VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 21-ENV-00103

Brewster River Mountain Bike Club CU Application	DECISION ON MOTION

Brewster River Mountain Bike Club ("BRMBC") seeks municipal approval to construct or reconstruct a multi-use trail bridge ("the bridge") over Settlement Brook in the Town of Underhill ("the Town"). The bridge is part of a network of trails maintained by BRMBC across various parcels of privately owned land. Those trails are used by BRMBC's members primarily for mountain biking, but also for hiking and cross-country skiing. This bridge is on a parcel identified as 348 Irish Settlement Road. The bridge is located within the thirty-foot setback from Fuller Road, a Class-4 town road. It is our present understanding that BRMBC constructed the bridge and subsequently applied for retroactive approval. It is undisputed in the filings that because the bridge encroaches in a required setback from a watercourse as well as within the setback from Fuller Road, the application must satisfy the criteria for conditional use review and a waiver of the applicable setbacks per the Town ordinances.

David Demarest and Jeff Moulton ("Appellants") both own property with addresses on Fuller Road. Both participated in the hearings on this application before the Underhill Development Review Board ("DRB"). After the DRB approved the application with conditions, Mr. Demarest timely appealed that decision to our Court. Mr. Moulton subsequently filed a notice of appearance, requesting to be joined as an appellant. After an initial status conference, we approved a stipulated schedule for discovery and attempted mediation. BRMBC subsequently filed this motion to dismiss both Appellants for a lack of standing and failure to satisfy the interested person criteria at 24 V.S.A. 4465(b)(3).

Legal Standard

Challenges to an Appellant's standing go to the Court's subject matter jurisdiction. Brod v. Agency of Natural Resources, 2007 VT 87, ¶ 8, 182 Vt. 234. We therefore review this motion as one brought under V.R.C.P. 12(b)(1). When reviewing such a motion, this Court accepts all

uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. The Court may consider evidence outside the pleadings if necessary to resolve such a motion, without converting it into one for summary judgment. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11.

Prudential and constitutional standing are both required elements to bring a case before our court. Capitol Plaza 2-Lot Subdivision, Nos. 3-1-19 Vtec, 4-1-19 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Nov. 12, 2019) (Walsh, J.); In re 110 East Spring Street CU, No. 11-2-16 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. April 22, 2016) (Walsh, J.). The requirement of constitutional standing stems from Article III of the U.S. Constitution's limitation on federal court jurisdiction to cases or controversies; Vermont has adopted this principle, such that "Vermont Courts have subject matter jurisdiction only over actual cases or controversies involving litigants with adverse interests." Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235 (quotation omitted). "To show [constitutional] standing, plaintiffs have the burden of demonstrating '(1) injury in fact, (2) causation, and (3) redressability.'" Capitol Plaza 2-Lot Subdivision, Nos. 3-1-19 Vtec, 4-1-19 Vtec at 4 (2019) (citing Parker v. Town of Milton, 169 Vt. 74, 76–77 (1998)).

Prudential standing is a further "self-imposed" doctrine developed by courts to assist with their obligation to limit jurisdiction to live cases. 110 East Spring Street CU, No. 11-2-16 Vtec at 2 (2016) (citing Franklin Cnty. Sheriff's Office v. St. Albans City Police Dept., 2012 VT 62, ¶ 12, 192 Vt. 188). To show prudential standing, the plaintiffs (or appellants in this case) must also demonstrate that their interests which have suffered or risk injury "fall within the 'zone of interests' protected by the substantive law invoked." Id.

To appeal a municipal zoning decision to our court, there are further statutory requirements that a party must meet. Specifically, the party must fall into one of the categories of "interested persons" defined in 24 V.S.A. § 4465 and must have participated in the proceedings before the municipal panel whose decision the party seeks to appeal. *See* 24 V.S.A. § 4471(a).

The requirements to fulfill one or more of the interested person categories in Section 4465 substantially or entirely overlap with the prudential and constitutional standing requirements. Specifically, we have held that Section 4465(b)(3), under which Appellants have claimed statutory standing, "reflects" and "overlaps" with those requirements. Capitol Plaza 2-Lot Subdivision, Nos. 3-1-19 Vtec, 4-1-19 Vtec at 4 (2019) (citing 110 East Spring Street CU, No. 11-2-16 Vtec at 2 (2016)). To be an interested person under section 4465(b)(3) one must "own[] or occupy[] property in the immediate neighborhood of the property that is the subject of the [decision under appeal]";

"demonstrate a physical or environmental impact on the person's interest under the criteria reviewed," and "allege[] 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." 24 V.S.A. § 4465(b)(3).

