STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 31-3-18 Vtec

Wright & Boester Conditional Use Application Appeal	

Decision on Cross-Motions for Summary Judgment

Mairan Wright and Greg Boester ("Appellants") appeal a February 9, 2018 decision of the Town of Greensboro Development Review Board ("DRB") partially approving their conditional use application to renovate a structure located on their property in Greensboro, Vermont. Neighboring property owners, Day Patterson, Janet Showers, and Philip Patterson, ("Neighbors") have noticed themselves as interested persons in this matter.[1] The Town of Greensboro ("Town") is also a party to this appeal. Presently before the Court are the parties' competing cross-motions for summary judgment.

Appellants are represented in this matter by Anthony N.L. Iarrapino, Esq. The Town is represented by Sara E. Davies Coe, Esq. Neighbors are represented by Christopher Roy, Esq.

Legal Standard

This Court will grant a motion for summary judgment when there is no genuine dispute concerning any material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). When considering the facts in the record, "the nonmoving party receives the benefit of all reasonable doubts and inferences." Gauthier v. Keurig Green Mountain, Inc., 2015 VT 108, ¶ 14, 200 Vt. 125 (quoting Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356). When the Court is presented with 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, ¶ 5, 186 Vt. 332.

[1] A separate Entry Order addressing Neighbors' standing in this matter has been issued concurrently.

Factual Background

We recite the following facts solely for the purpose of deciding the pending motions for summary judgment. Our present recitation summarizes the facts that we have deemed undisputed and material to the legal issues raised by the parties in their pending motions, but should not be mistaken for factual findings, which cannot occur until after the Court conducts a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000).

1. Marian Wright and Greg Boester own property located at 151 Birch Lane in Greensboro, Vermont ("the Property"). The Property adjoins the Caspian Lake ("the Lake") to the south and west, and abuts the lot owned by Day Patterson and Janet Showers to the north and east.

2. The Property is improved by a residence and a two-story lakeside structure which serves as a boathouse and additional storage ("the Structure"). The Structure is 18 feet and 5.5 inches long, 16 feet and 4 inches wide, and 19 feet and 8 inches tall.

3. The lower level of the Structure has a gravel floor and is unfinished. It includes two doors which lead to an adjoining dock. Appellants currently use this level for storage of nonmotorized boats such as kayaks and canoes.

4. The upper level is accessed on the opposite side of the Structure, facing away from the Lake. There are three rooms on this level, one of which contains an operational toilet and sink. Another room contains a shower. Appellants currently use this level for additional living space and storage of household items, such as furniture, arts and crafts supplies, and tools.

5. The Structure is in the Town's Shoreland Protection District as defined by the Greensboro Zoning By-Law ("By-Law"). It is presently nonconforming with applicable setbacks in this District.

6. On December 20, 2017, Appellants submitted an application for a "Conditional Use Permit/Variance for Reconstruction or Relocation of Nonconforming Structures [sic] in the Shoreland Protection District." The application proposed to reconstruct the Structure on its existing footprint, and to add a third level to the Structure, increasing its height by approximately 10 feet.

7. On February 9, 2018, the DRB issued a decision approving the conditional use permit application with conditions. The DRB denied the application with respect to the third level, and approved reconstruction of the Structure on its existing footprint to its existing height.

8. The DRB specifically found that the "rebuilt structure will be built on the existing nonconforming footprint and will not increase the degree of nonconformity." In re Wright & Boester CU Application, minutes of Jan. 29, 2018 hearing (Greensboro Dev. Rev Bd., approved Feb. 2, 2018). However, the DRB also found that the proposed height with the addition of a third level would have an undue adverse effect on the character of the area and would not be compatible with other structures in the area, as required by the By-Law.

