VERMONT SUPERIOR COURT
Environmental Division
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ENVIRONMENTAL DIVISION
Docket No. 50-7-20 Vtec

Whitten Variance	DECISION ON THE MERITS

This appeal concerns a flood hazard variance issued by the Town of Milton Development Review Board (DRB) to Danielle and Kelsey Whitten (Applicants) on June 11, 2020, for a seasonal camp located at 11 Champlain Lane in West Milton, Vermont (the Property). Neighboring property owners Robert Griswold and Ann Merrill-Griswold (Neighbors) appealed the permit to this Court on July 9, 2020.

Applicants are represented by Pietro J. Lynn, Esq. Neighbors are represented by George Edward Taft, Esq.

The Court held a one-day remote Webex trial on April 23, 2021. The Court did not complete a site visit to the subject Property. Based upon the evidence in the record, the Court issues the following Findings of Fact, Conclusions of Law, and Judgment Order that accompanies this Merits Decision.

Findings of Fact

Based upon the credible evidence presented at the April 23, 2021 Merits Hearing, the Court renders the following Findings of Fact.

1. In 1986, Mr. Raymond Whitten purchased a 0.46-acre parcel located at 11 Champlain Lane in West Milton, Vermont (the Property). The Property is located in the West Milton Planning Area and the Shoreland Residential (R6) and Flood Hazard Overly (FHO) districts. The Property has approximately 90 ft of shoreline and is located within the protected shoreland area.
2. To the north of the Property is a two-story seasonal camp. Beyond this camp continuing north are several year-round homes.

3. The Property is primarily composed of Livingston Clay. Livingston Clay is a poorly draining soil.

4. In 1986, Mr. Whitten placed a trailer on the property.

5. In the Summer of 1997, Mr. Whitten constructed an approximately 750 sq. ft unpermitted structure. This structure was used as a seasonal camp and included a bedroom, living room, and porch. The structure was served by an in-ground septic wastewater system and a potable water supply drilled well located on the Property.

6. From 1997 to 2009 the Whitten family occupied and visited the Property every summer.

7. On January 24, 2009, the structure was destroyed by a fire. The cause of the fire was likely a result of an explosion relating to the structure's heating system. At the time, Mr. Whitten did not have insurance coverage on the camp.

8. As the Property was not insured, Mr. Whitten did not have the available financial resources to rebuild the existing structure at the time.

9. The fire did not impact the in-ground wastewater system or the water supply well.

10. In 2010, Mr. Whitten placed another trailer on the Property. This trailer is connected to the in-ground septic wastewater system. Mr. Whitten pumps wastewater from the trailer to the septic system approximately every 4 months. The trailer's septic tank has a capacity of approximately 40 gal. Since the Summer of 2010, Mr. Whitten has occupied the trailer on the Property every summer from April to November.

11. Mr. Whitten owned a business, Champlain Transmission, which was operated on North Winooski Avenue in Burlington, Vermont with a business partner, Norman Nolon. In April of 2014, Mr. Nolon abandoned the business and traveled out of state. At this time, the business was in financial distress.

12. Starting In February of 2015, Mr. Whitten began experiencing health issues and was diagnosed with liver disease.

13. On September 10, 2015, Mr. Whitten was hospitalized for a ruptured appendicitis.

14. In January of 2016, Mr. Whitten experienced a stroke. Thereafter, Mr. Whitten experienced a second stroke in September of 2016 and two further strokes in July of 2016.

15. These significant health issues impaired Mr. Whitten's ability to work and speak.

16. In April 2016, Mr. Whitten transferred the property to his two daughters, Danielle and Kelsey Whitten (Applicants). Danielle had spent summers at the Property starting in 1986 when she was 3 years old. Kelsey is eight years younger than Danielle and also spent her childhood summers at the camp.

17. On September 14, 2017, Champlain Transmissions underwent a tax sale.

18. In February 2017, the Property was noticed for a municipal tax sale.

19. In the Summer of 2018, Applicants engaged Civil Engineering Associates, Inc. to review conditions associated with the Property and discuss improvements to the Property.

20. On March 26, 2020, Applicants sought a flood hazard variance for the property from the Town of Milton Development Review Board (DRB). Applicants sought the variance "to waive the Town's requirement to consider the camp abandoned after 12 months of discontinued use under UDR § 2201.J(2) and allow the applicant to plan substantial improvements to the property." In re Whiten No. 2020-09, Notice of Decision, at 1 (Town of Milton Dev. Rev. Bd. Jun. 11, 2020).

