VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
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Docket No. 21-ENV-00007

Stewart dba Premiere Homes of VT Subdivision Permit #04-69

ENTRY REGARDING MOTION

Title: Motion for Preliminary Injunction (Motion: 1)

Filer: Appellant Brian Harrington, *Pro Se*

Filed Date: March 02, 2021

Response Memorandum in Opposition filed on March 12, 2021, by Attorney Nicholas A.E. Low for Applicant David Stewart and Premiere Homes, Inc.

Reply Memorandum in Support filed on March 27, 2021, by Appellant Brian Harrington

The motion is DENIED.

Brian Harrington appeals a decision of the Town of West Rutland Development Review Board ("DRB") dated December 14, 2020, approving with conditions the application of David Stewart and Premiere Homes, Inc. (collectively, "Applicant") to amend a prior subdivision and site plan approval for a five-lot subdivision with frontage on Durgy Hill Road and Old Town Farm Road in West Rutland, Vermont, Parcel #22-0120370 ("the Project"). Presently before the Court is Mr. Harrington's motion for a preliminary injunction, seeking to enjoin Applicant from selling Project lots while this appeal is pending.

Background

The facts relevant to the motion for preliminary injunction are found in identical materials submitted by both Mr. Harrington and Applicant, which establish the procedural history of this matter. We therefore consider the following summary to be undisputed.

In 2006, this Court issued a Decision and Judgment Order approving the Project ("2006 Approval") and incorporating the terms of a settlement agreement put forward by the parties which included several conditions on 7 handwritten pages ("Settlement"). *See* In re Premiere Homes of Vermont, No. 186-9-05 Vtec, slip op. at 3 (Vt. Envtl. Ct. Oct. 13, 2006) (Wright, J.). The Settlement itself incorporated the terms of the original municipal approval granted by the West Rutland Planning Commission in 2005: Permit #04-69 ("2005 Approval"). Thus, under the 2006 Approval issued by this Court, the Project was subject to the conditions imposed in the 2005 Approval and the additional conditions set forth in the Settlement. The 2005 Approval included Condition 10 which required:

10. That no lot shall be sold until the applicant's engineer certifies the drainage system complete, the escrow account is complete and the payment for the Durgy Hill drainage system is made.

The Project's drainage system, as originally proposed, contemplated the construction of grass and earthen swales on the westerly side of the proposed lots near Old Town Farm Road, along with upgrades and repairs to the existing Old Town Farm Road drainage ditch.

As for the Settlement, a condition on page 7 required the planting of 25 trees, approximately 8 feet tall and 10 feet apart, along Old Town Farm Road. The plantings were to be done "in consultation with" Applicant's engineer and were "[t]o [b]e planted at the time the seeding of the swale network is accomplished." The trees would provide visual screening of the Project from the viewpoint of Mr. Harrington's neighboring property.

No party appealed the 2006 Approval. As of 2020, none of the Project lots had been sold and the trees had not been planted. Applicant applied to the DRB on November 9, 2020, for amendments and other determinations related to the 2005 Approval. Among other things, Applicant sought a determination that the grass swale drainage system had been completed such that Condition 10 was satisfied. The application did not seek to amend the tree-planting condition or any other condition of the Settlement.[1]

On December 14, 2020, the DRB issued a decision on the application ("2020 Decision"). The 2020 Decision, which is the decision at issue in this appeal, concluded that Condition 10 of the 2005 Approval concerning the drainage system had been satisfied. In addition, although the application before the DRB did not seek a determination regarding tree plantings, the DRB noted concerns raised by Mr. Harrington and imposed a new requirement that the trees be planted – along with a performance bond or escrow deposit for at least 50% of the estimated cost. Though the DRB acknowledged that there was a requirement for tree plantings in the Settlement underlying the 2006 Approval, the DRB explicitly declined to consider or modify the terms of the 2006 Approval, stating that "its authority does not extend to interpreting, applying, or amending VT Superior Court decisions, lacking clarification or specific instructions from the Court."

Discussion

As the party seeking relief, Mr. Harrington bears the burden of demonstrating that the relevant factors warrant the issuance of a preliminary injunction. The essential factors which guide the Court's analysis are: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest. Taylor v. Town of Cabot, 2017 VT 92, ¶ 19, 205 Vt. 586. Preliminary injunctions are an extraordinary remedy and are not granted as a matter of right. Id. (*quoting* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008)). Furthermore, "a court may exert its equitable powers to grant appropriate relief only when a judicially cognizable right exists, and no adequate legal remedy is available." Titchenal v. Dexter, 166 Vt. 373, 377 (1997). Equitable relief is not appropriate "where there is a plain, adequate, and complete remedy at law." Gerety v. Poitras, 126 Vt. 153, 155 (1966).

Mr. Harrington's motion for preliminary injunction suffers from two deficiencies: failure to demonstrate irreparable harm, and failure to demonstrate the absence of an adequate remedy at law.

[1] Mr. Harrington argues that Condition 10 of the 2005 approval cannot be satisfied until the tree planting condition of the Settlement is satisfied. For the reasons explained in the discussion below, our analysis is the same whether we accept Mr. Harrington's assessment or not.

