VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 21-ENV-00038

Washburn Remanded CU Denial	DECISION ON MOTIONS

Paul Washburn (Applicant) challenges the decision of the City of South Burlington (City) Development Review Board (DRB) denying his application for conditional use approval of an as-built accessory residential structure. Presently before the Court are Applicant's and the City's competing motions for partial summary judgment, asking us to determine the applicable law and standards for this application in our de novo review.

Applicant is represented by Alexander LaRosa, Esq. The City is represented by Colin McNeil, Esq.

Factual and Procedural Background

This application has a long procedural history that we survey at length to help the reader understand the question posed by the present motions. The following are not specific factual findings with relevance outside of this summary judgment decision. *See* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem. op.)).

In February 2018, Mr. Washburn submitted application CU-18-02 to the DRB. That application proposed construction of an accessory residential structure on the property where Mr. Washburn maintains a residence. This structure, also known as an accessory dwelling unit (ADU), had a proposed height of 12.75 feet and a proposed setback to the rear property line of 7 feet. It is undisputed that under the version of the City of South Burlington Land Development Regulations (LDR) then in effect, the maximum height for an accessory structure was 15 feet and

the minimum rear setback for such a structure was 5 feet; this project thus complied with both dimensional standards. The DRB approved of application CU-18-02 in March 2018.

Sometime in the summer or fall of 2018, a City representative observed that the accessory structure was being constructed at a height taller than approved and with a rear setback smaller than approved. The representative informed applicant that an amendment to the original permit was necessary. In November 2018, Applicant submitted an application, given number CU-18-12, to the DRB. This second application proposed to: 1) increase the approved height to 15 feet and reduce the approved setback to 5 feet (both the statutory limits) and 2) re-calculate the average pre-construction grade so that the structure would measure 15 feet tall as built. The version of the LDR in effect at this time took effect in August 2018. *See* Exhibit 10.

In April 2019 the DRB denied Application CU-18-12. Although it indicated that the 5-foot setback was "acceptable," it declined to alter the calculated average pre-construction grade. It determined that the structure as built exceeded the 15-foot maximum height and, at between 17 and 18 feet tall, was out of character with the area. Applicant appealed that decision to our Court, where it was assigned docket no. 62-5-19 Vtec.

During the pendency of the first appeal to our court, Applicant proposed changes to the design of the ADU's roof that, he claimed, would lead to the structure meeting the maximum height of 15 feet (the height of structures is measured differently according to roof design under the LDR). In accordance with our limited jurisdiction in de novo appeals and the parties' wishes, we dismissed the appeal without prejudice and remanded the application to the DRB so that it might consider the proposed changes to the application.

In February 2020, the DRB denied approval for the remanded application no. CU-18-12A. It determined that the proposed changes to the roof did not actually change the height of the building in a way that brought it into compliance with the Bylaws. That decision was also appealed to our Court and assigned docket no. 24-3-20 Vtec.

While that second appeal was pending, in October 2020, a law known as Act 179 was passed and took effect. This law made changes to the state statute enabling municipalities to enact zoning (the enabling statute), including specifically to the section governing ADUs contained at 24 V.S.A. § 4412. Applicant argued it was entitled to the benefit of those changes,

insofar as they pre-empted contrary provisions of the LDR. Applicant requested permission to amend its Statement of Questions to raise that issue. The issue represented a question of first impression of the interpretation of the South Burlington LDR on which the DRB had not spoken. In December 2020, we therefore denied the motion to amend the Statement of Questions and remanded the application to the DRB for a second time to rule on the narrow question of whether the amended 24 V.S.A. § 4412 governs this application.

In January 2021, for unknown reasons, Applicant attempted to submit a "new" application for the as-built structure (although it does not appear the substance of this application was any different from no. CU-18-12A). With the remanded application already before it, the DRB rejected this new application as redundant and/or unnecessary. In March or April 2021, the DRB determined that the changes made by Act 179 to the enabling statute did not govern the present application and again denied approval. That decision was again appealed to our Court in the present docket.

