STATE OF VERMONT

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

Wright & Boester Conditional Use App. Appeal

ENTRY REGARDING MOTION

Count 1, Municipal DRB Conditional Use (31-3-18 Vtec)

Title: Motion to Dismiss (Motion 2)

Filer: Marian Wright & Greg Boester

Attorney: Anthony L. Iarrapino

Filed Date: July 31, 2018

Response in Opposition filed on 08/17/2018 by Attorney Christopher D. Roy for Interested Persons Phillip Patterson, Day Patterson, and Janet Showers

The motion is GRANTED.

Marian Wright and Greg Boester (together, "Applicants") appeal a February 9, 2018 decision by the Town of Greensboro Development Review Board ("DRB") regarding their application for conditional use approval to reconstruct an existing structure on their property located on Caspian Lake in Greensboro, Vermont. The DRB ultimately approved reconstruction of the existing nonconforming structure at the property but denied Applicants' application to reconstruct the structure to their requested specifications. Applicants subsequently appealed the decision to this Court. Day Patterson, Janet Showers, and Phillip Patterson (together, "Neighbors") have intervened in this matter as interested persons pursuant 10 V.S.A. § 8504(n)(5). Presently before the Court is Applicants' motion to dismiss Neighbors as interested persons in this appeal.

A party's standing is a question of subject matter jurisdiction. Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 8, 182 Vt. 234 (citation omitted). Therefore, we review the motion under the standard of review afforded by Rule 12(b)(1). In re Main St. Place LLC, Nos. 120-7-10 Vtec, 191-11-10 Vtec, et. al., slip op. at 2 (Vt. Super. Ct. Envtl. Div. Jun. 19, 2012) (Durkin, J.). That is, we accept as true all uncontroverted factual allegations and construe them in a light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2 (mem.).

A person may intervene in a pending appeal if they satisfy one of six intervention requirements. 10 V.S.A. § 8504(n).[1] Neighbors here have asserted that they should be allowed

[1] There are actually seven subsections to 10 V.S.A. § 8504(n). However, subsection (3) only pertains to the Vermont Natural Resources Board and is therefore not applicable to these intervenors. Id.

to appear before the Court as intervenors in this appeal because they each qualify as an "interested person" as defined by 24. V.S.A. § 4465. 10 V.S.A. § 8504(n)(5). Applicable and most at issue here is § 4465(b)(3), which requires that an interested person meet three distinct elements: (1) to own or occupy "property in the immediate neighborhood" of a project; (2) to "demonstrate a physical or environmental impact" on the person's interest "under the criteria reviewed"; and (3) to allege "that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality." Id.

At issue in the pending motion is whether Neighbors have alleged that the decision on appeal, if confirmed, is not in accordance with the Greensboro plan or bylaw. Applicants assert that, because Neighbors have expressed agreement with the DRB's decision and the conclusions reached therein, they do not meet the cited definition for interested persons. Neighbors appear to argue that, because they meet the first two elements of § 4465(b)(3), they are permitted to intervene in this appeal. They also assert that the reading of the third element of the interested person test that Applicants suggest leads to absurd results and therefore should be disregarded.

We begin by noting that the case law regarding this third element of § 4465(b)(3) has been limited, but that it is helpful and a good starting point for understanding the pending motion.

The Vermont Supreme Court has interpreted a prior iteration of the statute in Kalakowski v. John A. Russell Corp. 137 Vt. 219 (1979). Prior to 2003, similar statutory language to that in § 4465(b)(3) was found in § 4464(b)(3).[2] In Kalakowski, neighboring property owners appealed a permit issued to an applicant. The applicant asserted that these property owners lacked standing to appeal the permit issuance. When interpreting what we now refer to as the third element, the Court noted that this element "was designed to limit the number of appeals." Id. at 222; see also In re Albert, 183 Vt. 637, 638—40 (2008) (mem.). It therefore concluded that "a claim that the decision is inconsistent with the regulations . . . sufficiently established standing to appeal." Kalakowski, 137 Vt. at 223.[3]

The parties have directed us to two relatively recent cases that touch upon this issue: In re DeSimone & Moises Family Tr. Conditional Use Application and In re Fowler NOV. No. 247-12-09 Vtec (Vt. Envtl. Ct. Apr. 27, 2010) (Wright, J.); No. 159-10-11 Vtec (Vt. Super. Ct. Envtl. Div. Aug. 8, 2012) (Durkin, J.).[4] We note that neither decision includes a full analysis of this language.

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[2] At that time, 24 V.S.A. § 4464(b)(3) read as "[a] person . . . who alleges that the decision or act, if confirmed, will not be in accord with the polices, purposes or terms of the plan of that municipality."

[3] We recognize that the applicability of the Kalakowski precedent is reduced because that Court was analyzing the propriety of someone appearing as an appellant, whereas in the case at bar, we are asked to determine the propriety of Neighbors appearing as intervening interested persons. We note, however, that the same general standard as set forth in § 4465(b)(3) is applied in both circumstances. See generally 24 V.S.A. § 4465(a)—(b); see also 10 V.S.A § 8504(n)(5).

