VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00124

Dousevicz, Inc. CU and Site Plan Approval	**Decision on Motions**

This is an appeal by Dousevicz, Inc. ("Appellant"), which applied for conditional use and site plan approval for the construction of a new 23,500-square-foot, 99-unit senior living facility, with associated infrastructure and landscaping, to be located on Sand Hill Road in Castleton, Vermont (together, the "Project"). Appellant proposes that the Project would include independent living, assisted living, and memory care units. Appellant proposed the Project as a Planned United Development ("PUD") under the Town of Castleton ("Town") Zoning Ordinance, adopted February 22, 2021 (the "Ordinance"). The Town of Castleton Development Review Board ("DRB") approved the Project with conditions requiring that the Project remove the proposed memory care units and include in-unit kitchens in all units. Appellant subsequently appealed to this Court.

Appellant is represented by Christopher D. Roy, Esq. Also appearing before the Court are interested persons Kathleen Culpo, Lara Beth DesJardins, Meredith Fabian, John Gillen, Mary Lee Harris, Wayne E. Pickett, Emilio Rosario, and John G. teRiele, Jr. (together "Neighbors"). Neighbors are represented by Bridgette Remmington, Esq. The Town has also appeared and is represented by Michael Tarrant, Esq.

Presently before the Court are Appellant's and Neighbor's cross-motions for summary judgment. Also before the Court is Appellant's motion to strike a portion of Neighbor's cross-motion for summary judgment.

Discussion

I. Motion to Strike

Because it impacts the scope of this Court's review of the pending cross-motions, we begin our analysis by addressing Appellant's motion to strike a portion of Neighbor's cross-motion for summary judgment on the grounds that it's not within the jurisdiction of this Court. Specifically, Appellant moves to strike the portion of Neighbors' cross-motion for summary judgment that

addresses the Project's height. This Court is without jurisdiction to rule upon this issue because it is not within the scope of the Statement of Questions, and Neighbors are not cross-appellants, since they chose not to file a Statement of Questions in this appeal.

This Court is one of limited jurisdiction. 4 V.S.A. § 34. Further, the scope of our review in a matter is limited to the legal issues preserved for our review by the Statement of Questions filed by an appealing party. Here, the sole appealing party is Appellant. See V.R.E.C.P. 5(f) (restricting the legal issues that may be presented at trial to only those issues raised in an appellant's statement of questions, subject "to a motion to clarify or dismiss some or all of the questions"); see also 10 V.S.A. § 8504(h) (directing that, in the case of de novo hearings, the legal issues to be addressed on appeal shall be limited "to those issues which have been appealed."). The Court is therefore confined to those issues raised in Appellant's Statement of Questions and cannot consider issues beyond the Questions. See Vill. Of Woodstock v. Bahramian, 160 Vt. 417, 424 (1993). This review, however, does include matters intrinsic to the Statement of Questions. In re LaBerge NOV, 2016 VT 99, ¶ 15 (citing In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190); see also In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 17.

Neighbors are not cross-appellants in this action, since they chose not to file a timely notice of cross-appeal and associated Statement of Questions. See V.R.E.C.P. 5(f). Thus, for the Project's height to be within the scope of this Court's review, it must be intrinsic to an existing Question. It is not. Neighbors effectively argue that, because this Court hears this appeal on a de novo basis, this Question is properly before the Court. We disagree. While this is a correct assessment of the type of review this Court performs in this appeal, it neglects the jurisdictional constraints placed on this Court by the Statement of Questions.

Appellants Questions ask in the most general terms: (1) whether the Project's use is within the Ordinance's definition of a "multi-family dwelling" (Question 1), (2) whether the Project's proposed layouts with respect to kitchens, and the use thereof, is within the Ordinance's definition of "multi-family dwelling" (Question 2), (3) whether the Project's use is as a "nursing home" under the Ordinance and Vermont state law (Question 3,) (4) whether the Project's hybrid uses are an allowed use within a PUD (Question 4), and; (5) addresses potential Fair Housing Act implications (Question 5).

All of Appellant's Questions address the use and design of the Project within the context of the Ordinance, and potentially related State statutory law. None of Appellant's Questions address dimensional standards applicable to the Project. Nor do the regulatory provisions cited directly

address any dimensional standards, including height, that may be applicable to the Project.[1] That the Questions are related to the Project's status as a purported PUD does not render these Questions so broad as to make all PUD standards, specifically PUD dimensional standards, intrinsic thereto. These Questions are not the type of broad Questions that require this Court to consider matters not "literally stated." In re Steward Subdivision Permit #04-69, No. 21-ENV-00007, slip op. at 7 (Vt. Super. Ct. Envtl. Div. July 20, 2021) (Durkin, J.). The Questions are focused on Appellant's proposed use, generally with respect to the care provided to residents, and the status of the residents themselves, and specifically with respect to kitchen access within the Project, and that use's compliance with the Ordinance. Thus, the Project's height is not before the Court and the DRB's conclusions with respect thereto, must stand.[2] For this reason, Appellant's motion to strike is **GRANTED**.[3]

II. Cross-Motions for Summary Judgement

We now turn to the pending cross-motions. "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 Enters. Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996); V.R.C.P. 56(a); V.R.E.C.P. 5. Under Rule 56, the initial burden falls on the moving party to show an absence of disputed material facts. 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 to demonstrate that there is a triable issue. Id. at 640. The party opposing a motion for summary judgment "cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to a factfinder." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citations omitted); V.R.C.P. 56(e).

