



Radicioni Denial

**ENTRY REGARDING MOTION**

Title: Motion to Dismiss (Motion: 2)  
Filer: K. Heather Devine, Esq.  
Filed Date: October 3, 2023

Appellant/Applicant Memorandum in Opposition to Motion to Dismiss, filed on October 26, 2023, by Walter Radicioni.

Town of Sharon Reply to Opposition to Motion to Dismiss Amended Question #3, filed on October 30, 2023, by Attorney K. Heather Devine.

**The motion is GRANTED.**

This is an appeal of a decision of the Town of Sharon Development Review Board (DRB) dated February 19, 2023 denying an application to extend a conditional use permit to rebuild a pole barn at 2911 VT Route 14, Sharon, Vermont (the Property) owned by Down River Investments, LLC, submitted by member Walter Radicioni (Mr. Radicioni).

On September 12, 2023, this Court issued an Entry Order granting in part and denying in part the Town of Sharon's (Town), motion to dismiss Mr. Radicioni's Statement of Questions. See In re Radicioni Denial, No. 23-ENV-00020 (Vt. Super. Ct. Env'tl. Div. Sept. 12, 2023) (Walsh, J.) (the September Entry Order). In so doing, the Court dismissed Questions then identified as 1, 2, 4, 7, and 8(1), 8(4)—(7). Id. at 8. The Court declined to dismiss Questions then identified as 3, 5, 6, 8(2) and 8(3). Id. The Court also revised Questions 5, 6, 8(2) and 8(3) to read as two new Questions, Question 1A and 2A. Id. The Court directed Mr. Radicioni to file an amended Question 3 by September 29, 2023 identifying the specific purpose statements of the Town of Sharon Flood Hazard Area Bylaws (the Flood Bylaws) that he believed were at issue in this matter.

Id. at 5—6, 8. Mr. Radicioni filed Amended Question 3A, referencing numerous subparts on September 26, 2023. Presently before the Court is the Town’s motion to dismiss amended Question 3 for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

**Amended Question 3A**

Amended Question 3A asks:

Should Down River be permitted to extend a conditional use permit to construct a pole barn on Down River’s property located at 2911 VT Route 14 in Sharon where the Planning Commission’s denied Down River’s permit application even though the conditional use applied for by Down River is entirely consistent, and does not conflict in any way, with the legislative intent of the Flood Hazard Area Bylaw stated clearly, unconditionally and unambiguously in its express stated purpose as follows:

- a. Implement the goals, policies and recommendations of the current municipal plan;
- b. Avoid and minimize the loss of property, the disruption of commerce, the impairment of the tax base, and the extraordinary public expenditures and demands on public services that result from flooding;
- c. Ensure that the selection, design, creation and use of development is reasonably safe and accomplished in a manner that is consistent with public wellbeing, does not impair flood plain services or the stream corridor;
- d. Manage the flood hazard area designated pursuant to 10 V.S.A. Chapter 32 Section 753, the municipal hazard mitigation plan; and make the Town of Sharon, its citizens and businesses eligible for federal flood insurance, federal disaster recover funds and hazard mitigation funds as they may become available;

and where the Town has repeatedly and continuous approved other subsequent applications for similar, if not less-compliant, conditional uses upon lands that lie within the same flood area that Down River’s land allegedly lies within,

and where the Down River[] lands do not appear to lie within the designated flood area in the first place;

and where the Town entirely failed to warn the public of its intention to adopt the subject Flood Hazard Area Bylaw as required by law.

Revised Statement of Questions Question 3A (filed on Sept. 26, 2023).

### **Legal Standard**

With respect to motions to dismiss for lack of subject matter jurisdiction, we follow the standards established in V.R.C.P. 12(b)(1), because the Vermont Rules of Civil Procedure govern proceedings in this Division. See V.R.E.C.P. 5(a)(2). When considering V.R.C.P. 12(b)(1) motions to dismiss, this Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party. Rheume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. We, therefore, provide deference to Mr. Radicioni in reviewing the pending motion.

