VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00018

Ranney Dairy Farm, LLC Major Subdivision Appeal

DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Title: Motion for Partial Summary Judgment (Motion: 4)
Filer: Samuel H. Angell
Filed Date: August 31, 2022

Appellant's Memorandum in Opposition to Motion for Partial Summary Judgment, filed on September 30, 2022, by Attorney Fletcher D. Proctor.

Applicant's Supplement to Motion for Summary Judgment Regarding Questions 15 & 16, filed on November 2, 2022, by Attorney Samuel H. Angell.

Memorandum in Opposition to Applicant's Supplement to Motion for Partial Summary Judgment Regarding Questions 15 & 16, filed on December 2, 2022, by Attorney Fletcher D. Proctor.

INTRODUCTION

Ranney Dairy Farm, LLC (Applicant) seeks permission to subdivide a parcel of land that it owns in the Town of Westminster (Town). The Town's Development Review Board (DRB) approved the subdivision. Adjacent property owners Daniel Deitz, Steven Goulas Sr., Veronica Goulas, Trisha Kneeland, Martha Moscrip, Nancy Pike, Philip Ranney, Michael Sylvester, and Teresa Sylvester (collectively, Neighbors) appealed the DRB's approval to this Court. Presently before the Court is Applicant's Motion for Partial Summary Judgment. Applicant moves for Summary Judgment on Questions 2–6, and 15–16.[1] Neighbors oppose the motion.

[1] While Applicant's motion requests summary judgment on Neighbor's Question 6, Applicant's memorandum does not address the issues raised in Question 6 in any capacity. Applicant's Mot. Partial Summ. J at

In this proceeding, Applicant is represented by Samuel H. Angell, Esq. Attorney Fletcher D. Proctor represents all Neighbors. The Town is represented by Lawrence G. Slason, Esq.

STATEMENT OF QUESTIONS

In the Environmental Division, the Statement of Questions "functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court." In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). It provides notice to other parties of the issues to be determined within the case, while also limiting the scope of the appeal. Id.

Applicant's Motion for Summary Judgment requests summary judgment on Questions 2–5, and 15–16. Those specific questions present the following issues:

> 2. Was public notice of the hearing before the DRB on the subdivision permit application posted within view from the public right-of-way most nearly adjacent to the Applicant's property as required by 24 V.S.A. § 4464(a)(1)(B) and Westminster zoning and subdivision bylaws?
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> 3. Is Old Codding Road a private road as defined by 24 V.S.A. § 4303(33) and the Westminster zoning and subdivision bylaws?
>
> 4. Is Old Codding Road a public road or class 4 town highway as described in 24 V.S.A. § 4412(3) and the Westminster zoning and subdivision bylaws?
>
> 5. Did the Applicant demonstrate that the development will have access to a public road or class 4 town highway as required by 24 V.S.A. § 4412(3) and the Westminster zoning and subdivision bylaws?

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1. The Court declines to consider Question 6, as the issue was inadequately briefed. See C&S Wholesale Grocers, Inc. v. Vermont Dept. of Taxes, No. 547-9-14 Wncv, slip op. at 4 (Vt.Super. June 24, 2015) ("The matter is inadequately briefed. The court declines to address it further."). Further, despite the fact that Applicant's original motion did not request summary judgment on Question 16, Applicant noted in its briefing that there was a pending motion to reconsider the dismissal of Questions 15 and 16 and, depending on the Court's ruling on said motion to reconsider, it may file a supplemental motion for summary judgment pertaining to those two questions. Applicant's Mot. Partial Summ. J. at 10. On Oct 28, 2022, the Court granted Appellants' motion to reconsider, and adopted the amendments to Questions 15 and 16. See Entry Order at 3–4 (Oct. 28, 2022). Subsequently, on November 2, 2022, Applicant filed an amendment to the Motion for Partial Summary Judgment, requesting the Court consider Questions 15 and 16 in the present motion.

. . .

> 15. Has Applicant consulted with or obtained approval from the Vermont Department of Fish and Wildlife for development within an identified deer wintering area, and has the Applicant demonstrated that the remainder of the deer wintering area owned by the Applicant will be managed in a manner compatible with the continued viability of the deer wintering area?
>
> 16. Is there adequate access to the development sites by emergency services such as fire, rescue, and police as required by the Westminster zoning and subdivision bylaws?

Neighbor's Statement of Questions (filed Feb. 22, 2022) (as amended by Ranney Dairy Farm, LLC Major Subdivision Appeal, No. 22-ENV-00018, slip op. at 3–4 (Vt. Super. Ct. Envtl. Div. Oct. 28, 2022) (Walsh, J.)).