21. Applicants did not pursue permitting and rebuilding of the camp sooner as they were focused on their father health and care. Additionally, Applicants took responsibility Mr. Whitten's financial issues and began paying Mr. Whitten's expenses. Applicants testified that they had to prioritize getting their father's finances in order due to his health issues and business closure.

22. Applicants intend to apply for a Conditional Use permit, seeking approval for a 1500 sq. ft. camp with at 275 sq. ft. elevated deck on its western side. Applicants also intend to install a 1000 gal. septic tank to replace the existing tank on the Property and enlarge the driveway from approximately 400 sq. ft. to 1100 sq. ft to provide parking for 3 vehicles. At trial, Applicants further indicated that the current in-ground wastewater system is also to be relocated and improved. Applicants indicated that they intend to seek a state water supply and wastewater permit for the new system.

23. On June 11, 2020, the DRB approved Applicant's flood hazard variance application, subject to conditions.

24. On July 9, 2020, Neighbors appealed the DRB's decision to this Court.

25. The Neighbors own property at 1512 Lake Road located to the south and east of the subject Property. Neighbors' residence is located on this property but is set back from the lake shoreline.

26. Neighbor Robert Griswald is semi-retired and has experience in the construction sector, including municipal and individual wastewater systems.

27. Neighbors built their nearby residence in 2006 and moved in during the winter of 2007. They use the lake in front of their property. They can see the Whitten Property from their home.

28. Neighbors' expert witness John Stuart, measured the water table on adjacent properties and determined the property had high groundwater level and that the soil was poorly-draining Livingston Clay, noting that this clay is not suitable for residential wastewater disposal systems.

29. Stuart presented that the current wastewater system is below the existing water levels and as presently configured could be unsafe during high water table times.

30. Stuart noted that there are no observable indications that the current system has failed.

31. Applicants' engineer, Jaques Larose of Civil Engineer Assoc. Inc., conducted soil extraction at the Property and identified a location most suitable for a new wastewater system at the southwest end of the Property. Applicant's Engineer represented that Applicants intend to relocate the existing in-ground wastewater system to this identified location and include improvements to the system.

32. Applicant's engineer testified that there are no indications that the current in-ground wastewater system has not failed and that the system could continue to be operated.

Conclusions of Law

This appeal concerns an approved Flood Hazard Variance permit granted by the DRB to Applicants for the purpose of rebuilding a destroyed seasonal camp. Neighbors timely appealed the approved permit to this Court. On appeal, Neighbors' Statement of Questions concern: (1) whether the Applicants' flood hazard variance application is "detrimental to the public health, safety, and welfare"; (2) the extent to which Applicants' circumstances delayed their request for a variance between 2016 and the time of the application; and (3) the Applicants misstated or omitted facts such that revocation

of the variance approval is necessitated.[1] See Neighbors Statement of Questions filed on Jul. 29, 2020, at 1.

We note here that this appeal is *de novo*. See 10 V.S.A. § 8504(h). Therefore, this Court will review the application for Flood Hazard Variance "as though no action whatever has been held prior thereto," and will apply the substantive standards that were applicable to the tribunal below. See Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) (quoting In re Poole, 136 Vt. 242, 245 (1978)); Trail v. Appeal of JO No. 2-233, No. 88-4-06 Vtec, slip op. at 5 (Vt. Envtl. Ct. Jan. 16, 2007) (Durkin, J.). In this case, the substantive standards are contained in the Town of Milton Unified Development Regulations (UDR). With this standard of review in mind, we consider the questions raised in Neighbors' Statement of Questions.

The scope of this appeal is limited to review of the Flood Hazard Variance. Here, Applicants are seeking a variance from UDR § 2201.J (2). This provision states that a nonconforming development within the FHO District may be considered abandoned "where such structures or uses are discontinued for more than 12 months." UDR § 2201.J; see also UDR §§ 1302, 1303 (defining nonconforming structures and uses). In accordance with 24 V.S.A. § 4469, the DRB may authorize variances if an applicant demonstrates that all of the applicable variance review criteria are met. UDR § 4605; see also In re: Appeal of David and Joyce Fifield., No. 198-9-00 Vtec, slip op. at 1 (Vt. Envtl. Ct. Dec. 26, 2001) (Wright, J.) (noting that to qualify for a variance under 24 V.S.A. § 4469(a) all 5 criteria must be met). The UDR permits variances within the Flood Hazard Overlay (FHO) District in accordance with specific criteria contained in Figure 4-01, including consideration of public health, safety, and welfare and whether the applicant has created the unnecessary hardship. See UDR § 4605.D; see also UDR Fig. 4-01. Appellants argue that these two criteria are not met.