[4] Neighbors additionally direct us to In re McCullough Crushing, Inc., Nos. 179-10-10 Vtec, 3-1-10 Vtec (Vt. Super. Ct. Envtl. Div. Jun. 27, 2013) (Walsh, J). While the Court denied appellant's motion to dismiss interested parties who ostensibly agreed with the DRB decision below, the Court's decision does not include an analysis or discussion of this element of § 4465(b)(3). We therefore find the decision not very helpful to our pending analysis.

In DeSimone & Moises Family Tr., an appellant-applicant moved to dismiss interested persons from the matter, in part, because one party failed to show that the subject project would not be in accord with the policies, purposes, or terms of the relevant municipality's plan or bylaw. No. 247-12-07 Vtec, slip op. at 10 (Apr. 27, 2010). However, the Court concluded that the appellant-applicant failed to adequately address "the actual language of the third element of § 4465(b)(3)," which required an allegation that the municipal panel's decision or act, not the project itself, if confirmed, will not be in accordance with the relevant regulations or plan. Id. at 10—11. The decision or act at issue in that appeal was the decision to deny the appellant-applicant's permit, which the Court noted that the interested party appeared to support. Id.. However, because the appellant-applicant failed to address the accurate language of § 4465(b)(3), the Court denied the motion to dismiss, but granted leave to renew the motion to address the accurate language more fully. Id. at 11. The appeal was subsequently withdrawn before further briefing.

In Fowler NOV, an appellant and alleged zoning violator moved to dismiss neighbors who intervened as interested persons, however the motion was not based on the third element of § 4465(b)(3). The Court noted that "the record before us indicates that the individuals effectively, if not explicitly, make this allegation: they express concerns that Appellant's [alleged violations] are not in conformance with [the regulations]." Fowler NOV, No. 159-10-11 Vtec, at 14 (Aug. 8, 2012).

While these cases do not provide a full analysis of the statutory language at issue here, when read together they provide some guidance on the issue presently before the Court. Even so, we note that the cases appear to be at odds, with DeSimone and Kalakowski seemingly standing for the principle that it is the municipal panel's decision or act that interested parties must allege are not in conformance with the relevant plan or bylaw, and Fowler NOV for the principle that it is sufficient for the interested parties to allege that the underlying activity, there a violation, is not in conformance with the relevant plan or bylaw. We keep this competing case law in mind as we complete our interpretation of § 4465(b)(3).

In interpreting a statute, we first "construe words 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, 184 Vt. 262 (citations omitted). If there is no plain meaning, we 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, our "paramount goal" is to implement the intent of its drafters. Colwell v. Allstate Ins. Co., 2003 VT 5, ¶ 7, 175 Vt. 61. We 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 (quotations omitted); see also In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49 (1986)) ("Our goal in interpreting . . . a statute . . . 'is to give effect to the legislative intent.'").

The terms "decision" or "act" are not defined statutorily. A commonly accepted definition of the word "decision" is "1. Judgement on an issue under consideration. 2. The act of making up one's mind or reaching a conclusion. 3. A verdict reached or judgment pronounced." Webster's II New College Dictionary *Decision* 298 (3d Ed. 2005). "Act" is defined as "1. The

process of doing . . . 2. Something done." Webster's II New College Dictionary *Act* 11. Alternatively, in relevant part, "application" is defined as "1. The act of applying . . . . 6a. A request, as for aid, employment, or admission. B. The form or document for such a request." Webster's II New College Dictionary *Application* 56.

Neighbors essentially ask us to read the term "application" into the words decision or act. "Application" is not included within § 4465(b)(3), nor is it included in the plain meaning of the terms "decision" or "act." By the plain meaning of those terms, we conclude that the statutory terms "decision" or "act" refer to the actions taken by the appropriate municipal panel on an application submitted to it. To read the term "application" within this subsection would be contrary to the plain language of the statute and the plain meaning of the words therein.

Further, Neighbors' assertion appears to run contrary to the legislative intent of § 4465(b)(3). See Kalakowski, 137 Vt. at 222 (noting that the purpose of the prior iteration of § 4465(b)(3) was "designed to limit the number of appeals."). To read the term "application" into § 4465(b)(3) as currently written would be to judicially expand the class of people who may qualify as interested persons. See In re Gulli, 174 Vt. 580, 582 n.* (2002) (holding that courts must "strictly adhere" to the standing requirements set forth by the Legislature); see also Garzo v. Stowe Bd. of Adjustment, 144 Vt. 298, 302 (1984) (holding that the reviewing court may not judicially expand the class of persons who qualify as interested persons).[5]

Alternatively, Neighbors appear to assert that compliance with the first two elements of § 4465(b)(3) permits them the right to intervene in this matter as interested persons.[6] However, the Court "must not allow a significant part of a statute to be rendered surplusage or irrelevant." In re Miller, 2009 VT 36, ¶ 14, 185 Vt. 550. To interpret § 4465(b)(3) as Neighbors here suggest would lead to that exact result: the third element would be mere surplusage and irrelevant to the determination of whether a party may be an interested person before the Court. As such, we decline to adopt Neighbors' statutory interpretation.

