VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 16-2-20 Vtec

Burr & Burton Academy Act 250 JO 8-161	DECISION ON MOTION

This appeal concerns a jurisdictional opinion (JO) issued by the Act 250 Districts 1 & 8 Coordinator (District Coordinator) to Burr & Burton Academy (BBA) for the construction of a 25,000 square foot, 3-story academic building with a central courtyard (the Project)[1] located at 57, 61, and 63 Seminary Ave. in Manchester, Vermont. The central issue in this case concerns the District Coordinator's denial of the application as incomplete due to nonpayment of the application fee set forth under 10 V.S.A. § 6083(a) and the Act 250 Rules for BBA's proposed project. The Natural Resources Board (NRB) opposes BBA's appeal.

Presently before the court is BBA's motion for summary judgment and NRB's cross motion for summary judgment on all of the questions presented in BBA's Statement of Questions.[2]

BBA is represented by David L Grayck, Esq. The NRB is represented by Gregory J Boulbol.

[1] The Project also includes the construction of a separate maintenance facility, a new green space, and circulation improvements.

[2] We note here that on March 3, 2021, BBA filed a motion to strike the affidavit of Donna Russo-Savage on the grounds that it constitutes an inadmissible expert opinion concerning a question of law. The NRB responded in opposition to this motion on March 31, 2021, arguing that Ms. Russo-Savage was not being offered as an expert witness and the facts presented in the affidavit are admissible under V.R.C.P. 56 and V.R.E. 902(5). As this Court resolves the issues presented in BBA's Statement of Questions in this decision on other grounds, this motion is now moot.

Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). When considering cross motions for summary judgment, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332. In determining whether there is any dispute over a material fact, "we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n Inc. 170 Vt. 25, 28 (1999) (citation omitted); V.R.C.P. 56(c)(1)(A).

Findings of Fact

We recite the following facts solely for the purpose of deciding the pending motions for summary judgment. These facts do not constitute factual findings, as factual findings cannot occur until after the Court conducts a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.).

1. Burr and Burton Academy (BBA) is a Non-profit Corporation founded in 1829 by the Vermont Legislature Under Act No. 40 as the Burr and Burton Seminary. BBA is located in Manchester, Vermont.
2. BBA's Vermont Secretary of State Business ID is 005 1970 and its File No. is N08414.
3. BBA is an approved independent secondary school, pursuant to 16 V.S.A. 11(8).

1973 Project

4. On August 10, 1973, upon request by BBA for a determination concerning BBA's status under Act 250 with respect to a boiler replacement project (1973 Project), the Act 250 District Coordinator issued a letter to the Environmental Board Chairman. In this correspondence, the District Coordinator inquired as to whether the 1973 Project constituted a project for "municipal purposes." The District Coordinator also noted that "BBA is defined as a 'public' school because the town pays more than 75% of its operating costs through tuition payments."

5. On August 15, 1973, the Environmental Board Chairman's answer indicated that the 1973 Project did not constitute a substantial change to the existing facilities and stated that “no formal declaratory ruling was issued” concerning BBA's status under Act 250.
6. On August 23, 1973, the Act 250 District Coordinated responded to BBA's inquiry in stating that the 1973 Project "[did] not require a permit pursuant to 10 VSA, Chapter 151."

1975 Project

7. On October 2, 1975, upon request by BBA for a determination concerning BBA's status under Act 250 with respect to planned improvements[3] (1975 Project), the Act 250 District Coordinator sent a memorandum to the Environmental Board Chairman. In this memorandum, the District Coordinator asked whether the Chairman agreed that the 1975 Project "is for municipal purpose and does not need a permit" and included checkbox in which for the Chairman to respond. The Chairman marked the "needs a permit" box and included a note that read "see Rule 2(L) of the Board Rules."[4]
8. On October 24, 1975, the BBA challenged the Coordinator's Opinion that BBA's 1975 Project constituted project for a "commercial purpose," pursuant to Rule 2(L), and sought an additional determination as to whether the 1975 Project was for a municipal purpose.
9. On October 28, 1975, in response to BBA's letter addressing the Coordinator's Opinion, the Environmental Board Chairman issued a determination on the 1975 Project (1975 Determination), noting that it sought improvements for the purpose of providing educational facilities and services. The Board Chairman concluded that BBA was serving a municipal purpose and therefore did not require a permit under Act 250.
10. On October 29, 1975, BBA applied for an Act 250 permit for the 1975 Project. One day later, the District No. 8 Environmental Commission issued a Notice of Dismissal for BBA's application, based upon the 1975 Determination.

