STATE OF VERMONT
SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 64-7-16 Vtec

Madsonian Museum CU	DECISION ON MOTION

DECISION ON MOTION FOR SUMMARY JUDGMENT

This is an appeal from a Town of Waitsfield Development Review Board decision denying Appellant's application for conditional use approval for an addition to a pre-existing building. [1] The Town of Waitsfield, represented by David W. Rugh, Esq., filed a motion for summary judgment on November 10, 2016. Appellant, who is self-represented, did not file a response, and the motion is now ripe for our review.

Legal Standard

We 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), applicable here through V.R.E.C.P. 5(a)(2). The moving party shows that no material facts are in dispute principally by filing a statement of undisputed facts supported by materials in the record. V.R.C.P. 56(c)(1)(A). When, as here, there is no response to a motion for summary judgment, we may consider the movant's factual assertions to be undisputed. Id. 56(e). Nevertheless, before granting the motion we must determine whether those assertions are supported by materials in the record, and the moving party still "must demonstrate the absence of a genuine issue of material fact and entitlement to a judgment as a matter of law." In re Pixley,

[1] The underlying zoning permit application include a generic permit application listing "Sellersonian LLC (Madsonian Museum)" as the land owner, and a conditional use permit application listing Sellersonian LLC as the "Owner/Applicant." The Development Review Board decision lists the applicant as "Dave Sellers of the Madsonian Museum," and the land owner as Sellersonian, LLC. The notice of appeal filed with this court specifies that "[t]he party taking the appeal is the MADSONIAN MUSEUM, and the Property owner: Sellersonian LLC" and was filed by David Sellers, who is described on the notice of appeal as "owner of the Sellersonian LLC that owns the property, and Ex. Director and founder of the Museum that leases the property." For clarity, in this motion we refer to David Sellers, Sellersonian LLC, and Madsonian Museum collectively as "Appellant."

No. 2004-477, slip op. at *2 (Vt. June 2005) (unpub. mem.) (citing Miller v. Merchants Bank, 138 Vt. 235, 237–38 (1980)).

Factual Background

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

1. The Town of Waitsfield (the Town) is a Vermont municipality located in Washington County. The Town has had duly-adopted zoning regulations—the Town of Waitsfield Zoning Bylaws, as amended May 17, 2010 (the Bylaws)—in effect at all times relevant to this matter.

2. The property at issue in this appeal is a 0.92 +/- acre parcel at 45 Bridge Street in Waitsfield.

3. The property is situated in the Village Business (VB), Historic Waitsfield Village Overlay (HWVO), Flood Hazard Area Overlay (FHO), and Fluvial Erosion Hazard Area Overlay (FEHO) zoning districts.

4. The southern boundary of the property is delineated by the Mad River. The average grade, or slope, of the bank leading down to the river is between 0% and 8%.

5. The property has an existing structure which is operated as a museum. The structure has been in place since well before the Bylaws were enacted.

6. Approximately 316.4 square feet of the south corner of the existing structure, including the entire southeast side of the structure, is within fifty feet of the top of the river bank.

7. On September 25, 2015, Appellant submitted a zoning permit application with two proposed changes to the existing structure.

8. The first proposed change was to add a 600 square-foot dormer. The Town of Waitsfield Development Review Board (DRB) bifurcated the application and separately approved the application for the dormer.

9. The second proposed change was for a 360 square-foot addition. The proposed addition would extend out from the southeast side of the existing building, and would include a "required fire stair" and an exhibit and class space.

10. The entire addition would be within fifty feet of the top of the river bank. The addition would increase the square footage of the structure located within fifty feet of the top of the river

bank by more than 50%. The south corner of the addition would be approximately 11.9 feet closer to the Mad River than the south corner of the existing structure.

11. Appellant's application does not propose any landscaping, planting, or vegetative buffer; creation of stormwater management devices; measures to mitigate the impact of runoff from an existing gravel driveway located between the proposed addition and the river bank; or any other measures to protect water quality.

12. The application for the proposed addition was denied by the DRB on June 3, 2016. Appellant timely appealed that decision to this Court.

Analysis and Conclusions of Law

We hear appeals from permit application decisions de novo, sitting in the place of the decision making body below—in this case, the DRB—and determining whether the application should be approved. V.R.E.C.P. 5(g). A party seeking to reverse the denial of a permit application has the burden of proving that the application should be granted. In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 18, 195 Vt. 586.

