

VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
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Docket No. 22-ENV-00087

Laidlaw Conditional Use Permit Denial
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ENTRY REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT

Title: Motion for Summary Judgment (Motion #1)

Filer: James William Barlow, attorney for the Town of Fayston

Filed Date: February 21, 2023

Appellant's Opposition to Town's Motion for Partial Summary Judgment, filed on May 1, 2023,
by L. Brooke Dingleline, Attorney for Appellant/Applicants William and Kimberly Laidlaw

Town's Replay Brief in Support of Partial Summary Judgment, filed on May 5, 2023, by Attorney
James W. Barlow on

The motion is GRANTED in PART and DENIED in PART.

This matter is before the Court on William and Kimberly Laidlaw's (together "Applicants") appeal of a conditional use permit denial for property owned by Applicants in the Town of Fayston ("Town"). Applicants applied for a conditional use permit to remove an existing seasonal camp and construct a single-family dwelling ("the Project") on their property located off Dunbar Hill Road ("the Property"). The Town of Fayston Development Review Board ("DRB") unanimously denied the application, concluding that it did not comply with several provisions of the Town of Fayston Land Use Regulations ("Bylaws"). Applicants timely appealed. Presently before the Court is the Town's motion for partial summary judgment on Applicant's Questions 4 and 5 of their Statement of Questions. Applicants oppose the motion.

In these proceedings, Attorney James W. Barlow represents the Town, and Attorney L. Brooke Dingleline represents the Applicants.

Legal 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 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 a 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 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). For the purposes of the motion, the Court “will accept as true the allegations made in opposition to . . . summary judgment,” id., and give 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, on either side, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8, 208 Vt. 112.

Statement of Questions

In the Environmental Division, the Statement of Questions provides notice to other parties and this Court 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.). In this matter, the Town moves for summary judgment on Appellants’ Questions 4 and 5. Appellant’s Questions 4 and 5 present the following issues for the Court’s review: “4. [w]hether the project complies with the Town of Fayston Land Use Regulations Section 3.8 Non-complying Structures & Nonconforming Uses?” and “5. [w]hether the project complies with the Town of Fayston Land Use Regulations Section 3.13 Streams and Wetlands?” Appellants’ Statement of Questions (filed on October 27, 2022).

Undisputed Material Facts

On February 21, 2023, the Town filed a Statement of Undisputed Material Facts (“Town’s SUMF”) in support of their Motion. Applicants responded with their Statement of Disputed Facts (“Applicants’ SDMF”) on April 28, 2023.¹ The Court sets out the following facts for the sole purpose of deciding the pending motion, adopting those facts that are undisputed or inadequately disputed, and noting any relevant material disputes. What follows is not a list of the Court’s factual findings since findings of fact may only be announced after a merits hearing. 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. Applicants William and Kimberly Laidlaw own an approximately 0.5-acre parcel located off Dunbar Hill Road in the Town of Fayston.
2. The Property is in Fayston’s Rural Residential Zoning District.
3. There is an existing seasonal camp on the Property.
4. On March 10, 2022, the Laidlaws applied to the Town for a conditional use permit to “[c]hange a non-complying structure” by removing an existing seasonal camp and constructing a single-family dwelling on the Property. See Town’s Ex. B.
5. In connection with this March 2022 application the Applicants included a site plan depicting the Property and proposed project (“the Laidlaw Site Plan”). See Town’s Ex. F (“For Town Permitting”).
6. The Laidlaw Site Plan shows that the existing seasonal camp will be demolished, and a new 22-foot by 24-foot single-family dwelling will be constructed. Town’s Ex. F.
7. The proposed single-family dwelling will utilize a new on-site well and septic system.
8. The DRB denied the permit application on August 17, 2022. Id.
9. There are channels on or near the Property in which water flows, though it is disputed how regularly the water flows there. The parties dispute the status of the channels.

¹ The parties stipulated to, and the Court adopted, an extension such that this opposition was timely. See Stipulated Mot. to Enlarge Deadline for Resp. to Mot. for Partial Summ. J. at 1 (filed Apr. 6, 2023); Mot. for Additional Extension to Resp. at 1 (filed Apr. 21, 2023); Am. Stipulated Mot for Additional Extension to Resp. at 1 (filed Apr. 23, 2023).

10. The channels are not manmade or agricultural irrigation channels, but rather drainages flowing downhill of existing culverts passing under Dunbar Hill Road. See Ex. F.
11. The Fayston Zoning Administrator Jason Wilson (“ZA”) went to the Property to observe the channels on September 12, 2022, and January 13, 2023.
12. The channels had water in them on January 13, 2023.
13. It is genuinely disputed whether the channels had water on September 12, 2022.

