VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00122

Midtown Associates, Inc. NOV Appeal

ENTRY REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Title: Appellant's Motion for Summary Judgment (Motion #2); City's Cross-Motion for Summary Judgment
Filer: Matthew Daly, attorney for Midtown Associates, Inc.
Filed Date: January 19, 2023; February 21, 2023
Response in Opposition, as well as Cross-Motion for Summary Judgment, filed on February 21, 2023, by Kyle Clauss, attorney for the City of Burlington

Appellant's motion is GRANTED. The City's motion is DENIED.

This matter is before the Court on Midtown Associates, Inc.'s ("Appellant") Notice of Violation ("NOV") appeal. The City of Burlington ("City") issued the NOV to Appellant on September 13, 2021. Appellant timely appealed the NOV to the City of Burlington Development Review Board ("DRB"). On November 2, 2021, the DRB reversed the violation alleged in the NOV, but issued a new finding and conclusion asserting that a different violation was on-going at the subject property. Appellant timely appealed the DRB's decision to this Court. Presently before the Court are the parties' cross-motions for summary judgment.[1] Appellant is represented by Attorney Matthew Daly. Attorneys Kimberlee Sturtevant and Kyle Clauss represent the City.

[1] The Court notes that both motions were untimely, but as no party has objected to the Court's consideration of the motions, the Court considers them now. However, the Court cautions the parties to maintain the Court established deadlines going forward. Order at 1 (entered Dec. 22, 2022) ("By January 9, 2023, *any* motions for summary judgement shall be filed by either party." (emphasis added)); see V.R.C.P. 56(b) ("A party may file a motion for summary judgment at any time until 30 days after the close of all discovery, unless a different time is set by stipulation or court order."); cf. Appellant's Mot. for Extension (filed Jan. 9, 2023).

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.). Appellant's Statement of Questions presents the following Questions for the Court's review:

> 1. Is the City of Burlington's Notice of Violation premature, and therefore, unlawful, because the Permit at issue expressly allows Appellant until November 24, 2023, to complete its approved project?
>
> 2. Is Appellant's use of its property as temporary parking permitted because the City approved it for parking in 1986 and has never objected to this use since then?

Appellant's Statement of Questions (filed Jan. 13, 2022).

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 dispute of material facts. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). Once the moving party has made that showing, the burden shifts to the non-moving party to demonstrate that there is a triable issue. Mello v. Cohen, 168 Vt. 639, 640 (1998) (mem.). 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 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, 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. 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.

Undisputed Material Facts

Appellant filed its Statement of Undisputed Material Facts on January 19, 2023 ("Appellant's SUMF"). The City subsequently filed its response to Appellant's SUMF ("City's SDMF"), and its own Statement of Undisputed Material Facts ("City's SUMF") in support of its cross-motion for summary judgment. Appellant did not file a reply to the City's opposition, nor an opposition or objection to the City's untimely cross-motion. As such, the Court accepts the facts in City's Statement of Undisputed Material Facts as true so long as they are supported by admissible evidence.[2] 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, eliminating those that are disputed or unsupported by admissible evidence, and adjusting the facts accordingly. 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. Appellant Midtown Associates, Inc. is a valid Vermont Corporation in good standing with the Vermont Secretary of State's Corporations Division. Jeffery Nick is a shareholder and authorized representative of Appellant.

2. Appellant owns the subject property located at 230 Main Street in Burlington.

[2] Portions of the City's SUMF are unsupported by admissible evidence. As such, the Court does not consider City's SUMF ¶¶ 1–3, 12; cf. Aff. Gustin (filed Mar. 1, 2023) (showing that City eventually filed a signed affidavit to support SUMF ¶¶ 7–9). However, the Court does note that City's SUMF ¶ 3 provides that "[u]nder § 14.3.5-E of the Burlington Comprehensive Development Ordinance ("CDO"), parking lots are not a permitted use in FD5." The City did not provide the Court with a copy of the CDO, and no party has filed a copy in this proceeding. The Court is not aware of any authority in Vermont permitting a court to take judicial notice of a municipal ordinance. See V.R.E. 201; Hebert v. Stanley, 124 Vt. 205, 207 (1964) ("Under [Vermont] law a court cannot take judicial notice of a local ordinance."). However, as this is the City's own representation, the Court mentions it here.