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[1] Neighbors assert that Question 4, which cites to Ordinance § 204(G) allows this court to consider the building's height. Subsection G states that "[o[ther uses not listed here . . . may be permitted if . . . such a use is clearly of the same general character as those permitted in the area . . .." Subsection (G) is clearly related to uses, not dimensions. To the extent that Neighbors cite to other provisions of § 204, those provisions are irrelevant as they are not cited within Question 4.

[2] To the extent that Neighbors assert that this conclusion is an "absurd result," this Court notes that our review, as defined by the scope of the Statement of Questions are jurisdictional within the context of our de novo review.

[3] In reaching this conclusion, we note that Neighbors have raised concerns with Appellant's Questions and, potentially, their desire to file an untimely cross-appeal. Neighbors have filed no such motion with respect to either issue and, therefore, the Court will not address the potential merits of any such motion at this juncture.

For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary judgment," id., and gives the nonmoving party the benefit of all reasonable doubts and inferences, City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332. The evidence must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8, 208 Vt. 112. When considering cross-motions for summary judgment, such as the Court is presented with here, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences." Fairpoint Commc'ns, Inc., 2009 Vt 59, ¶ 5, 186 Vt. 332.

Both parties assert that they are partially entitled to judgment as a matter of law. Appellant has presented five Questions within its Statement of Questions. Appellant moves for summary judgment on Questions 1 through 4 of their Statement of Questions. Neighbors move for summary judgment on Appellant's Question 5.[4]

> 1. Is the Project properly deemed a "multiple-family dwelling unit" under the Town of Castleton Zoning Ordinance (the "Ordinance") (Ordinance, Art. IX)?
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> 2. May some or all residents of a "multiple-family dwelling unit" eat in a common, on-site dining area, or is it proper to require each individual residential unit to have its own kitchen despite the fact that both "fraternity and/or sorority houses" and "group homes" are expressly identified as "multiple-family dwelling units" under the Ordinance, neither of which requires kitchens in each individual residential unit (Ordinance, Art. IX)?
>
> 3. Does the 18-unit memory care unit within the Project render the Project a "nursing home" when residents will not "require in house nursing care," thus not meeting the definition of "nursing home" under either the Ordinance or Vermont state law (Ordinance, Art. IX; 33 V.S.A. § 7102(7))?
>
> 4. Should the Project's hybrid use as a combined independent living, assisted living and memory care senior living facility specifically designed to provide a much-needed spectrum of living arrangements for residents as may be appropriate for them over time be deemed an allowed use in a Planned Unit Development (*Ordinance* §§ 204(G), 417)?
>
> 5. Would discriminatory treatment of the Project under the Ordinance due to the identity and condition of its residents violate the federal Fair Housing Act (42 U.S.C. § 3604(f))?

Appellant's Statement of Questions (filed December 29, 2022).

As discussed above in Section I, Appellant's Questions address the Project's use. Underlying each of these Questions, and directly in Questions 3 and 4, is a dispute as to whether the Project includes, or constitutes a "nursing home" as that term is defined by the Ordinance. The Court's

[4] For the reasons set forth above, the portion of Neighbors' motion with respect to the Project's height is stricken.

conclusion on this issue will have direct implications on the Project's use as defined by the Ordinance, and in the context of a PUD.

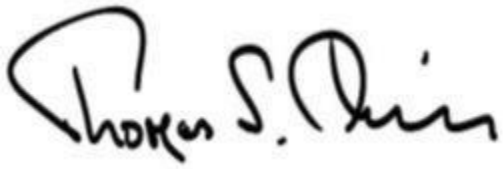
A review of the parties' filings, including their legal briefs and statements of undisputed material facts, show that there is a dispute about the level of nursing care provided at the Project. For the reasons set forth above, this fact is material. Appellant asserts that it will provide "limited" nursing care to residents. In support of this assertion, it provides a "Testimony Recap," see Appellant Ex. G, and generally states that it will be licensed with the State of Vermont as a "Residential Care Facility," which allows only for "limited" nursing care to be provided. See 33 V.S.A. § 7102. Appellant has not, however, provided any evidence of what "nursing care" at the Project will look like, including what types of care will be provided, or the staffing that would be responsible for such care. Without this information, Neighbors assert, and the Court agrees, that the Project's compliance with the Ordinance cannot be assessed. As such, the Court **DECLINES** to enter summary judgment to either party because there is a genuine dispute as to the nursing care to be offered at the Project. To the extent that there are aspects of these Questions that could be answered absent a full analysis of whether the Project is, in whole or in part, a "nursing home," the dispute is such that these conclusions are best determined after a merits hearing and within the context of determined facts.

Conclusion

For the foregoing reasons, the Court **DECLINES** to enter summary judgment for either party on Questions 1 through 5 of Appellant's Statement of Questions. Instead, adjudication of these issues are best determined after a merits hearing. In reaching this conclusion, we **DENY** both Appellant and Neighbors' cross-motions for summary judgment, as there is a genuine dispute of material fact. Further, we **GRANT** Appellant's motion to strike portions of Neighbors' cross-motion as being outside the scope of this Court's review.

The Court will set this matter for a status conference so as to hear from the parties on what must be accomplished for preparation and scheduling of trial.

Electronically signed at Burlington, Vermont on Wednesday, June 21, 2023, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division