Legal Standard

"Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Samplid Enters, Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996). When considering a motion for summary judgment, the Court gives the nonmoving party the benefit of all reasonable doubts and inferences. Id.

The initial burden in a motion for summary judgment falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). Where "the moving party does not bear the burden of persuasion at trial," however, "it may satisfy its burden of production by indicating an absence of evidence in the record to support the nonmoving party's case." Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). Once the moving party has made that showing, the burden shifts to the non-moving party. Id. The non-moving party may not rest on mere allegations but must come forward with evidence that raises a dispute as to the facts in issue. Clayton v. Unsworth, 2010 VT 84, ¶ 16, 188 Vt. 432.

DISCUSSION

I. Admissibility of Applicant's Affidavits and Exhibits

In support of Applicant's Motion, Applicant supplies two affidavits. The affidavits are submitted by Peter Shumlin and Joseph DiBernado. The affidavits set forth alleged material facts relative to Mr. Shumlin's and Mr. DiBernado's knowledge of the project at issue in this appeal, and the basis for Applicant's pending motion for partial summary judgment. The affidavits, and their respectively attached exhibits, are the totality of the evidence Applicant cites to in support of its pending motion.

Neighbors argue that the two affidavits supplied by Applicant are inadmissible. Specifically, Neighbors object to Mr. Shumlin's and Mr. DiBernardo's affidavits on the grounds that (a) the information provided is not based on personal knowledge, and (b) that the affidavits are not sworn.

The evidence, either in support of or in opposition to, a motion for summary judgment, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8, 208 Vt. 112. "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." V.R.C.P. 56(c).

An affidavit relied upon by any party on summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." V.R.C.P. 56(c)(6); *see also* Vermont Dep't of Soc. Welfare v. Berlin Dev. Assocs., 138 Vt. 60, 62 (1980) (affidavit could not support summary judgment motion where "affidavit, read as a whole, d[id] not reveal that the statements it contain[ed] were made on personal knowledge"). Affidavits do not need to expressly state that it is based on personal knowledge so long as "it is clear from the affidavit and the attached exhibits that it is made on personal knowledge." Openaire, Inc. v. L.K. Rossi Corp., 2007 VT 120, ¶ 14, 182 Vt. 636 (concluding affidavit satisfied requirement because the affiant signed the contract in question, was intimately involved with the details of the matter, and that the exhibits submitted with the affidavit would be admissible at trial).

The Vermont Rules of Civil Procedure does not expressly require that affidavits be sworn. V.R.C.P. 56(c)(6). Rather, V.R.C.P. 56(c)(6)'s other requirements—namely, that the affidavit set out facts that would be admissible in evidence and show the affiant is competent to testify—carry the requirement by implication. For a witness's testimony to be admissible, a witness must declare that they will testify truthfully. V.R.E. 703. Additionally, to be competent to testify, a witness must "understand[] the duty of a witness to tell the truth." V.R.E. 601. This is mirrored in V.R.C.P. 56(c)(6), which requires that affidavits must "set out facts that would be admissible evidence, and show the affiant is competent to testify on the matters stated." V.R.C.P. 56(c)(6).

Further guidance can be found in the equivalent rule set forth in the Federal Rules of Civil Procedure. The Vermont Rule and Federal Rule provide the same requirements with respect to affidavits used on summary judgment. *Compare* V.R.C.P. 56(c)(6), (e) *with* F.R.C.P. 56(c)(4), (e). Under the Federal Rule, "affidavits no longer need to be notarized and will be admissible if they are made under penalties of perjury; only unsworn affidavits will be rejected." Wright and Miller, Fed. Prac. & Proc. Civ. § 2738, n. 37 (4th ed.) ("Affidavits in Support of or in Opposition to Summary Judgment"); *see also* Harbec v. United States, No. 5:19-CV-61, 2020 WL 4729065, at *2 n. 4 (D. Vt. May 26, 2020) (interpreting V.R.C.P. 56(c) and the federally equivalent rule and discussing insufficiency of unsworn document in summary judgment);*see also* 28 U.S.C. § 1746 (providing required language for written unsworn declarations, which includes "under penalty of perjury"; 12 V.S.A. § 5851 (providing acceptable alternative language for giving an oath or affirmation). Courts have concluded that unsworn affidavits are not competent summary judgment evidence because it does not comply with the requirements of Federal Rule of Civil Procedure 56(e). *See* Nissho–Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1305–07 (5th Cir.1988) (concluding that notarized but unsworn affidavit was not competent summary judgment evidence); *see also* Harbec, No. 5:19-CV-61, 2020 WL 4729065, at *2 n. 4.

