Court that they had reached an agreement on the outstanding issues (Stipulation), including the details of a Parking Management Plan. The Longs advised that they had only received the Stipulation on the eve of trial and that they opposed the resolution. The Longs requested additional time to review and consider the Stipulation. The Court, therefore, recessed the hearing to a later date to allow the Longs time to prepare evidence as to why Appellants’ and the City’s Stipulation does not comply with the City’s regulations.

The Court reconvened the one-day remote Webex trial on August 3, 2021. The Court did not complete a site visit to the subject Property. Based upon the evidence in the record, the Court issues the following Findings of Fact, Conclusions of Law, and Judgment Order that accompanies this Merits Decision.

Appellants are represented by Hans G. Huessy, Esq. The City is represented by Kimberlee J. Sturtevant, Esq. Interested parties Caryn and Michael Long are self-represented.

Findings of Fact

Based upon the credible evidence presented at the August 3, 2021 Merits Hearing, the Court renders the following Findings of Fact.

1. Appellants applied to the City of Burlington Development Review Board (DRB) for conditional use approval to increase occupancy from 4 unrelated adults to 5, and for a 1 space parking waiver, at Appellants’ single family residence located at 83 North Willard St., Burlington, Vermont (the Property).

2. On September 17, 2019, the DRB denied Appellants' application to allow occupancy by 5 unrelated adults at the Property.
3. The DRB's decision included an adverse finding as to the requested parking waiver pursuant to the City of Burlington Comprehensive Development Ordinance (CDO) § 8.1.15.
4. The Property is located in the Medium-Density Residential District (RM District).
5. Potential parking space at the Property is limited to a one-car garage and a single car width driveway approximately 25 feet long.
6. Appellants timely appealed the DRB decision to this Court on October 10, 2019.
7. Some of the salient features of the Appellants' and the City's Stipulation include:
 - a. By lease agreement with tenants, no more than two cars can be parked on-site at any time and one of those cars must be parked in the garage.
 - b. Appellants will purchase a CarShare Vermont membership, or equivalent, and reimburse \$100 per month usage.
8. Appellants have a Property Management Plan which addresses topics, including but not limited to, the following:
 - a. A management team, including a local contact person and one tenant designated as the on-site manager to assure compliance with lease terms and property management issues.
 - b. A methodology for selecting tenants to help ensure compliance with lease terms and property management issues.
 - c. A Parking Management Plan. This plan allows for a maximum of two cars parked on-site, membership for tenant(s) within CarShare Vermont including reimbursement of \$100 monthly usage.

Conclusions of Law

On appeal, the Statement of Questions remaining for the Court to decide concern: (4) whether a parking waiver is appropriate, and (5) is the Parking Management Plan compliant with City regulations.

We note here that this appeal is *de novo*. See 10 V.S.A. § 8504(h). Although Appellants' Statement of Questions are written in a form asking for review of the DRB's actions, this Court will review the application "as though no action whatever has been held prior thereto," and will apply the substantive standards that were applicable to the tribunal below.² See Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) (quoting In re Poole, 136 Vt. 242, 245 (1978)); Trail v. Appeal of JO No. 2-233, No. 88-4-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Jan. 16, 2007) (Durkin, J.).

In addition to our very limited scope of our trial, Applicants offer into evidence a Stipulation and Property Management Plan to support positive conclusions that a parking waiver is appropriate and that the Parking Management Plan is compliant with the CDO.

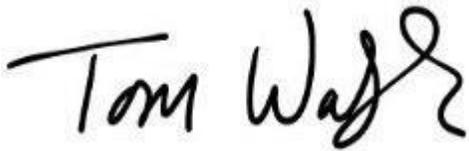
The Longs offered two exhibits into evidence which read much like pre-filed testimony. Over the "gentle" objections by Attorney Huessy as to their admissibility, the Court admitted both exhibits noting that each would be given the weight they deserve, including redacting specific sections of each exhibit. See V.R.E.C.P. 2(e) (allowing this Court to admit evidence at its discretion "if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs"). The Longs' evidence before the Court is contained in these two exhibits and some additional testimony. The Longs offer that a parking waiver is inappropriate and that the Parking Management Plan does not meet the standards in the ordinance, however, few specifics are provided. The specific details that are provided relate to whether Appellants will comply with the Parking Management Plan going forward, such as parking that encroaches into the sidewalk and the narrow width of the garage. Although these are important issues, they are not before the Court in this matter. The Longs' evidence does not show non-compliance with the CDO.

Conclusion

² While this Court's review is generally limited to issues raised by an applicant's Statement of Questions, the "[t]he literal phrasing of the question cannot practically be considered in isolation from the . . . action that prompted the appeal." In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190, 194. Moreover, we appreciate that Appellant was a self-represented litigant at the time of drafting the Statement of Questions and we view the Statement of Questions in light of our obligation to assure that there is not an unfair disadvantage in this proceeding. See Sandgate Sch. Dist. v. Cate, 2005 VT 88, ¶ 9, 178 Vt. 625 (noting that the court traditionally affords "wider leeway" to pro se litigants); see also In re Hawk's Nest South, LLP, No. 84-5-10 Vtec, slip op. at 5-7 (Vt. Super. Ct. Env'tl. Div. Nov. 29, 2010) (Durkin, J.) (allowing leniency in analyzing legal issues incorporated in a pro se Appellants' statement of questions).

For the reasons stated above, we **REVERSE** the DRB's October 10, 2019 Decision denying Appellant's request for a conditional use permit. We **REMAND** this matter to the DRB for the ministerial act of granting conditional use approval and issuing a permit consistent with this decision. The DRB shall incorporate the terms of the Stipulation filed with the Environmental Division on May 25, 2021 and the terms within the Property Management Plan filed with the Environmental Division on July 27, 2021. A Judgment Order accompanies this Merits Decision. This completes the current proceedings before this Court.

Electronically Signed: 9/14/2021 11:17 AM 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