With respect to motions to dismiss for failure to state a claim upon which relief can be granted, the Court may not grant such a motion unless it is beyond doubt that there are no facts or circumstances that would entitle the nonmoving party to relief. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1 (citation omitted). When ruling upon such a motion, we take all well-pleaded factual allegations made by the nonmoving party, here Mr. Radicioni, as true and “assume that the movant’s contravening assertions are false.” Alger v. Dep’t of Labor & Industry, 2006 VT 115, ¶ 12, 181 Vt. 309 (citation omitted). There is a “exceedingly low” threshold to survive a 12(b)(6) motion and, “[m]otions to dismiss for failure to state a claim are disfavored and should rarely be granted.” Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575 (mem.).

Amended Question 3A identifies the four purpose statements in the Flood Bylaws. See Flood Bylaws, § 2(1)—(4).<sup>1</sup> As addressed in the September Entry Order, purposes statements in zoning bylaws are generally unenforceable. See In re Wagner & Guay Permit, 2016 VT 96, ¶ 26, 203 Vt. 71 *overruled on other grounds by* 2017 VT 112. The exception being when a purpose or policy statement “set[s] forth a specific policy stated in the language that is clear and unqualified, and creates no ambiguity.” In re Liberty St. Permit, No. 21-ENV-00085, slip op. at 3 (Vt. Super. Ct. Envtl. Div. May 24, 2022) (Walsh, J.) (citations omitted). In any event, however, even when a provision contains language that appears mandatory, it will be unenforceable when standardless.

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<sup>1</sup> The Flood Hazard Bylaws were not filed as an exhibit to the pending motion but was filed as an exhibit to the Town’s initial motion to dismiss.

See In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶¶ 12—14, 185 Vt. 201 (declining to enforce a statement within a bylaw requiring a relevant development to “protect important natural resources . . .” because the statement provided no standards to determine what constituted a failure to “protect.”).

The four purpose statements of the Flood Hazard Area Bylaw are:

1. Implement the goals, policies, and recommendations in the current municipal plan;
2. Avoid and minimize the loss of life and property, the disruption of commerce, the impairment of the tax base, and the extraordinary public expenditures and demands on public services that result from flooding;
3. Ensure that the selection, design, creation, and use of development is reasonably safe and accomplished in a manner that is consistent with public wellbeing, does not impair flood plain services or the stream corridor;
4. Manage the flood hazard area designated pursuant to 10 V.S.A. Chapter 32 § 753, the municipal hazard mitigation plan; and make the Town of Sharon, its citizens and businesses eligible for federal flood insurance, federal disaster recovery funds, and hazard mitigation funds as they may be available.

Flood Bylaws, § 2(1)—(4).

None of the purpose statements in the Flood Bylaws are enforceable as regulating specific land use activities. When interpreting a bylaw, we apply the principles of statutory construction, adopting an interpretation that implements the legislative purpose, starting with the plain language of the statute, which we enforce if unambiguous. In re Application of Lathrop Ltd. P’ship J, 2015 VT 49, ¶ 22, 199 Vt. 19 (internal citations omitted). The plain language of these purpose statements shows that, to the extent that any aspect of the statement contains mandatory language (i.e., “implement,” “avoid and minimize,” “ensure,” and “manage”), the language is standardless because there are no provisions for the Court to apply to determine what constitutes compliance with the statements. Absent express mandatory language and standards that this Court can apply, the provisions are unenforceable. We therefore **GRANT** the Town’s motion with respect to Amended Question 3A (a) through (d) and **DISMISS** these Questions.

Next, we turn to the three paragraphs not enumerated at the end of Amended Question 3A. We note that these are not specific questions, but appear, based on Mr. Radicioni’s filings in

opposition to the pending motion, to be narratives provided for context. Even as improperly presented, however, Mr. Radicioni clearly seeks Court review of these issues. These paragraphs address three issues. First, the alleged approval of other similar applications for projects within the mapped flood hazard area. Second, contentions related to whether the Property is within the mapped flood hazard area. Third, alleged notice deficiencies related to the adoption of the Flood Bylaws.