His primary concern is that the trees required by the Settlement and this Court's 2006 Approval have not been planted – and will never be planted if Applicant is allowed to sell the land to third parties. Mr. Harrington suggests that Condition 10 of the 2005 Approval is dependent on the tree planting condition of the Settlement, such that the drainage system cannot be deemed complete until the trees are installed. Under this interpretation, Applicant cannot sell Project lots until the planting requirement is fulfilled.

Mr. Harrington argues that the DRB's 2020 Decision effectively waives the planting requirement by concluding that Condition 10 of the 2005 Approval is satisfied and allowing Applicant to begin selling Project lots. According to Mr. Harrington, once the lots are sold, he "will have nothing to ensure that the trees are ever planted as required": thus, he will be irreparably harmed. Though we recognize Mr. Harrington's concern, his argument is premised on the unsupported assumptions that: the DRB's 2020 Decision somehow altered the tree planting condition; the tree planting condition is not enforceable on its own; and future owners of the Project lots will not be bound by the tree planting condition.

As explained above, the 2006 Approval incorporated all conditions of the 2005 Approval, and all conditions of the Settlement. The 2006 Approval has the same force and effect as an approval issued by the DRB. The 2006 Approval was never appealed, therefore it is final and may only be altered if the circumstances warrant the grant of a permit amendment. *See* In re Hildebrand, 2007 VT 5, ¶ 12, 181 Vt. 568 (2007) (discussing the finality requirement of 24 V.S.A. § 4472). Thus, in principle the Project must meet all conditions of the 2005 Approval and the Settlement. The DRB's 2020 Decision explicitly declined to interpret or modify the Settlement incorporated in the 2006 Approval. It follows that nothing in the 2020 Decision altered the condition requiring tree plantings along Old Town Farm Road.[2]

Municipal zoning permit conditions run with the land: they are binding on the applicant as well as any successors in interest. *See* Hannaford SD Revision, Nos. 68-5-14 Vtec, 69-5-14 Vtec, 70-5-14 Vtec, slip op. at 12 & n.5 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2016) (Walsh, J.) ("Municipal land use permits apply to and run with the land."); Zins 2-Lot Subdivision Denial, No. 115-10-19 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. Dec. 15, 2020) (Durkin, J.) (quoting Hildebrand, 2007 VT 5, ¶ 11) ("Failure to appeal a permit condition 'binds the successor in interest.'"). Thus, the condition requiring tree plantings, which was incorporated into the 2006 Approval, is binding on Applicant and any future owners of the relevant lots. *See* Zins, No. 115-10-19 Vtec at 6–7 (Dec. 15, 2020) (noting there was "no dispute" that the applicant was bound by the terms of the original subdivision permit that created his parcel).

The Town's Zoning Administrator has authority to enforce the terms of the 2006 Approval. *See* In re Minor Subdivision Plot Approval No. 88-340, 156 Vt. 199, 202 (1991) ("A violation of a condition of a subdivision permit would be a violation of the zoning ordinance itself."); *see also* 24 V.S.A. § 4452. This Court also retains the authority to enforce the terms of the Settlement. *See* Newbury v. Celeste, No. 50-3-10 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. July 28, 2010) (Wright, J.) (citation omitted) ("If the settlement had been . . . incorporated into a court order, then the Court would have authority directly to enforce its terms, through a contempt proceeding or other post-judgment proceeding.").

[2] Thus, even if we accept Mr. Harrington's assertion that Condition 10 of the 2005 approval cannot be satisfied until the tree planting condition is fulfilled, the planting condition itself remains unmodified as part of Settlement incorporated in the 2006 Approval.

Though it appears that the Zoning Administrator has authority to enforce the tree planting condition, we note that this authority is time-bound. The condition arises from the 2006 Approval and Order, which was issued October 13, 2006. In re Premiere Homes, No. 186-9-05 Vtec (Vt. Envtl. Ct. Oct. 13, 2006). Pursuant to 24 V.S.A. § 4454(a), an enforcement action must be instituted "within 15 years from the date the alleged violation first occurred, and not thereafter." If an enforcement action is not initiated before October 13 of this year, 2021, the statute of limitations may bar the Town from pursuing the issue at a later date. *See* 24 V.S.A. § 4454(a).

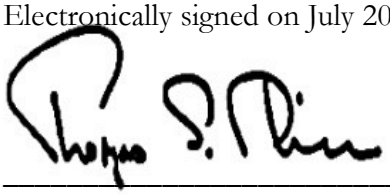
Because the tree planting condition incorporated in the 2006 Approval has not been altered, and because municipal land use permit conditions run with the land, we conclude that Mr. Harrington has failed to show that he will be irreparably harmed if Applicant begins selling Project lots.

Though it seems Mr. Harrington has not attempted to enforce the tree planting condition, he does have recourse through municipal and judicial enforcement mechanisms. Therefore, we further conclude that he has an adequate remedy at law. For these reasons, we conclude that Mr. Harrington is not entitled to injunctive relief. *See* Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc., 148 Vt. 1, 7 (1987) (indicating that irreparable harm is required); Taylor, 2017 VT 92, ¶ 40 (quotation omitted) ("A preliminary injunction will usually be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief.")

The motion for preliminary injunction is **DENIED**.

So Ordered.

Electronically signed on July 20, 2021, at Burlington, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division