VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org

Docket No. 22-ENV-00012

Town of Marshfield v. Harris

ENTRY REGARDING MOTION

Motion 1: Motion to Dismiss

Filer: Evan Barquist, attorney for Defendant Henry Harris

Filed Date: March 28, 2022

Town of Marshfield's Oppositions to Defendant's Motion to Dismiss, filed on April 28, 2022, by Brian P. Monaghan, attorney for Town of Marshfield

Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, filed on May 20, 2022, by Evan Barquist, attorney for Henry Harris

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Motion 2: Motion for Judicial Notice of Municipal Documents

Filer: Evan Barquist, attorney for Defendant Henry Harris

Filed Date: March 28, 2022

See Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, filed on May 20, 2022, by Evan Barquist, attorney for Henry Harris (noting Town did not respond to this motion)

The motions are DENIED.

This matter is before the Court on Defendant Henry Harris's Motion to Dismiss for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss at 8 (filed Mar. 28, 2022). In support of his motion, Defendant argues that the Town of Marshfield ("Town") misapplied its Zoning Regulations ("Bylaws") to his summer venture, Uprise Camp ("Camp"), and that the Town's review process and subsequent enforcement action violate his rights under the First and Fifth Amendments to the U.S. Constitution via the Fourteenth Amendment, as well as his rights under Article Four, Seven, Thirteen, and Twenty of the Vermont Constitution. Id.

To support his Motion to Dismiss, Defendant filed 10 exhibits supporting his motion. See Mot. for Judicial Notice (filed Mar. 28, 2022). The Town opposes

the motion to dismiss, arguing that Defendant's Camp use is a commercial use, Defendant failed to establish that the Town's ordinance is unconstitutional, and Defendant had ample notice that a conditional use permit ("CUP") would be necessary and chose not to apply for the permit. Town's Opp. at 3–10. The Town did not respond to Defendant's motion for judicial notice of municipal documents, nor did the Town include any exhibits in its opposition or rely on Defendant's exhibits.

Standard of Review

As Defendant filed extrinsic evidence with the Court, the Court must determine which standard of review to apply to Defendant's Motion to Dismiss. A Rule 12(b)(6) "motion to dismiss serves to identify an insufficient cause of action . . . where essential elements [of the claims] are not alleged." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1. A motion for failure to state a claim may not be granted unless it is beyond doubt that there are no facts or circumstances that would entitle the Town to relief. Id. ¶ 5 (citation omitted). The Court takes all well-pleaded factual allegations in the Complaint and all reasonable inferences derived therefrom as true and "assume[s] that the movant's contravening assertions are false." Alger v. Dep't of Labor & Industry, 2006 VT 115, ¶ 12, 181 Vt. 309 (citation omitted). The Court's job is to determine whether the Town has alleged a set of facts upon which relief could be granted, not to determine the veracity of those allegations. The Town's burden to state a claim under Vermont's "notice-pleading standard is exceedingly low." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575.

If, while deciding a motion to dismiss under 12(b)(6), matters outside the pleadings are presented to and not excluded by the court, the motion is converted to one for summary judgment. See V.R.C.P. 12(b); see Reporter's Notes V.R.C.P. 12(b) ("the rule provides for the conversion of a motion under it into a motion for summary judgment under Rule 56 in appropriate circumstances"). When treated as a Rule 56, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." V.R.C.P. 12(b). Even when "'the parties rely on extrinsic evidence,'" however, "it is up to the court whether to convert the motion, and [the Court] 'may simply disregard the extrinsic materials instead.'" Island Indus., LLC v. Town of Grand Isle, 2021 VT 49, ¶ 18 (quoting S. Gensler & N. Mulligan, 1 Federal Rules of Civil Procedure, Rules and Commentary Highlights, Rule 12 (2021)).

Here, Defendant filed this motion to dismiss prior to submitting an answer to the Town's complaint. Def.'s Mot. to Dismiss; V.R.C.P. 12(b). Defendant's motion references several exhibits outside the pleadings, namely the municipal zoning documents, applications, correspondence, and decisions. See id. at 2–7, 11 (citing Exs. A–J); see Def.'s Mot. for Judicial Notice of Municipal Docs. (filed Mar. 28, 2022) (listing exhibits referenced in Defendant's Motion to Dismiss). The Town's opposition, however, does not respond to that extrinsic evidence, but rather responds to Defendant's legal arguments from within the four-corners of the Complaint. The Court does not find this to be an appropriate circumstance

for considering the extrinsic evidence. See Reporter's Notes V.R.C.P. 12(b). Due to the absence of an answer from Defendant, or any responsive materials made pertinent to this motion pursuant Rule 56 from either party, the Court does not have the resources to determine which material facts remain disputed. The Court is therefore disregarding Defendant's extrinsic exhibits and proceeding with the motion pursuant the above quoted Rule 12(b)(6) standard. See Island Indus., 2021 VT 49, ¶¶ 18–19. As such, Defendant's Motion for Judicial Notice of Municipal Documents (Motion 2), as it pertains to the present Motion to Dismiss, is **DENIED**.

