VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00035

Evans Clearing Limits

ENTRY ORDER

Title: Motion to Remand

Filer: Joseph McLean, attorney for the Town of Stowe

Filed Date: December 16, 2021

Memorandum in Opposition filed by Nicholas Low, attorney for Appellant, Town of Barre, January 10, 2022

David and Donna Evans ("Applicants") seek retroactive permission from the Town of Stowe Development Review Board ("DRB") to amend the clearing limits established as a condition of the original subdivision permit that created their property. In a decision dated April 6, 2021, the DRB denied their application and Applicants appealed to our Court. The Town of Stowe has entered an appearance, through its attorney, Joseph S. McLean, to defend the DRB decision. Interested parties Ryan and Taylor Bennett have also entered an appearance, as self-represented litigants. Presently before the Court is the Town of Stowe's motion to remand.

Appellants/Applicants are represented by Attorney Nicholas AE Low. Applicants have filed memoranda in opposition to the DRB and the Town's request for remand.

We recite the following facts and procedural history purely for the purpose of deciding the present motion. The following are not specific factual findings with relevance outside of this decision. *See* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem. op.)).

Applicants purchased their property in the Town of Stowe in 2002. The property had been created as part of a subdivision in 1989. The original plat for the subdivision limited the areas of the property that could be cleared of their natural vegetation ("clearing limits"). The clearing limits were updated in a 1995 plat that governed the property at the time of the events relevant to this proceeding. However, in 2017 and 2020, Applicants cleared areas of the property beyond what the 1995 plat permitted, including beginning construction of a driveway and roughing in a site for their residence. The Town of Stowe Zoning Administrator ("Zoning Administrator") sent them a letter warning that this constituted land development without a permit, and encouraged them to apply for a permit, warning that a notice of violation would follow if they did not.

Applicants did apply for what they termed a minor permit alteration, submitted to the Zoning Administrator. The Zoning Administrator determined that the application needed to be referred to

the DRB for review and determination (see discussion below). The DRB denied the application on substantive grounds and Applicants appealed.

The Town of Stowe has elected to comply with the requirements of the Municipal Administrative Procedures Act; therefore, our review in this case is "on-the-record."

The Town and DRB request a remand of these proceedings because they claim the DRB erroneously neglected to conduct a threshold legal analysis when denying the Evans' application. That analysis, frequently called the Hildebrand or Stowe Club Highlands analysis, after the Vermont Supreme Court cases mandating and defining it, applies to applications to amend conditions of land use permits. Like the successive application doctrine, it is an application of the general concept of preclusion in the specific context of land use law and represents an exception to the finality of land-use determinations established by 24 V.S.A. § 4472. *See* In re Application of Lathrop Ltd. Partnership I, 2015 VT 49, ¶ 54, 199 Vt. 19 ("Two preclusion doctrines are implicated in this decision: the standards and restrictions on zoning permit amendments and the successive-application doctrine. Each of these doctrines is governed by and must be consistent with the controlling statute, 24 V.S.A. § 4472(d)").

As a preclusion doctrine, Hildebrand is a threshold barrier that an applicant seeking to amend conditions of a zoning permit must surmount. The doctrine seeks to balance the competing interests of finality and flexibility in the land use and planning context. In order for a municipal permit amendment application to even be considered on the merits—i.e., against whatever substantive criteria apply in subdivision, conditional use, or any other relevant form of review—the applicant must prove to the decision-maker that, applying the Hildebrand factors, the need for flexibility outweighs the interests of finality in their case. *See* Clark & Castle Final Plan Amendment, No. 52-4-19 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. May 22, 2020) (Durkin, J.) (citing In re Nehemiah Assocs., Inc., 168 Vt. 288, 292 (1998)). Specifically, they must show either that the condition they seek to amend was not critical to the issuance of the permit, *see* Lonie Parker dba Porky's Bkyd BBQ SP & NOV, No. 6-1-20 Vtec, slip op. at 30 (Vt. Super. Ct. Envtl. Div. Nov. 17, 2020) (Walsh, J.), or, if it was, that changes to facts or regulations beyond the applicant's control, or unforeseeable changes to project construction, operation, or technology nevertheless warrant allowing them to seek an amendment. In re Stowe Club Highlands, 166 Vt. 33, 38 (1996) (*mot. rearg. denied*) (upholding the old Environmental Board's use of these factors to consider applications to amend Act 250 permits[1]); In re Hildebrand, 2007 VT 5, ¶13, 181 Vt. 568 (upholding the Environmental Court's application of these factors in a zoning case). Reliance by the applicant's neighbors or the state or municipality on the original permit conditions may be taken into account when conducting this analysis. Stowe Club Highlands, 166 Vt. at 40.