[3] The planned improvements included the construction of a 124-foot by 90-foot gymnasium addition, a 1-acre parking lot, a library renovation, a cafeteria-study area, and a soccer field.

[4] The State of Vermont Environmental Board adopted revised Environmental Board Rules on October 9, 1973, which became effective on July 15, 1975. Environmental Board Rule 2(E) defined projects for a municipal purpose as including those projects "which are to be used by the state, county, municipality, or members of the general public." Rule 2(L) distinguished this with a commercial purpose, which was defined as "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others. in exchange for payment of a purchase price, fee, contribution, donation or other object having value." These rules were the precursor to Act 250 Rules, which were most recently revised on December 4, 2015.

11. On November 4, 1975, BBA received a refund of the $400 application fee associated with the 1975 Project and the District Coordinator noted that the 1975 Project "[did] not require an Act 250 permit."
12. In the fiscal year 1975, BBA's operating expenses totaled $676,000. Approximately $660,00 of the tuition income was generated from the taxes of various Vermont Towns and $16,000 from sources other than taxes.

1996 Project

13. On November 26, 1996, BBA requested a jurisdictional opinion (JO) on whether planned improvements (1996 Project) to campus facilities would require an Act 250 permit. In this request, BBA included enrollment data.
14. On December 4, 1996, the District Coordinator issued JO No. 8-161. The JO stated that "[BBA] is an independent secondary school but it has previously been accorded "municipal" status for purposes of determining Act 250 jurisdiction" and therefore did not require an Act 250 permit. The JO concluded that the 1996 Project did not constitute a substantial change pursuant to 10 V.S.A. 5 6081(d), which "required that more than 10% capacity increase occur in the student population."

2004 Project

15. On January 9, 2004, BBA applied for an Act 250 permit for proposed improvements (2004 Project) and included a statement that the project was for a municipal purpose and therefore was exempt from payment of a fee.
16. On February 11, 2004, the District Commission issued Act 250 land use permit No. 8B0565 and a Decision (2004 Decision) to BBA. The 2004 Decision noted that the 2004 Project involves the construction of improvements for a municipal purpose as a substantial change to a preexisting development, since it will increase the student capacity by more than 10%
17. BBA did not pay an application fee for the 2004 permit.

2005 (Dash 1) Project

18. On April 29, 2005, BBA applied for Act 250 permit to make modifications to the 2004 Project (Dash 1 Project) and included a statement that the project was for a "municipal school" and therefore was exempt from associated fees.[5]
19. On May 24, 2005, the District Commission issued Act 250 permit No. 8B0565-1 for the 2004 Project Amendments (Dash 1 Permit).
20. BBA did not pay an application fee for the Dash 1 Permit.

2015 (Dash 2) Project

21. On January 26, 2015, BBA applied for an Act 250 permit for the reconstruction of an existing 6-bedroom dwelling to be used as BBA's Headmaster House (Dash 2 Project).
22. BBA paid an application fee of $7,020 for the Dash 2 Project application.
23. On March 4, 2015, the District Commission issued Act 250 Permit No. 8B0565-2 (Dash 2 Permit) to BBA.

2015 (Dash 3) Project

24. On May 29, 2015, BBA applied for an administrative amendment to the Headmaster House (Dash 3 Project).[6]
25. On June 5, 2014, the District Commission issued Act 250 Permit No. 8B0565-3 as an administrative amendment permit (Dash 3 Permit).

2019 (Dash 4) Project

26. On July 26, 2019, BBA filed an application for an Act 250 permit for the replacement of parking facilities in preparation for concerting an existing parking lot into a courtyard and green space on a 53-acre parcel (Dash 4 Project).
27. BBA paid a $2,960 application fee for the 2019 Project application.

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[5] The modifications included alterations to the playing field, parking, fitness center, utilities layout, and a larger addition to the Riley Arts Center (the (Dash 1 Project).

[6] There is a genuine dispute of material fact concerning whether BBA paid a $50 application fee for the Dash 3 permit. The NRB has provided proof of a $50 receipt relative to the Dash 3 Project. See NRB Exhibit C. Through the affidavit of Dennis Filippi, BBA's Director of Finance and Operations, BBA alleges that it did not pay any fee for the Dash 3 Permit. See Affidavit of Filippi at ¶ 7. As this represents a genuine dispute of material fact, this Court does not consider the Dash 3 permit for purposes of the pending motions

28. On December 17, 2019, the District Commission issued Act 250 Permit No. 8B0565-4 (Dash 4 Permit) for the Dash 4 Project.