I. Question 1

Neighbors' Question 1 of their Statement of Questions asks: "[i]s the stated intention to build the proposed new structure above the base flood level elevation in an area of very poorly drained Livingston Clay adequate to overcome the staff's finding that the proposed development is unlikely to

[1] Neighbors filed their Statement of Questions on July 29, 2020. At this time, Neighbors were proceeding "pro-se" as self-represented litigants. In the succeeding analysis, we quote each question and then provide our reasonable interpretation of each question keeping in mind that our review of the application for Flood Hazard Variance in this appeal is *de novo*.

be detrimental to public health, safety and welfare?"[2] This Question appears to address whether Applicant's flood hazard variance application complies with UDR § 4605.D. UDR § 4605.D(2) requires that an application for a variance in the Flood Hazard Overlay District include review of specific criteria contained in Figure 4-01. Figure 4-01 requires that a "proposed land development will not be detrimental to public health, safety, or welfare." See UDR §§ 1003, 4605.

Here, consideration of whether the development would be detrimental to public health, safety, or welfare includes consideration of whether the in-ground septic system, as currently situated, poses a risk that sewage will rise to the surface or contaminate groundwater. See In re: Appeal of Stuart L. Richards, No. 236-12-99 Vtec, slip op. at 2 (Vt. Envtl. Ct. Apr. 05, 2000) (Wright, J.). At trial, Neighbors expressed concern about Applicants' use of the in-ground wastewater treatment system on the property. Neighbors' wastewater expert John Stuart (Stuart) of Environmental Assessment Group, Inc., provided testimony that the current conditions on Applicant's property are not conducive to supporting a safe wastewater system. Stuart noted that the soil is primarily composed of livingston clay, a poorly draining soil not suited to residential waste disposal systems, and noted that the existing system was located below the groundwater level. Neighbors argue that the proposed development would expand the living space and therefore increase pressures on the wastewater system, which as presently configured is unsafe. Stuart, however, also noted that the current system showed no indication of present failure as there were no associated odors or visible leaking of sewage on the property. Applicants, though the testimony of their engineer, Jaques Larose of Civil Engineers Associates Inc., noted that the current in-ground system was functional and could continue to be operated if desired.

Here, there is no actual or imminent impact on public health, safety, or welfare as the current in-ground wastewater system is operational and there is no evidence of contamination or wastewater system failure. See State of Vermont Agency of Natural Resources, v. Edward B. and Judy Ann Fuller, Respondents., No. E91-017 Vtec, slip op. at 2–3 (Vt. Envtl. Ct. July 18, 1991) (Wright, J.) (stating that where there had been no actual failure of a septic system or contamination of a waterway or water

[2] As this appeal is *de novo*, the DRB staff's findings or conclusions that the application is consistent with public health, safety, or welfare does not have bearing on our review of the application. Indeed, we review this question anew, as though the DRB had not issued a decision prior. Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989). As such, we interpret Applicant's questions to ask whether the application itself is detrimental to public health, safety, and welfare. See Bart Industries, Inc. Zoning Permit, No. 136-12-18 Vtec, slip op. at 3 n.1 (Vt. Super. Ct. Envtl. Div. Aug. 08, 2019) (Walsh, J.) (reframing an Appellants' questions in a *de novo* appeal that asked "did the DRB err"); see also In re Stowe Highlands PRD, No. 184-8-06 Vtec, slip op. at 2–3 (Vt. Envtl. Ct. Nov. 02, 2006) (Durkin, J.) (distinguishing on-the-record review and *de novo* review).

supply by effluent of the septic system, there was no present impact on public safety or welfare); see also Secretary v. Henry, No. 215-12-10 Vtec, slip op. at 11–13 (Vt. Super. Ct. Envtl. Div. Mar. 13, 2012) (Durkin, J.) (concluding there was actual and potential harm to public safety where the septic system was filled beyond capacity and resulted in wastewater flow over the property and into a nearby stream). The Applicants' current septic system is operational and shows no indication of leakage. See Waiver v. Setback/Variance, No. 10-1-11 Vtec, slip op. at 20 (Vt. Super. Ct. Envtl. Div. Dec. 19, 2012) (Walsh, J.) (noting that "[a] leaking septic tank could have adverse public health and welfare impacts"). For this reason, we **UPHOLD** the DRB's decision and conclude that the current system does not pose a threat to public health, safety, or welfare.