A 2015 Vermont Supreme Court decision, Lathrop Limited Partnership, suggests that when a town has adopted its own standards to determine when applications to amend permits should be considered on the merits, the Hildebrand test no longer applies. In other words, this language suggests that in the municipal zoning context, Hildebrand performs only a gap filling role in municipal ordinances. *See* Lathrop Lt'd P'ship., 2015 VT 49, ¶ 66 n. 19 (stating that "[t]hese [Hildebrand] standards are applicable if the zoning bylaws do not set forth different ones").

We must therefore look to the Stowe Subdivision Regulations to determine if they establish an analogous test to Hildebrand. These Regulations require applications to alter a subdivision to be evaluated against certain Planning and Design Standards, contained at Section 5 of the Regulations.

[1] In the Act 250 context, these factors have been formalized through the adoption of NRB Rule 34(E).

They dictate that the Zoning Administrator may conduct this evaluation in the case of truly minor alterations. Subdivision Regulations § 3.4(1). However, the Regulations also direct the ZA to refer the application to the DRB should they find a likely impact under those standards or determine that the alteration, regardless of how presented by the applicant, is "substantial." Id.

Here, Applicants submitted their application as a minor alteration. However, the Zoning Administrator referred the application to the DRB for consideration under the Planning and Design Standards. The DRB reviewed the application under those standards, determined it did not meet them, and so denied the application. Before conducting this substantive review, the DRB did not explicitly conduct a Hildebrand analysis or any analog under its bylaws to determine whether the amendment should even be considered—although it did, in a short paragraph, assert that applicants did not meet any of the three factors that make up the second half of the Stowe Club Highlands/Hildebrand test, without mentioning that test by name. *See* In re: 0 Bryan Road; #08-044.090, Findings of Fact and Decision, at 12 (Tn. of Stowe Dev. Review Bd. April 6, 2021). Applicants have raised this failure through Question 1 in their Statement of Questions, which asks whether that portion of the decision must be struck because it is "not supported by substantial evidence, findings of fact, or conclusions of law." The DRB and the Town request that we remand the case to the DRB so that they may conduct this analysis in the first instance.

Applicants oppose that request. Their principal argument is that the procedures established by the Subdivision Regulations for minimal alterations to subdivision permits take the place of a Stowe Club Highlands/Hildebrand analysis. Since no Hildebrand analysis is necessary, they claim, remand should not be granted.

Under our Rules of Environmental Court Proceedings, "at the request of the tribunal appealed from . . . [we] *may* remand the case to that tribunal for its reconsideration." V.R.E.C.P. 5(i)(emphasis added). This is in fact merely the codification of the inherent discretion of our Court to remand a case to an administrative body or municipal panel where that body has failed to take evidence on or decide a critical legal issue. *See* In re Maple Tree Place, 156 Vt. 494, 500 ("It is beyond [the Environmental Division's] role as an appellate tribunal, even under a de novo review standard, to start addressing new issues never presented to the [appropriate municipal panel below] and on which interested persons have not spoken in the local process. Use of the remand authority in such cases is consistent with the court's role.").

As we begin our analysis, we must note our agreement with the Town: the Subdivision Regulations do not establish an analogous threshold test to the test established by Hildebrand. Applicants point to Subdivision Regulations §§ 3.1.1 and 3.4.1 in arguing that the Regulations do create such a test. These provisions define "minor alterations" to subdivision permits and indicate that truly minor alterations may be approved by the Zoning Administrator without a public hearing, while all other alterations must be reviewed by the DRB after a public hearing. However, apart from this purely procedural distinction, the Subdivision Regulations do not establish different substantive review for minor versus other subdivision permit amendments. Instead, they indicate that all proposed amendments to subdivision permits must satisfy Section 5's Planning and Design standards. *See* Regulations § 3.4.1 (indicating that for truly minor alterations, "[t]he Zoning Administrator shall review the plan in accordance with the Section 5, Planning and Design Standards *in lieu of the DRB*") (emphasis added). Furthermore, those are the same substantive standards that new subdivision applications must satisfy.

