VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
802-951-1740
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Docket No. 21-ENV-00046

DJK, LLC WW & WS Permit

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Title: Motion for Summary Judgment; Motion for Summary Judgment Motion for Summary Judgment & Motion to Dismiss as to Appellants' 3rd Amended Statement of Questions; Crowley's Motion for Summary Judgment (Motion: 4; 6)
Filer: Jeremy S. Grant; Nathan Stearns
Filed Date: January 10, 2022; February 10, 2022

DJK, LLC's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, filed on January 10, 2022, by Nathan Stearns, attorney for the Applicant

Appellants' Opposition to DJS, LLC's Motion for Summary Judgement, filed on February 9, 2022, by Jeremy S. Grant, Attorney for the Appellants

Appellants' Statement of Disputed Facts and/or Response to DJK's Statement of Undisputed Material Facts, filed on February 9, 2022, by Jeremy S. Grant, Attorney for the Appellants

ANR Reply to Appellants' Opposition to Motion for Summary Judgment, Filed on February 23, 2022, by Kane Smart, Attorney for the Agency of Natural Resources

DJK, LLC's Reply to Appellants' Opposition to DJK, LLC's Motion for Summary Judgment, filed on March 23, 2022, by Nathan Stearns, Attorney for the Applicant

DJK, LLC's Opposition to Appellants' Motion for Summary Judgment, filed on March 28, 2022, by Nathan Stearns, Attorney for the Applicant

DJK, LLC's Response to Appellants' Statement of Undisputed Material Facts, filed on March 28, 2022, by Nathan Stearns, Attorney for the Applicant

DJK, LLC's Statement of Additional Material Facts, filed on March 28, 2022, by Nathan Stearns, Attorney for the Applicant

ANR Response in Opposition to Motion for Summary Judgment, Filed on March 28, 2022, by Kane Smart, Attorney for the Agency of Natural Resources

Crowley's Reply to DJK, LLC and ANR's Opposition to Crowley's Motion for Summary Judgment, filed on May 9, 2022, by Jeremy S. Grant, Attorney for the Appellants

Applicant's Motion is **GRANTED**; Appellants' Motion is **DENIED**.

Ralph and Joanne Cowley (Appellants) appeal the Wastewater System and Potable Water Supply Permit #WW-8-2087 (the Permit) issued by the Vermont Agency of Natural Resources, Department of Environmental Conservation (DEC) to DJK, LLC (Applicant) on May 24, 2021. The Permit authorizes Applicant's new, on-site mound-type wastewater system with existing on-site potable water supply well to support improvements to developed land at 303 West Union Street in Manchester, VT. Currently pending before this Court are cross-motions for summary judgement filed by Appellants and Applicant concerning whether the Permit unlawfully impacts Appellants' use of their property. The Agency of Natural Resources (ANR) has filed responses to both motions.

In this proceeding, Appellants are represented by Attorneys Jon T. Anderson, Gary L. Franklin, and Jeremy S. Grant, Applicant is represented by Nathan Stearns, Esq., and ANR is represented by Kane Smart, Esq.

UNDISPUTED FACTS

On January 10, 2022, Applicant filed a Statement of Undisputed Material Facts (Applicant's SUMF) in support of their Motion. Appellants responded with their Statement of Disputed Facts (Appellants' SDMF) on February 9, 2022. On February 10, 2022, Appellants filed their Statement on Undisputed Material Facts (Appellants' Cross-SUMF), contained in their Motion for Summary Judgment. See Appellants' Mot. for Summ. J. at 3–10. On March 28, 2022, Applicant filed a response to Appellants' Cross-SUMF (Applicant's Cross-SDMF), accompanied by additional material facts (Applicant's Add'l SUMF).

The material facts are largely undisputed, with either parties' disputes flowing from legal conclusions rather than material facts. Both parties assert that the undisputed material facts entitle them to judgment as a matter of law on all four questions. The Court consolidates the parties' statements of undisputed material facts for use in both motions. The Court sets out the following facts for the sole purpose of deciding the pending motions. The facts are limited to those material to the Court's decision and excludes the undisputed material facts relevant to the issues not addressed by the Court here. What follows is not a list of the Court's factual findings. See Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) ("It is not the function of the trial court to find facts on a motion for summary judgment").