2020 (Dash 5) Project

29. On BBA applied for an Act 250 permit for proposed improvements including the construction of a 25,000 square foot, 3-story academic building with a central courtyard (Dash 5 Project).
30. BBA did not pay an application fee for the 2020 Project application.
31. On February 4, 2020, District 1 & 8 Coordinator issued a JO (Dash 5 Decision) denying BBA's 2020 Project application as incomplete because BBA failed to submit Act 250 Fee Schedule A, did not pay the Act 250 application fee, and did not qualify for a fee waiver.
32. On February 24, 2020, BBA timely appealed the Dash 5 Decision to this Court.
33. On February 25, 2020, BBA paid a $ 96,200 application fee for the Dash 5 Project application.
34. On May 6, 2020, the District Commission issued Act 250 permit No. 8B0565-5 (Dash 5 Permit) to BBA for the 2020 Project.

BBA Funding and Enrollment

35. In fiscal year 2020, BBA was paid $10,574,159 for 617 "sending" students from 13 Vermont municipalities and $559,098 for 35 "choice" students from 6 Vermont municipalities. Enrollment for the 2022 fiscal year is likely to be of comparable composition.
36. The Dash 5 Project will be used for the provision of educational services to the "sending" and "choice" students enrolled at BBA.
37. BBA and the Taconic and Green Regional School District (TGRS District) have an existing agreement, made September 2, 2020, for the provision of secondary school services to the students of the TGRS District. Under this agreement, the TGRS District pays the per pupil regular tuition charge of 517,990 for the 2020-2021 fiscal year. In the 2020 fiscal year, BBA received payments of $4,717,897.17, $4,983,804.10, and $5,107,191.57 from TGRS District.
38. BBA does not decide whether a student is a legal resident of the TGRS District, or any other school district. All decisions as to the residency of the "Sending" and "Choice" students are made by the students' respective school district.

39. TGRS District is a unified school district governed by a 13-person board for resident students of the towns of Danby, Dorset, Landgrove, Londonderry, Manchester, Mt. Tabor, Peru, Sunderland, and Weston.
40. The TGRS District is part of the Bennington-Rutland Supervisory Union (BRSU).
41. BRSU contracts with BBA for special education services for residents located in the towns of Danby, Dorset, Landgrove, Londonderry, Manchester, Mt. Tabor, Pawlet, Peru, Rupert, Sunderland, Weston, and Winhall.
42. BBA is exempt from real property taxation with respect to its ownership of real property in the Town and Village of Manchester and the Town of Peru. BBA's ownership of real property is solely within Manchester and Peru.

Discussion and Conclusion of Law

Both BBA and NRB move for summary judgment on all of BBA's Questions listed in their Statement of Questions. BBA's' Question 1 concerns the classification of BBA as a "municipal agency," pursuant to 10 V.S.A. § 6083a(c), for purposes of application fee exemption for BBA's land use permit No. 8B0565-5 (Dash 5 Permit). BBA's Question 3 addresses whether the NRB is barred by *res judicata*, issue preclusion, or equitable estoppel to require a fee pursuant to Act 250 Rule 10(E)(iii) and 10 V.S.A. § 6083a(c). Questions 2 and 4 raise issues relevant to this Court's jurisdiction and whether the present appeal should be dismissed if the District No. 8 Environmental Commission (District Commission) issues a final decision on the merits of the Dash 5 Project prior to this Court's adjudication of this appeal. We address these issues in order below.

I. Question 1

BBA's Question 1 asks: "[w]hether, pursuant to Act 250 Rule 10(E)(iii) and 10 V.S.A. §6083a(a), the BBA N[otice of Appeal] Exhibit 1 permit application is incomplete unless and until BBA pays the fee required by 10 V.S.A. 6083a and Act 250 Rule 11?" In effect, this question asks whether BBA is exempt under § 6083a(c) as a "municipal agency" from Act 250 permit application fees. See Act 250 Rule 10 (E) (listing permit application requirements).

Act 250 Rule 10 (E)(iii) and 11 (A) require that land use permit applications include fees as proscribed by 10 V.S.A. § 6083a(c). Pursuant to § 6083a(c), "[f]ees shall not be required for projects undertaken by municipal agencies or by State governmental agencies, except for

publication and recording costs." The statute, however, does not define "municipal agencies" or "state governmental agency" for purposes of § 6083a(c).