These provisions therefore do not play the critical and threshold role that the Hildebrand test does—they do not mandate an analysis of whether the interests of flexibility outweigh the interests of

finality that ordinarily would forbid amendment of a permit's conditions. In short, the DRB should have conducted a full Hildebrand analysis, and only if the permit conditions sought to be amended were not critical, or if the DRB found that any of the other factors had been met—a change in facts, regulations, technology, operations, construction, etc.—should it have considered the application on its merits.

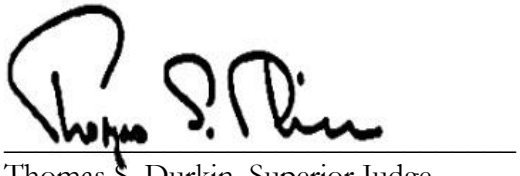
Ordinarily, given this conclusion, remand would be appropriate to allow the DRB to complete any missing fact-finding and legal analysis in the first instance. *See, e.g.* In re Maple Tree Place, 156 Vt. 494, 500 ("It is beyond [the Environmental Division's] role as an appellate tribunal . . . to start addressing new issues never presented to the planning commission and on which interested persons have not spoken in the local process."). However, two other factors also must be considered. First, we regret that due to other demands on the Court's time, this motion has been pending for several months, and the entire appeal has been pending for more than one year. Remanding to the DRB, with all the procedural requirements that would attend re-opening a public hearing to rule on the Hildebrand issue, would further delay a resolution of matters. Second, we note that the DRB's request for a remand is solely so that it may conduct this Hildebrand analysis. We therefore cannot envision any scenario in which the DRB will reach a different conclusion on the ultimate question of whether the application must be approved as a result of a remand. The DRB denied the Evans's application because the proposal did not meet the Section 5 Planning and Design Standards. If it now conducts the Hildebrand test, its only options would be to conclude that the application passes that threshold test, and so review under the Planning and Design Standards was appropriate, or to conclude that the application fails the Hildebrand test, and must be denied on that basis, instead of based on its flaws under Section 5. Either way an appeal would be sure to follow. This scenario evokes the "procedural ping-pong match" that we have been directed to avoid in other cases involving use of the remand authority. *See* In re Sisters & Bros. Inv. Grp., LLP, 2009 VT 58, ¶ 21, 186 Vt. 103.

We therefore conclude that the weighty interests of fairness and efficient administration of justice dictate that remand is not appropriate at this time. *See* V.R.C.P. 1 (directing that the Vermont Rules of Civil Procedure "shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action."); Reporter's Notes to V.R.C.P. 1 (noting that the word "administered" was added to "emphasize the duty of the court to apply the rules in the interest of not only the fair, but the efficient, administration of justice"); Nelson v Russo, 2008 VT 66, ¶8, 184 Vt. 550 (indicating that the Rules of Civil Procedure must be "construe[ed] and administer[ed] liberally" to this ultimate end).

Instead of remanding now, we will review the DRB's legal conclusions on the merits of the permit amendment under the Section 5 Planning and Design Standards. As this is an on-the-record review, we will **not** be conducting our own evidentiary hearings, and our remaining review will likely correspondingly be brief. Further, we will give priority to completing that on-the-record review as soon as the parties' briefing is complete. If we affirm the DRB's conclusions and the denial of the permit, then the issue of the missing Hildebrand analysis will be moot. However, if we conclude that the DRB's decision on the merits of the application must be reversed or remanded, at that time we will remand to the DRB for completion of the Hildebrand test in the first instance. While potentially taking the steps in the analysis out of their usual order by reviewing the merits prior to a threshold issue, this arrangement appears to us to best serve the parties' interests for a just and expeditious resolution of this matter.

So Ordered.

Electronically signed on May 11, 2022, at Newfane, Vermont, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Environmental Division