Discussion

The Town moves for summary judgment on Applicant’s Questions 4 and 5, arguing that, as a matter of law, the Project is not an allowed alteration, enlargement, or expansion of a non-complying structure under § 3.8(A)(3) and that the Project violates § 3.13(A) and (B) of the Bylaws due to its proximity to the channel, which the Town classifies as a “stream.” Applicants oppose the motion, arguing that the Project is a reduction in size of an existing non-complying residential structure and is therefore permitted under § 3.8(A)(3) and (5) of the Bylaws, and that the drainage channels on the Property do not rise to the classification as “streams” such that the Project complies with § 3.13(A) and (B) of the Bylaws.

A determination of the Project’s compliance both with Bylaws §§ 3.8 and 3.13 require interpreting the Bylaws. In interpreting zoning ordinances, the Court applies the rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, the Court “construe[s] words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” Id. (citations omitted). The Court presumes that all language in an ordinance “is inserted for a purpose,” and therefore the interpretation “must not allow a significant part of [an ordinance] to be rendered surplusage or irrelevant.” In re Miller, 2009 VT 36, ¶ 14, 185 Vt. 550. If there is no plain meaning, the Court will “attempt to discern the intent from other sources without being limited by an isolated sentence.” In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). In construing statutory or ordinance language, the paramount goal is to implement the intent of its drafters. Morin v. Essex Optical/The Hartford, 2005 VT 15, ¶ 7, 178 Vt. 29. The Court will therefore “adopt a construction that implements the ordinance’s legislative purpose and, in any event, will apply common sense.” In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578; see also In re Bierke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven

Zoning Bd., 148 Vt. 47, 49, 195 Vt. 586 (1986)) (“Our goal in interpreting [a zoning regulation], like a statute, ‘is to give effect to the legislative intent.’”). Finally, “[b]ecause zoning ordinances limit common law property rights, any uncertainty must be resolved in favor of the property owner.” Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22. With these provisions of interpretation in mind, the Court turns to the applicable questions and their associated Bylaw provisions.

I. Question 4: Section 3.8

Question 4 asks whether the Project complies with the Bylaws § 3.8, which contemplates certain improvements to preexisting non-complying structures and non-conforming uses as being, with review, allowable under the Bylaws. The Town argues that the Project is not an enlargement or expansion of a non-complying structure, but rather the demolition of one non-complying structure and construction of a new, also non-complying structure. Applicants argue that the proposed construction of a new single-family dwelling will result in a reduction of the degree of non-conformity on the Property and is therefore a reduction of an existing non-complying residential structure permissible under Bylaws § 3.8(A)(3). Alternatively, Applicants argue that the Project is permissible under Bylaws § 3.8(A)(5) because any increase in disturbance at the Property is for the purpose of meeting mandated state or federal environmental, health, or safety regulations.

Non-complying structures are “[a]ny structure, or portion thereof, legally in existence as of the effective date of these regulations, including a structure improperly authorized as a result of error by the administrative officer, which does not comply with the requirements of these regulations, shall be deemed a non-complying structure.” Bylaws § 3.8(A).

Pursuant to the Bylaws

A non-complying structure may be allowed to continue indefinitely, but shall be subject to the following provisions. A non-complying structure:

...

(3) if residential, *may be structurally enlarged, expanded or moved*, upon approval of the Administrative Officer, provided the enlargement, expansion or relocation would otherwise be conforming. All other residential non-complying structures may be enlarged or expanded with the approval of the DRB as a

conditional use in accordance with Section 5.3, provided the expansion or enlargement:

- a) does not increase the total volume or area of the non-complying portion of the structure in existence prior to the effective date of these regulations by more than 50%, and
- b) does not extend the non-complying feature/element of a structure beyond the point that constitutes the greatest pre-existing encroachment.

...

(5) may, subject to conditional use review under Article 5, undergo *alteration or expansion* that would increase the degree of noncompliance² solely for the purpose of meeting mandated state or federal environmental, safety, health, energy regulations or handicap access in accordance with ADA standard which would allow for continued use of the non-complying structure

Bylaws 3.8(A)(3), (5) (“Non-complying Structures”) (emphasis added).

Here, it is undisputed that the existing camp on the Property is a non-complying structure.³ It is further undisputed that the Project would remove the non-complying seasonal camp and construct a new single-family dwelling, with a new septic system and well to support the single-family home. Section 3.8(A)(3), however, only applies when a project proposal seeks to “structurally enlarge[], expand[] or move[]” a non-complying structure.