This Court concludes that Mr. Shumlin and Mr. DiBernado's affidavits are based on personal knowledge. Mr. Shumlin speaks to observations or experiences obtained as sole member and representative of Applicant, and his direct involvement in the creation of the

application presently on appeal. See Applicant's Statement of Facts (Ex. A) (filed Aug. 31, 2022). Mr. DiBernardo describes his field work and survey of the parcels through his employment with Applicant, and in connection with the application presently on appeal. *See* id. (Ex. B). It is clear from the affidavit and attached exhibits that the statements of both affiants are based on information "gained through firsthand observation or experience." Black's Law Dictionary, personal knowledge (11th ed. 2019). Therefore, the Court concludes that the affidavits satisfy the requirement that an affidavit's content must be made on personal knowledge.

The affidavits are unsworn. Therefore, the Court concludes that the affidavits do not satisfy the remaining Rule 56(c) requirements. While the affiants signed the affidavits before a notary public, the notary block, as well as the body of the affidavit, are insufficient to show that either document was sworn or carries with it the pains and penalties of perjury. See Applicant's Exs. A and B. The notary block of both affidavits only provides that "[affiant] personally appeared and, he acknowledged this instrument, by him subscribed, to be his free act and deed." Id. As such, the notary block only tells the Court that the signature was not forged and not made under duress. It does not inform the Court that the information provided therein is sworn to and, therefore, the truth under penalty of perjury. The Court cannot rely on these affidavits as support for Applicant's statement of undisputed material facts.[2]

Because these affidavits and attached exhibits represent the entirety of the support of Applicant's motion, the Court concludes that Applicant has failed to establish undisputed material facts and therefore are not entitled to Summary Judgment. The Court **DENIES** Applicants Motion.

II. Justiciability of Neighbor's Questions 2, 3, and 4.

Despite the Court's above conclusion, the Court has identified subject matter jurisdiction issues in Neighbor's Questions 2, 3, and 4.

[2] In reaching this conclusion, the Court does not rule upon whether the content of the affidavits or attached exhibits could not be submitted in a manner that would be admissible. Instead, this ruling is limited to the scope of the present procedural context of ruling upon a motion for summary judgment.

This Court has "an independent obligation to determine whether subject-matter jurisdiction exists" and must consider such jurisdiction on its own. In re Verizon Wireless Barton Permit, No. 133-6-08 Vtec, slip op. at 8 (Vt. Envtl. Ct. May 20, 2009) (Durkin, J.) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006)); *see also* V.R.C.P. 12(h)(3) (stating that "[w]henever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

The Vermont Constitution "limits the authority of the courts to the determination of actual, live controversies between adverse litigants." In re Durkee, 2017 VT 49, ¶ 11, 205 Vt. 11 (internal quotation omitted). "[N]o justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." Gilligan v. Morgan, 413 U.S. 1, 9 (1973).

Beyond these constitutional limits, the Environmental Division is further limited by the scope of its own jurisdiction. 4 V.S.A. § 34. This Court's jurisdiction is limited to: "(1) jurisdiction of matters arising under 10 V.S.A. chapters 201 and 220; (2) jurisdiction of matters arising under 24 V.S.A. chapter 61, subchapter 12 and chapter 117; and (3) original jurisdiction to revoke permits under 10 V.S.A. chapter 151." Id. To be properly before this Court, the questions on appeal, must fall within any of the categories above.

To be properly before this Court, the questions on appeal must both be within the scope of this Court's jurisdiction and present a live, actionable controversy. Upon review of Neighbor's Questions 2, 3 and 4, the Court identifies subject matter jurisdiction issues in each question deeming them non-justiciable in this action. Each of those issued is discussed in relevant subpart.

a. Question 2

Neighbors' Question 2 states:

> Was public notice of the hearing before the DRB on the subdivision permit application posted within view from the public right-of-way most nearly adjacent to the Applicant's property as

required by 24 V.S.A. § 4464(a)(1)(B) and Westminster zoning and subdivision bylaws?

Question 2 presents the issue of whether public notice of the underlying DRB hearing, specifically as it relates to the physical posting of a public hearing notice on Applicant's property, was proper, This question is nonjusticiable as it relates to the parties presently before the Court.