3. On November 24, 2020, the City of Burlington's Department of Permitting & Inspections issued Appellant a Zoning Permit (ZP #: 21-0487CA) ("the Permit"). The Permit authorizes Appellant to "[d]emolish motel, related parking, and ancillary site features" and replace those features "with undeveloped open space." Appellant's Ex. 1 [hereinafter "Permit"]; City's Ex. A (same).

4. Permit Condition No. 2 provides: "The owner shall complete the approved project and obtain a UCO (combined Zoning and Building certificates of occupancy, still applicable even if a zoning or building permit was not required) by November 24, 2023, or be subject to enforcement actions." Id.

5. Permit Condition No. 3 provides that: "The resultant use of the property shall be that of a vacant lot containing only green space and the remaining driveway accessing the adjacent property as depicted on the approved site plan. Id.

6. Since the issuance of the Permit, Appellant has completed some work under the Permit, including demolition work, site work, and grading.

7. Appellant intends to complete the remaining work authorized in the Permit by the Permit's November 24, 2023 deadline.

8. On September 13, 2021, the City issued a Notice Of Alleged Zoning Violation to Appellant for failure to comply with the Permit. Appellant's Ex. 2; City's Ex. B [hereinafter "NOV"].[3] Specifically, the NOV describes the violation as follows: "Property not in compliance with approved Zoning Permit 21-0478CA, (ZP-20-780), which was to demolish building, related parking, and ancillary site features and turn the property into green space." Id.

[3] Appellant's Ex. 2 NOV is a one-page document. City does not dispute the validity of the exhibit. In City's Ex. B NOV, however, the NOV has two pages. It is unclear to the Court which one is a true and accurate representation of the NOV. The signature block is on the bottom of the first page and the two pages have different dates. However, the Court concludes that it is irrelevant which NOV is the true and accurate copy, as both pages represent the Violation description as the same as quoted in Finding ¶ 8 and cite the same statutory and ordinance provisions as the operative law. The only additional information on the second page are factual findings and the remedy options, which are not subject to this appeal.

9. The NOV alleges that this is in violation of Burlington Comprehensive Development Ordinance ("CDO") Articles 2, 3, 5, 8, 12, and 24 V.S.A. § 4451. Notably absent, the NOV does not include a cite to CDO Article 14 as being violated.

10. In the City's Ex. C NOV, the factual findings include that the "[a]rea has not been converted to green space and is being used for parking." The "Remedy" options include "discontinu[ing] parking and turning the property into green space as per the approved permit and site plan dated 11-23-2020 . . . ." City's Ex. C.

11. On appeal to the DRB, the DRB considered the noticed violation but changed the description of the violation as follows:

> 1. **Property not in compliance with approved zoning permit. Vehicles parked in an unpermitted parking area.**
> Property not in compliance with approved Zoning Permit 21-0478CA, (ZP-20-780), which was to demolish building, related parking, and ancillary site features and turn the property into green space.

Appellant's Ex. 3 at 1 [hereinafter "DRB Decision"]; City's Ex. C at 1 (same).

12. In its conclusion, the DRB decided to "uphold the violation notice as to the parking onsite but reverse the violation notice to the extent that it addresses failure to convert any of the property to green space in accordance with zoning permit 21-0478CA." DRB Decision at 3.