Generally, when assessing statutory interpretation, the "paramount task in construing statutes is to ascertain and implement the legislative intent." McClellan v. Haddock, 2017 VT 13, ¶ 13, 204 Vt. 252; State v. Love 2017 VT 75, ¶ 9, 205 Vt. 418. In doing so, "[w]e interpret the statute as a whole, looking to the reason and spirit of the law and its consequences and effects to reach a fair and rational result." In re Margaret Susan P., 169 Vt. 252, 262 (1999); see also Miller v. Miller 2005 VT 89, ¶ 14, 178 Vt. 273 (looking to the purpose of the statute and intent of the legislature in interpreting an undefined statutory term). Generally, we look first to a statutory language's plain meaning as an expression of legislative intent. If, however, the language is ambiguous or does not provide sufficient guidance to ascertain intent, the Court '"may look elsewhere to determine the legislative intent in order to provide a fair and reasonable construction of the statute." State v. Reed 2017 VT 28, ¶ 20, 204 Vt. 399. More specifically, where undefined terms are ambiguous, the Court discerns legislative intent by "considering the statute as a whole, regarding integral parts of the statutory scheme together." Heffernan v. Harbeson 2004 VT 98, ¶ 7, 177 Vt. 239.

Here, NRB argues that the plain language and common usage of the term "municipal agency," is unambiguous. BBA argues that this term is ambiguous as the NRB has failed to exercise its authority, pursuant to 10 V.S.A. § 6025(b), to establish a definition of "municipal agency" as a basis for denying fee exemption, thereby generating ambiguity as § 6083a(c).

Ambiguity exists where a statute is "capable of more than one reasonable interpretation, each vying to define a term to the exclusion of other potential interpretations." See State v. Thompson, 174 Vt. 172, 177 n. 3 (2002); State v. Brunner, 2014 VT 62, ¶ 18, 196 Vt. 571. Here, §6083a(c) has been inconsistently interpreted and applied, as shown by the waiver of a fee in the approved 2004 Project and Dash 1 Projects and later acceptance of a fee in the later Dash 2 and Dash 4 Projects.[7] This inconsistent application interprets the term both broadly, by encompassing

[7] The NRB correctly notes that at the time of the 1975 and 1996 Projects a "public school" was defined as elementary or high schools which are "principally supported by public taxation or tuition payments derived from public funds." At this time, as the majority of BBA's funding was derived from public taxes, BBA was considered a public school. In 2020, the definition of a public school changed to include "an elementary school or secondary school operated by a

incorporated schools with a municipal purpose, and strictly, by excluding such schools. Therefore, as there exists ambiguity in the interpretation and application, we look to the purpose and intent of the legislature and the statute as a whole. See Burlington Elec. Dep't v. Vermont Dep't of Taxes, 154 Vt. 332, 335 (1990).

Additionally, this Court recognizes that "when the plain meaning of the statute contradicts the intent of the Legislature, [the Court is] not confined to a literal interpretation of the statutory language." See Burr & Burton Seminar v. Town .of Manchester 172 Vt. 433, 436 (2001) (citing In re C.S. 158 Vt. 339, 343 (1992)). Indeed, where a statute provides an express exemption, such as a fee exemption, the Court "must ascertain the legislative intent from a consideration of the entire . . . statute and with regard to both the subject matter of legislation and its ramifications." Id. (citing Governor Clinton Council Inc. v. Koslowski 137 Vt. 240, 247 (1979) (holding that even when the express language of a statute only considers ownership and does not consider "use" for the purpose of tax exemptions, if the purpose of the exemption statute seeks to only provide benefits to property used for to serve a public purpose, the Court may consider a property's "use")); see also Addison County Cmty. Action v. City of Vergennes, 152 Vt. 161, 165—66 (1989) (noting that Courts should seek to avoid construing a statute in a manner that would render the statute ineffective or illogical). We therefore first look to the provisions of Act 250 that address municipal development and purpose.

Here, while "municipal agency" is undefined, Act 250 Rule 2(C)(14)(b) does define a "municipal purpose," with respect to 10 V.S.A. § 6001(3), as "any project proposed by an entity enumerated in 1 V.S.A. § 126.[8] In accordance with 1 V.S.A. § 126, a municipality includes "a city, town, town school district, incorporated school or fire district or incorporated village, and all other governmental incorporated units." BBA argues that it has been an "incorporated school" pursuant to Act. No. 40 since 1829 and as such constitutes a municipality for purposes of 1 V.S.A. § 126. NRB contends that this provision refers instead to "incorporated school districts" because the

school district." This change, however, precedes the inconsistent use and application of whether BBA is considered a "municipal agency" and exempt under § 6083a(c) from an application fee in the 2004 and Dash 1 Permit.