1. DJK owns property at 303 West Union Street, Manchester, Vermont. Applicant's SUMF ¶ 1 (citing Ex. 1, ¶ 2).
2. On March 31, 2021, DJK filed an application seeking a Wastewater System and Potable Water Supply Permit for the construction of a wastewater system (the "Wastewater System") to serve an additional bedroom in the existing residence and a single bedroom in a detached accessory unit at DJK's property. Id. ¶ 2 (citing Ex. 2); see also Appellants Cross-SUMF ¶ 5 (citing Ex. B).
3. The DEC issued the Permit to DJK on April 27, 2021. Applicant's SUMF ¶ 3 (citing Ex. 3). The Permit authorizes construction of the Wastewater System per the plans submitted in the application. Id. (citing Ex. 2); Ex. 3; see Appellants Cross-SUMF ¶ 6 (citing Ex. C).
4. Paragraph 2.3 of the Permit imposes the following condition of DJK's property:

> No buildings, roads, water pipes, sewer services, earthwork, regrading, excavation, or other construction that might interfere with the operation of a wastewater system or a potable water supply are allowed on or near the site-specific wastewater system, wastewater replacement area, or potable water supply depicted on the stamped plans. Adherence to all isolation distances that are set forth in the Wastewater and Potable Water Supply Rules is required.

Applicant's SUMF ¶ 6 (citing Ex. 3 ¶ 2.3); Appellants' Cross-SUMF ¶ 9 (Ex. C).

5. To qualify for a wastewater permit, an applicant must demonstrate, among other things, that the proposed location of its wastewater system does not contain any potable water supplies within its associated isolation zone. Applicant's SUMF ¶ 8 (citing Ex. 4, App. A(d)(1)(C)).

6. In this case, the standard isolation zone required by the Rules extends, or overshadows, onto a portion of Appellants' Property. Id. ¶ 9 (citing Ex. 5 ¶ 8).

7. The area of Appellants' property covered by the isolation zone is approximately 10 percent of Appellants' total lot. Id. ¶ 10 (citing Ex. 5 ¶ 9).

8. This portion of Appellants' property is currently undeveloped and does not contain any potable water supply. Id. ¶ 11 (citing Ex. 5 ¶ 8).

9. Outside of the isolation zone, Appellants' property already contains a well/potable water supply, a wastewater system, and a residence. Id. ¶ 12 (citing Ex. 6 at Resp. 6).

10. The Rules, § 1-1104, contain an essentially reciprocal isolation zone for construction of a potable water supply. Id. ¶ 13 (citing Ex. 4 § 1-1104).

11. In order to qualify for a potable water supply permit, an applicant must demonstrate, among other things, that the proposed location of its water supply does not contain any wastewater system within its associated isolation zone. Id. ¶ 14 (citing Ex. 4, App. A(e)(1)(C)–(D)).

12. Under some circumstances, an applicant can request a reduction in the isolation distances for its potable water supply. Id. ¶ 15 (citing Ex. 4 § 1-1104(k)). Reductions in the isolation distances for wastewater systems are also available. Id. ¶ 16 (citing Ex. 4 § 1-912(e)).

13. Appellants' have no plans to install a potable water supply in the area encompassed by the isolation zone. Id. ¶¶ 17–18, 19 (citing Ex. 6 at Resps. 8, 10–11). Appellants have produced no permits, analysis, or engineering plans demonstrating an intention to install a potable water supply in this portion of their property. Id. Appellants have not applied for a permit to construct a potable water supply in the isolation zone or analyzed whether a reduction in the isolation zone could be obtained. Id.