9. Appellants filed a timely appeal of the DRB decision to this Court. No other party appealed the DRB decision.

Discussion

Appellants move for summary judgment on Question 1 of their Statement of Questions.[2] Question 1 asks:

> Should an existing structure within the Shoreland Protection District that has multiple floors, a ¾ bathroom, and a continuing history of use for more than just the storage of boats be properly characterized as an "accessory structure" rather than a "boathouse," as those terms are defined in and for the purposes of conditional use review under the . . . By-Law?

The Town and Neighbors jointly move for summary judgment on Appellants' Question 2, which asks:

> Can the applicants reconstruct their existing, nonconforming "accessory structure" in the Shoreland Protection District to a height of 29.5', which is 0.5' lower than the maximum height permitted for such structures under § 2.7(E), without causing an "undue adverse effect on . . . [t]he character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the Town Plan" for purposes of receiving Conditional Use Approval under the . . . By-Law?

We address the legal issues raised by the parties in turn, beginning with the issues raised by Question 1.

[2] In their memorandum in opposition to Appellants' motion, Neighbors include a request for entry of summary judgment against the Appellants. For the reasons set forth in our accompanying Entry Order, the request is now **MOOT**.

I. Whether the Structure is properly characterized as an "accessory structure" or a "boathouse."

The By-Law defines a boathouse as "[a] building at or near the high water mark used only for storage of boats." By-Law § 8.4. Boathouses are a conditional use in the Shoreland Protection District. By-Law § 2.7(D).

An accessory structure is "[a] building or use customarily incidental and subordinate to a principal building or use on the same lot, or on an adjoining lot under the same ownership." By-Law § 9.2. Accessory structures are permitted uses within the Shoreland Protection District and are subject to the dimensional standards set forth in § 2.7(E). By-Law § 2.7(C).

We interpret a zoning ordinance using the familiar rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. We will "construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance." Id. If the plain language resolves the conflict, "there is no need to go further, always bearing in mind that the paramount function of the court is to give effect to the legislative intent." Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49 (1986).

We depart from the plain meaning only in "narrow and particular circumstances." Dykstra v. Prop. Valuation & Rev. Div., 156 Vt. 215, 218 (1991). This is because, presumably, the Legislature or municipality was aware of the words it employed and their commonly understood meaning when drafting the ordinance. State v. Camolli, 156 Vt. 208, 213 (1991). If we must look beyond plain meaning, we normally look at "'the subject matter, its effects and consequences, and the reason and spirit of the law.'" Nash v. Warren Zoning Bd. of Adjustment, 153 Vt. 108, 112 (1989) (quoting In re R.S. Audley, Inc., 151 Vt. 513, 517 (1989)).

We can also use a town's interpretation of its own bylaws to guide us to their accurate and intended meaning. See, e.g., Brisson Stone, LLC v. Town of Monkton, 2016 VT 15, ¶ 11, 201 Vt. 286. The amount of weight we give to a town's interpretation depends on the strength of the "'reason or rationale for its decision' as well as a demonstration that the interpretation has been consistent." In re Korbet, 2005 VT 7, ¶ 10, 178 Vt. 459 (quoting In re Appeal of Chatelain, 164 Vt. 597, 598 (1995)); see also In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 21, 199 Vt. 19.

Appellants assert that the Structure is better characterized as an accessory structure rather than a boathouse because the Structure is not used exclusively for the storage of boats

and therefore falls outside the narrow definition of a boathouse. Appellants additionally assert that the interpretation proffered in the DRB decision presently on appeal is inconsistent with prior interpretations.

The Town asserts that the DRB's interpretation of the By-Law was proper and consistent with prior interpretations of the relevant regulations and that the Appellants themselves[3] had at one point classified the Structure as a boathouse. It further asserts that the interpretation offered by Appellants would lead to absurd results.

Turning to the definition of a boathouse in the By-law, the plain meaning of the term "only" is, in relevant part, "[w]ithout anything or anyone else . . . [s]olely: exclusively." Webster's II New College Dictionary *Only* 784 (3d Ed. 2005). If we imposed the plain meaning on this term in the definition of a boathouse, only those structures used exclusively for the storage of boats would fall within the definition. Therefore, those structures that abut the Lake that are used to store boats as well as related items, such as lifejackets, paddles, nonmotorized boat rigging, and dock furniture or other seasonal items, would not be boathouses but instead accessory structures.