[8] Act 250 Rule 2(C)(14)(a) also defines "municipality", for the purposes of 10 V.S.A. §§ 6084 and 6085, as "any city, town, or incorporated village wherein the land is located." This definition, however, is specific to determinations of party status and notices of applications, hearings, and commencement of review. See 10 V.S.A. §§ 6084, 6085.

inclusion of an "incorporated school" in the definition of a municipality would render absurd results. See 16 V.S.A. §§ 471—515 (discussing incorporated school districts). BBA counters that the construction of this provision utilizes a polysyndeton through the use of the conjunction "or," which renders the term ambiguous. [9]

This Court may reasonably interpret the term to address either an incorporated school or incorporated school district due to the placement of the "or" and the construction of the listed commas. As there is more than one reasonable interpretation, the construction of this provision is ambiguous, and we therefore look again to the legislative intent and the statute as a whole to provide guidance. State v. Thompson, 174 Vt. 172, 177 n. 3 (2002). In the interest of ascertaining legislative intent, Act 250 Rules provide guidance by distinguishing between municipal and commercial purposes.

Act 250 Rule defines 2(C)(15) "state, county, or municipal purposes" as the construction of improvements which are undertaken by or for the state, county, or municipality and which are to be used by the state, county, municipality, or members of the general public." In contrast, a commercial purpose means "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value." Act 250 Rule 2(C)(4).

The primary function of Act 250's distinguishment between municipal and commercial purposes is to provide greater leniency when engaging in projects devoted to serving the public. It so follows that the intent of the legislature in providing a fee waiver operates to provide greater leniency for these municipal purposes. See Act 250 Rule 2(C)(4) (defining commercial purpose); see also Capitol Plaza Act 250, No. 59-5-19 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. June 17, 2020) (Walsh, J.) (discussing more lenient restrictions on developments for municipal purposes); Vermont Agency of Nat. Res. v. Duranleau, 159 Vt. 233, 237–238 (1992); In re Agency of Admin., State Bldgs. Div., 141 Vt. 68, 77 (1982) (noting that "[w]hen first introduced in the House on January 30, 1970, Act 250 specifically exempted all activities of state government from its definition of development"). Indeed, this language indicates that the purpose of these statutory schemes is to provide exemptions for land use permitting processes that benefit or serve the

[9] A polysyndeton is a repetition of conjunctions in close succession.

state, municipality, or members of the general public. See Vermont Agency of Nat. Res. v. Duranleau, 159 Vt. 233, 237 (1992) (distinguishing a municipal purpose and a commercial purpose of a corporate construction company). We therefore look to the purposes being served by BBA as an incorporated school and the Dash 5 Project.

As stated above, BBA it is an incorporated school that serves a municipal purpose in providing "public" education for multiple Vermont municipalities pursuant to 16 V.S.A. § 821. BBA's municipal purpose on behalf of school districts, such as the TGRS District, evidenced by the 652 students' tuition, amounting to approximately $11,133,257, that was paid by public tax dollars in fiscal year 2020. Indeed, 16 V.S.A. § 822 even directs school districts to maintain public high schools or pay tuition to an approved independent high school, such as BBA, in order to satisfy constitutional obligations of providing equal education opportunities. See also 16 V.S.A. §§ 1, 164(9), 824, 827. The TGRS District also has sole authority to determine whether students are residents of the TGRS District and this final determination is accepted by BBA, which then provides the service of secondary education. See 16 V.S.A. § 1075 (addressing students' residences). Additionally, BBA has a documented history in receiving fee waivers due to its identified role in serving a municipal purpose as an independent secondary school for the 1973, 1975, 1996, 2004, and Dash 1 Projects. BBA's Dash 5 project will also be used for the provision of educational services to the "sending" and "choice" students enrolled at BBA.

BBA asserts that as it serves a municipal purpose and is an approved independent school, BBA should be exempt from land use permit fees. BBA argues that while the legislature has an interest in ensuring funding to the Act 250 program, requiring a fee for Act 250 permit applications that serve a municipal purpose it is contrary to the Legislature's intent.

We agree. Indeed, the requirement of such a fee, in effect, serves only to recirculate $96,200 public tax dollars, received by BBA pursuant to 16 V.S.A. § 821 from municipal districts, in the form of intra-governmental transfers with no benefit to public educational services for which the tax dollars were intended. The legislative intent in providing a fee exemption seeks to provide less stringent procedures for projects that serve a municipal purpose and are conducted by a municipal agency. As a general principle, this Court seeks to "avoid construing a statute in a manner that would render the statute ineffective, or lead to irrational consequences." See Burr

& Burton Seminar v. Town of Manchester, 172 Vt. 433, 437 (2001) (citing Addison County Cmty. Action v. City of Vergennes, 152 Vt. 161, 165–66 (1989)). It therefore follows that were this Court to limit this exemption to a school that has historically and continues to operate primarily through public tax dollars, seeks to construct improvements for use by the public for educational services, and is contractually and statutorily bound to provide educational services to the TGRS District, this Court would render the purpose of this exemption, in permitting incorporated schools that serve a municipal purpose to waive an application fee, ineffectual.