14. Appellants received notice of Applicant's application for the Permit by certified mail (the Notice). Id. ¶ 22 (citing Ex. 5 ¶ 11; Ex. 7); see also Appellants' Cross-SUMF ¶ 2 (Ex. A). The Notice enclosed a site plan "showing the location of the . . . proposed wastewater system (the septic system)" that included "presumptive isolation zones drawn around the proposed . . . septic system," and explained that "[a] presumptive isolation zone is an area that, . . . when drawn around components of a septic system (the leachfield or septic tank or

other tanks that are part of the septic system), shows where a well, with a design capacity of 2 gallons per minute or less, cannot be located" pursuant the Rules. See Appellants' Cross-SDMF ¶ 2 (Ex. A); Cf. Applicant's Cross-SDMF ¶ 2 (disputing only "in relevant part"); see also Applicant's SUMF ¶¶ 22–25.

15. The Notice also included the prescribed notice form, which stated that Appellants "have the opportunity to discuss, and potentially resolve, conflicts before a permit is issued . . . ." Applicant's SUMF ¶ 24 (citing Ex. 7 at 2–3); see Appellants' Cross-SDMF ¶ 2 (Ex. A); cf. Applicant's Cross-SDMF ¶ 2 (disputing only "in relevant part"). The Appellants' contractor contacted Mr. Parent to request that the Wastewater System design be altered to remove the isolation zone from Appellants' property. Applicant's SUMF ¶ 26 (citing Ex. 1 ¶ 4). Mr. Parent discussed potential design alternatives with DJK, which were subsequently presented to the Appellants. Id. ¶ 28 (citing Ex. 5 ¶ 12).

16. Appellants did not contact DJK again until they filed the current appeal. Id. ¶ 29 (citing Ex. 1 ¶ 10). Appellants filed the present appeal on May 24, 2021. See Notice of Appeal (filed May 24, 2021).

DISCUSSION

In Applicant's motion for summary judgment, they argue that the undisputed facts entitle them to judgment as a matter of law on all four questions. Specifically, Applicant argues (1) the Permit does not apply to Appellants' property and therefore, Paragraph 2.3 cannot violate their property or due process rights; (2) "to the extent that Appellants' questions hinge on a determination of whether the Permit creates an easement, the Environmental Court is without jurisdiction to make a determination of property rights;" Applicant's Mot. Summ. J. at 8 (citing In re Umpire Mtn., LLC WW & WS Permit, No. 1711212, slip op., at 8 (Vt. Env. Ct. Feb. 2014) (Walsh, J.)); (3) the facts demonstrate that Appellants' takings claim must fail as a matter or law; and (4) Appellants have not demonstrated an injury-in-fact sufficient to meet Article III standing requirements.

Appellants argue that they are entitled to judgment as a matter of law, because the Permit takes an interest in real property from Appellants for Applicant's private use, making it invalid. Specifically, Appellants argue that the undisputed material facts demonstrate that where Applicant's Permit's presumptive isolation zone crosses their property line, the State has imposed an illegal easement. Appellants argue they are entitled to judgment as a matter of law because (1) the Permit appropriated a permanent interest in Appellants' real property and conveyed it to DJK without just compensation, constituting a *per se* taking; (2) the taking does not serve a necessary public purpose; and (3) Appellants were deprived of real property without an opportunity to be heard.

The Court first discusses whether the undisputed material facts entitled either party to judgment as a matter of law on the takings claim. Because the Court finds the issue dispositive, the Court does not reach the other arguments that (1) the Permit does not apply to Appellants' property, or (2) Appellants have not demonstrated injury-in-fact.

I. *Summary Judgement Standard*

"Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996). When considering cross-motions for summary judgment, the court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 186 Vt. 332.

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). Where "the moving party does not bear the burden of persuasion at trial," however, "it may satisfy its burden of production by indicating an absence of evidence in the record to support the nonmoving party's case." Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). Once the moving party has made that showing, the burden shifts to the non-moving party. Id. The non-moving party may not rest on mere allegations but must come forward with evidence that raises a dispute as to the facts in issue. Clayton v. Unsworth, 2010 VT 84, ¶ 16, 188 Vt. 432. The evidence, on either side, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8.

II. *Statement of Questions*

In the Environmental Division, the Statement of Questions "functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court." In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). It provides notice to other parties of the issues to be determined within the case, while also limiting the scope of the appeal. Id.

