

VERMONT SUPERIOR COURT  
Environmental Division  
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Docket No. 22- ENV-00106

Clark Restricted Landing Area Appeal
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**ENTRY REGARDING MOTION**

Title: Motion to Stay/For Inactive Status (Motion: 1)  
Filer: Brian Dunkiel, Esq.  
Filed Date: November 9, 2022

Applicants' Memorandum in Further Support of Motion, filed on December 19, 2022, by Attorney Brian Dunkiel.

Town of Lincoln Memorandum Regarding Development Review Board Jurisdiction, filed on December 19, 2022, by Attorney Benjamin Putnam.

Response to Appellant's and Town of Lincoln's Memoranda Regarding Jurisdiction, filed on January 6, 2023, by Attorney Claudine Safar.

Reply in Further Support of Motion to Place Appeal on Inactive Status, filed on January 23, 2023, by Attorney Brian Dunkiel.

Kyle and Katie Clark (the Applicants) appeal a September 22, 2022 decision of the Town of Lincoln Zoning Board of Adjustment (ZBA) denying their application for a zoning permit for a "Restricted Landing Area" as an accessory use at their home located at 432 Orchard Road North in Lincoln, Vermont (the Subject Property). Presently before the Court is Applicants' motion to place the pending appeal on inactive status pursuant to Vermont Rules of Environmental Court Proceedings Rules 2(b) while they seek conditional use approval of a "Personal Landing Area" at the Subject Property.

This Court held a status conference in this matter on December 12, 2022, via WebEx, during which the Court addressed jurisdictional concerns it has related to the pending appeal and the conditional use application. The Court invited the parties to provide legal briefs on this issue, as it relates to the pending motion, and on the issue of potentially remanding this appeal back to the Town while it considered the conditional use application. Applicants provided such a brief in further support of its motion, the Town of Lincoln (Town) provided a brief outlining its understanding of the issues, and Neighbor Marilyn Ganahl (Neighbor) provided a brief opposing the motion. No other party filed a brief.<sup>1</sup>

For the reasons set forth below, we **DENY** Applicants' motion and **REMAND** the matter, without prejudice to re-file an appeal to this Court, to the DRB pending the DRB's consideration of Applicants' conditional use application.

#### **FACTUAL BACKGROUND**

On or about March 17, 2022, Applicants submitted an application for a Zoning Permit for a "Restricted Landing Area" (RLA) on the Subject Property to the Town Zoning Administrator (the Accessory Use Application). The Accessory Use Application stated that the RLA would be used for electric and occasionally hybrid aircraft and included 8 conditions related to the RLA's use and landscaping. The RLA as proposed consisted of a leveled grass area measuring 1,500 feet by 60 feet on the southern portion of the Subject Property. The Zoning Administrator approved the application as an accessory use. Neighbor appealed the Zoning Administrator's decision on the Accessory Use Application to the ZBA.

Following hearings on the appeal, the ZBA reversed the Zoning Administrator's approval and denied the application on September 22, 2022. In its decision, the ZBA included a footnote noting that there are some undefined conditional uses in the Subject Property's zoning district. Without remarking on the potential applicability of these conditional uses, the ZBA concluded that the application before it was for an accessory use only and did not include an alternative

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<sup>1</sup> Also appearing in this matter as interested parties are Mark and Stephanie Atkins, Louella Bryant, Sarah Farr, Christine Fraioli, Michelle Ann Hall, Sarah Laird, Michael O'Connor, Louise Rickard, and Jacquelyn Tuxill (together, Interested Parties). The Interested Parties did not file memoranda regarding the pending motion.

conditional use application. Therefore, the ZBA stated that it would rule on the issue of whether the Accessory Use Application satisfied the accessory use standards alone. The ZBA ultimately concluded that Applicants were not entitled to a permit. Applicants timely appealed that decision to this Court on October 19, 2022 and submitted their Statement of Questions on November 9, 2022.

Through the pending motion in this appeal, Applicants informed the Court that they applied for conditional use approval “for the same Personal Landing Area”<sup>2</sup> on October 13, 2022, approximately 6 days before they appealed the Accessory Use Application to this Court. Motion at 1. Applicants point to the ZBA’s footnote, as “raising the possibility that the proposed use could also be a conditional use.” Motion at 2. The October 13, 2022 application is for a “Personal Landing Area” measuring approximately 1000 feet by 60 feet in generally the same location as the Accessory Use Application (the Conditional Use Application).

Additionally, on July 19, 2022, while the Accessory Use Application was pending before the ZBA, the Town of Lincoln Select Board adopted a resolution dissolving the ZBA and related Planning Commission and establishing the Town of Lincoln Development Review Board (DRB). Pursuant to this resolution, the ZBA would continue to exist until the completion of matters pending before it, at which time, it would be discontinued. The ZBA was both authorized under 24 V.S.A. Chapter 117 to administer and review the Town’s zoning bylaws. The ZBA has since been discontinued. The newly formed DRB is similarly authorized under Chapter 117, pursuant to § 4461, and performs the functions of the ZBA as well as development review.