Here, each Neighbors has stated that they agree with the decision below that is presently on appeal. They assert that the DRB reached the proper conclusion in its decision below. Ostensibly, they believe that the decision was in accord with the policies, purposes, or terms of the plan or bylaw of Greensboro. Therefore, if confirmed, at least as the Neighbors allege, the decision would remain in accordance with the relevant Regulations. Instead, it appears that they assert that the application as proposed by Applicants is not in accord with the policies, purposes, or terms of the relevant regulations. As discussed above, such an allegation is outside of the scope of the third element of § 4465(b)(3).

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[5] We note that both of these cases dealt with the prior iteration of § 4465(b)(3) and that those intervenors were seeking interested person status to bring forth their own appeal, not intervene pursuant to § 8504(n) in another party's appeal. However, as both address the definition of "interested person" as it relates to standing to appear before the Court, we find it helpful in our analysis.

[6] Neighbors' compliance with the first two elements of § 4465(b)(3) is not at issue in the present motion, though it appears to be contested. We note that Neighbors represent in their most recent filings that they seek to intervene in the pending appeal pursuant to 10 V.S.A. § 8504(n)(5). We therefore do not address the five other potentially relevant avenues under § 8504(n) by which an individual may seek intervenors status, since no party here has briefed those avenues.

Having received no allegation that the DRB decision, if confirmed on appeal, would be at odds with the policies, purposes, or terms of Greensboro's plan or bylaw, we must conclude that Neighbors have failed to demonstrate that they are interested persons pursuant to § 4465(b)(3) and therefore must also conclude that they are not entitled to intervene in this matter pursuant to § 8504(n)(5).

We recognize that this result appears unduly draconian. Applicants do not dispute that Neighbors own the adjacent property, that the proposed structure will be only a few feet from the parties' common boundary line, and that Neighbors may be impacted by Applicants' vertically expanded structure. Further, without Neighbors participation as interested persons, the Court must rely solely upon the Town for evidence and legal argument in opposition to the proposed improvements in its search for the proper outcome in this land use litigation. Nonetheless, based upon the legal arguments presented, we conclude that the granting of Applicants' motion to dismiss neighbors as parties is required by the unambiguous reading of 24 V.S.A. § 4465(b)(3) and the intent of this provision. See Kalakowski, 137 Vt. at 222.

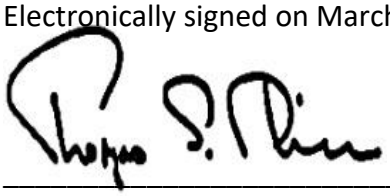
We note that both Applicants and Neighbors premised their arguments upon 10 V.S.A. § 8504(n)(5), which directs that someone claiming standing to participate in another's land use appeal must "qualif[y] as an 'interested person,' as established in 24 V.S.A. § 4465 . . . ." Subsection (n) provides that any person may intervene in a pending appeal if that person satisfies any one of six intervention alternatives.[7] See also V.R.E.C.P. 5(c). Subsection (n)(6) provides that a party may intervene in a pending land use appeal when that person "meets the standards for intervention established in the Vermont Rules of Civil Procedure." We hesitate to make a determination here as to whether Neighbors may qualify for intervention under V.R.C.P. 24, or another V.R.C.P. provision, because neither Neighbors nor Applicants provided the Court with the relevant factual representations or legal arguments concerning intervention.

For all these reasons, we **GRANT** Applicants' motion to dismiss that asserts that Neighbors do not qualify as interested persons pursuant to 24 V.S.A. § 4465(b)(3). Neighbors are hereby dismissed as parties from this appeal. However, in an attempt to avoid an unnecessarily draconian result, we shall allow Neighbors thirty (30) days from the issuance of this Entry Order to file a request for reconsideration, provided that such request is accompanied by a representation of material facts and memorandum of law as to why Neighbors are entitled to intervene in this appeal pursuant to 10 V.S.A. § 8504(n)(6). All other parties shall be afforded an opportunity to respond to any filings that neighbors submit, in accordance with the V.R.C.P.

[7] We conclude that the six subsections to 10 V.S.A. § 8504(n) provide alternative tracks for intervention because subsection (5) ends with the word "or."

So Ordered.

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



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Thomas S. Durkin, Superior Judge
Environmental Division

Notifications:

Anthony L. Iarrapino (ERN 4781), Attorney for Appellants Marian Wright and Greg Boester
Christopher D. Roy (ERN 1352), Attorney for Interested Persons Day Patterson, Janet Showers, and Phillip Patterson
Sara Davies Coe (ERN 3964), Attorney for the Town of Greensboro