I. Surface Water Protection Standards

The Bylaws define "development" or "land development" in part as the "construction, . . . expansion, conversion, structural alteration, . . . or enlargement of any building." Bylaws § 7.02. Under the plain language of this section, the proposed addition is a development or land development for the purposes of the Bylaws.

The Bylaws require the maintenance of a fifty-foot wide, "undisturbed, naturally vegetated buffer strip" at river banks with a grade of 0–8%, such as the one here. Bylaws § 3.12(A) and Table 3.4. The fifty-foot strip is measured horizontally away from the river, beginning at the top of the river slope. Id. § 3.12(A). Development in the buffer strip is generally prohibited. Id. § 3.12(B). The addition proposed here is entirely within the 50-foot buffer strip, and is therefore prohibited under Bylaw § 3.12(B).

The DRB can modify the width of the buffer strip for developments in the VB district if:

> 2. reasonable measures are undertaken to protect water quality, such as, but not limited to, the planting of shade trees adjacent to streambanks, the establishment of vegetated buffer areas along streambanks, and/or stormwater management provisions to collect and disperse stormwater away from the stream or river; and

3. the development will not result in degradation of adjacent surface waters.

Bylaws § 3.12(C)(2–3). The application here contains no measures to protect water quality as required by § 3.12(C)(2), and Appellant makes no offer or claim that existing features on the property would provide such protection. There is also no offer to show the development will not result in degradation of adjacent surface waters. We therefore conclude that Appellant has failed to meet its burden of proving that the proposed addition meets requirements allowing a deviation from the setback standards set out in Bylaws § 3.12(A).

II. Expansion of a Nonconforming Structure

A proposed addition that fails to meet the requirements of Bylaws § 3.12 can be approved if it satisfies requirements allowing for the expansion of a nonconforming structure under Bylaws § 3.08.

The Bylaws define a nonconforming structure, in part, as "[a]ny pre-existing structure or part thereof which is not in compliance with the provisions of these regulations concerning setbacks . . . or which does not meet other applicable requirements of these regulations." Bylaws § 3.08(A). The existing structure on the property is a nonconforming structure in that it is pre-existing, i.e. it predates the Bylaws, and a part of it lies within the fifty-foot river bank buffer strip.

The DRB can approve the enlargement, expansion, or relocation of a nonconforming structure in a manner that increases the degree of noncompliance as a conditional use if doing so:

a. does not increase the total volume or area of the nonconforming portion of the structure in existence prior to March 5, 2002 by more than 50%;

b. does not, after May 17, 2010, increase the total footprint of a structure within the Fluvial Erosion Hazard Area Overlay District by more than 500 square feet or 50% of the existing footprint of the principal structure, whichever is greater (see Table 2.11 and Section 5.03F);

c. does not extend the nonconforming feature/element of a structure beyond that point which constitutes the greatest pre-existing encroachment; and

d. complies with all conditional use standards.

Bylaws § 3.08(A)(3)(a–d). The addition proposed here fails to satisfy the requirements of § 3.08(A)(3)(a) and (c) because it would increase the total area of the nonconforming portion of the existing structure by more than 50%, and it would extend the nonconforming corner of the

structure closer to the river and further into the buffer strip. The proposed addition therefore fails to meet the requirements under which an expansion of a nonconforming structure might be approved pursuant to Bylaws § 3.08(A)(3).

Alternatively, the DRB can approve the alteration or enlargement of a nonconforming structure that would increase the degree of noncompliance if doing so is "solely for the purpose of meeting mandated state or federal environmental, safety, health or energy regulations." Bylaws § 3.08(A)(4). The addition proposed here includes a "required fire stair," along with a class and exhibit space. Even if the fire stair is required to meet state or federal regulations[2], because the addition also includes a class and exhibit space, it would not be solely dedicated to meeting state or federal regulations. The proposed addition therefore fails to meet the requirements under which an expansion of a nonconforming structure might be approved pursuant to Bylaws § 3.08(A)(4).

III. Conclusion

The proposed addition does not meet requirements for approval under Bylaws §§ 3.12 or 3.08. In addition, Appellant has not offered, nor is the Court aware of, any other provision under which we might approve the proposed addition. For these reasons, the Town's motion for summary judgment is **GRANTED**.

This concludes this matter. A judgment Order is issued concurrently with this decision.

Electronically signed on February 02, 2017 at 03:12 PM pursuant to V.R.E.F. 7(d).

Tom Walsh

_____

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[2] Appellant has made no claim that this is the case. Nevertheless, on summary judgment "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).