Appellants' Statement of Questions presents the following four questions for the Court's review:

> 1. Does paragraph 2.3 of the permit subject to appeal (the "Permit") state a condition that is invalid because it seeks to impose an illegal easement on Crowley in violation of constitutional standards articulated by the Environmental Division in *In re Umpire Mtn., LLC,* WW and WS Permit Docket No. 171-12-12 Vtec (February 2014), as well as *Dolan v. City of Tigard*, 512 US 374 (1994), and *Nollan v. Calif Coastal Commission*, 483 US 825 (1987)?
>
> 2. Does paragraph 2.3 of the Permit state a condition that is invalid as it applies to Crowley because Crowley was not a joined party to the proceedings leading to the issuance of the Permit?
>
> 3. If paragraph 2.3 states an invalid condition, should the application be denied pursuant to Section 1-308(2) of the Water and Wastewater Rules because the project does not provide the necessary isolation distances as required in Section 1-912 of such Rules?
>
> 4. If paragraph 2.3 states an invalid condition, and if the Permit and survey have been recorded in the Town of Manchester Land

> Records, should the Secretary be ordered to record a statement in such land records that adherence to the isolation distances shown on the Survey is not required?

Appellants' Third Amended Statement of Questions (filed Nov. 5, 2021) (footnotes omitted). More briefly, Appellants' Questions first ask whether paragraph 2.3 is invalid because (1) the condition results in an unconstitutional taking, and/or (2) the condition affects appellants property without providing an opportunity to be heard, in violation of their procedural due process rights. Appellants' Questions 3 and 4 are conditional questions, predicated upon this Court finding paragraph 2.3 invalid based on the legal considerations articulated in Questions 1 and 2.

III. *Appellants' Takings Claim*

The first question concerns whether paragraph 2.3 is invalid because it results in an unconstitutional taking. Statement of Questions ¶ 1. Appellants argument in support of Summary Judgment is that the Permit "appropriated a permanent interest in [Appellants'] real property and conveyed it to DJK, without just compensation and constitutes a *per se* taking," violating the State and Federal Constitutions. Appellants' Mot. for Summ. J. at 1. The Supreme Court has described three different categories of takings claims, each with their own operative tests: (1) *per se* takings, (2) regulatory takings, and (3) land-use exactions. Appellants concede that the Permit's presumptive isolation zone causes neither a Penn Central regulatory taking nor a Nollan/Dolan land-use exaction. Appellants' Mot. for Summ. J. at 13–15 ("In this case, the Permit issued to DJK was a *per se* physical taking of Crowley's Property, not a regulatory taking" and "the *Nollan/Dolan* takings analysis does not fit this case"); see Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); see Nollan v. Calif Coastal Commission, 483 U.S. 825 (1987); see Dolan v. City of Tigard, 512 U.S. 374 (1994). Thus, Appellants sole takings assertion before the Court is that this Permit and its accompanying regulations caused a *per se* taking pursuant the Supreme Court's holding in Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

At its most basic level, the Takings Clause requires that when the government physically appropriates private property for public use, just compensation is provided to the owner. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 301 (2002). "These sorts of physical appropriations constitute the 'clearest sort of taking,' and [the Courts] assess them using a simple, *per se* rule: The government must pay for what it takes." Cedar Point Nursery, 141 S.Ct. at 2071 (citations omitted). When the government "imposes regulations that restrict an owner's ability to use his own property," however, the Court applies the Penn Central balancing factors to determine whether the use restriction effects a taking. Id. at 2071 (referencing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

Regulatory takings can go "too far" and rise to the level of a *per se* taking. Id. at 2072. Case law has extended the *per se* takings rule to regulations that have either (1) deprived the owner of all economic use of their property, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), or (2) authorized a physical invasion of their property, see, e.g., Cedar Point Nursery, 141 S. Ct. at 2077; see also, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

A. *Per Se* Physical Taking

This Court's jurisdiction for "consideration of property-related issues and rights is limited to issues within the scope of the regulations governing the permit application." In re Britting, No. 259-11-07 Vtec, slip op. at 5 (Vt. Envtl. Ct. Apr. 7, 2008) (Wright, J.) (noting the Court's subject matter jurisdiction to consider matters arising under 10 V.S.A. ch. 220). For example, in cases in which the applicable regulation requires a new septic system not be built within a certain distance of a potable water source, "the Court can consider whether the applicant has demonstrated that the application meets such a requirement." Id. "On the other hand, resolution of adjacent landowners' rights regarding a disputed right-of-way is beyond the jurisdiction of this Court." Id.

