

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 51-6-16 Vtec

Chippers, Inc. Conditional Use App.

DECISION ON MOTION

Decision on Motion for Summary Judgment

This is an appeal from the decision of the Town of Pomfret Zoning Board of Adjustment (“ZBA”) denying a conditional use application for storage of timber logs on a property in Pomfret, Vermont. The matter is now before the Court on Appellant/Applicant Chippers, Inc.’s (“Chippers” or “Appellant”) motion for summary judgment.

Chippers is represented by attorneys Paul S. Gillies, Stephen F. Coteus, and Ryan P. Kane. Interested Persons Hudson and Margaret Holland and Brian Alderfer (“the Interested Persons”) are represented by attorney Peter K. Vollers. The Town of Pomfret (“the Town”) is represented by attorney Amanda S.E. Lafferty.

Chippers filed its motion for summary judgment on September 1, 2016. The Interested Persons filed an opposition to the motion on November 7, 2016, a reply to which Chippers filed on November 14, 2016. The Town filed its opposition to the summary judgment motion on November 22, 2016, and Chippers filed a reply to that opposition on December 15, 2016. The pending motion thereafter became ripe for our consideration.

Factual and Procedural Background

We recite the following facts solely for the purposes of deciding the pending motion for summary judgment.

1. Chippers provides “lawn, land, and tree services to residents of Vermont and New Hampshire.” Chippers’ Statement of Material Facts (“SOMF”) ¶ 1.
2. Chippers operates in the Town of Pomfret. SOMF ¶ 2. Chippers’ operation is on land divided by Pomfret Road, with part of the land lying on the east side of the road, and part on the west side of the road. SOMF ¶ 2. It is not clear to the Court whether these lands are considered

a single parcel, nor is it clear from the pre-trial pleadings whether Chippers is the fee title holder to the lands on both sides of the road. SOMF ¶ 2; Town Response to SOMF ¶ 2.

3. Chippers maintains a rotating stock of timber logs, known as the “log pile.” SOMF ¶¶ 4–6. Logs in the log pile are moved on and off the property by truck. SOMF ¶¶ 6, 8. The log pile is part of Chippers’ wood processing activity, which has also included burning, chipping, and grinding wood, and cutting and splitting firewood. Town Response to SOMF ¶¶ 4, 9.

4. The log pile was previously kept on the western side of the road (or the “Chippers” side), where a greenhouse now stands, and was moved to the eastern side of the road (the “Southeast Parcel”) in anticipation of the greenhouse being built. SOMF ¶ 4; Town’s Opp. to Mot. Summ. J., Ex. H. This appears to have occurred in 2011. Affidavit of Mundy Wilson Piper (“Piper Affidavit”), ¶ 3; Town’s Opp. to Mot. Summ. J., Ex. H.

5. Since moving the log pile to the Southeast Parcel, Chippers has planted trees to screen the view of the log pile from passersby on Pomfret Road and from neighbors. SOMF ¶ 7; Piper Affidavit ¶ 4.

6. On October 2, 2015, the Town of Pomfret Zoning Administrator Preston Bristow (“ZA Bristow”) sent a letter to Chippers regarding Chippers’ wood processing activity. Town’s Opp. to Mot. Summ. J., Ex. E. The letter asked Chippers to either (1) demonstrate the activity is a silvicultural practice exempt from zoning regulations; (2) cease the activity, or decrease it to a point that it would be exempt; or (3) “[a]pply for an expansion of [Chippers’] Non-conforming Use Permit.” Id.

7. On November 19, 2015, Chippers sent a letter to ZA Bristow explaining that it had made changes to its wood processing activities to reduce noise, truck traffic, and visual impact. Town’s Opp. to Mot. Summ. J., Ex. F. The letter suggested that the use would now qualify as an exempt silvicultural practice.

8. On December 18, 2015, ZA Bristow sent a response letter to Chippers. Town’s Opp. to Mot. Summ. J., Ex. G. The letter includes a number of findings. Id. One of these is that the ZBA granted Chippers a non-conforming use permit for a pole barn on July 10, 2006. Id. The ZA’s findings indicate that wood processing activities began after this permit was granted. Id.

9. The December 18, 2015 letter concludes that the wood processing activity is not an exempt silvicultural practice, that the activity is an expansion of a pre-existing, non-conforming use, and that Chippers would have to apply for a permit for this expansion. Id.

