

VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
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Docket No. 21-ENV-00053

Mongeon Bay Properties, Inc. Permit Extension Denial

ENTRY REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT

Motion 2: Motion for Summary Judgment
Filer: A.J. LaRosa, Attorney for Appellant/Applicant Mongeon Bay Properties, LLC
Filed Date: August 22, 2022

Statement of Material Facts in Support of Motion for Summary Judgment, filed August 22, 2022, by A.J. LaRosa, Attorney for Appellant

Town of Colchester's Opposition to Appellant's Motion for Summary Judgment, filed on September 21, 2022, by Brian Monaghan, Attorney for Town of Colchester

Statement of Disputed Material Facts, filed on September 21, 2022, by Brian Monaghan, Attorney for Town of Colchester

Motion 3: Motion for Summary Judgment
Filer: Brian P. Monaghan
Filed Date: August 31, 2022

Statement of Undisputed Material Facts, filed on August 31, 2022, by Brian Monaghan, Attorney for Town of Colchester

Memorandum of Law in Opposition to Town of Colchester's Motion for Summary Judgment, filed September 29, 2022, by A.J. LaRosa, Attorney for Appellant

Statement of Disputed Facts in Support of Opposition to Town's Motion for Summary Judgment, filed September 29, 2022, by A.J. LaRosa, Attorney for Appellant

Reply in Support of Motion for Summary Judgment, filed on October 13, 2022, by Brian Monaghan, Attorney for Town of Colchester

Statement of Disputed Material Facts, filed on October 13, 2022, by Brian Monaghan, Attorney for Town of Colchester

INTRODUCTION

Mongeon Bay Properties, LLC (Mongeon) appealed the Town of Colchester (Town) Development Review Board's (DRB) May 19, 2021 decision denying Mongeon's request to extend building permit #26013 (Permit). The Permit, issued July 2018, authorized Mongeon to re-construct a home at 927 East Lakeshore Drive (Project) and on its face, expired July 2019. The home was not completed during that year, and Mongeon requested an extension sometime after July 2019. Presently before the Court are cross motions for summary judgment filed by Mongeon and the Town concerning whether the facts demonstrate that the Permit was active when the extension was requested. Mongeon's Mot. for Summ. J. (filed Aug. 22, 2022); Town's Mot. for Summ. J. (filed Aug. 31, 2022). Mongeon is represented by Attorney A.J. LaRosa. Town is represented by Attorney Brian Monaghan.

STATEMENT OF QUESTIONS

In the Environmental Division, the Statement of Questions provides notice to other parties of the issues to be determined within the case and limits the scope of the appeal. In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). Appellants' Statement of Questions presents the following questions for the Court's review:

1. Did Pert No. #26013 expire or was it subject to renewal as requested? In answering this question, the Court is directed to Section 11.05 – Expiration of Permits and Approvals – of the Colchester Development Regulations?
2. To the extent Permit #26013 provided for the reconstruction of a permitted single family residence within the Shoreland Overlay District, that was technically non-conforming as to lakefront encroachment, does Section 7.03(F)(10) of the Colchester Development Regulations eliminate any permit expiration deadlines applicable to this specific structure and permit?
3. Did the COVID-19 Pandemic and Governor Scott's Emergency Order(s) relating thereto continue, toll, extend, or otherwise constitute good cause to extend any timelines for permit expiration and/or toll, extend, or otherwise constitute good cause to extend any timelines for renewal?
4. Did the Town of Colchester's Stop Work Order and Zoning Enforcement Action with order to stay construction at 927 E.

Lakeshore Drive continue, toll, extend, or otherwise constitute good cause to extend any timelines for renewal?

5. By failing to act on Applicant's request for renewal in a timely manner when previously made, did the Town inherently renew Permit No. #26013?