For these reasons, we therefore **GRANT** BBA's motion for summary judgment on Question 1 of their Statement of Questions and **DENY** NRB's cross motion for summary judgment.

II. Question 2

BBA's Question 2 asks "[w]hether, pursuant to 10 V.S.A. 5 6083a(c), the Application shall not require "fees: as a project undertaken by a municipal agency, except for the publication and recording costs?" In their motion for summary judgment, BBA notes that while the District Commission's Dash 5 Decision denying the application as incomplete was timely appealed, BBA's later payment of the application fee and the Commission's subsequent issuance of an Act 250 permit for the Dash 5 project does not affect this Court's jurisdiction over the Dash 5 appeal. In this Question, BBA argues that the February 4, 2020, Dash 5 Decision, indicating the application was incomplete, rendered this Court's jurisdiction over the dispute. BBA argues that this Court has jurisdiction, notwithstanding the District Commission's later issuance of a permit and decision on May 6, 2020, and therefore this Court has authority to order a refund of the Dash 5 application fee.

It is a general rule of this Court that when proper notice of appeal from a final decision is timely filed, this Court has jurisdiction "as to all matters within the scope of the appeal." In re Petition of GMP Solar-Richmond, LLC, 2017 VT 108, ¶ 17, 206 Vt. 220 (citing Downer v. Battles, 103 Vt. 201, 202 (1930)); Alfred v. Alfred, 87 Vt. 542, 543 (1914); Eustance Act 250 Jurisdictional Opinion No. 2-231, 13-1-06 Vtec, slip op. at 15 (Vt. Envtl. Ct. Mar. 16, 2007) (Wright, J.); see also V.R.C.P. 62(d) (providing limited exceptions). Under Act 250 Rule 10 (D), a District Coordinator's decision that an application is "substantially incomplete is treated as a jurisdictional opinion, pursuant to 10 V.S.A. § 6007(c)." See 10 V.S.A. § 6007(c). Thus, as a jurisdictional opinion operates

as a final decision, we conclude that this Court has jurisdiction to consider the Dash 5 Decision issued on February 4, 2020. For this reason, we **GRANT** BBA's motion for summary judgment on Question 2.

III. Question 3

BBA's Question 3 asks "[w]hether the State of Vermont, Natural Resources Board, is barred by the doctrine of claim preclusion (*res judicata*), issue preclusion (collateral estoppel), equitable estoppel, or waiver, to require a fee pursuant to Act 250 Rule 10 (E)(iii) and 10 V.S.A. § 6083a(a) such that the Application is complete under § 6083a, and Act 250 Rules 10 (E)(iii) and 11?" In this Question, BBA argues that the 1973 and 1975 administrative opinions, the 1996 jurisdictional opinion, and the issuance of the 2004 and Dash 1 permits establish the necessary elements for claim or issue preclusion with respect to BBA's municipal status. We address these issues in turn below.

A. Res Judicata

The doctrine of *res judicata*, or claim preclusion, "bars litigation of a claim or defense if there exists a final judgment in former litigation in which the parties, subject matter, and causes of action are identical, or substantially identical." Kellner v. Kellner 2004, VT 1, ¶ 8, 176 Vt. 571 (mem.). *Res judicata* operates to protect courts and parties from the burdens of relitigation by barring parties from raising claims that were or could have been raised in a prior action. Natural Res. Bd. Land Use Panel v. Dorr 2015 VT 1, ¶ 10, 198 Vt. 226 (quoting Carlson v. Clark 2009 VT 17, ¶ 13, 185 Vt. 324); State v. Dann 167 Vt. 119, 125 (1997) (discussing the purpose of r*es judicata*).

When applying this doctrine against administrative agencies, such as ANR, the Court reviews the criteria required under *res judicata* more narrowly. See Delozier v. State, 160 Vt. 426, 429 (1993); see also United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966) (noting that *res judicata* applies to administrative decisions only when "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"); Sheehan v. Dep't of Employment Training, 169 Vt. 304, 308 (1999) (applying claim and issue preclusion to an administrative

decision only when an agency acts in a "judicial capacity"); 1 C. Koch, Administrative Law and Practice § 6.63, at 312 (Supp. 1997).