Completing the merged analysis of constitutional standing and statutory standing under § 4465(b)(3), the "physical or environmental impact" that an appellant alleges must be sufficiently concrete and particularized. In other words, the injury must not be too remote or speculative and it must be sufficiently specific to the appellant and not shared by all members of the local public. In re UVM Certificate of Appropriateness, No. 90-7-12 Vtec, slip op. at 11 (Vt. Super. Ct. Envtl. Div. Feb. 26, 2013) (Walsh, J.). Further, there must be a plausible causal link between the activities authorized by the permit and the risk of injury. *See* 110 East Spring Street CU, No. 11-2-16 Vtec at 4–5 (2016) (discussing causation in the context of a neighbor's challenge to a municipal permit).

At the initial pleadings stage, we do not expect appellants to provide definitive proof of their anticipated injuries. They must, however, allege sufficiently concrete facts within their knowledge tending to demonstrate the reasonable possibility of those injuries. *See* Goddard College CU, No. 175-12-11 Vtec, slip op. at 2–3 (Vt. Super. Ct. Envtl. Div. July 5, 2012) (Walsh, J.) ("[T]o survive a motion to dismiss for lack of standing in an appeal from a municipal panel . . . Appellant must show only that there is a reasonable possibility that Applicant's proposed project will result in a physical or environmental impact on Appellant's interests under the Regulations."). This burden is complicated by the fact that an appeal from a municipal permitting decision to our court does not begin with a complaint, but rather with a Statement of Questions. *See* V.R.E.C.P. 5(g). We have allowed parties to assert the facts that in a civil matter would be alleged in a complaint in those parties' responses to a motion to dismiss for lack of standing, and we have not required much if any in the way of documentary evidence provided the allegations are sufficiently concrete. *See* Goddard College CU, No. 175-12-11 at 2 (2012) (denying the motion to dismiss a party due to that party's allegations of a concrete potential impact, which it supported with a map).

Discussion

BRMBC contends that Appellants do not "own or occupy property in the immediate neighborhood" of the project site, that the injuries they claim are speculative and fail the causation prong of constitutional standing requirements. We address these points in turn.

1. Immediate Neighborhood

As we have frequently stated, to determine whether an appellant's property is in the "immediate neighborhood" of the subject parcel, we "examine[] not only the proximity of the appellant to the project on appeal, but also whether the appellant potentially could be affected by any of the aspects of the project which have been preserved for review on appeal." Bostwick Road Two-Lot Subdivision, No. 211-10-05 Vtec, slip op. at 2 (Vt. Envtl. Ct. Feb. 4, 2006) (Durkin, J.). This is a "case-by-case" determination that "depends on the physical environment surrounding the project property and its nexus to a particular appellant and their property." Id. at 2–3.

Appellants' parcels are roughly 450 feet and 5000 feet from the subject parcel at their closest points, *see* Appellants' Exh. B to Opp'n to Mot. Dismiss. More importantly, Appellants live close enough to the subject property that it is plausible they would experience the traffic-related impacts they have identified as their main concern, as discussed below. We therefore conclude that they own or occupy property in the immediate neighborhood of the subject parcel, as required by 24 V.S.A. § 4465(b)(3).

2. Non-speculative Injury and Causation

Through their opposition to the motion to dismiss, Appellants express concern that the project will lead to increased numbers of mountain bikers using Fuller Road. More specifically, they are concerned that these bikers will exit the trail network from the trail leading immediately off the bridge onto Fuller Road at speeds that represent a danger to the bikers and drivers on the road. They claim to have witnessed bikers exiting from the trails off the bridge at "relatively high speeds" since the bridge was constructed. Appellants state that they drive on Fuller Road to and from their residences multiple times per day, and therefore face an increased risk of an accident involving these bikers as a result of the project.

BRMBC makes several related arguments in response. It claims that Appellants' theorized injury is too speculative, and that Appellants have not in any case demonstrated the necessary causal link between the project and that possible injury. This is because, BRMBC claims, the project would replace an existing bridge on an existing trail leading to the road, and so the risk predates the project. Finally, BRMBC claims Appellants have not introduced evidence sufficient to establish the likelihood of this injury.

While Appellants describe the project as one to replace an existing bridge, we note that the DRB decision simply referred to the project as one to "construct" a bridge, and nowhere stated that a bridge already existed at this site. Given that this project involves nonconformities as to setbacks,

which, had the bridge predated the applicable zoning laws might have been permissible as part of a pre-existing nonconformity, that is a curious omission. The original application to the DRB has not been submitted to our Court, nor have photographs of the bridge before or after [re]construction. While we do not doubt the truthfulness of Mr. Timbers's affidavit stating that the project is a bridge replacement, this lack of supporting documents makes it difficult to determine conclusively the parameters of the project.