Mongeon's Statement of Questions (filed June 6, 2021). Mongeon's Questions 1 and 2 ask whether the permit was extended or exempted by the operative language in the Town of Colchester Development Regulations (Bylaws). Question 3 asks whether the COVID-19 pandemic and its ensuing Executive Orders and Legislative Enactments prevented the permit from expiring. Question 4 asks whether the Notice of Violation (NOV) Stop Work Order and litigation regarding the seawall construction on the property tolled the Permit period for the reconstruction of the home on the property. Finally, question 5 contemplates whether the Permit was extended by application of the "deemed-approval" remedy in § 4448 of Title 24.

DISCUSSION

In Mongeon's motion for summary judgment, it argues that the undisputed facts entitle it to judgment as a matter of law. Specifically, Mongeon argues (1) by operation of the language in Bylaws §§ 11.05.A, 7.03.F.10, the Permit did not expire July 2019 and § 2.12.B does not apply due to the non-conforming nature of the house; (2) the litigation regarding the seawall permit (and its accompanying Stop-Work Order) caused a construction delay because the home could not be built until the seawall was complete, Preseault v. Wheel, 132 Vt. 247, 253 (1974); (3) the COVID-19 pandemic and ensuing law prevented the Permit from expiring until September 15, 2021; and (4) the Town's failure to respond to Mongeon's request for a permit extension resulted in that request being approved pursuant 24 V.S.A. § 4448.

The Town argues that it is entitled to judgment as a matter of law because the Permit expired July 2019, at which point, insufficient work had been completed to extend the Permit's expiration pursuant the Bylaws. As such, the Town argues that the undisputed material facts demonstrate that Mongeon's Permit was expired prior to receipt of any request for an extension or tolling from the COVID-19 pandemic.

Summary Judgment 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.

I. Questions 1–4

The Court starts the analysis with Question 4, as Mongeon’s other questions appear to rely on an affirmative finding of Question 4.¹ Question 4 asks whether the NOV’s stop-work order or the ensuing seawall litigation tolled the expiration of the Permit. The Court concludes that there remains a dispute of material fact, particularly with regards to whether the litigation regarding the seawall permit actually delayed construction on the Project.

¹ Without the original tolling from the seawall litigation and the NOV’s stop work order, the Permit would have expired long before the COVID-19 tolling could take effect. Thus, to determine Question 3, the Court must first determine Question 4. Also, determining when the permit period began to run—or would have expired—is a central determination for concluding whether Bylaws § 11.05 or § 2.12.B caused or prevented the permit from expiring. See Statement of Questions 1–2. Thus, before the Court can determine Questions 1 or 2, the Court must determine Questions 3 and 4.

On the Town's Motion for Summary Judgment, the Court considers all reasonable doubts and inferences in favor of the Mongeon. In so doing, the Court finds that it is possible that the litigation regarding the seawall caused an actual delay to construction on this Permit. It is possible that construction on the Project could not move forward until construction on the seawall was complete due to instability in the ground below the home. Thus, the Court **DECLINES** to enter summary judgment for the Town on Question 4.

Considering all reasonable doubts and inferences in the Town's favor, however, the Court cannot find that Mongeon has met their burden of showing that there is no dispute of material fact regarding whether the completion of the seawall was necessary before construction could begin on the Project. While Mongeon did provide evidence sufficient to survive a motion for summary judgment, the only evidence proffered from Mongeon is from the affidavit of Bruce Mongeon, the "managing member of Mongeon Bay Properties, LLC." See Mongeon Aff. ¶ 1 (filed Aug. 22, 2022). In it, Mr. Mongeon asserts that "[w]ithout the completed seawall, the revised house at 927 would be unstable." *Id.* 22. While sufficient to prevent the Town from prevailing on its motion, this is insufficient to prevail on its motion. The Town did not bring evidence disputing his testimony, or even object to this assertion on evidentiary grounds. Town's Statement of Disputed Material Facts ¶¶ 12–14, 16 (disputing solely on the basis that seawall is immaterial). The Court, however, does not have sufficient background on this witness to determine whether he is qualified to offer this opinion. See generally *id.* The Court can only consider admissible evidence in a summary judgment motion, and taking reasonable inferences in the Town's favor, this testimony is insufficient. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8; see V.R.E. 701–702 (concerning the admissibility of opinion testimony). As such, the Court finds that Mongeon has failed to meet its burden and also **DECLINES** to enter summary judgment to Mongeon on Question 4.