13. Appellant timely appealed the DRB Decision. The City did not cross-appeal.

Discussion

This matter is before the Court as an appeal of a NOV issued by the City Zoning Administrator William Ward and the City Code Compliance Officer Theodore Miles. NOV at 1. The Zoning Administrator must issue a valid NOV and seven-day warning before the City may bring an enforcement action for penalties against the alleged offender. 24 V.S.A. § 4451(a). By statute, those notices of violation and seven-day warnings must "state that a violation exists, that the alleged offender has an opportunity to cure the violation within the seven days, and that the alleged offender will not be entitled to an additional warning notice for a violation occurring after the seven days." 24 V.S.A. § 4451(a)(1) (seven-day warning requirements). Notices of Violation issued under Title 24, Chapter 117 also require notices of violation to state:

> (A) the bylaw or municipal land use permit condition alleged to have been violated;
>
> (B) the facts giving rise to the alleged violation;
>
> (C) to whom appeal may be taken and the period of time for taking an appeal; and
>
> (D) that failure to file an appeal within that period will render the notice of violation the final decision on the violation addressed in the notice.

24 V.S.A. § 4451(a)(1)(A)–(D) (providing the "Notice of Violation" requirements).

Ultimately, the purpose of a notice of violation is to provide the landowner with notice of the alleged violation. Such due process requires the notice be sufficient to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and to "provide explicit standards for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see also State v. Galusha, 164 Vt. 91, 94 (1995). The degree of precision that will satisfy this standard "varies with the nature—and in particular, with the consequences of enforcement—of the statutory provision." Gen. Media Commc'ns, Inc. v. Cohen, 131 F.3d 273, 286 (2d Cir. 1997). Here, the Court is mindful that zoning ordinances are in derogation of common law property rights, therefore the Court will apply a degree of precision and "any uncertainty [will] be decided in favor of the property owner." Cf. In re Vitale, 151 Vt. 580, 584 (1989) (establishing cannons of bylaw interpretation).

It is undisputed that the NOV presently on appeal alleges the following violation: "Property not in compliance with approved Zoning Permit 21-0478CA, (ZP-20-780), which was to demolish building, related parking, and ancillary site features and turn the property into green space." NOV at 1. As such, the notice provided would put a person of ordinary intelligence on notice that the property is in violation of permit conditions established in Zoning Permit 21-0478CA. Grayned, 408 U.S. at 108; 24 V.S.A. § 4451(a)(1). A person of ordinary intelligence, however, would not be notified that their current use of the property is a prohibited use in the FD5 district pursuant CDO § 14.3.5-E. See City's SUMF ¶ 3 ("Under § 14.3.5-E of the Burlington Comprehensive Development Ordinance ("CDO"), parking lots are not a permitted use in FD5.").

The Court's conclusion is further supported by the cited zoning ordinances in the NOV. The NOV cites the Zoning Permit and Articles 2, 3, 5, 8, 12, and 24 V.S.A. § 4451 to inform Appellant of the "the bylaw or municipal land use permit condition alleged to have been violated." 24 V.S.A. § 4451(a)(1)(A); NOV at 1. Notably absent from the NOV is an allegation that the property is being impermissibly used as a surface lot or an indication that Appellant is in violation of Article 14, which the City asserts is the provision that prohibits surface parking lots in the FD5. See supra, note 2; cf. City's SUMF ¶ 3 (asserting, albeit without evidentiary support, that "[u]nder § 14.3.5-E of the Burlington Comprehensive Development Ordinance ("CDO"), parking lots are not a permitted use in FD5."). In fact, the only mention of parking in the NOV is in "Findings" and "Remedy Options." Specifically, the alleged facts giving rise to the violation and remedy options provide:

> Property not in compliance with approved zoning permit ZP-20-780, which was to demolish building, related parking, and ancillary site features and turn the property into green space. Area has not been converted to green space and is being used for parking.
>
> Within seven (7) days from receipt of this notice you may cure the violation by:
>
> 1) – Removing the violation noted above by discontinue [sic] parking and turning the property into green space as per the approved permit and site plan dated 11-24-2020, and informing the Code Enforcement Office that the violation has been removed so our office may verify compliance . . . .