The 1973 Environmental Board Chairman opinion does not constitute a final judgment as, pursuant to the 1973 Vermont Environmental Rule 4(b), the Chair lacked authority to issue opinions on Act 250 determinations and the opinion itself noted that it was not a "formal ruling." See Vermont Agencv of Nat. Res. v. Francis Supeno et. al., 98-8-15 Vtec, slip op. at 4—5 (Vt. Super. Ct. Envtl. Div. Feb. 14, 2017) (Walsh, J.). Moreover, the subject matter of the opinion did not address BBA's municipal status, but rather addressed whether the 1973 Project was a "substantial change" requiring an Act 250 permit. This determination, therefore looks to the specifics of the 1973 Project as proposed, rather than the purpose or status of BBA as municipal. For these reasons, *res judicata* does not apply with respect to the 1973 opinion ad it does not constitute a "final judgment."

The 1975 Environmental Board Chairman determination and District Commission Notice of Dismissal address whether the proposed 1975 Project required an Act 250 permit and whether BBA functioned a "public school" pursuant to Act 250 Rule 2(L) and 16 V.S.A. § 11. It is important to note here that the definition of a public school, which at the time of the 1975 permit included schools "principally supported by public taxation or tuition payments derived from public funds," the definition was revised to include only schools "operated by a school district." 16 V.S.A. § 11(a)(7). Thus, the doctrine of *res judicata* does not apply here as the subject matter is not substantially identical to the pending appeal.

Next, while the 1996 jurisdictional opinion was a final judgment and may have involved the same parties, it did not address the same subject matter at issue here. This decision, like the 1973 opinion, focused upon whether the proposed project constituted a "substantial change" requiring an Act 250 permit and did not reach the issue of application fee exemptions or waivers. Therefore, for the same reason as above, *res judicata* does not attach here with respect to the 1996 jurisdictional opinion.

The 2004 and Dash 1 projects do not satisfy *res judicata* on the same grounds. The 2004 Permit and Decision concluded that "jurisdiction attaches because the project involves the construction of improvements for a municipal purpose as a substantial change to a pre-existing

development, since it will increase student capacity by more than 10%." In this Decision, the District Commission relied upon 10 V.S.A. § 6081 (d)(3) and did not conclude that exemption was waived on the basis that BBA constituted a municipal agency. As this Court is instructed to interpret *res judicata* narrowly when reviewing administrative decisions, we conclude that the 2004 and Dash 1 decisions so not apply here.

B. Collateral Estoppel

Collateral estoppel, or issue preclusion, "bars the subsequent relitigation of an issue that was actually litigated and decided in a prior case where that issue was necessary to the resolution of the dispute." Scott v. City of Newport, 2004 VT 64, ¶ 9, 177 Vt. 491 (quoting Alpine Haven Prop. Owners Ass'n v. Deptula, 2003 VT 51, ¶ 13, 175 Vt. 559). An issue is necessary for the resolution of a dispute when, "in the absence of a determination of the issue, the judgment could not have been validly rendered." In re Audet No. 34-2-10 Vtec, slip op. at 12 (Vt. Super. Ct. Envtl. Div. July 13, 2010) (Wright, J.) (citing Efthimiou v. Smith 846 A.2d 222, 227 (Conn. 2004)). Generally, collateral estoppel is more narrow than *res judicata* in that it bars the relitigation of an issue, as opposed to a claim, that was actually litigated. [10] See In re Tariff Filin of Cent. Vermont Pub. Serv. Corp., 172 Vt. 14, 20 (2001).

Collateral estoppel applies when "all five of the following criteria are met: (1) preclusion is asserted against one who was a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same in both actions; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion is fair." In re Saladino Conditional Use Application, No. 223-11-09 Vtec, slip op. at 4 (Vt. Envtl. Ct. June 01, 2010) (Durkin, J.) (citing Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990)).

BBA argues that claim preclusion bars the relitigation of BBA's municipal status and exemption from application fees under 10 V.S.A. § 6083a(c). As stated above, the 1973 decision does not constitute a "final judgment on the merits" and for this reason collateral estoppel does not apply. With regard to the 1975, 1996, 2004, and Dash Decisions, the parties did not actually

[10] When an issue "is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Mellin v. Flood Brook Union School Dist. 173 Vt. 202, 209 (2001).

litigate the issue of whether BBA constituted a municipal agency under 10 V.S.A. § 6083a(3). In assessing whether applying issue preclusion is "fair" this Court considers the Dash 2 and Dash 4 permit applications in which BBA did not challenge the District Commission's application of a fee. For these reasons, we conclude that collateral estoppel does not bar the present appeal.