Because there remains a dispute as to Question 4, there remains a clear disputes of material fact regarding whether "substantial construction ha[d] commenced and [was] continuing" or "fifty (50) percent of the work to be done under" the Permit had been completed prior to the Permit's expiration, or whether it was completed within a twelve month

period of starting to run. Bylaws §§ 11.05.A, 2.12.B.² Further, because the Court cannot conclude whether the Permit was tolled by litigation, there remains a clear dispute of material fact regarding whether the Permit was still active when the COVID-19 pandemic executive orders and legislation tolled the expiration of all active permits. Thus, the Court must **DECLINE** to enter summary judgment to both the Town and Mongeon on Questions 1–4.

II. Question 5

Mongeon’s final question, however, is raised in the alternative and can be addressed by the Court in these summary judgment motions. Question 5 asks whether the Town inherently renewed the Permit when it failed to timely act on Mongeon’s request for a renewal. Question 5 concerns what is known as the “deemed approval” remedy. 24 V.S.A. § 4448(d).

The Town moves for summary judgment on this question, asserting that the undisputed material facts demonstrate that: (1) no application for renewal or extension was received in 2019 prior to the Permit’s expiration, (2) the application submitted in February 2020 was never completed, and (3) even if it was “completed,” the deemed approval remedy requires procedure and cannot be unilaterally imposed by an applicant. Town’s Mot. for Summ. J. at 14–16. While Mongeon did provide facts in its SUMF related to this issue, neither its motion for summary judgment nor its opposition to the Town’s motion to summary judgment argue or discuss this issue. See generally Mongeon’s Mot. for Summ. J. at 12–14 (discussing that the request for an extension should have been approved by operation of the Bylaws, but never discussing the deemed approved remedy); see also Mongeon’s Mem. in Opp. to Town’s Mot.

² While Question 2 appears to ask whether the permit was exempt from any permit expiration provision by way of being a non-conforming structure, Mongeon’s motion practice clarifies for the Court that the question asks whether § 2.12.B applies. The Court notes, however, that it has insufficient information about the Project itself to enter judgment on this question. Section 7.03.F.10 of the Bylaws exempts “legal encroachments” from the expiration deadlines established in Bylaws § 2.12(B)(2), which would make the operative provision § 11.05.A. While it is undisputed that the project is a non-conforming structure, nowhere in the SUMFs do the parties assert that it is non-conforming by way of legal encroachment, nor do the parties provide exhibits with the operative setback requirements or distance of the house from the mean water mark. See Bylaws §7.03 (noting the “boundaries of the Shoreland District shall include all lands within 250 feet from the mean watermark,” and contemplating encroachments within 100 feet of mean water mark, but not providing Table-2A for setback requirements); see, e.g., Mongeon Aff. Ex. 4 (showing an illegible site plan, which appears to not show set back distances). Thus, in addition to not being able to determine whether the Permit was tolled, the Court does not have sufficient facts to determine which Bylaw applies.

for Summ. J. at 8, 14 (discussing facts related to this issue, but not arguing the merits of this deemed approved remedy). At best, in its Statements of Disputed Material Facts, Mongeon challenges the completeness requirement on the basis that the Bylaws do not address what constitutes a “complete” extension request, though this argument does not appear in its motion or memorandum of law. Mongeon’s SDMF ¶¶ 13–14 (“The Town’s zoning regulations contain no specific standards for what must be in a permit extension request.”).