10. On February 24, 2016, Chippers applied for a permit to “[c]ontinue to use the ‘Southeast Parcel’ for temporary but continual storage of logs [and to] process firewood on ‘Chippers’ side of the road.” Town’s Opp. to Mot. Summ. J., Ex. H. The application appears to be for a non-conforming or conditional use permit. Id.; Town Response to SOMF ¶ 3. The ZBA denied the application on May 19, 2016. Mot. Summ. J. Ex. 1. Chippers thereafter filed a timely appeal with this Court.

Discussion

We will grant summary judgment to a party “if the movant shows 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). 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). “Further, the nonmoving party receives the benefit of all reasonable doubts and inferences.” Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted).

Chippers is moving for summary judgment on all six questions contained in its Statement of Questions. Before addressing Chippers’ arguments for summary judgment, we turn to the Town’s assertion that some of the Questions set out in the Statement of Questions pose legal issues that are not proper for our consideration in this appeal.

I. Whether Questions 2, 5, and 6 are properly before this Court.

As a preliminary matter, the Town, citing 24 V.S.A. §§ 4465 and 4472, argues that Chippers may not raise the issues set out in Questions 2, 5, and 6, because those issues relate to findings and a determination made by ZA Bristow in his December 18, 2015 letter, and those findings and determination were not appealed to the ZBA. The Town asserts that ZA Bristow’s determinations, as related in his letter became final when they were not appealed, and therefore

cannot be challenged in this subsequent appeal. However, the Town has not moved to dismiss these Questions.

Section 4465 allows an interested person to appeal the “decision” of a zoning administrator to the appropriate municipal panel. 24 V.S.A. § 4465. The municipal panel’s decision may then be appealed to the Environmental Division of the Superior Court. *Id.* §§ 4471, 4472(a). If an interested person fails to appeal the decision of a zoning administrator under § 4465, or the decision of the municipal panel under §§ 4471 and 4472(a), then that decision becomes final. *Id.* § 4472(d).

ZA Bristow’s December 18, 2015 letter reads, in part:

because the logs being stored on the east side of Pomfret Road originate from residential client jobs, because they are being stored in conjunction with your business activities on the west side of Pomfret Road, and because wood processing activities on the east side of Pomfret Road began after the ZBA granted a Non-conforming Use Permit in July of 2006, I must conclude that even the storage of logs on the east side of Pomfret Road constitutes an expansion of a non-conforming use which requires review and approval by the Zoning Board of Adjustment.

It is my determination, therefore, that the storage of logs (and other wood processing activities) on the east side of Pomfret Road that are part of the Chippers business operation does not meet the forestry exemption from local regulation and requires a zoning permit.

Town’s Opp. to Mot. Summ. J., Ex. G. The letter goes on to explain how Chippers can appeal this determination. Rather than appeal the determination, Chippers applied for a permit.

We disagree with Chippers’ suggestion that the determinations set out in the December 18, 2015 letter do not qualify as “decisions” under § 4472(d). ZA Bristow is an administrative officer for purposes of § 4465. See In re Burns Two-Unit Residential Bldg., 2016 VT 63, ¶ 12 (May 27, 2016). An administrative officer is tasked to “administer the bylaws literally and shall not have the power to permit any land development that is not in conformance with those bylaws.” 24 V.S.A. § 4448. Part 10.2.5 of the Town of Pomfret Zoning Ordinance (“Ordinance”) requires the Zoning Administrator to “be aware of any violation of this ordinance and the applicable statutes, and in the name of Pomfret to institute appropriate action to prevent or correct such violation.” Mot. Summ. J. Ex. 3. When ZA Bristow contacted Chippers on October 2, 2015, and then made his determinations on December 18, 2015, he was carrying out his duty under 24

V.S.A. § 4448 and Ordinance § 10.2.5. As such, those determinations were “decision[s] . . . by the administrative officer” pursuant to §§ 4465 and 4472(d), and because they were not appealed, they are final. 24 V.S.A. § 4472(d).

This does not, however, mean that all the legal issues raised in the challenged Questions are impermissible. Instead, we must review the specific language of each of those challenged Questions, particularly in regards to Chippers’ request for summary judgment.

Question 2 asks whether a permit should be granted on the basis of equitable estoppel, which is based on the theory that the ZA provided oral permission to Chippers to move its logs to the Southeast Parcel. This represents a continuation of Chippers’ efforts to obtain a permit, and does not challenge ZA Bristow’s unappealed determination that the challenged activity “does not meet the forestry exemption from local regulation and requires a zoning permit.” See Town’s Ex. G. (ZA Bristow Dec. 18, 2015 ltr.). Question 2 is therefore not barred by any failure to appeal that first ZA determination.