“Enlarge,” “expand,” and “move” are not defined in the Bylaws. Thus, the Court must apply the terms “according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” In re Appeal of Trahan, 2008 VT 90, ¶ 19. By their plain and ordinary

² “Degree of Noncompliance” is defined in the bylaws as “[t]he extension of a structure, that results in an additional encroachment of the non-complying feature/element, represents an increase in the degree of non-compliance. An expansion in the volume or area of a structure shall not constitute an increase in the degree of noncompliance unless the expansion results in encroachment upon the setback that is greater than the existing non-complying encroachment.” Bylaws § 3.8

³ The application permit submitted by the Laidlaws checked the box for “[c]hange to a non-complying structure or non-conforming use” and the parties admitted to the exhibit in the briefing. While the Court does not have any facts supporting what provisions specifically give rise to the non-conformity, specifically because Applicant’s dispute the classification of the channel and, presumably, the Property’s non-complying status pursuant thereto, it is undisputed that the structure is non-conforming. This is clear from both Applicant’s own application for the Project and their brief in response to the pending motion. The Court accepts that admission as adequately supported.

meaning, “enlarge” means “to make larger,” or “to give greater scope to” something. Enlarge, Merriam-Webster (last update June 14, 2023).⁴ Similarly, “expand” means “to open up: unfold” or “to increase the extent, number, volume, or scope of” something. Expand, Merriam-Webster (last update June 13, 2023).⁵ Finally, “move” can have several meanings, but most consistent with the use here, “move” means “to transfer (something, such as a piece in chess) from one position to another,” or “to cause to change position or posture” of something. Move, Merriam-Webster (last update June 14, 2023).⁶

By contrast, the Project does not propose to enlarge, expand, or move the preexisting camp structure. Instead, the non-complying structure “will be *demolished*, and a new 22’ x 24’ single-family dwelling will be constructed.” Town’s SUMF ¶ 19 (emphasis added) (citing Town’s Ex. F (showing Site Plan noting “existing camp to be demolished”)); Applicants’ SDMF ¶ 19 (“Admitted.”). The evidence shows that the Project is one for demolition, not for modification.

Bylaws § 3.8(A)(3) does not serve to permit a parcel with one non-complying structure to indefinitely have a series of non-complying structures. Such a rule would authorize or contemplate a non-complying structure to be intentionally demolished or removed and subsequently replaced with another non-complying structure. Interpreting § 3.8 to authorize such development would ignore Vermont’s policy of phasing out non-complying structures and non-conforming uses. See In re Stowe Club Highlands, 164 Vt. 272, 278 (1995) (affirming the trial court’s reliance “on the policy of phasing out nonconforming uses, including noncomplying structures”). Rather, § 3.8 merely allows a non-complying structure to remain, and gives the landowner an opportunity to expand, enlarge, or move such structures under certain circumstances as specifically addressed by Bylaws § 3.8. Applicants’ argument that this proposal represents a reduction in the degree of nonconformity similarly misses the mark. Again, the non-complying structure itself is not being structurally reduced, but rather demolished and replaced

⁴ Available at <https://www.merriam-webster.com/dictionary/enlarge>.

⁵ Available at <https://www.merriam-webster.com/dictionary/expand>.

⁶ Available at <https://www.merriam-webster.com/dictionary/move>.

with a new structure in a new location that may decrease the degree of non-conformity, but possibly not eliminate the degree of non-conformity.⁷

Finally, to the extent that Applicants argue that Bylaws § 3.8(A)(5) allows the increase in disturbance at the Property, which will include the new home and associated new infrastructure, because it is for purposes of installing the septic system and well for the Project, Appellants' application of § 3.8(A)(5) similarly falls short. Section 3.8(A)(5) provides that "[a] non-complying structure . . . may, subject to conditional use review under Article 5, undergo *alteration or expansion* that would increase the degree of noncompliance" if necessary to meet a required state or federal environmental, health, or safety regulation. "Alteration" is defined in the Bylaws as "[a]ny structural change, change of location, or addition *to a building or structure*, excluding normal maintenance and repair." Bylaws § 10.2 ("Alteration (To alter)") (emphasis added) (cross-referencing "improvement"); see also Bylaws § 10.2 ("Improvement") ("Any physical addition to real property, or any part of such addition, including but not limited to any building, structure, parking facility, wall, fencing, or landscaping."). While installation of the improved septic system and well may fall into this category, the expansion of the well and septic here is not to the existing non-complying structure, but to a new structure replacing the existing structure to be demolished.