For the reasons detailed below, the Court concludes that no material facts are in dispute and the Town is entitled to summary judgment. The Town took appropriate action on Applicant’s completed extension request within 30-days of its most completed submission, as required by 24 V.S.A. § 4448(d), and therefore, as a matter of law, the Court cannot deem Mongeon’s application approved under this alternative theory.

a. Undisputed Material Facts Regarding “Deemed Approval” Doctrine

On August 22, 2022, Mongeon filed a Statement of Undisputed Material Facts (Mongeon’s SUMF) in support of their Motion. Town responded with their Statement of Disputed Facts (Town’s SDMF) on September 21, 2022. On August 31, 2022, the Town filed their Statement on Undisputed Material Facts (Town’s Cross-SUMF). On September 29, 2022, Mongeon filed its response to the Town’s Cross-SUMF (Mongeon’s Cross-SDMF), accompanied by additional material facts (Mongeon’s Add’l SUMF). Mongeon’s additional SUMF was almost identical to the SUMF filed in its original motion. Compare Mongeon’s SUMF with Mongeon’s Add’l SUMF (adding only ¶ 34, which was only disputed on semantics and a typo); see Town’s [Additional] Statement of Disputed Facts ¶ 34 (filed Oct. 13, 2022).

The material facts concerning the deemed approval doctrine are largely undisputed, with both parties’ disputes flowing from relevancy and weight objections rather than material facts. The Court consolidates the parties’ relevant statements of undisputed material facts for use in both motions solely as they relate to whether the extension request could have been deemed approved. 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 on Question 5. 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. On February 6, 2020, Mr. Mongeon sent a letter to Ms. Riddle, the Town’s then Zoning Administrator, in which he requested a reconstruction extension for seven of his properties, including 927 East Lakeshore Drive. Mongeon SUMF ¶ 46; Town’s SUMF ¶ 8.
2. Approximately twenty-two minutes later, Ms. Riddle responded via email and stated, “[p]lease request permit extension per the permit number and project for each address that you are asking for an extension on.” Town’s SUMF ¶ 11. In that email, she also informed Mr. Mongeon that “anything more than 50% complete does not need an extension.” Ms. Riddle then issued the Zoning Compliance report. Mongeon’s SUMF ¶ 48.
3. Mr. Mongeon did not take further action on 927 East Lakeshore Drive pursuant to Ms. Riddle’s request for more information. Town’s SUMF ¶ 12; Mongeon’s SDMF ¶ 12 (admitting “that Mr. Mongeon did not take further action on 927” but contextualizing the absence of response on Ms. Riddle’s information that the permit was “active”).
4. On February 5, 2021, Mr. Mongeon again wrote to Ms. Riddle, requesting extensions for 927 East Lakeshore Drive and other permits. Mongeon’s SUMF ¶ 81;³ Town’s SUMF ¶ 13.
5. On March 8, 2021, Mr. Mongeon submitted further documentation in his request for an extension. That letter included the Permit’s number and project. Town’s SUMF ¶ 14; see Mongeon’s SDMF ¶ 14 (disputing the requirements of a “complete” permit extension request, but not the statement itself). The letter also notes that Ms. Riddle “asked that [Mr. Mongeon] make a more formal request for an extension,” and in the letter Mr. Mongeon states he is “willing to pay the additional \$100 for the C/O in accordance with the Permit Terms.” See Mongeon Aff. Ex. 8 (“Project shall be complete within one year of approval or an additional \$100 will be charged for a Certificate of Occupancy.”).
6. Ms. Riddle denied the request on March 16, 2021. Mongeon’s SUMF ¶ 83; Town’s SUMF ¶ 17. Her denial was premised on the belief that the permit expired July 31, 2019, and that an extension could not be granted after the Permit had expired. Town’s SUMF ¶ 17.

³ Mongeon’s SUMF cites Exhibit 7 of the Mongeon Affidavit. However, the Court found the appropriate support for this assertion in Exhibit 8.

