VERMONT SUPERIOR COURT

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

Docket Nos. 21-ENV-00119
22-ENV-00016

Guilmette Zoning Appeal; Town of Richford v. Britch

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment
Filer: Nicholas AE Low
Filed Date: February 7, 2022
Response in opposition filed by Brian P. Monaghan on March 9, 2022

The Motion is **DENIED.**

In the first of these two coordinated matters, Leah Britch (Appellant), a landowner in the Town of Richford (Town), appeals multiple Notices of Violation (NOVs) issued to her by the Town Zoning Administrator and affirmed by its Development Review Board (DRB). In the second matter, the Town seeks an injunction and monetary relief from Appellant based upon those NOVs. Presently before the Court is Appellant's motion for summary judgment, spanning the two dockets. While titled a motion for "partial" summary judgment, for reasons that will become apparent, the motion does not relate back to particular questions in the Statement of Questions, but rather seeks to have the NOVs declared "defective, void ab initio and unenforceable." Appellant filed a very brief statement of undisputed material facts with the motion, to which the Town has noted its disputes.

Appellant is represented by Nicholas AE Low, Esq. The Town of Richford is represented by Brian P. Monaghan, Esq.

Background

We recite the following factual and procedural background, which we understand to be undisputed unless otherwise noted, based upon the record before us and solely for the purposes of deciding the pending motion. These recitations do not constitute factual findings, since factual findings cannot occur until after the Court has completed a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.); *see also* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14.

Through a letter dated May 3, 2021, the Town sent Appellant a formal notification that she was in violation of the Town's Zoning Bylaws by storing junk without holding a salvage yard permit or complying with the specific requirements of the Bylaws. Through a letter dated July 7, 2021, the Town formally notified Appellant that she was also in violation of a separate provision

of the Bylaws, specifically the performance standards concerning adverse effects on the reasonable use of neighboring properties. Through a follow-up letter dated July 29, the Town provided further details on the alleged violation of the performance standards, noting that one of Appellant's neighbors had complained about offensive odors from the property, while another neighbor had tested surface water downstream of the property and found pollutants. All three letters informed Appellant of her right to appeal the Zoning Administrator's determination to the DRB within 15 days, "in accordance with 24 V.S.A. § 4466."[1] The May 3 and July 7 letters informed Appellant of her right to cure the violation within seven days pursuant to 24 V.S.A. § 4451.

Appellant appealed at least the July 29 letter to the DRB on August 13. The DRB treated this as an appeal of the May 3 and July 7 NOVs as well. After a public hearing, the DRB upheld the Zoning Administrator's determinations, as contained in the May 3, July 7, and July 29 communications. Appellant's appeal to our Court followed. Soon thereafter, the Town filed the enforcement action against Appellant.

Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "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. The ultimate burden of persuasion at trial in either of the two present matters would lie with the Town to demonstrate the existence a zoning violation. *See* In re Jewell, 169 Vt. 604 (1999) (holding that town retained burden of proof in appeal of NOV and coordinated enforcement action). Given that Appellant is the movant, the holding of Boulton v. CLD Consulting Engineers, Inc. therefore applies, and she "*may* satisfy [her] burden of production [on motion for summary judgment] by showing the court that there is an *absence* of evidence in the record to support the nonmoving party's case.... The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." 2003 VT 72, ¶ 5, 175 Vt. 413 (emphasis added). As always, the nonmoving party "receives the benefit of all reasonable doubts and inferences," but must respond with more than unsupported allegations in order to show that material facts are in dispute. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356.

Discussion

There are three NOVs or letters to the Landowner purporting to be NOVs: A letter dated May 3, concerning junk, and letters dated July 7 and 29, concerning offensive smells and water pollution. Appellant has stated that the present motion for summary judgment only concerns the July 7 and 29 documents. As we discuss in more detail below, we consider the July 29 letter a clarification of the July 7 NOV, as it provides information missing from the July 7 NOV that is necessary under 24 V.S.A. § 4451. There are therefore only two NOVs, one concerning junk violations, and one concerning offensive smells and water pollution. The latter NOV was not perfected for purposes of the running of Appellant's time to cure and/or appeal until July 29, 2021. *See* In re Tibbits, 272-12-02 Vtec, 2003 WL 25479299 (Vt. Envtl. Ct. Apr. 03, 2003) (finding

[1] For the Town's edification, we note that while 24 V.S.A. § 4466 contains certain requirements for the notice of appeal, 24 V.S.A. § 4465 is the provision establishing the right to appeal to the appropriate municipal panel.

that an NOV corrected deficiencies in an earlier letter and gave the respondent the chance to appeal the determinations of the earlier letter along with the NOV).

Appellant raises several alleged defects in the July 7 NOV (as amended) in the present motion. The Town correctly points out that she did not raise these issues in her Statement of Questions. Our rules are clear that "[t]he appellant may not raise any question on the appeal not presented in the statement [of questions] as filed," unless a motion to amend or clarify the statement is granted. V.R.E.C.P. 5(f). Our Court may consider issues "intrinsic" to those raised by the Statement of Questions, however, without exceeding our jurisdiction. In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190 ("The literal phrasing of the question cannot practically be considered in isolation from the zoning administrator's action that prompted the appeal."). Appellant claims that the issues of defects in the NOV are intrinsic to the Questions in the Statement of Questions addressing the substance of the NOV. Even "construing [the] statement of questions liberally in favor of [the] party exercising appeal rights," id., we disagree. These alleged defects are not intrinsic to the questions posed by Appellant. In fact, the questions she cites in her motion implicitly accept the NOVs as sound by responding to the substantive issues raised therein.

