

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 130-11-18 Vtec

Hettinger Telecommunications Facility

ENTRY REGARDING MOTION

Count 1, Municipal DRB Other (130-11-18 Vtec)

Title: Motion to Dismiss (Motion 2)

Filer: Black Diamond Consultants, Inc.

Attorney: William J. Dodge

Filed Date: January 25, 2019

Response in Opposition filed on 02/02/2019 by Attorney Laura L. Wilson for Appellant John Luongo

Response filed on 02/08/2019 by Attorney William J. Dodge for Applicant Black Diamond Consultants, Inc., and Interested Person Rising Tide Towers, LLC

Response filed on 02/11/2019 by Attorney Laura L. Wilson for Appellant John Luongo

The motion is DENIED.

The present motion relates to the conditional use application of Applicant Black Diamond Consultants, Inc., and Interested Person Rising Tide Towers, LLC (together, Project Proponents).¹ Project Proponents seek to construct a communications tower (the Project), which includes a 190-foot lattice tower, on land owned by Ronald and Donna Hettinger located at Church Hill Road, Lot 03043, in Norton, Vermont (the Property). The Town of Norton Development Review Board (DRB) approved the application in a November 8, 2018 decision. John Luongo, a neighboring property owner, appealed that decision to this Court. Mr. Luongo proceeded to file a Statement of Questions and a supplemental Statement of Questions, which each contain a single question.² Project Proponents move this Court to dismiss Mr. Luongo's supplemental Statement of Questions pursuant to V.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Alternatively, Project Proponents ask this Court to convert their Rule 12(b)(6) motion to dismiss into a V.R.C.P. 56 motion for summary judgment pursuant to V.R.C.P. 12(b).

Also before the Court is Mr. Luongo's motion for leave to file an amended Statement of Questions. In a contemporaneous Entry Order, we grant his motion. Mr. Luongo's amended Statement of Questions supersedes his original Statement of Questions and his supplemental

¹ Our records show that Black Diamond Consultants, Inc., is the applicant (and appellee) in this matter and Rising Tide Towers, LLC, is participating as an Interested Person. The filings of these two entities, however, indicate that they conceive of themselves as co-applicants.

² Relevant to the present motion is Mr. Luongo's supplemental Statement of Questions, which (to paraphrase) alleges that the DRB misidentified the zoning district of the Project as the Agricultural and Forest District when the Project is actually located in the Rural Residential District, and questions whether the Project meets the standards of the Rural Residential District.

Statement of Questions. See, e.g., In re Northfield Engine House Renovation (Appeal of Drown), No. 119-6-08 Vtec, slip op. at 1-2 (Vt. Env'tl. Ct. Nov. 14, 2008) (Wright, J.). Therefore, the Question posed by his supplemental Statement of Questions no longer raises an issue before this Court on appeal. See V.R.E.C.P. 5(f). This moots Project Proponents' motion to dismiss the Question in Mr. Luongo's supplemental Statement of Questions and compels us to **DENY** the motion.

So ordered.

Electronically signed on March 14, 2019 at 11:05 AM pursuant to V.R.E.F. 7(d).



Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

Municipality Town of Norton

Laura L. Wilson (ERN 4042), Attorney for Appellant John Luongo

Interested Person Michael Branham

For Informational Purposes Only Gina Vigneault

Interested Person Town of Norton

William J. Dodge (ERN 4634), Attorney for Appellee Black Diamond Consultants, Inc.

Alexis L. Peters (ERN 10111), Attorney for party 6 Co-counsel

William J. Dodge (ERN 4634), Attorney for Interested Person Rising Tide Towers, LLC

Alexis L. Peters (ERN 10111), Attorney for party 8 Co-counsel