7. Mr. Mongeon appealed the March 16, 2021 denial to the DRB. Mongeon’s SUMF ¶ 87. The DRB upheld Ms. Riddle’s denial. *Id.* ¶ 91. Mongeon appealed the DRB’s denial to this Court.

b. Conclusions of Law

“The purpose of deemed approval is to ‘remedy indecision and protracted deliberations on the part of zoning boards and to eliminate deliberate or negligent inaction by public officials.’” In re Bjerke Zoning Permit Denial, No. 72-5-111 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Mar. 22, 2012). The deemed approval remedy provides that “[i]f the administrative officer fails to act with regard to a complete application for a permit within 30 days, whether by issuing a decision or by making a referral to the appropriate municipal panel, a permit shall be deemed issued on the 31st day.” 24 V.S.A. § 4448(d). Thus, the deemed approval remedy only applies to a “complete application.” In re Wood NOV & Permit Applications, 2013 VT 40, ¶ 40.

The Supreme Court has “cautioned against extending the deemed approval remedy beyond this limited purpose, as improper application ‘can operate to grant permits wholly at odds with the zoning ordinance.’” In re Appeal of Ashline, 2011 VT 117, ¶ 8, 175 Vt. 203 (quoting In re Appeal of Newton Enters., 167 Vt. 459, 465 (1998)). The remedy is construed strictly, and only applied when it is “clearly consistent with the statutory purpose.” *Id.* ¶ 13.

The Court concludes that the undisputed material facts demonstrate that Mongeon’s Permit extension request(s) cannot be “deemed approved” pursuant this provision, regardless of the outcome of Questions 1–4. Mongeon’s assertion, at best, relies on the letters sent to the Zoning Administrator on February 6, 2020 and February 5, 2021. The Zoning Administrator, however, responded to Mongeon’s February 6, 2020 request, directing Mongeon to “[p]lease request permit extension per the permit number and project for each address that you are asking for an extension on.” Town’s SUMF ¶ 11. As such, the Court cannot conclude that there was deliberate or negligent inaction by the public official. The February 5, 2021 request similarly did not contain the permit number and project for each address provided in the email. See Mongeon Aff. Ex. 8 (attaching the February 5, 2021 email). Hence, the Court cannot conclude that either request was “complete” and therefore did not begin the running of the 30-day “deemed approval” period.

Finally, Mr. Mongeon sent additional information to the Zoning Administrator on March 8, 2021. Town’s SUMF ¶ 14; see Mongeon’s SDMF ¶ 14. In this letter, Mr. Mongeon provided the previously requested permit number for the 927 East Lakeside Drive Project. Mongeon Aff. Ex. 8 (“The permit I received for the 927 Project, attached . . .”). Despite not being accompanied by the associated extension fee, the Zoning Administrator timely responded to this request on March 17, 2021, denying the extension just 9 days after the earliest the application could have been completed. Mongeon’s SUMF ¶ 83; Town’s VT SUMF ¶ 17; but see In re Wood NOV & Permit Applications, 2013 VT 40, ¶ 40 (“This letter, unaccompanied by an application fee, was plainly not a complete permit application triggering § 4448(d).”).

Mongeon’s extension request form, while submitted on February 6, 2020, was not complete until the Permit number and project was supplied on March 8, 2021. Under the plain language of 24 V.S.A. § 4448(d), the deemed approval period begins when the application is complete. See State v. Stell, 2007 VT 106, ¶ 12, 182 Vt. 368 (explaining that in interpreting statutes, courts look first to the plain language); e.g. In re Trahan, 2008 VT 90, ¶7 n. 6, 184 Vt. 262 (explaining that time period for deemed approval begins to run when application is complete). Thus, as a matter of law, the Court finds that the deemed approval remedy cannot apply to these facts and **GRANTS IN PART** Summary Judgment to the Town on Question 5 and **DISMISSES** Question 5 from the appeal.

CONCLUSION

The Court **DENIES** Mongeon’s Motion for Summary Judgment. The Court **GRANTS in part** the Town’s Motion for Summary Judgment as it pertains to Question 5 and **DENIES in part** as to the remaining Questions 1–4. The Court **DISMISSES** Question 5 from the appeal.

Electronically signed February 13, 2023, pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh" with a stylized flourish at the end.

Thomas G. Walsh, Judge
Superior Court, Environmental Division