After this appeal was filed, in February 2022, the South Burlington DRB approved changes to its LDR, including to the provisions governing ADUs, to reflect the amended 24 V.S.A. § 4412. Our understanding is those changes took effect shortly thereafter.

Applicant and the city have filed cross partial motions for summary judgment, asking us to determine what legal standards govern this application: the pre- or post-Act 179 enabling statute and the South Burlington LDR as amended in August 2018 or as amended in 2022.[1] They also ask us to determine which provisions in the LDR govern the application, but the City at least appears to refer exclusively to the 2018 LDR in its arguments while the Applicant refers flexibly to the 2018 or 2022 LDR, making it impossible for us to address this issue here.

[1] Contrary to the City's assertion in its briefing, all parties do not "agree that the City's Land Development Regulations governing Appellant's original application and this appeal were those that were amended July 16, 2018 and effective August 6, 2018." City's Opposition to Appellant's Motion and City's Cross-Motion for Partial Summary Judgment at 3. While it appears undisputed that this was the version in effect at the time Application CU-18-12 was submitted, it is very much in dispute whether this is the version in which Applicant's rights have vested for consideration of that application. *See, e.g.,* Applicant's Motion for Partial Summary Judgment at 6 ("Given . . . the various changes of the law applicable to ADUs—both by Act 179 and by the City itself—Applicant asks to have this Court identify those dimensional standards that apply to this Application.").

Discussion

The question of what version of a law that has been amended should govern a land use permit application is known formally as the vested rights doctrine. Under this doctrine in Vermont, ordinarily the "zoning regulations in effect when the application was filed govern" that application, so long as it was substantially complete and filed in good faith. Smith v. Winhall Plan. Comm'n, 140 Vt. 178, 183 (1981) (announcing the rule and requiring a "proper" application, filed in good faith); In re Ross, 151 Vt. 54, 57 (1989) (requiring a substantially complete application). In other words, if the statute or regulations become less favorable to a land use permit applicant following the submission of a complete application, the application is reviewed under the previous version of the law. We have recognized one relevant exception to this rule, which is that if the statute or regulations become *more* favorable overall to an applicant following submission of a land-use application but before a final ruling on that application, "the applicant can take advantage of the newer, more favorable statutes and rules." Laberge Shooting Range JO, No. 96-8-16 Vtec, slip op. at 16–17 (Vt. Super. Ct. Envtl. Div. Aug. 15, 2017) (Walsh, J.) (citing In re Times & Seasons, LLC, 2011 VT 76, ¶ 16, 190 Vt. 163; In re John A. Russell Corp., 2003 VT 93, ¶ 13, 176 Vt. 520 (mem.)).

This exception is a pragmatic recognition that in the absence of such an exception, an applicant would be forced to needlessly go through the effort and expense of withdrawing their application and filing a fresh one after changes to the law take effect. We have held that the general rules of statutory construction contained at 1 V.S.A. §§ 213 and 214, according to which amendments to Vermont statutes do not affect pending litigation, accommodate this exception. Laberge Shooting Range JO, No. 96-8-16 Vtec at 17 (Aug. 15, 2017). As discussed below, however, this exception does not entitle an applicant to pick and choose provisions from both the prior and current versions of the law. Rather, the applicant must affirmatively choose to have the application vest in the current version of the law in its entirety; otherwise, the default rule of vesting in the version in effect when the application was complete applies.