For a case to be justiciable, it must "remain live throughout" the court process. Wool v. Off. of Pro. Regul., 2020 VT 44, ¶ 6, 212 Vt. 305. (quoting Houston v. Town of Waitsfield, 2007 VT 135, ¶ 5, 183 Vt. 543 (mem.)). A case becomes moot if at any point the court no longer can grant effective relief. Id.; In re Moriarty, 156 Vt. 160, 163 (1991) ("A case is moot if the reviewing court can no longer grant effective relief."); see Holton v. Dep't of Emp. & Training (Town of Vernon), 2005 VT 42, ¶ 14, 178 Vt. 147 ("The mootness doctrine . . . limits the authority of the courts to the determination of actual, live controversies between adverse litigants.").

Further, Neighbors standing to raise these issues is a jurisdictional prerequisite. Wool, 2020 VT at ¶ 10. To have standing, there must be "(1) injury in fact, (2) causation, and (3) redressability." Severson v. City of Burlington, 2019 VT 41, ¶¶ 9–10, 210 Vt. 365. In other words, there must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; "a causal connection between the injury and the conduct complained of"; and "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Turner v. Shumlin, 2017 VT 2, ¶ 11, 204 Vt. 78. Generally, Courts "do not allow third-party standing." Baird v. City of Burlington, 2016 VT 6, ¶ 15, 201 Vt. 112; see *Kimball,* 2011 VT 81, ¶ 12 ("We have the same standing requirement as the federal courts . . . a party who is not injured has no standing to bring a suit.").[3]

[3] While there are exceptions to the prohibition of their party standing, those exceptions are not relevant to this action.

First, the Court concludes this question is moot as it relates to Neighbors. The Environmental Division will review this appeal by trial de novo. V.R.E.C.P. 5(g). As the Court frequently notes, "a de novo trial is one where the case is heard as though no action whatever has been held prior thereto." Burton Corp. Site Work Approval, No. 15-2-20 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. June 25, 2021) (Durkin, J.) (quoting Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989)). To be appellants before this Court, a person must satisfy the statutory standing requirements set forth in 24 V.S.A. §§ 4465, 4471. Neighbor's ability to appear before this Court as appellants in this matter has not been challenged.[4] Thus, all Neighbors are currently challenging project presently before the Court, where they will be permitted to present evidence as though no action had been heard below. Burton Corp. Site Work Approval, No. 15-2-20 Vtec at 10 (June 25, 2021). Because the Court cannot conclude that any appellant or interested party was prejudiced due to any alleged procedural defect below. Cf., e.g., Town of Pawlet v. Banyai, 2022 VT 4, ¶ 15 (finality limiting issues on appeal). Any possible notice issues related to the noticing of the initial public hearing on the application presently before the court, and as they pertain to Appellants, have been cured by the appeal and are now moot.

To the extent Neighbors assert that any alleged public notice issues are not moot because other non-appellant individuals may have been entitled to notice, but did received notice, of the initial public hearing before the DRB, Neighbors do not have standing to raise this Question. Neighbors attempt to assert third-party standing on behalf of others not before the Court. See Baird, 2016 VT 6, ¶ 15 (concluding professor lacked standing to challenge trespass ordinance on behalf of Burlington's unhoused population); Bischoff v. Bletz, 2008 VT 16, ¶ 16, 183 Vt. 235 (determining that plaintiffs' contract with defendants did not give them standing to challenge third party's contract with defendants); see also State v. Karov, 170 Vt. 650, 652 (mem.) (holding that defendant did not have standing to raise facial challenge to validity of aggravated assault statutes for their risk of creating double jeopardy grounds because he himself was not charged in way that created double jeopardy). As stated above, Neighbors'

[4] While Ms. Moscrip did not participate before the DRB, Applicant has not challenged her ability to appear in this matter as an interested person. In re Ranney Dairy Farm, LLC, No. 22-ENV-00018, slip op. at 3—4 (Vt. Super. Ct. Envtl. Div. May 31, 2022) (Walsh, J).

ability to appear before the Court as appellants in this matter is not challenged. Thus, they have not been injured by any alleged deficiency in the public notice of the initial DRB hearing. Effectively, they are asserting that an alleged injury of another. This is prohibited by the third-party standing rule. The Court concludes that Neighbors do not have standing to assert a defect in notice on behalf of any hypothetical persons not before the Court.