Such a narrow reading of the definition would lead to the absurd result that a structure at or near the high-water mark used for the storage of boats and associated items that are not boats would not qualify as a boathouse. See Bergeron v. Boyle, 2003 VT 89, ¶ 11 n. 1, 176 Vt. 78 (citation omitted) (explaining that courts will avoid an interpretation which leads to absurd results.). This limited reading is at odds with the subject matter of this By-Law provision. We therefore decline to interpret the definition of "boathouse" so restrictively.

However, even with this broader reading of the definition of a boathouse, in which we take the term "only" to mean something closer to "primarily," the Structure has other uses we must consider. Here, Appellants have a two-level building. The bottom level is accessible only from the lakeside; the top level is only accessible from the opposite side, facing away from the Lake. The two levels are not connected by interior stairs. While Appellants use the bottom level

[3] It is unclear from the record before us whether Appellants or a surveyor working for them previously used the term "boathouse." The reference appears to have been made on a survey that was filed with a 2011 application for a permit to conduct work on another building on Appellants' property. The Court was not provided with a copy of that application or the supporting survey.

to store nonmotorized boats, the top level contains household items, arts and crafts supplies, a working ¾ bathroom, and additional living space.

The Town asserts that boathouses in the Town are typically used to store boats, but also old furniture and other items, and that these structures typically have plumbing, like the Structure here. It asserts that these structures are not accessory structures, but boathouses, as defined by the By-Law. However, such a use would be outside the scope of the definition of boathouses in the By-Law, as analyzed above.

Appellants direct us to a previous DRB decision in which such a building was deemed an accessory structure, not a boathouse, to argue that the interpretation the Town posits here has not been consistently applied.

In 2013, a property owner submitted an application to rebuild a nonconforming accessory structure on its preexisting footprint in the Town. In re Brown Conditional Use, Findings of Fact & Decision, at 1 (Greensboro Dev. Rev. Bd. Oct. 11, 2013) (hereinafter "the Brown Decision"). The accessory structure at issue in the Brown Decision had deteriorated to the point that renovation was cost-prohibitive, so the building was to be torn down and rebuilt. Id. That existing structure also had two levels. The lower level had a sand floor and was used for boat storage. Id. The second level was one large open room with both a small kitchen and a bathroom. Id. The applicants proposed to reconstruct the structure on the same footprint and approximately to the same height. Id.

The matter of whether the structure was properly characterized as an accessory structure or as a boathouse was not analyzed in the Brown Decision. However, it would appear that the DRB agreed that the building was properly classified by the applicant as an accessory structure, not a boathouse, because the DRB did not object to the applicant's classifying the building as such. Therefore, it would appear that the Town has interpreted the definition of a boathouse to exclude structures that serve purposes both within and outside the scope of the term.

Here, the Structure serves such multiple purposes. The Structure here is very similar to that at issue in the Brown Decision (i.e., two levels, with the lower level having an unfinished floor and used for storing boats, and the upper level having amenities associated with additional living space). It is not solely a boathouse and fits within the more broad term of accessory

structure, as it serves a purpose outside the scope of the definition of boathouse that is incidental and subordinate to the use of the residence. The By-Law does not provide further guidance on how the DRB, or this Court on appeal, should treat such structures.

We note that zoning ordinances "are in derogation of private property rights." In re Champlain Oil Co., 2014 VT 19, ¶ 2, 196 Vt. 29. As such, "any ambiguity is resolved in favor of the landowner." In re Tyler Self-Storage Unit Permits, 2011 VT 66, ¶ 16, 190 Vt. 132 (quotation omitted). The reason for this interpretive rule is that "[a]mbiguous zoning regulations . . . risk arbitrary and capricious exercise of the police power [of a municipality] in violation of due process." Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 29 (citing 1 A. Rathkopf et al., The Law of Zoning and Planning § 2:3 (4th Ed. 2014)). This rule therefore "serves to protect the landowner whose common law property rights are being restricted by the regulations." Id.