This Court does not have jurisdiction to determine whether the Permit appropriated an "easement-like" property interest. Appellants' Mot. for Summ. J. at 16 ("The Permit took an interest in [Appellants'] Property and required [Appellants] to suffer a permanent physical invasion of their Property because, under Vermont law, paragraph 2.3 of the Permit took an easement-like interest in [Appellants'] Property."). Here, Appellants' argument requires the Court to determine whether the Permit required Appellants to cede an interest in their property rights to the Applicants within the isolation zone. Appellants' Opp. to Applicant's Mot. for Summ. J. at 6. To the extent that Appellants ask whether the Permit's isolation distances appropriated a permanent interest in their real property rights, they ask this Court to make a determination of property rights that is beyond the Court's jurisdiction. See Umpire, No. 171-12-12 Vtec, slip op. at 8. The Court cannot determine whether the Permit "seeks to impose an illegal easement on Crowley," Third Am. Statement of Questions ¶ 1, or otherwise appropriates a property interest, Appellants' Opp. to Applicant's Mot. for Summ. J. at 6. As such, the Court cannot determine that a *per se* physical taking of a legal interest in Appellants' property has occurred on this basis.

To the extent that Applicants sought summary judgment based on the Court's lack of jurisdiction to make a determination of property rights, summary judgement is GRANTED without reaching the merits of whether a taking has occurred.

B. *Per Se* Regulatory Taking

This Court can, however, consider "whether the Rules, as applied to Appellants by way of the Permit, amount to a taking due to the State's placement of potential development limitations on their propert[y]." Umpire, No. 171-12-12 Vtec, slip op. at 8. Appellants argue that the Permit's presumptive isolation zone amounts to a *per se* taking because it resulted in (1) the complete deprivation of "one of the bundle of rights inherent in [Appellants'] ownership of the [Property]—the right to beneficial use of one's property," and (2) a permanent physical invasion of their property. Appellants' Mot. for Summ. J. at 17. Even viewing the material facts in the light most favorable to the Appellants, however, the facts cannot support the finding that Appellants were deprived of all economic value in their property, e.g., Lucas, 505 U.S. 1003, nor that their right to exclude was restricted, e.g., Cedar Point Nursery, 141 S. Ct. 2063.

First, as a matter of law, the possible restriction on Appellants' free use of groundwater within the isolation zone cannot be a constitutional taking because Appellants do not have an absolute private property interest in groundwater. See 10 V.S.A. § 1410. The Vermont Legislature expressly abolished "the common-law doctrine of absolute ownership of groundwater." 10 V.S.A.

§ 1410(a)(5). In place of private ownership, "the groundwater resources of the state are held in trust for the public," 10 V.S.A. § 1390(5), and managed "for the benefit of all Vermonters," in which "all persons have a right to the beneficial use and enjoyment of groundwater free from unreasonable interference by other persons." 10 V.S.A. §§ 1390, 1410. As such, "groundwater in Vermont is not subject to private ownership," Towns v. Northern Sec. Ins. Co., 2008 VT 98, ¶ 19, 184 Vt. 322, and the government cannot appropriate it from a private landowner for public use.