We do not deny the motion on this basis, however, because even assuming these claimed defects were intrinsic to the Questions in the SOQ, substantively Appellant has not established that the July 7 NOV (as amended) was fatally defective. Appellant alleges two defects. First, she argues that the NOV is not directed at an instance of land development, and because zoning laws may only regulate land development, the NOV is invalid on that ground. Second, she argues that the NOV does not contain necessary information to put her on notice of the nature of the alleged violations, thereby violating her constitutional due process rights and the statutory requirements of 24 V.S.A. § 4451.

In response to the first argument, the Town correctly points out that while permits are required only for land development, the enabling statute also gives municipalities the right to establish performance standards for any *use* of property. *See* 24 V.S.A. § 4414(5) (emphasis added) ("As an alternative *or supplement* to the listing of specific uses permitted in districts . . . bylaws may specify acceptable standards or levels of performance that will be required in connection with *any use.*"). The provision of the Bylaws that the NOV cites follows this formula, establishing performance standards "that must be met and maintained in all districts for all uses." Bylaws § 4.7. The Town also correctly cites Shatney NOV, 171-12-13 Vtec, slip op. at 5–6 (Vt. Super. Ct. Envtl. Div. Feb. 4, 2015) (Durkin, J.) as a case which directly rebuts Appellant's arguments. In that case, respondents to an NOV argued that "absent land development, the Bylaws in general and the performance standards specifically, do not apply to their activities." The Court stated that the respondents "err in this interpretation." Id.

In attempting to distinguish the present case from Shatney, Appellant misstates the holding of Shatney, claiming that the Court there found that use of the property in question "*was* land development." Reply in support of MSJ (emphasis added). In fact, the Court found no such thing, but rather stated that even assuming starting up tractor trucks was "part and parcel of [respondents'] residential use of the property such that they do not need a zoning permit" for trucking, such use still was subject to the performance standards. Id.

Appellant also argues that the NOV does not sufficiently state "the facts giving rise to the alleged violation" as required by 24 V.S.A. § 4451. She argues that this omission violates her due process rights by depriving her of a meaningful opportunity to cure the alleged violations.

This argument is also unsuccessful. As the Vermont Supreme Court has stated, "[t]o satisfy due process requirements, [a] Town's notice of a zoning violation must include '(1) the factual basis for the deprivation, (2) the action to be taken against [the respondent], and (3) the procedures available to challenge the action.'" Town of Hinesburg v. Dunkling, 167 Vt. 514, 523 (1998) (quoting Town of Randolph v. White, 166 Vt. 280, 284, (1997)).

Appellant is correct that the July 7 NOV does not identify any facts giving rise to the alleged violation, as required under 24 V.S.A. § 4451. Rather, this document simply states which provisions of the Bylaws she is accused of having violated. The July 29 letter remedies this defect, however, by informing Appellant that her neighbors have complained about offensive smells and water pollution, which complaints form the basis for the NOV. While still scant in factual details, this addendum is sufficient to put Appellant on notice of what facts are alleged to have given rise to the violation. As owner and resident of the property, she is in the best position to know what uses are causing offensive smells and water pollution, and so what actions she may take to cure the violations. The July 29 letter therefore perfected the July 7 NOV and gave Appellant the opportunity to contest any issues in the NOV by appealing within 15 days of receipt. *See* In re Tibbits, 272-12-02 Vtec (Vt. Envtl. Ct. Apr. 03, 2003). The July 29 letter did notify Appellant that she had 15 days to appeal to the DRB, an opportunity she took advantage of. The DRB heard that appeal on the merits, as will we should the case proceed to a merits hearing, giving Appellant a full opportunity to understand and defend against the alleged violations.

The initially insufficient July 7 NOV has therefore not prejudiced Appellant in any way. That distinguishes this case from Town of Randolph v. White, 166 Vt. 280 (1995), a case cited to by Appellant. There, an NOV did not inform the respondent of his right to appeal, and the respondent did not appeal the NOV. Ordinarily, the violations in an unappealed NOV may not be contested in a subsequent enforcement action, creating substantial prejudice to the respondent. Respondent therefore successfully raised this defect in the NOV as a due process defense to the subsequent enforcement action. Id. at 283–86. In contrast, Appellant's NOV, as amended, does not approach this level of constitutional infirmity. We caution the Town of the risks of issuing notices of violation lacking necessary information in the first instance.

Lastly, we clarify a point of potential confusion. Appellant's appeal of the July 7 NOV to the DRB was not time-barred, because the Town did not perfect that NOV until it sent the July 29 clarification letter. Further, given that neither the Town nor neighbors filed their own appeals, the DRB's decision to treat Appellant's appeal as one of the May 3 NOV as well as the July 7/29 NOV can not be challenged. In other words, the alleged violations in the May 3 NOV are also before us on appeal.

Conclusion

For the reasons discussed above, the motion for summary judgment is **DENIED**. In a separate scheduling order, we set a status conference to determine the next steps in these matters.

Electronically Signed: 5/16/2022 3:50 PM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division