Here, the By-Law is ambiguous regarding instances such as this one, where a structure serves as both a boathouse and for purposes outside the scope of the definition of a boathouse. We resolve this ambiguity in favor of Appellants. Therefore, we conclude that the Structure is better classified as an accessory structure, rather than a boathouse. As such, we **GRANT** Appellants' motion for summary judgment and answer Question 1 in the affirmative.

II. Whether the height proposed by Appellants has an undue adverse effect on the character of the area.

The Environmental Division's jurisdiction in an appeal of a municipal panel's decision is dictated and restricted by an appellant's Statement of Questions. See V.R.E.C.P. 5(f); In re Garen, 174 Vt. 151, 156 (2002). Therefore, the Statement of Questions limits the scope of an appeal before us.

The Statement of Questions must be sufficiently clear to give the Court and the other parties notice of the grounds on which the appellant's claims rest. Reporter's Notes, V.R.C.P. 8(a) (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)). Both the parties and the Court "are entitled to a statement of questions that is not vague or ambiguous, but is sufficiently definite so that they are able to know what issues to prepare for trial." In re Unified Buddhist Church, Inc., Indirect Discharge Permit, No. 253-10-06 Vtec, slip op. at 5 (Vt. Envtl. Ct. May 11, 2007) (Wright, J.).

Appellants' Question 2 asks:

> Can the applicants reconstruct their existing, nonconforming "accessory structure" in the Shoreland Protection District to a height of 29.5', which is 0.5' lower than the maximum height permitted for such structures under § 2.7(E), without causing an "undue adverse effect on . . . [t]he character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the Town Plan" for purposes of receiving Conditional Use Approval under the . . . By-law?

The Town and Neighbors assert that Appellants' application seeks to impermissibly expand a nonconformity. Therefore, the Town and Neighbors argue, this Court cannot, in response to a pre-trial motion, reach the question of whether the structure as proposed is in line with the character of the area, because the issue of whether or not a nonconformity may be expanded is a prerequisite to this analysis.

Appellants assert that the DRB found that the nonconformity was not expanded by their proposal and no party appealed that positive finding to this Court. Therefore, they assert, the nonconformity issue is beyond the scope of the Statement of Questions because it was not appealed.

When boiled down, Question 2 addresses a simple issue: does the structure as proposed have an undue adverse effect and therefore is not compliant with the applicable conditional use standards? While it may be true that the nonconformity issue is related to this analysis—in that the DRB must make a finding regarding the expansion of a nonconformity prior to analyzing conditional use standards—they are not intertwined, in that the analyses of both issues is separate and distinct. See By-Law § 5.4(B)(2) (setting forth the character of the area conditional use requirement); and By-Law § 8.9(A)(3) (regarding the expansion of nonconformities). Put another way, a conclusion that a proposed project does not increase the degree of nonconformity is a separate and distinct issue from whether the project satisfies conditional use standards.

Here, it is undisputed that the DRB in its decision below reached a conclusion that the proposed new structure did not constitute an expansion of a pre-existing nonconformity, along with reaching other conclusions adverse to the Appellants' application. Appellants then appealed, filing with the Court a Statement of Questions addressing issues they concluded were

averse to their interests. Therefore, they appealed issues related to the conditional use review itself, not the separate issue of an expansion of a nonconformity. As such, the issue of nonconformity is not presently before the Court in Appellants' Statement of Questions. Nor can we conclude that the issue is intrinsic to our analysis of the character of the area because the two legal considerations are separate and distinct.

Because the issue of expansion of a nonconformity was decided by the appropriate municipal panel below and is not raised in the only Statement of Questions filed with the Court, we conclude that we do not have jurisdiction to reach this legal question. See Vill. of Woodstock v. Bahramian, 160 Vt. 417, 424 (1993).