Discussion on Motion to Dismiss

Turning now to Defendant's Motion to Dismiss, Defendant's primary argument in support of his motion is that the Town of Marshfield Development Review Board ("DRB") misapplied the Bylaws to his Camp. Def.'s Mot. to Dismiss at 10–16. Defendant argues that the Camp is not a commercial use, but rather one of the uses permitted in the Agricultural and Residential Use District, or alternatively, a First Amendment protected activity. However, the Court finds that because Defendant did not appeal either the DRB decision determining the Camp was a commercial use, or the Zoning Administrator's ("ZA") Notice of Violation ("NOV") determining that he had violated the Bylaw, the Court is bound by the finding that the Camp was a commercial use.

Under 24 V.S.A. § 4465(a), "[a]n interested person may appeal any decision or act taken by the administrative officer in any municipality by filing a notice of appeal with the . . . development review board of that municipality." Then, after the development review board reaches a decision, any interested person who participated in the board proceedings "may appeal a decision rendered in that proceeding . . . to the Environmental Division." 24 V.S.A. § 4471.

These appeals are "the exclusive remedy of an interested person with respect to any decision or act taken [by a ZA] . . . with respect to any one or more of the provisions of any plan or bylaw." 24 V.S.A. § 4472(a); Town of Pawlet v. Banyai, 2022 VT 4, ¶ 14. If an interested person fails to appeal the decision to the development review board pursuant § 4465 and the Environmental Division pursuant § 4471, they are "bound by that decision . . . and shall not thereafter contest, either directly or indirectly, the decision or act, provision, or decision of the panel in any proceeding, including any proceeding brought to enforce this chapter." 24 V.S.A. § 4472(d).

Courts "strictly enforce the exclusivity of remedy provisions contained within § 4472 to require that all zoning contests go through the administrative and appellate review process in a timely fashion." Banyai, 2022 VT 4, ¶ 15 (quoting In re Ashline, 2003 VT 30, ¶ 10, 175 Vt. 203). In effect, § 4472(d) bars "any kind of collateral attack on a zoning decision that has not been properly appealed through the mechanisms provided by the municipal planning and development statutes." Id. (emphasis in original) (quoting City of S. Burlington v. Dep't of Corr., 171 Vt. 587, 588–89 (2000) (mem.)).

There is, however, an exception to the general finality rule for constitutional challenges. 24 V.S.A. § 4472(b). Section 4472(b) allows an interested person to challenge the constitutionality of a provision of the zoning ordinance. It does not, however, authorize a constitutional attack on the application of the ordinance to particular facts. See Hinsdale v. Vill. of Essex Junction, 153 Vt. 618, 627 (1990). The Court has distinguished permissible constitutional challenges from such impermissible collateral attacks "because a landowner can often restate a request for a permit in terms of such necessity that the denial might rise to a constitutional deprivation." Id. Considering such repackaged constitutional issues through a collateral attack—especially one raised several months after the decisions involved became final—would undermine the finality the Legislature established in 24 V.S.A. § 4472. Id.

Courts have applied § 4472 to similar facts. In Town of Charlotte v. Richmond, the town zoning administrator issued a notice of violation to a landowner whose commercial use violated the town's zoning ordinance. 158 Vt. 354 (1992). The landowner had not appealed the notice, nor brought his land into compliance, and the town brought an enforcement action. During the enforcement proceedings, the landowner argued that the notice of violation was incorrect because the landowner's business was a permitted nonconforming use and therefore in compliance with the ordinance. The Supreme Court held the Environmental Division had no jurisdiction over the landowner's permitted-nonconforming-use argument because landowner failed to appeal the notice of violation, and the Court was bound by the ZA's determinations in the notice of violation. Id. at 356–57.

Here, as in Town of Charlotte, the Town has alleged that Defendant did not appeal the DRB's commercial use determination or the NOV, and it is now final. Town of Marshfield Compl. ¶ 24, 28 (filed Jan. 21, 2022) [hereinafter "Compl."]. Therefore, all parties and this Court are bound to those determinations, namely that Uprise Camp was a commercial use, that Defendant was required to obtain a CUP to operate the Uprise Camp on his land for that specific year, and that Defendant operated the Camp without the necessary permit. Thus, the Town has sufficiently pleaded facts supporting the Camp is a commercial use, in light of the unappealed final determination. Further, it follows that this Court does not have jurisdiction over the landowner's not-commercial-use argument. Charlotte, 158 Vt. at 356–57.