Even assuming that the project is a bridge *replacement*, that does not conclusively sever the causal link between the project and Appellants' claimed injuries. If, for example, the bridge to be replaced has been unsafe or in poor repair for many years, or even if the new bridge is simply wider or more stable, the reconstruction may result in a significant increase in ridership.

There would hardly be a way, even after discovery, for Appellants to prove that such an increase in ridership would result. Rather, at most, they could demonstrate the likelihood of such an increase based on the respective characteristics of the old and new bridges. Appellants have not produced such information but neither has BRMBC in its motion or supporting documents. In his affidavit, Mr. Timbers states that "this portion of the trail may see an estimated 20-25 riders per week," but the affidavit does not indicate the basis for that estimate or whether it represents a change compared to ridership before completion of the project. Such information is uniquely within the hands of BRMBC at this pre-discovery stage, and we do not believe that its absence supports dismissal; rather, that absence undermines the case for dismissal until discovery may be had.

Appellants have alleged facts sufficient to demonstrate the "reasonable possibility" of the injury they claim will result from this project. Goddard College CU, No. 175-12-11 Vtec at 2 (2012). They have supported that alleged injury with a map demonstrating the relationship between their properties and the project site. No more is needed for them to survive this motion to dismiss at this early stage of this litigation. Id.

3. Particularized Injury Under the Relevant Statutory Criteria

Though not challenged by BRMBC, we complete the analysis by noting that Appellants' claimed injury is particularized and within the zone of interests protected by the relevant statutory criteria.

From the parties' motion and response, we glean that Fuller Road is a Class 4 dirt road with either three or five residences on it (some of which may be seasonal camps) and turns into a dead-end trail. Appellants live in two of the residences on Fuller Road and therefore it is highly plausible that they would drive past the point where the BRMBC trails intersect with it on a regular basis. As two

of just a handful of residents of the road, this is a particularized grievance that they do not share with members of the general public.

Concerns over bike traffic also fall well within the relevant statutory criteria. It appears to be undisputed that because BRMBC is requesting a waiver from stream and front yard setbacks, the project must undergo conditional use review. *See* Town of Underhill Unified Development Regulations ("UDR") §§ 3.19(E)(2); 5.5(C). All conditional use applications must be reviewed for their impact on "traffic on roads and highways in the vicinity" of the project. This criterion encompasses "projected impact[s] of traffic resulting from the proposed development on the condition, capacity, safety, efficiency and use of existing and planned roads, bridges, intersections and associated highway infrastructure in the vicinity of the proposed development." UDR § 5.4(B)(3). There is nothing in either this provision or the definitions section of the UDR limiting this analysis to motor vehicle traffic from the proposed project. The possibility of increased bike traffic on Fuller Road resulting from bridge construction therefore appears to be encompassed within this provision.

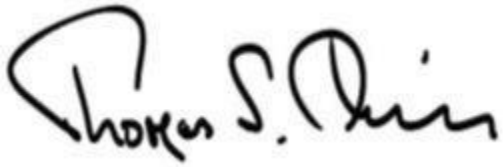
Finally, Appellants have clearly preserved the issue of these traffic impacts for our review on appeal, specifically through Question 9 of its Statement of Questions and several related Questions. BRMBC's motion to dismiss Appellants is therefore **DENIED.**

We note that in the alternative to outright dismissal of the Appellants, BRMBC has requested in its Reply in Support of Motion that we dismiss Questions 3, 4, 5, 8, and 14(a) of the Statement of Questions, which do not deal with the purported traffic issues but rather with issues of potential pollution of Settlement Brook. BRMBC essentially argues that under Section 4465, an appellant may only raise those issues connected to the injuries through which they have asserted standing. This is mistaken; "having established particularized interests protected by the conditional use criteria, Appellant may challenge the Project's general compliance with conditional use standards without particular reference to its own interests at every rhetorical turn." 110 East Spring Street CU, No. 11-2-16 Vtec at 4 (Apr. 22, 2016). We therefore **DENY** this request in the alternative as well.

It would be a mistake for any party to interpret our rulings here on the pending motion to dismiss to be a determination that Appellants have offered sufficient evidence to show the likelihood that the impacts they fear are likely to occur. We may only make such a determination once all evidence is received at a merits hearing.

So Ordered.

Electronically signed at Burlington, Vermont on Thursday, June 30, 2022, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge

Superior Court, Environmental Division