Second, the Court cannot conclude, as a matter of law, that the presumptive isolation zone will prohibit or interfere with Appellants access to groundwater in a manner that could deprive them of all economic use of their property. It is undisputed that Appellants already have access to groundwater on their property, and the presumptive isolation zone does not interfere with that use. Applicant's SUMF ¶ 12 (citing Ex. 6 at Resp. 6). Further, the presumptive isolation zone only limits Appellants ability to site a well within that area but leaves all other beneficial uses of that property intact. The State's use of these presumptive isolation zones is a valid regulatory tool for protecting the State's groundwater and public health by ensuring that drinking water supplies, when accessed by private users, are adequately distanced from contamination sources. They do not regulate any other practical use in the presumptive isolation area. And finally, the presumptive isolation zone is presumptive. The Wastewater and Potable Water Supply Rules (eff. Apr. 12, 2019) (WW/WS Rules) define "Wastewater System Presumptive Isolation Zone" as the "area delineated around leachfields, replacement areas, and wastewater tanks in which a potable water source with a design rate of less than or equal to 2.0 gallons per minute, assuming it would be located in bedrock or confined surficial aquifer, is *presumed* to be unable to be located." WW/WS Rules § 1-201(103). It is undisputed that, under some circumstances, a well may be sited within the isolation zone. Applicant's SUMF ¶¶ 15–16 (citing Ex. 4 §§ 1-912(e), 1-1104(k)); see, e.g., WW/WS Rule § 1-802 (allowing a permit applicant to request a variance from the technical standards for potable water supplies under certain circumstances); see also, e.g., id. § 1-1104(k) ("applicant may submit a written request to the Secretary for a reduction in the required isolation distances or isolation zone for a particular potential source contamination"). Thus, even in the light most favorable to Appellants, the undisputed material facts cannot show that the isolation zone will deprive Appellants of all economic use of their property.

Finally, the presumptive isolation zone is not a physical invasion of Appellants' property as consistent with Cedar Point Nursery, and therefore is not, as a matter of law, a *per se* taking. 141 S. Ct. 2063. Appellants argument that Cedar Point Nursery stands for the proposition that all regulatory easement-like encumbrances create a physical taking has no merit. Cedar Point Nursery involved a regulation that granted labor organizations the right to enter farmers' properties during certain times to meet with their employees. Id. The Supreme Court held this regulation constituted a *per se* physical taking because it gave unions the right to physically enter and occupy the property—i.e., taking the property owner's right to exclude. Id. at 2072 ("Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude."). The Court reasoned that the right to exclude is of "central importance to property ownership" rights, thereby distinguishing the right to exclude from other property rights.

Id. at 2073.[1] Here, the regulations authorize no such physical entry or occupation of property. Rather, the presumptive isolation zone merely delineates an area in which a use-restriction regulates where a landowner may be able to site a well. Categorically, this is not the type of physical occupation, entry, or invasion that constitutes a *per se* taking as a matter of law. Id. at 2071.

Thus, the Court cannot conclude that a *per se* taking has occurred. Accordingly, with regards to Applicants and Appellants remaining takings arguments, Applicant's motion for summary judgment is GRANTED and Question 1 is DISMISSED.

IV. *Appellants' Procedural Due Process Claim*

The second question concerns whether paragraph 2.3 is invalid because it affected Appellants' property rights without providing an opportunity to be heard. Statement of Questions ¶ 2. Appellants' argument in support of Summary Judgment is that the Permit is invalid because Appellants' "Property was taken without due process of law, in violation of the United States Constitution." Appellants' Mot. for Summ. J. at 24.

The Fourteenth Amendment to the U.S. Constitution protects persons against state deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Courts examine procedural due process questions in two steps: (1) "whether there exists a liberty or property interest which has been interfered with by the State;" and if so, (2) "whether the procedures attendant upon that deprivation were constitutionally sufficient." Conway v. Gorczyk, 171 Vt. 374, 376 (2000). If there is no liberty or property interest implicated under either the United States Constitution or Vermont Constitution, no violation of due process rights occurs. Id. at 379.

As noted above, this Court cannot conclude that Appellants were deprived of property. Because the Court cannot conclude a property interest was implicated, the Court cannot conclude that Appellants procedural due process rights were violated as a matter of law.