Therefore, the Court concludes that any alleged notice issue has been cured and is now moot as it relates to Neighbors, and Neighbors do not have standing to assert the rights of others not before the Court. Accordingly, the Court **DISMISSES** Question 2 as not justiciable pursuant to 12(b)(1).

b. Questions 3–4: Adjudication of Property Rights

Neighbors' Questions 3 and 4 state:

> 3. Is Old Codding Road a private road as defined by 24 V.S.A. § 4303(33) and the Westminster zoning and subdivision bylaws?
>
> 4. Is Old Codding Road a public road or class 4 town highway as described in 24 V.S.A. § 4412(3) and the Westminster zoning and subdivision bylaws?

This Court's jurisdiction over "property-related issues and rights is limited to issues within the scope of the regulations governing the permit application." In re Britting, No. 259-11-07 Vtec, slip op. at 5 (Vt. Envtl. Ct. Apr. 7, 2008) (Wright, J.) (noting the Court's subject matter jurisdiction to consider matters arising under 10 V.S.A. ch. 220). For example, in cases in which the applicable ordinance or statute requires a subdivision has frontage or access to a public road, "the Court can consider whether the applicant has demonstrated that the application meets such a requirement." Id. "On the other hand, resolution of adjacent landowners' rights regarding a disputed right-of-way is beyond the jurisdiction of this Court." Id. That is a matter left for the Civil Division.

The crux of the parties disputes relevant to these Questions, as shown through Applicant's motion and supporting papers and Neighbor's memoranda in opposition to this motion, is one of property rights. Applicant argues that it is entitled to summary judgment

because (1) the Vermont Supreme Court has recognized the right of abutting property owners to use a discontinued roadway; (2) 19 V.S.A. § 717(c) mandates that when a public road is discontinued, a person has a right of access along that road if it was their sole access to all or a portion of their land; and (3) it is not appropriate to apply ancient easement law to the law of road discontinuance. Neighbors' arguments focus on the interplay between easements, public road discontinuance, and the meaning of "sole access" to argue that Applicant does not have a legal right to the increased use of Old Codding Road.

These questions are beyond this Court's jurisdiction. While this Court can determine whether Applicant has satisfied its burden of showing that the application meets access requirements set forth in the Town's Bylaws,[5] it cannot decide what rights the Applicant and Neighbors hold relative to this disputed roadway. See Britting, No. 259-11-07 Vtec at 5 (Apr. 7, 2008). That is a matter left for the Civil Division.

Accordingly, the Court DISMISSES Questions 3 and 4 as they request adjudication of a matter beyond the subject matter jurisdiction of this Court.

CONCLUSION AND ORDER

For the forgoing reasons, the Court **DENIES** Applicant's Motion for Partial Summary Judgment as to Questions 2–5, and 15–16. Applicant has failed to produce any admissible evidence demonstrating the absence of genuine issues of material fact, and thus has not satisfied its burden under V.R.C.P. 56.

Further, Questions 2, 3 and 4 are hereby **DISMISSED** as they are outside the scope of this Court's jurisdiction. Question 2 is moot as it pertains to the Neighbors before the Court, and Appellants lack standing to raise the issue on behalf of those hypothetical persons not

[5] The Court notes that Question 5 appears to raise that issue more specifically, asking:

> 5. Did the Applicant demonstrate that the development will have access to a public road or class 4 town highway as required by 24 V.S.A. § 4412(3) and the Westminster zoning and subdivision bylaws?

Further, based upon the Court's above conclusion that it cannot grant Applicant's motion, this Question remains before the Court.

before the Court. Questions 3 and 4 ask for adjudication for matters beyond the limited jurisdiction of this Court.

To assist the parties in their preparations for a merits hearing, we note the following Questions remain for trial, preserving the original numbering for clarity:

1. Are the 2017 subdivision bylaws used by the Westminster Development Review Board ("DRB") in reviewing the Applicant's permit application validly in force?

5. Did the Applicant demonstrate that the development will have access to a public road or class 4 town highway as required by 24 V.S.A. § 4412(3) and the Westminster zoning and subdivision bylaws?

6. Does the plot plan filed by the Applicant conform to the site plan review requirements of 24 V.S.A. § 4416 and Westminster zoning and subdivision bylaws?

15. Has the Applicant demonstrated that the remainder of the deer wintering area owned by the Applicant will be managed in a manner compatible with the continued viability of the deer wintering area?

16. Is there adequate access to the development sites by emergency services such as fire, rescue, and police as required by the Westminster zoning and subdivision bylaws?

This matter will be set for a status conference to establish the remaining schedule leading to trial.

Electronically signed January 3, 2023, pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division