As such, the Project does not propose to "enlarge," "expand," "move," or "alter" the existing non-complying structure. The undisputed material facts here demonstrate that Bylaws § 3.8 does not apply to the Project as proposed, which is one for the demolition of an existing non-compliant structure and the construction of a new, potentially also non-compliant, structure, and as such the Town is entitled to judgment as a matter of law on Question 4. Accordingly, the Court **GRANTS** summary judgment on Question 4 to the Town.

II. Question 5: Section 3.13

Question 5 asks whether the Project complies with Bylaws § 3.13, which sets forth the development regulations as they pertain to the development's proximity to streams and wetlands. Specifically, the parties dispute whether the channels located along the Property are

⁷ See supra note 3.

“streams” under the relevant Bylaws. If the channels are “streams,” § 3.13(A) requires a buffer strip. The buffer strip is meant

To prevent soil erosion, protect wildlife habitat and maintain water quality, an undisturbed vegetated buffer strip shall be maintained for a minimum of 50 feet from the banks of *streams* and rivers, and the shores of ponds formed by in-stream impoundments in streams and rivers. The width of the buffer strip shall be measured from the top of the streambank or stream slope, or, where no streambank is discernable, from the regular high-water mark.

Bylaws § 3.13(A) (emphasis added). With limited exceptions, none of which apply to the present Project,⁸ the Bylaws prohibit development, excavation, landfill, or grading within the buffer strip, and require that vegetation be left in an undisturbed state. Bylaws § 3.13(B).

Streams are specifically defined in the Bylaws as “[a]ny surface water course in the Town of Fayston as depicted by the U.S. Geological Survey 7.5 minute Series (topographic) maps or as identified through site investigation; excluding artificially created irrigation and drainage channels.” Bylaws § 10.2 (“Stream”).

Here, it is genuinely disputed whether the channels on or near the Property may be categorized as “streams” as defined in the Bylaws. It is undisputed that the channels are not depicted by the U.S. Geological Survey 7.5-minute series maps. However, it is genuinely disputed whether they were, or should have been, identified as streams through site investigation. The Bylaws do not provide guidance for who is permitted to make such a determination on a “site investigation,” what standards they are to apply to such a determination, or any other intelligible principle relevant in aiding such a determination. Rather, the only insight into the determination is the 7.5-minute series maps, and types of determinations used by the U.S. Geological Survey. While the Town can provide evidence demonstrating that the ZA identified water in the channels such that the Town classified them as a stream, Applicants genuinely dispute whether the ZA is qualified to make that determination, and whether that categorization was appropriate with an

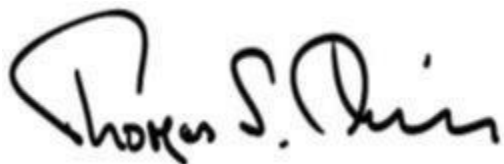
⁸ As discussed above, the Project as proposed does not constitute an expansion of a non-conforming structure, and thus § 3.13(E) is not applicable. See Bylaws § 3.13(E) (“Expansion of Structures. The expansion or enlargement of any structure in existence prior to the effective date of these regulations and not in compliance with subsections (B) may be permitted with the approval of the Development Review Board in accordance with Article 5.”).

expert report stating that the channels do not rise to the level of streams. See Aff. Murawski ¶ 5; Town's Ex. G at 4–5; see also Applicants' Ex. 2 (showing the channels are not labeled as streams on the 7.5-minute map). As such, there remains a genuine dispute regarding whether these channels are streams, and the Court **DECLINES** to enter judgment as a matter of law on Question 5.

Conclusion

For the foregoing reasons, the Town's Motion for Partial Summary Judgment is **GRANTED in part** and **DENIED in part**. With regards to Question 4, the Project does not propose to "enlarge," "expand," "move," or "alter" the existing non-complying structure. The undisputed material facts here demonstrate that Bylaws § 3.8 does not apply to the Project as proposed and as such the Town is entitled to judgment as a matter of law on Question 4. Accordingly, the Court **GRANTS** summary judgment on Question 4 to the Town. With regards to Question 5, there remains a genuine dispute of material fact regarding whether the channels are streams as defined by the Bylaws. As such, the Court **DENIES** the Town summary judgment on Question 5.

Electronically signed at Burlington, Vermont on Wednesday, July 5, 2023, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Thomas S. Durkin". The signature is stylized with a large, looped initial 'T' and a cursive 'D'.

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