At trial on April 23, 2021, Applicants proffered testimony that they intended to install a new wastewater system that would replace the current in-ground system. Applicants asserted that the new system would be located in a different area and would conform to existing wastewater standards. This Court, however, does not have the authority to opine as to whether this proposed wastewater system is consistent with public health and safety or other elements of the UDR, as the Court does not have the new system designs before us in this appeal. In re Huntington Nov Appeal, No. 204-8-06 Vtec, slip op. at 10 (Vt. Envtl. Ct. Mar. 18, 2008) (Durkin, J.) (stating that rulings which require the Court to assume facts "not in evidence and not yet specifically presented to the appropriate municipal panel [are] the practical foundation of the prohibition against advisory opinions"). This decision therefore is limited to reviewing the current application with the current wastewater and septic system as they exist upon the property.

II. Question 2

We next Turn to Neighbors' Question 2 of their Statement of Questions concerning whether Applicants delayed their application for a Flood Hazard Variance. Question 2 asks:

> If the applicant daughters of Mr. Whitten do not personally and separately allege special circumstances which frustrated their ability to apply to reconstruct from the time they obtained the title in 2016 to the present overcome the staff's finding that the applicants themselves do not appear to have created the unnecessary hardship?[3]

[3] Similar to Question 1, this Question is framed as asking whether the DRB staff erred in finding a particular conclusion. For the reasons articulated above concerning the scope of review in *de novo* appeals, we reframe this question to ask whether the application itself complies with the relevant UDR requirements.

Appellants' Question appears to ask whether the Applicants unduly delayed their application for a variance after obtaining title in 2016. Appellants argue that Applicants' "special circumstances," including health problems and financial constraints arising after 2016, which frustrated Applicants' ability to apply for a variance resulted in undue delay, creating an unnecessary hardship.

At trial, Appellants also appeared to raise issue of whether the seasonal camp's reconstruction was delayed, "abandoned," or "discontinued" after the camp was destroyed by a fire in January of 2009. To the extent that Appellants' question addresses whether the property was "abandoned" or "discontinued" for more than 12 months for purposes of UDR § 2201.J, this issue is not before the Court. This Court is tasked with consideration of whether a variance should be granted, not the merits of whether the property was abandoned or discontinued for purposes of establishing whether there was a preexisting nonconforming use.[4] See UDR § 4605 (detailing review criteria for a variance application).

Applicants argue that the severe health issues and associated care of their father, Mr. Whitten, and the financial burdens associated with the loss of Mr. Whitten's business constitute justification for delaying the development of the property since Applicants acquired title in 2016. Applicants provided testimony recounting the loss of Mr. Whitten's business partner in 2014 and eventual tax sale of the business in 2017. Applicants also detailed the onset of Mr. Whitten's severe health issues beginning in February 2015, including a burst appendix, liver disease, and multiple strokes, which impeded Mr. Whitten's ability to speak and work. Applicants also testified that they began to consult engineers regarding redevelopment of the property in the summer of 2018, before their formal application in 2020.

Appellants argue that Applicants' delay between gaining title in 2016 and their application for a variance in 2020 created an unnecessary hardship. Generally, an unnecessary hardship, as addressed by UDR Figure 4-01 criterion 6 and 24 V.S.A. § 4469(a)(3), "must result from circumstances beyond the control of the property owner." See In re: Appeal of Gary Audet, d/b/a Audet Management Associates, No. 89-4-00 Vtec, slip op. at 3 (Vt. Envtl. Ct. Sep. 28, 2000) (Wright, J.) (citing In re Application of Fecteau, 149 Vt. 319 (1988)). Here, Applicants' financial and health related concerns that inhibited

