

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 72-7-16 Vtec

Vt. Agricultural & Environmental Lab CU & SP

ENTRY REGARDING MOTION

Count 1, Municipal DRB Multiple Types OTR (72-7-16 Vtec)

Title: Motion to Dismiss for Lack of Standing (Motion 3)
Filer: Vermont State Colleges
Attorney: Joseph S. McLean
Filed Date: November 16, 2016

No response filed

The motion is GRANTED.

This is an appeal from a decision by the Town of Randolph Development Review Board granting a zoning permit to the State of Vermont, Department of Buildings and General Services (the State). The State filed the pending motion to dismiss Appellant Pierre LaFrance and Interested Person Nancy Rice for lack of standing.

I. Appellant Pierre LaFrance

In its motion, the State alleges that Mr. LaFrance no longer has standing in this matter because he no longer owns any property in the immediate neighborhood of the proposed project.

Mr. LaFrance did not respond to the State’s motion to dismiss. On December 23, 2016, however, Mr. LaFrance filed a “Notice of Withdrawal and / or Voluntary Dismissal” confirming that he sold the property located in the immediate neighborhood of the proposed development, and acknowledging that he no longer has standing pursuant to 10 V.S.A. § 8504 and 24 V.S.A. § 4465(b).

Because Mr. LaFrance no longer owns property in the immediate neighborhood of the proposed project, and he does not claim interested party status under any other grounds set out in 24 V.S.A. § 4465(b), we agree that he no longer has standing to bring this appeal. Mr. LaFrance’s notice of withdrawal, and the State’s motion to dismiss Mr. LaFrance, are therefore **Granted**.

We note that where, as here, the original appellant is dismissed or has withdrawn from a case, intervening parties may continue the appeal as long as those intervening parties are properly before the Court. In re Garen, 174 Vt. 151, 153 (2002); In re Albert, 2008 VT 30, ¶ 9, 183 Vt. 637.

II. Interested Person Nancy Rice

The State moves to dismiss Ms. Rice on procedural grounds because she entered her appearance after the deadline set by the statute and rules and because she failed to file a motion to intervene. In addition, the State argues Ms. Rice should be dismissed because she fails to qualify as an interested person and therefore has no standing.

We address the State's second argument first. An Interested Person who has participated in a municipal regulatory proceeding may appeal a DRB decision to this Court. 24 V.S.A. § 4471. Pursuant to 24 V.S.A. § 4465(b)(3), as applicable here, an Interested Person is:

A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of the municipality.

While "immediate neighborhood" is not defined by statute, in order to determine whether a property is in the immediate neighborhood of a proposed project we "will consider the physical environment surrounding the project and the nexus between the project, the potential party, and the potential" party's property. Two Bad Cats, LLC Conditional Use, No. 169-12-14 Vtec, slip op. at 3 (Vt. Super Ct. Env'tl. Div. May 29, 2015) (Walsh, J.) *aff'd*. In re Two Bad Cats LLC Conditional Use Permit, No. 2015-238 (Nov. 19, 2015) (unpub. mem.) (citations omitted). Distance between the potential party's property and the proposed project is one factor that we consider in determining "whether the party potentially could be affected by any aspects of the project which have been preserved for review on appeal." *Id.* (internal quotations omitted); see also In re Bostwick Rd.-2 Lot Subdivision & Final Plan Application, No. 2006-128, slip op. at *2-3 (Jan. 2007) (unpub. mem.) (affirming Environmental Court's decision that party's property was not in the immediate neighborhood of a proposed project because the properties were not adjacent; they were separated by "extensive acreage, dense vegetation, and rolling hills" so that one was not visible from the other; and because there was no indication that traffic would be affected).

On a motion to dismiss a party for lack of standings, we consider the facts in the light most favorable to the non-moving party. Bostwick Road Two-Lot Subdivision/ Meach Cove Real Estate Trust/ Kenneth Albert (Appeal of Senesac), No. 211-10-05 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Feb. 24, 2006) (Durkin, J.). Having said that, we note that Ms. Rice has not filed a response to the motion to dismiss, or in any way challenged the factual allegations set out in the motion to dismiss and the exhibits attached to that motion.

As the crow flies, Ms. Rice's residence at 539 South Randolph Road is situated half a mile or more from the proposed project. Mot. Dismiss Ex. D (Google Maps image). Between Ms. Rice's residence and the proposed project are woodlands, fields, an orchard, and the main campus of Vermont Technical College (VTC), which is made up of numerous buildings, parking areas, and internal roads. *Id.*; Mot. Dismiss Ex. E (map of VTC campus). The road from Ms. Rice's residence to the proposed project is more than half a mile long, and passes through Randolph Center. The proposed project would not be visible from Ms. Rice's residence, or from any other part of her property.

Because of the distance between Ms. Rice's property and the proposed project, and because of the natural features and man-made developments separating them, we conclude that

the proposed project is unlikely to have a physical or environmental impact on Ms. Rice's property interest. Absent a showing of a physical or environmental impact, Ms. Rice does not qualify as an Interested Person in this matter, and we therefore **Grant** the State's motion to dismiss Ms. Rice. See Willowell Foundation, CU, No. 142-10-12 Vtec, slip op at 10-12 (Vt. Super. Ct. Envtl. Div. Jul. 10, 2014) (Walsh, J.) ("the Legislature intended to provide standing to appeal to persons who are current landowners or occupiers of land in the immediate neighborhood of a proposed development so long as they 'can demonstrate a physical or environmental impact' on their interest") (quoting 24 V.S.A. § 4465). Because Ms. Rice does not have standing, we do not reach the State's argument that Ms. Rice should be dismissed for failing to follow procedures.

III. Interested Person Kevin P. Doering

The State's motion to dismiss does not address Mr. Doering. Nevertheless, we note that Mr. Doering has failed to appear or participate in this matter since entering his appearance, apart from notifying the Court of a change of address on October 5, 2016.

Litigants have a responsibility to efficiently prosecute their case. See V.R.C.P. 41(b)(2) (allowing for a motion to dismiss for failure to prosecute or comply with procedural rules or orders of a court). We have the inherent power to dismiss any party that fails to carry this responsibility. Hinesburg Hannaford CU (Hrs. of Operation), No. 129-9-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2016) (Walsh, J.).

Here, Mr. Doering has failed to participate in these proceedings, and has made no indication he wishes to continue the appeal in the absence of Mr. LaFrance, the original appellant. Based on this lack of participation, we deem it appropriate to **DISMISS** Mr. Doering as a party.

Having dismissed Appellant, Ms. Rice, and Mr. Doering, there are no remaining parties to carry this appeal. This matter is therefore dismissed.

This concludes this matter. A Judgment Order accompanies this Entry Order.

So ordered.

Electronically signed on January 3, 2017 at 3:07 PM pursuant to V.R.E.F. 7(d).



Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

Ryan P. Kane (ERN 6705), Attorney for Appellant Pierre LaFrance
Joseph S. McLean (ERN 2100), Attorney for Appellee Vermont State Colleges and Appellee State of Vermont
Interested Person Town of Randolph
Interested Person Kevin P. Doering
Interested Person Nancy Rice
For Informational Purposes Only Mardee Sanchez