Even assuming the Permit did impact a property interest entitling Appellants to additional due process requirements, the undisputed material facts indicate the Appellants have been given notice and an opportunity to be heard. Applicants provided notice to Appellants of their intent to file the Permit application. Applicant's SUMF ¶ 22 (citing Ex. 5 ¶ 11; Ex. 7). Then, after attempting to resolve their objections to the Permit with Applicants, see Applicants SUMF ¶¶ 26, 28–29 (citing Exs. 1, 5), Appellants filed this appeal before the Court. Appellants are currently challenging the

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[1] The Supreme Court noted that its

> [D]ecisions consistently reflect this intuitive approach . . . that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply "enter[ing] into physical possession of property without authority of a court order." In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. Yet we recognize a physical taking all the same. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation.

Cedar Point Nursery, 141 S.Ct. at 2077 (citations omitted) (quoting United States v. Dow, 357 U.S. 17, 21 (1958) (citing United States v. Clarke, 445 U.S. 253, 256–257, and n. 3 (1980).

Permit, and there is no evidence before the Court that Appellants were prejudiced due to their inability to challenge the Permit before the present appeal. Cf., e.g., Town of Pawlet v. Banyai, 2022 VT 4, ¶ 15 (finality limiting issues on appeal). Accordingly, the Court finds that the undisputed material facts show there was no procedural due process violations, and the Court GRANTS Applicant's summary judgment motion and DISMISSES question 2.

V. *Appellants' Remaining Claims*

Appellants' Questions 3 and 4 are conditional questions, predicated upon this Court finding paragraph 2.3 invalid based on the legal considerations in Questions 1 and 2. Statement of Questions ¶¶ 2–3. Because this Court cannot conclude, as a matter of law, that paragraph 2.3 is invalid, the Court need not consider Questions 3 and 4. Accordingly, the Court GRANTS summary judgment to the applicant, and DISMISSES the appeal.

CONCLUSION AND ORDER

For the forgoing reasons, this Court **GRANTS** Applicants' Motion for Summary Judgment and **DISMISSES** the appeal.

Regarding Question 1 in Appellants' Third Amended Statement of Questions, the Court enters Summary Judgment for the Applicant. First, the Court does not have subject matter jurisdiction over Appellants per se physical takings argument. Thus, to the extent that Applicants sought summary judgment premised on this Court's lack of subject matter jurisdiction, summary judgment is partially **GRANTED** without reaching the merits. Second, the undisputed material facts, as a matter of law, cannot support that a *per se* regulatory taking has occurred, and Appellants conceded that the Penn Central and Nollan/Dolan regulatory takings analyses are inapplicable here. To the extent that Applicants have requested Summary Judgment on the remaining takings claim, it is **GRANTED**.

Regarding Question 2 in Appellants Third Amended Statement of Questions, the Court enters Summary Judgment for the Applicant. Because this Court cannot conclude that a property interest has been affected nor that Appellants were deprived of notice and opportunity to be heard, this Court cannot conclude that a procedural due process violation has occurred. As such, this Court **GRANTS** Applicant's summary judgment motion on the procedural due process claim.

Regarding Questions 3 and 4 in Appellants Third Amended Statement of Questions, the Court enters Summary Judgment for the Applicant. These questions were conditional, predicated on the Court finding paragraph 2.3 invalid. Because the Court could not, as a matter of law, conclude that paragraph 2.3 was invalid, the Court **GRANTS** Applicant's summary judgment motion as to questions 3 or 4.

Finally, because the Court found the undisputed material facts regarding the takings claim dispositive, the merits of the other arguments briefed to the court are not addressed here. Namely, the Court does not address the merits of Applicants argument that (1) the Permit does not apply to Appellants' property and therefore, cannot violate their property or due process rights; or (2) Appellants have not demonstrated an injury-in-fact sufficient for Article III standing.

It is hereby ordered that:

1. Applicant's Motion for Summary Judgment (Motion 4) is GRANTED.
2. Appellants' Cross-Motion for Summary Judgment (Motion 6) is DENIED.
3. The appeal is DISMISSED.

A Judgment Order is issued concurrently with this decision. This concludes the matter before the Court.

Electronically signed October 3, 2022 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division