NOV at 2 ("Findings" and "Remedy Options"). Thus, these findings demonstrate that the Zoning Administrator found that a parking lot is still on the property and it hasn't been converted to green space. The NOV in its totality does not describe the property's parking use as an independent violation, but merely a fact demonstrating that a parking lot remains on the property. These findings and remedy options do not inform a person of ordinary intelligence, nor this Court, of a use violation relative to parking that would result in a violation of CDO § 14.3.5-E. NOV at 2 (describing parking without ever asserting that the parking area is unpermitted or impermissible); see City's SUMF ¶ 3. In fact, the NOV does not specifically reference CDO § 14.3.5-E, or Article 14 thereof, at all. It is clear to the Court that the finding that the property

"is being used for parking" only describes how the property is not in compliance with the Permit, not a separate zoning violation.

Appellant timely appealed the NOV to the DRB. During this appeal, Appellant argued that the Permit is still active, and therefore the violation of noncompliance is not yet ripe. DRB Decision at 2. The DRB agreed; because the permit did not require Appellant to complete the work authorized by the Permit until November 24, 2023. Therefore, the DRB voted to "reverse the violation notice to the extent that it addresses failure to convert any of the property to green space in accordance with zoning permit 21-0478CA." Id. at 3.

The undisputed material facts do not disrupt that conclusion, and the Court now affirms that portion of the DRB's conclusion. It is clear to the Court that, on the issue involving the noticed Permit violation (i.e., noncompliance with permit), the undisputed material facts demonstrate that Appellant is entitled judgment as a matter of law. It is undisputed that the Permit is still active. The Permit gives the Appellant until November 24, 2023, to complete the approved project and obtain a UCO. See Permit, Condition No. 2. When the Zoning Administrator issued the NOV on September 13, 2021, the Appellant still had over two years to bring the property into compliance with the Permit and obtain the UCO. Compare id. (setting compliance deadlines) with NOV at 1. Thus, the Court concludes that enforcement on the Permit is not yet ripe, and the undisputed material facts demonstrate that Appellant is entitled to judgment as a matter of law on Question 1. Appellant's motion is therefore **GRANTED** as to Question 1. For those same reasons, the City's cross-motion is **DENIED**.

The present appeal, however, is somewhat complicated by the DRB Decision. On appeal of the Zoning Administrator's decision, the DRB read another violation into the NOV. In the DRB's findings, it asserted that there are two alleged violations in the NOV, specifically: "Property not in compliance with approved zoning permit. Vehicles parked in an unpermitted parking area[.]" Id. at 1. While the DRB reversed the NOV "to the extent that it addresses failure to convert any of the property to green space in accordance with the zoning permit," it voted to "uphold the violation notice as to the parking onsite . . . ." Id. at 3. Appellant timely appealed the DRB Decision to this Court.

Effectively, the DRB read the NOV clause: "Area has not been converted to green space and is being used for parking" as being two separate violations within the NOV. There is no reference to any such separate violation in the NOV, including a citation to CDO Article 14, which the City asserts is relevant CDO provision. Thus, the NOV does not address a violation of CDO Article 14.

We know of no authority for an appropriate municipal panel to alter a notice of violation in a manner that functionally issues a new notice of violation. The powers of municipal zoning administrators and development review boards are delegated by statute. Zoning administrators are delegated the authority to "administer the bylaws literally and shall not have the power to permit any land development that is not in conformance with those bylaws." 24 V.S.A. § 4448; see 24 V.S.A. § 373 ("The Zoning Administrative Officer shall have all of the powers, duties, and responsibilities as are provided in the Vermont Planning and Development Act to an administrative officer."). It is pursuant to this delegation that the Zoning Administrator—and their delegated assistant administrative officers—have the sole authority to issue notices of violation; the Zoning Administrator is ultimately responsible for all enforcement of the zoning ordinances. 24 V.S.A. § 4448; 24 V.S.A. § 373.