### **Discussion**

“Trial courts reviewing administrative decisions have the inherent or implied authority to remand the matter to the administrative agency in the interests of justice.” In re Maple Tree Place, 156 Vt. 494, 499 (1991).

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<sup>2</sup> Applicants indicate in their Motion that “Personal Landing Areas” and “Restricted Landing Areas” are interrelated landing areas as defined by the Vermont Transportation Board. While this Court does not have jurisdiction over Vermont Transportation Board matters or rules, we note this solely to assist us in ruling upon the jurisdictional concerns posed by Applicants’ consecutive municipal zoning applications.

Remanding this matter is in the interest of justice. The ZBA, in ruling upon the Accessory Use Application, noted the potential applicability of conditional use standards to Applicants' proposal as an alternative to the Accessory Use Application before it. It concluded, however, that it was outside the scope of the application before it and appeal. As a direct result of that note, Applicants submitted the Conditional Use Application as an alternative in addition to the Accessory Use Application before this Court.<sup>3</sup> Applicants have noted the Conditional Use Application is for "the same Personal Landing Area" and, therefore, the only distinction between the two application are the applicable standards. We conclude that remanding this matter back to the Town to allow it to consider the Conditional Use Application, at which time the application, or applications, matter may, in whole or in part, return to this Court on appeal promotes judicial efficiency because it allows for the coordination of all presently pending municipal land use permitting issues relative to the proposed project and is in the interest of justice.

Further, as noted in Maple Tree Place, there may be instances where remand is improper should it deny "the aggrieved party the judicial review to which it is entitled." 156 Vt. at 501 (citation omitted). As in Maple Tree Place, however, Applicants have consented to the remand of the denied Accessory Use Application and, therefore have not been denied judicial review. Further, Neighbor has not indicated how she as an interested party would be prejudiced from this Court's decision and the coordination of these applications before the DRB.<sup>4</sup>

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<sup>3</sup> In reaching its conclusion in Maple Tree Place, the Court cited a Washington State Supreme Court case noting that remand may be proper even in situations "which might not warrant a reversal, but which, to the court reviewing the record, would indicate to it that the . . . [administrative body] . . . may have failed to give adequate consideration to an alternative route. . . ." State ex rel. Gunstone v. Washington State Highway Comm'n, 72 Wash.2d 673, 674-75, 434 P.2d 734, 735 (1967). While this case addressed highway decisions, and may be referring to alternative driving routes, we think this guidance is helpful here in the context of alternative permitting "routes."

<sup>4</sup> To the extent that Neighbor asserts that this Court cannot remand this matter because the ZBA has since been disbanded and replaced with the DRB, we conclude that we can so remand to the DRB. The DRB is authorized under the same statutory authority as the ZBA and administers the functions of the former ZBA. See 24 V.S.A. Ch. 117; see also 24 V.S.A. §§ 4460, 4461. It is the "appropriate municipal panel" as a matter of law and, therefore, it is appropriate to remand this matter back to the DRB.

Further, to the extent that Neighbor argues that we cannot remand this matter to the DRB because the DRB has not, or could not, request that this Court remand this matter back to it, we conclude that such a request is not

Having reached this conclusion, we need not rule on the issue of whether the DRB was deprived of jurisdiction to hear the Conditional Use Application as the Accessory Use Application is on appeal before this Court. See In re Punderson 2-Lot Subdivision, No. 106-10-18 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Mar. 29, 2019) (Durkin, J.) (citing Kotz v. Kotz, 134 Vt. 36, 38 (1975)). We will note, however, that the Court remains concerned about the DRB hearing an application presenting, effectively, the exact same project as the Accessory Use Application that is before this Court. While we do not reach a conclusion as to whether jurisdiction over the landing area was divested as a result of the pending appeal, the jurisdictional concerns presented by the consecutive applications further supports the conclusion that remand in this matter is in the interest of justice.

Thus, this matter is **REMANDED** back to the Town DRB to allow the DRB to retain full jurisdiction over both the Accessory Use Application and the Conditional Use Application, such that it may move forward with the Conditional Use Application. This matter is remanded without prejudice so that Applicants may appeal the Accessory Use Application following the conclusion of the Conditional Use Application process.

Electronically signed this 31<sup>st</sup> day of January 2023 pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Tom Walsh", with a stylized flourish at the end.

Thomas G. Walsh, Judge  
Vermont Superior Court, Environmental Division

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required in this instance. While a tribunal may request a remand pursuant to V.R.E.C.P. 5(i), this Court is exercising its inherent authority to remand this matter to the DRB and is not remanding pursuant to V.R.E.C.P. 5(i).