Unlike in Town of Charlotte, however, here Defendant repackages some arguments as constitutional challenges. Namely, Defendant argues that the Town is impermissibly regulating private First Amendment activities, and that the Town does so with a process that is uncertain in duration, gives excessive discretion to the DRB, and prioritizes the neighbor's due process over his first amendment, property, and privacy interests. Def.'s Mot. to Dismiss at 8. Central to the Defendant's substantive constitutional arguments is the assertion that Uprise Camp is not a commercial venture but constitutes protected First Amendment speech and assembly. See Def.'s Mot. to Dismiss at 12–13. In

essence, Defendant is repackaging his argument that Uprise Camp is not a commercial use by arguing that it is a First Amendment activity in order to raise a constitutional defense. See Hinsdale, 153 Vt. at 627 ("landowner can often restate a request for a permit in terms of such necessity that the denial might rise to a constitutional deprivation."). As noted above, however, the Court is bound to the determination that Uprise Camp was a commercial use, since Defendant chose not to timely appeal that determination to the Environmental Division. See id. ("If [an interested person] seriously thought he had been denied all practical use of his property by the two zoning board decisions in this case, his remedy was to appeal one or both of those decisions.")

Regarding Defendant's procedural due process and the common benefits clause arguments, the Court finds that Defendant has failed to meet his burden. First, and most critically, Defendant was given the opportunity to appeal the DRB commercial use determination—including the opportunity to challenge the procedural violations he now asserts—and elected not to appeal that decision. Compl. ¶ 24. As such, this Court is bound by that finality. 24 V.S.A. § 4472.

Second, Defendant has not shown that the decision he challenges deprived him of life, liberty, or property without due process. "Zoning bylaws are presumed to be valid," McLaughry v. Town of Norwich, 140 Vt. 49, 54 (1981), "and will not be held unconstitutional if wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective." Greene v. Blooming Grove, 879 F.2d 1061, 1063 (2d Cir. 1989) (citations omitted). Zoning requirements are constitutional so long as the landowner maintains "some practical use of his land, and the existence of a public good or benefit of sufficient magnitude to justify the burdening of the affected property." In re Letourneau, 168 Vt. 539, 543 (1998) (quoting Galanes v. Town of Brattleboro, 136 Vt. 235, 240 (1978)). Here, Defendant has failed to establish either that the Bylaws do not serve a permissible state objective, or that they deprive him of all practical use of his land. Even if the Court were to grant the requested injunction, Defendant could still operate future seasonal Camps on his property with the appropriate CUP, as well as use his property for any number of other activities. See Bylaws § 420 (enumerating the permitted uses in the Agricultural and Rural Residential Zoning District)

Third, Defendant has not identified a part of the community that received a benefit that another part of the community does not receive. The Common Benefits Clause "is intended to [ensure] that the benefits and protections conferred by the state are for the common benefit of the community and not for the advantage of persons 'who are a part only of that community.'" USGen New England, Inc. v. Town of Rockingham, 2003 VT 102, ¶ 28, 176 Vt. 104. All Town members are subject to the same Bylaws—including the notice and opportunity to be heard provisions—both when they are a permit applicant and an adjoining landowner.

Conclusion and Order

Looking at the Complaint as a whole, the Town has met its "exceedingly low" pleading standard. See Bock, 2008 VT 81, ¶ 4. The Town has sufficiently pleaded factual allegations to show that Mr. Harris's Camp was a commercial use, that the Camp's operation on Mr. Harris's property in Marshfield required a permit, and that Mr. Harris operated that commercial use on his property without having first obtained the necessary permit. Compl. ¶¶ 1–28. Thus, the Town has provided the short and plain statement of the factual elements of the claim that entitles it to relief. Further, Defendant has failed to meet his burden of establishing that a constitutional violation requires the Court to dismiss this enforcement action.

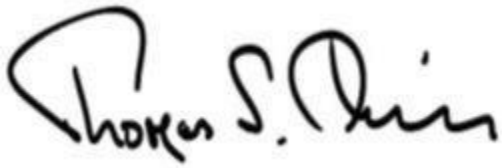
Thus, for the foregoing reasons:

1. The Court **DENIES**, for purposes of this Motion to Dismiss, the Defendant's Motion for Judicial Notice of Municipal Documents; and

2. The Court **DENIES** Defendant's Motion to Dismiss.

So Ordered

Electronically signed at Newfane, Vermont on Thursday, September 22, 2022, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division