C. Equitable Estoppel

The doctrine of equitable estoppel has four elements: (1) the party being estopped must know the relevant facts; (2) the party being estopped must intend that his or her conduct be acted on; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely to his or her detriment on the estopped party's representations. See In re Langlois/Novicki Variance Denial, 2017 VT 76, ¶ 13; Vermont Structural Steel v. State, 153 Vt. 67, 74 (1989) (stating that a party's detrimental reliance must be reasonable). The party invoking the doctrine bears the burden of establishing each element. Fisher v. Poole 142 Vt. 162, 168 (1982).

When asserted against the government, a party must also demonstrate that the "injustice that would result from denying the estoppel outweighs the negative impact on public policy that would result from applying the estoppel." Lakeside Equip. Corp. v. Town of Chester, 2004 VT 84, ¶ 8, 177 Vt. 619; see In re DeVita Subdivision Amendment No. 164-12-17 Vtec, slip op. at 14 (Vt. Super. Ct. Envtl. Div. Oct. 1, 2018) (Walsh, J.); see also In re McDonald's Corp., 146 Vt. 380, 383 (1985) ("Estoppels against the government are rare and are to be invoked only in extraordinary circumstances.").

BBA argues that it satisfies all the elements of equitable estoppel. Under the first element, BBA notes that it has disclosed all proposed land use to the governmental regulator and noted its municipal status, as demonstrated in BBA's letters to the district commission for the 1973, 1975, 1996, 2004, and Dash 1 permits. Second, BBA contends that the representations made by the District Commission and the Environmental Board Chair in these decisions intended that the conduct interpreting Act 250 be relied upon. Third, BBA notes that they were ignorant of the District Commission's decision to require a fee in the Dash 5 Project. Fourth, BBA alleges that they suffered in reliance upon this conduct by being compelled to pay the application fee, "knowing that its future land use activities will not be evaluated for being a municipal purpose,"

and being "denied the right . . . to serve Manchester and surrounding communities as their public high school."

The NRB counters that equitable estoppel is not. appropriate in this case because the alleged conduct arises from informal administrative decisions. Moreover, the alleged reliance upon the 1973, 1975, 1996, and 2004 opinions could be later assuaged by the Dash 2 and Dash 4 permits that indicated that the application fees were necessary under 10 V.S.A. § 6083a(3). In addition, NRB argues that BBA did not "rely" on the earlier decisions not to pay the required fee; BBA paid the fee in response to District Coordinator Burke's letter stating that the Dash 5 application was incomplete. As a final point, the NRB notes that BBA has not met the burden of showing that the resulting injustice for failure to find an estoppel sufficiently outweighs any effect upon policy.

The administrative decisions allegedly relied upon by BBA do not rise to the level of equitable estoppel. Indeed, equitable estoppel, as a general rule, requires a showing that a party's conduct in some way induced the opposing party to "delay bringing suit, or 'lull[ed] him into inaction.'" Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 12 186 Vt. 605 (quoting Beecher v. Stratton Corp., 170 Vt. 137, 140). Here, BBA does not sufficiently show evidence that they were "lulled" into inaction when the Dash 2 and Dash 4 permits, by requiring an application fee, openly indicated that BBA may subject to future application fees. We therefore conclude that equitable estoppel does not apply in this case.

For the reasons addressed above, we **GRANT** NRB's cross motion for summary judgment and **DENY** the BBA's motion for summary judgment on BBA's Question 3.

IV. Question 4

BBA's Question 4 asks "[w]hether this appeal shall not be dismissed pursuant to 10 V.S.A. § 6083a(e)(6) if the District No. 8 Environmental Commission issues a final decision on the merits of the Application prior to the Court's adjudication of this appeal?" In their motion, BBA raises this question in the alternative, if this Court concluded that it had no jurisdiction under Question 2 to address the merits of this appeal when the District Commission issued a Dash 5 permit to BBA after payment of the application fee at issue in this proceeding. As this Court has concluded

that it has jurisdiction pursuant to Act 250 Rule 10(D) and 10 V.S.A. § 8503(b)(2) in Question 2, this question is moot. .

Conclusion

For the foregoing reasons, we **GRANT** BBA's motion for summary judgment with respect to Questions 1 and 2 and **DENY** BBA's motion with respect to Question 3. Additionally, this Court concludes that Question 4 is moot. We therefore order that the NRB to refund the $ 96,200 application fee for the Dash 5 permit.

This concludes the matter before this Court. A Judgment Order accompanies this Decision.

Electronically Signed: 9/3/2021 2:33 PM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division