Because the Town and Neighbors raise a legal issue in their summary judgment memoranda that is not presently before the Court, we **DENY** their motion for summary judgment on Question 2.[4]

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[4] We note that the parties in their legal memoranda have raised an additional issue: whether Appellants' Question 2 as currently framed encompasses all adverse findings in the decision below. In its decision, the DRB concluded both that the proposed height had an undue adverse impact on the character of the area pursuant to By-Law § 5.4(B)(2), and that the proposed height was not compatible with other structures in the area pursuant to By-Law § 5.4(C)(5). The Town and Neighbors assert that Appellants' Question 2 does not incorporate § 5.4(C)(2). Appellants assert that, as both sections pertain to whether the height is out of context with the surrounding area, Question 2 addresses both adverse findings.

As currently written, Question 2 does not encompass both standards. This is because it specifically quotes and references § 5.4(B)(2) and makes no mention whatsoever of § 5.4(C)(5), nor does it reference other conditional use standards generally. Even employing the most liberal construction of the Question, we cannot reach a reading which would cure this deficiency. See In re Milton Arrowhead Mountain, 169 Vt. 531, 531 (1999) (recognizing the general rule that statutory appeal rights are to be liberally construed in favor of the persons exercising those rights) (citation omitted).

However, we agree with Appellants that the issues are functionally very similar. They both relate to the proposed project's alignment with its surroundings. That issue, in the context of a character of the area analysis, has been raised within Question 2. We further note the overall background that prompted the present appeal, which is partially based in issues regarding height and surroundings. See In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190 (directing that "[t]he literal phrasing of the question cannot practically be considered in isolation from the zoning administrator's action that prompted the appeal.").

In their memorandum in opposition to Neighbors summary judgment motion, Appellants appear to request permission to amend their Statement of Questions, should the Court rule as we do here. See, Memorandum in Opposition to Neighbors' Motion for Summary Judgment, filed Sept. 20, 2018, at Pp. 5–7. On Oct. 9, 2018, Neighbors filed a memorandum in opposition to Appellants' request to amend. Because we conclude that no party will be prejudiced by such an amendment since the issue is, as a practical matter, presently before the Court, we grant Appellants leave to file an amended Statement of Questions to include the § 5.4(C)(5) issue. See In re Ridgewood Estates Homeowners Ass'n, No. 57-4-10 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Jan. 26, 2011) (Wright, J).

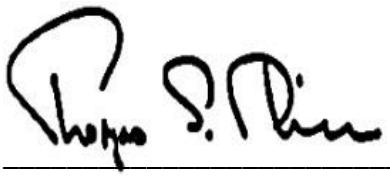
Additionally, Appellants appear to suggest that we should enter summary judgment in their favor on Question 2. We decline to do so for two reasons: first, they have not moved for summary judgment on that Question; without such a motion and without prior notice and opportunity for further briefing, granting such a request would

Conclusion

For the foregoing reasons, we conclude that the Structure is not a boathouse, but an accessory structure as defined by the By-Law. We therefore answer Appellants' Question 1 in the affirmative and **GRANT** Appellants' motion for summary judgment. We also conclude that the issue of whether the project seeks to expand a nonconformity is not before the Court in the present appeal, and therefore **DENY** the Town's and Neighbors' joint motion for summary judgment on Question 2. We further grant Appellants leave, within the next thirty (30) days to amend their Statement of Questions pursuant to our above analysis.

The Court Operations Manager shall set this matter for a pre-trial status conference within the next 45 days, so that the Court and the parties may discuss trial preparation and scheduling.

Electronically signed on March 28, 2019 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division

violate V.R.C.P. 56(f). Secondly, we decline to grant Appellants summary judgment on Question 2 because questions of adverse impacts under conditional use criteria are often very fact driven and therefore often require the benefit of an evidentiary hearing.