Question 5 asks whether “some or all” of the activity in question were established prior to 2001. This does not necessarily challenge the determination that because the “wood processing activities on the east side of Pomfret Road began after the ZBA granted a Non-Conforming Use Permit in July of 2006, . . . the storage of logs on the east side of Pomfret Road constitutes an expansion of a non-conforming use.” Instead, the determination that a use was expanded presupposes that the use existed to some extent prior to the expansion. Question 5 is therefore also not barred by any failure to appeal that first ZA determination.

Question 6 asks whether the storage of logs is a non-conforming, pre-existing use. This Question does seem to challenge the ZA’s determination that “the storage of logs on the east side of Pomfret Road constitutes an expansion of a non-conforming use which requires review and approval by the Zoning Board of Adjustment.” However, it is important to not merge what appear to be two separate factual issues. Chippers represents that it has stored and processed timber logs on the west side of the road; none of the other parties appear to contest this fact. Second, the ZA determined that the storage and processing of timber logs on the east side of the road began after the ZBA granted a permit in 2006. This separate determination was not

challenged by a timely appeal being filed. Further, it does not appear that Chippers or any other party contests this separate factual determination now.

These two separate factual determinations appear to be subsumed by the legal justifications that Chippers offers as to why it should be allowed to continue to store and process timber logs on the east side of the road. First, Chippers appears to assert that because it has stored and processed logs on the west side of the road, it should now be allowed to conduct the same activities on the east side of the road. We do not have before us the facts material to this legal issue that would allow us to grant Chippers' requested summary judgment. In particular, we have been left to wonder what commercial activities Chippers conducts on the west side of the road where its log storage and processing once took place. We are told of a greenhouse that was permitted and constructed at that location, but are unaware of its intensity and whether other commercial activities occur on that side of the road. Second, Chippers asserts that it should be allowed to store and process timber logs on the east side of the road because the ZA gave a verbal authorization to do so. At trial, the parties will need to present all material facts concerning this legal issue in order for the Court to make a proper legal determination.

The parties should be prepared to address the legal issues raised by Question 6 that are not foreclosed by the unappealed determinations that the ZA announced in his December 18, 2015 letter. For all the reasons stated above, we conclude that it is appropriate for the legal issues presented by Chippers' Questions 2, 5, and 6 to be addressed by this Court.

We next turn to the question posed by Chippers' motion of whether it is entitled to summary judgment on all Questions presented.

II. Question 1: Public Nuisance

Question 1 asks:

Whether the temporary storage of logs on the Applicant's property constitutes a "public nuisance," as that term is used in Sections 4.23 and 8.1.1 of the Pomfret Zoning Bylaws.

Chippers alleges that the log pile is minimally visible from outside the property (SOMF ¶ 7); that logs are stored there for short periods of time (SOMF ¶ 8); that burning and chipping are no longer done on the property and chainsaws operated only rarely (SOMF ¶ 9); and that trucks

only rarely sound their back-up alarms (SOMF ¶ 10). Chippers also alleges that it adopted Log Yard Rules in November 2015 to mitigate impact on the community. SOMF ¶ 20, Ex. 9.

The Interested Persons disagree with a number of these assertions, including the frequency that logs are delivered to and from the site and duration of storage on the site; visibility of logs on the site; and burning, chipping, and frequency of chainsaw use and back-up alarms. Interested Persons' Response to SOMF ¶¶ 6–10. They claim that Chippers' use of the property involves regular use of heavy machinery, regular eighteen-wheeler traffic, other heavy equipment, chainsaws, and chippers. Interested Persons SOMF ¶¶ 5–10. They allege that the use results in smoke from burning, exhaust from trucks and other machinery, and loud and frequent noise. Id.

Because the Interested Persons dispute the material facts related to Question 1, Chippers' motion for summary judgment on this Question must be **denied**.

III. Question 2: Equitable Estoppel

Question 2 asks:

Whether the Zoning Administrator's oral permission to move the logs from the side of the public highway to the other constitutes approval by the Town for the storage of logs on he [sic], such that equitable estoppel would justify considering it a fit grant of approval by the Town of Pomfret.

Chippers alleges that the log pile was moved from the western side of the road, at the current greenhouse site, across the street to the current location based on verbal approval given by ZA Bristow. SOMF ¶ 12. The Town, however, calls into question whether any such verbal approval was given. Town Response to SOMF ¶ 12.

Because the material facts related to Question 2 are disputed, Chippers' motion for summary judgment on this Question must be **denied**.

IV. Question 3: Town Plan Compatibility

Question 3 asks:

Whether the proposed use of the land for temporarily storing logs is consistent with the enforceable portions of the Pomfret Town Plan.