With respect to the second and third issues, the Court previously dismissed similar Questions for lack of subject matter jurisdiction. See Radicioni, No. 23-ENV-00020, slip op. at 3—5 (Sept. 12, 2023) (Walsh, J.). To the extent that Mr. Radicioni seeks adjudication of these issues in this appeal, for the same reasons as set forth in the September Entry Order, the Court **GRANTS** the Town’s motion and **DISMISSES** these paragraphs.

The sole remaining issue in Amended Question 3A is Mr. Radicioni’s assertion that the Town has granted permits to similarly situated properties in the mapped flood hazard area. The Town argues that the Court has dismissed a similar question, which concerned permits granted by other municipalities, and this issue should similarly be dismissed. Importantly, however, the presently posed question addresses permits issued by the Town, not other municipalities. While the Town’s alleged issuance of permits to other similarly situation properties will not be dispositive for Mr. Radicioni’s application, in matters of interpretation of a municipality’s regulations, the Court has looked to a municipality’s consistent interpretation of said regulations. See In re Sisters & Bros. Invest. Grp., LLP, No. 106-5-06 Vtec, slip op. at 8—9 (Vt. Envtl. Ct. Feb. 21, 2007) (Durkin, J.) (citations omitted); see also In Re Korbet, 2005 VT 7, ¶ 10, 178 Vt. 459 (noting that the amount of weight the Court gives a town’s interpretation of its regulations depends on the strength of the “reason or rationale for its decision as well as a demonstration that the interpretation has been consistent.”) (internal quotation and citation omitted).<sup>2</sup>

Thus, evidence of Town approvals of allegedly similarly situated applications is relevant in this Court’s de novo review of the application. The paragraph as written, however, is not specifically a question and is unclear. We do believe that this issue is, however, intrinsic in the

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<sup>2</sup> We note that this issue typically arises when a town is seeking deference in its interpretation of its zoning bylaws. The Town has not requested such deference at this early stage of this appeal.

Court's revised Question 2A, which asks whether Mr. Radicioni is entitled to an extension of the original conditional use permit. See In re LaBerge NOV, 2016 VT 99, ¶ 15, 203 Vt. 98 (“[T]he Environmental Division may consider matters that are intrinsic to the statement of questions, even if they are not literally stated in the statement of questions.”). Thus, we **GRANT** the Town’s motion to dismiss the issue as raised, with the caveat that relevant evidence of such permitting may be addressed at trial.<sup>3</sup>

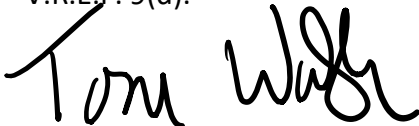
### Conclusion

For the foregoing reasons, we **GRANT** the Town’s motion to dismiss Amended Question 3A. Amended Question 3A is therefore **DISMISSED**. The remaining Questions before the Court are:

- 1A. Whether the Town Bylaws and Flood Bylaws, as applied to the Property, has resulted in a regulatory taking at the Property due to their incorporation of the FEH maps.
- 2A. Whether Mr. Radicioni is entitled to an extension of the original conditional use permit relative to the reconstruction of the pole barn at the Property.

The Court will set this matter for a status conference.

Electronically signed this 14<sup>th</sup> day of November 2023 in Montgomery, Vermont pursuant to V.R.E.F. 9(d).



Thomas G. Walsh, Judge  
Superior Court, Environmental Division

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<sup>3</sup> We note that this issue is further outside the scope of this Court’s leave to file an amended Question 3, which was specifically to address specific purpose statements in the Flood Bylaws that he argued were relevant in this appeal. See Radicioni, No. 23-ENV-00020, slip op. at 5—6, 8 (Sept. 12, 2023) (Walsh, J.). Pursuant to V.R.C.P. 15(a), a party seeking to amend their statement of questions more than 20 days after it is initially filed may only do so with leave of the Court. While the Court is encouraged to allow such pleading amendments, the Court has received no request for leave to amend the statement of questions beyond the scope of that provided in the September Entry Order. This presents additional grounds to dismiss the issue as posed.