The first question is therefore whether there was a final decision on application CU-18-12 prior to the amendments to 24 V.S.A. § 4412 and the South Burlington LDR taking effect, because if there was, Applicant may not take advantage of those amendments. When a decision of an

appropriate municipal panel is appealed to our Court, that decision is not "final" for these purposes, at least not on the issues raised by the Statement of Questions. *Cf.* 24 V.S.A. § 4472(d) (establishing that if an act or decision of a municipal panel is *not* appealed, then it is final and cannot be challenged in any subsequent proceeding); Hinesburg Hannaford SP Application, No. 112-10-18 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Mar. 08, 2019) ("Any issue *not* identified in the Statement of Questions is not a subject of the appeal to our court and becomes final under 24 V.S.A. § 4472(d)") (emphasis added); Laberge Shooting Range JO, No. 96-8-16 Vtec at 17 (Aug. 15, 2017) ("Because the jurisdictional opinion is still on appeal, Laberge does not have a pre-existing obligation or liability *in the form of a final opinion* requiring an Act 250 permit.") (emphasis added).

The DRB's April 2019 decision to deny application CU-18-12, which was appealed to our Court, was therefore not "final." On the two previous occasions in which we considered this application, we did not affirm or reverse any of the DRB's substantive findings. Rather, on each occasion, we remanded to the DRB for a discrete purpose: respectively, to consider a proposed change to the application and to consider whether a change in the law applied and if so how to construe the LDR in light of that change. There has therefore not been a final decision on Application CU-18-12 that would deprive Applicant of the ability to take advantage of favorable changes to the law or regulations.

Nor does the fact that CU-18-12 was itself an application to amend a previous approval, CU-18-02, mean that there has been a final decision, such that applicant's rights irretrievably vested in the law as it existed at the time CU-18-02 was approved. The situation is comparable to what first our Court and the Supreme Court on appeal faced in In re Jolley, 2006 VT 132, 181 Vt. 190, a case with, if anything, an even more convoluted procedural history than the present matter. In that case, we had previously denied Jolley's conditional use gas station application due to its failure to include a site plan, while at the same time holding that the Applicant had obtained a vested right to have its conditional use application reviewed under the version of the bylaws in effect when it was filed. Because the denial was without prejudice to Applicant's ability to resubmit the conditional use application and because we never finally decided the issue of site plan approval, when the application came before us on appeal a second time (this time with a

site plan), we ruled (and the Supreme Court affirmed) that the conditional use application was still entitled to consideration under the bylaws at the time it was originally filed. We also ruled, and the Court again affirmed, that the site plan review should, however, be conducted under the (newer) version of the bylaws in effect when the site plan was filed. Id. at ¶¶ 14, 17. This application to amend a conditional use permit is like the application for site plan approval in Jolley and does not need to be considered under the regulations in effect when CU-18-02 was reviewed, especially given Applicant's apparent desire to have it reviewed under the Regulations presently in effect.

The next issue has to do with the interplay between the enabling statute and municipal ordinances such as the South Burlington LDR. Initially (prior to our remand), Applicant requested us to consider the amendments to 24 V.S.A. § 4412 as the favorable changes in law that applied to this application, including insofar as those changes preempted any contrary provisions in the South Burlington LDR. It is black letter law in Vermont that "[t]he power of a municipality to accomplish zoning exists by virtue of authority delegated from the state, and may be exercised only in accordance with that delegation, subject to any terms and conditions imposed by the state." State v. Sanguinetti, 141 Vt. 349, 353 (1982). Therefore, our Court and the Vermont Supreme Court have not hesitated to find provisions of municipal ordinances in violation of the Vermont Planning and Development Act, also known as the "enabling statute," codified as amended at Title 24, Chapter 117 of the Vermont Statutes Annotated. *See* id. at 354 (finding invalid a provision of a zoning ordinance and holding that "[t]he citizens of Montpelier, whose property rights were affected by the bylaws they enacted pursuant to those [statutory] procedures in 1973, *were entitled to rely on those statutory procedures and on all of the other terms and conditions contained in the enabling act*") (emphasis added).

Were we to find, therefore, that the provisions of the South Burlington LDR governing accessory dwelling units conflict with the enabling statute, it would be the enabling statute that governs. This may be an academic point because, as mentioned, after this appeal was filed, South Burlington amended its LDR, purportedly in part to come into compliance with the changes made by Act 179. Applicant has also requested that we declare these recent amendments to the South Burlington LDR to represent the governing law—or at least, seeks to avail itself of those changes

it deems beneficial. Applicant may not pick and choose provisions from the old and new LDR, however.