Chippers argues that its use of the property is compatible with the Town Plan's general aspiration that visual elements of land use reflect the rural character of a working landscape. Chippers' Mot. Summ. J. at 6; Ex. 4 (Town Plan) at 18, 28.

The Interested Persons disagree with the factual assertions that would support this claim. They claim that Chippers' use of the property involves regular use of heavy machinery, regular eighteen-wheeler traffic, other heavy equipment, chainsaws, and chippers. Interested Persons SOMF ¶¶ 5–10. They allege that the use results in smoke from burning, exhaust from trucks and other machinery, and loud and frequent noise. *Id.*

Because the Interested Persons dispute the material facts related to Question 3, Chippers' motion for summary judgment on this Question must be **denied**.

V. Question 4: Conditional Use

Question 4 asks:

Whether the storage of logs on the Russell Trust property satisfies the criteria for a conditional use permit under Part 7 and Section 11.3 of the Town of Pomfret Zoning Bylaws.

Chippers argues that its use of the property on the east side of the road complies with conditional use requirements set out in Part 7 and Section 11.3 of the Bylaws because it does not involve water or sewer; includes no facilities or structures; traffic to and from the site is minimal, and less than when the use was on the western side of the road; there is no need for parking; and there is no risk of flooding, ponding, erosion, or hazard for pedestrians or vehicles. SOMF ¶¶ 14–18.

The facts set out by Chippers are not sufficiently specific for the Court to determine on summary judgment whether the use of the property complies with the conditional use standards set out in the Bylaws. For this reason, Chippers' motion for summary judgment on Question 4 must be **denied**.

VI. Question 5: 15-year Statute of Limitations; and Question 6: Nonconforming, Pre-existing Use

Questions 5 and 6 ask:

Whether some or all of the storage and processing of firewood on the Russell Trust land is lawfully allowed to continue, being established prior to 2001 and outside the 15-year period for enforcement in 24 V.S.A. § 4454.

Whether the storage of logs on the Russell Trust property is a nonconforming, preexisting use.

Chippers alleges that the former log pile was in place at the current greenhouse site since long before 2001. SOMF ¶ 4. It further alleges that the impact on the land is the same in the current location as it was in the previous location. SOMF ¶ 13. Chippers also points out that in the decision below, the ZBA “grandfathered” the log storage use of the property on the west side of the road, possibly indicating that Chippers could continue log storage use at or below 2001 levels. Chippers’ Mot. Summ. J. at 1, 7.

Municipal zoning decisions, such as the instant case, are appealed to the Environmental Division de novo. 24 V.S.A. § 4472(a). We therefore do not defer to the municipal panel’s decision. The exception to this rule is where the municipal panel has established a consistent pattern on which a party may have relied. See In re Korbet, 2005 VT 7, ¶ 10, 178 Vt. 459; 38 Thasha Lane Dev. Water & Sewer Fees Denial, No. 136-9-14 Vtec, slip op. at 4–5 (Vt. Super. Ct. Env’tl. Div. Aug. 28, 2015) (Walsh, J.). Here, there is no evidence of a consistent pattern, and we therefore give no deference to the DRB’s decision below on this point.

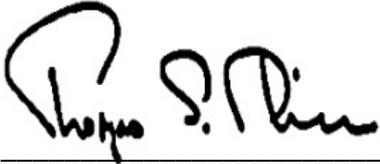
Furthermore, the Town alleges that the activities on the east side of the road began in 2006 and intensified in 2011. Town Response to SOMF ¶¶ 4, 12; Affidavit of Preston Bristow (“Bristow Affidavit”), ¶¶ 4, 8. Although ZA Bristow apparently believed at one point that Chippers had been granted a non-conforming use permit for its wood processing activities, that permit was apparently actually for a pole barn. Mot. Summ. J. Ex. 10; Town’s Opp. to Mot. Summ. J., Ex. G. In addition, the Town and the Interested Persons question whether prior use on the western side of the road is relevant to current use on the eastern side. Interested Persons’ Response to SOMF ¶¶ 13, 16; Town SOMF ¶¶ 13, 16. We can only answer that factual question after all the competing evidence is presented at trial.

Because we do not have sufficient undisputed material facts to find that Chippers is entitled to judgment as a matter of law on Questions 5 and 6, Chippers’ motion for summary judgment on these Questions must be **denied**.

CONCLUSION

For all the reasons stated above, we **deny** Chippers summary judgment as to all legal issues presented in its Statement of Questions.

Electronically signed on January 26, 2017 at Newfane, 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, Judge
Environmental Division