Conversely, the DRB is tasked with reviewing the decisions of the zoning administrator. 24 V.S.A. § 4460(e); 24 V.S.A. § 4465(c). In reviewing such decisions, the DRB has the power to

> (1) To hear and decide appeals taken under this section, including where it is alleged that an error has been committed in any order, requirement, decision, or determination made by an administrative officer under this chapter in connection with the administration or enforcement of a bylaw.
>
> (2) To hear and grant or deny a request for a variance under section 4469 of this title.

24 V.S.A. § 4465(c) ("Appeals of decisions of the administrative officer"). Pursuant to this delegation of authority, the DRB serves as an appellate review board. Its role is to review decisions of a zoning administrator and determine whether there has been an error, not to issue a wholly new notice of violation. As discussed above, the NOV here contemplates only one violation—i.e., noncompliance with zoning permit ZP-20-780. Thus, the Court concludes that,

when the DRB decided to "uphold the violation as to the parking onsite" as a violation not of the Permit, but of the CDO generally, the DRB functionally issued a new notice of violation. This act exceeded the scope of the DRB's authority under statute.

Thus, because the DRB did not have the authority to issue the alleged use violation, that matter is not appropriately before this Court. As such, the Court reverses the portion of the DRB decision that upheld "the violation as to the parking onsite," because that violation was not properly noticed to Appellant pursuant 24 V.S.A. § 4451.[4]

Because the Court concludes that the NOV does not contemplate a use violation, but rather only a permit violation, the Court cannot reach the merits of Appellant's Question 2, as it calls for an advisory opinion regarding whether the use is permissible. Baker v. Town of Goshen, 169 Vt. 145, 151 (1999) ("[C]ourts are not instituted to render advisory opinions."). Accordingly, Question 2 is **DISMISSED**.

Conclusion

For the foregoing reasons, the Court **GRANTS** Appellant's motion for summary judgment, **DENIES** the City's cross-motion, and **DISMISSES** the appeal. The Permit that the NOV alleges has been violated is still active, as the owner has until November 24, 2023, to complete the approved project and obtain a UCO. See Permit, Condition No. 2. When the Zoning Administrator issued the NOV on September 13, 2021, the Appellant still had over two years to bring the property into compliance with the Permit and obtain the UCO. Compare id. (setting compliance deadlines) with NOV at 1. Thus, the Court concludes that enforcement of the Permit is not yet ripe, and Appellant is entitled to judgment as a matter of law. The Court reverses the NOV.

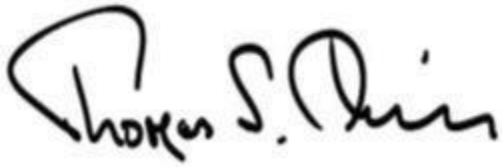
Because the use violation—i.e., unpermitted parking lot—was not noticed by the NOV and instead issued by the DRB on appeal, rather than by the Zoning Administrator through a notice of violation, the Court concludes that issues regarding whether there is an ongoing use

[4] Nothing in this decision precludes the Zoning Administrator from issuing a subsequent Notice of Violation that encompasses the alleged use violation. The Court, here, merely determines that if the City should wish to pursue the alleged use violation, it must issue proper notice. Cf. In re Benoit Conversion Application, Nos. 143-7-08 Vtec, 148-8-04 Vtec, 126-7-04 Vtec, slip op. at 15 (Vt. Super. Envtl. Div. Oct. 14, 2021) (Durkin, J.) (noting that municipalities that issue inadequate NOVs "do so at their own peril"), *aff'd* 283 Vt. 956 (2022).

violation of the CDO at the property is not properly before the Court. Accordingly, the Court reverses the DRB's decision upholding the violation as to onsite parking. As such, Question 2, which asks the Court to rule upon aspects of the improperly noticed use violation, calls for an advisory opinion beyond the scope of this Court's jurisdiction and is, therefore, **DISMISSED**.

This concludes this matter before the Court. A Judgment Order accompanies this decision.

Electronically signed at Newfane, Vermont on Monday, May 1, 2023, pursuant to V.R.E.F. 9(d).



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