The Vermont Supreme Court provided clear guidance on this point in Times and Seasons, LLC. The Court stated that 1 V.S.A. § 213 "prevents an applicant from *selectively* taking advantage of favorable changes in the law on reconsideration, which is merely the continuation of the original permit application." In re Times & Seasons, LLC, 2011 VT 76, ¶ 14, 190 Vt. 163 (emphasis added). Times and Seasons concerned a request for reconsideration of an Act 250 permit denial, which is a somewhat unique procedural device in the Act 250 context. The applicability of the Court's holding on this narrow issue to the present litigation is, however, clear. This appeal—the third to our Court thus far in this long-running permitting process—is also "merely the continuation of the original permit application." As we have already discussed, there has been no final decision, at least not on the issues preserved through the Statements of Questions across those three appeals. Therefore, the Applicant here is in much the same situation as the applicant in Times & Seasons. He too may not *selectively* take advantage of the changed laws, but rather must determine whether he wants his rights to vest under the pre-Act 179 versions of the enabling statute and LDR or the post-Act 179 versions.

Having identified Applicant's right to have this application considered under the current versions of the enabling statute and the LDR, we can proceed no further until Applicant indicates whether it wishes to make use of that right, or whether the default rule vesting the application in the 2018 versions of the enabling statute and LDR should apply. Moreover, it would be premature to analyze which standards in the 2022 version of the LDR govern this application or how those standards operate, given the lack of briefing from the City on this point—the City's motion appears to exclusively discuss the operation of the 2018 version of the LDR.

Accordingly, we have not yet reviewed in detail the text of the LDR as amended in 2022. We wish to caution Applicant, however, that we are not inclined to credit an interpretation of the amended enabling statute that *entitles* an ADU applicant to a setback smaller than is required for single family homes while also allowing the ADU to be built to the maximum height of a single-family home. Even assuming the amended 24 V.S.A. § 4412(1)(E) requires municipalities to apply dimensional standards for ADUs that are no less favorable than those applied to single family

dwellings,[2] Applicant would have us apply what he claims is the smaller minimum setback applicable to accessory structures and the larger maximum height applicable to single family dwellings under the bylaws. This result, which would treat ADUs *more* favorably than single family dwellings, is certainly not compelled by 24 V.S.A. § 4412.

For the above reasons, we **partially GRANT** and **partially DENY** both the Applicant's and the City's motions for partial summary judgment. We determine that, given the absence of a final decision on Application CU-18-12, Applicant may take advantage of the 2020 amendments to the enabling statute and 2022 amendments to the LDR, should he so elect. If he takes that route, however, he must choose to have the Application reviewed under the current versions of those laws in their entirety and may not, for example, ask us to apply certain provisions from the 2018 LDR and certain provisions from the 2022 LDR. We also conclude that the as-amended 24 V.S.A. § 4412(1)(E) does not require that bylaws which contain different dimensional and setback standards for accessory structures and single-family homes apply the more permissive of the two standards to an ADU in each instance, rather than allowing for the continued application of such standards in a holistic manner.

Within 30 days of this decision, Applicant shall file a letter with the Court identifying which version of the LDR he would like his Application reviewed under. Thereafter, should either party wish to re-file a motion for summary judgment in light of Applicant's declaration they shall do so within thirty (30) days of the filing of Applicant's declaration. Absent a motion, we will schedule a status conference to discuss marshalling the matter towards a de novo hearing on those aspects of Application CU-18-12 preserved through the Statement(s) of Questions.

Electronically signed September 1, 2022 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[2] The City does not appear to contest this general interpretation of Act 179's amendments to 24 V.S.A. § 4412(1)(E), *see, e.g.,* City's Opposition and Cross-Motion at 6. We therefore do not explore other plausible plain-text interpretations of the provision here.