[4] This scope of this appeal is limited by the issues raised in Neighbors' Statement of Questions and by the nature of the appeal as a variance approval by a DRB. See V.R.E.C.P. 5 (a), (f); see also Appeal of Town of Fairfax, No. 45-3-03 Vtec, slip op. at 4 (Vt. Envtl. Ct. June 13, 2005) (Wright, J.). Here, Neighbors did not raise the question of whether the Property was abandoned or discontinued after the time of the January 2009 fire. As such, this issue is not before the Court. Moreover, this Court does not have the relevant material facts to make such a determination concerning the use of the structure during this period.

reconstruction at the property were not created by Applicants. Therefore, to the extent that this Question challenges whether Applicants' delay created an unnecessary hardship, we conclude that the circumstances were not within the control of the Applicants.[5]

III. Question 3

Neighbors' Question 3 of their Statement of Questions asks: "[i]f it were shown to the Court's satisfaction that applicants had misstated or omitted facts, would that revoke the approval of the variance?" Neighbors' question appears to address UDR § 4205.A, which, in accordance with 24 V.S.A. § 4455, concerns the revocation of permits or approvals "if an applicant omitted or misrepresented a material fact on an application or at a hearing that would have affected the decision on the original application." See also 24 V.S.A. § 4455 (permitting revocation "on a determination that the permittee violated the terms of the permit or obtained the permit based on misrepresentation of material fact").

Appellants contend that "during the site visit, neither the applicants nor their consultant knew where the existing wastewater system was located and yet it is located in the consultant's Existing Conditions Area Plan dated [January 18,] 2020." See Appellants' Statement of Questions filed on July 29, 2020, at 1. The site visit that Appellants contend operates as a basis for revocation occurred on May 20, 2020 in preparation for the hearing before the DRB. Appellants appear to argue that this site visit and Applicant's area plan demonstrate a misstated or omitted fact that informed the DRB's June 14, 2020 Decision and therefore the application should be revoked.

[5] In municipal zoning appeals, the scope of an appeal is limited to the issues raised by the Statement of Questions. See V.R.E.C.P. 5(f) (noting that a Statement of Questions must raise issues that "the appellant desires to have determined"); see also Appeal of Town of Fairfax, No. 45-3-03 Vtec, slip op. at 4 (Vt. Envtl. Ct. June 13, 2005) (Wright, J.) (stating that the Statement of Questions establishes the scope of litigation); In re Waitsfield Water System Final Plan Approval Application, No. 67-5-12 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Jan. 18, 2013) (Durkin, J.). Here, we are therefore limited to the questions raised by Appellants. While this Court has some limited discretion to interpret manners in which questions are framed, such as rephrasing questions to conform with *de novo* review standards, this Court may not independently raise issues outside the scope of Appellants' Statement of Questions.

Here, Applicant only challenged UDR Figure 4-01 variance criteria 3 and 6, and therefore this Court's analysis is limited to these criteria. Thus, this Court does not address whether (1) the proposed development will alter the essential character of the area, (2) the proposed development will substantially or permanently impair the lawful use or development of adjacent property; (3) applicant is proposing the least deviation from municipal regulations that will afford relief; (4) there are unique physical circumstances or conditions alleged by Applicants that constitute an unnecessary hardship; and (5) the proposed land meets all applicable federal and state rules for compliance with the National Flood Insurance program. UDR Figure 4-01; see also 24 V.S.A. § 4469.

In our *de novo* review of municipal decisions, this Court looks anew at the application as though the DRB had rendered no decision below. See V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h); In re Feeley Constr. Permits, Nos. 4-1-10 Vtec, 5-1-10 Vtec, slip op. at 11–13 (Vt. Super. Ct. Envtl. Div. Jan. 3, 2011) (Wright, J.) (citing In re Maple Tree Place, 156 Vt. 494, 500 (1991)). Therefore, the issue of whether the DRB relied upon misstated or omitted facts in its determination is not before us. The scope of this appeal is limited to whether any omissions or mistake of fact occurred before this Court. Here, Appellants do not allege that Applicants have omitted or misrepresented any material fact at bear in this proceeding. For this reason, we see no basis for revocation.

Conclusion

For the reasons stated above, we **UPHOLD** the DRB's June 11, 2020 Decision approving Applicant's request for a Flood Hazard Variance. A Judgment Order accompanies this Merits Decision. This completes the current proceedings before this Court.

Electronically Signed: 7/8/2021 1:31 PM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division